Pareto Superiority, Consent, and Justice

Lawrence G. Sager
PARETO SUPERIORITY, 
CONSENT, AND JUSTICE

Lawrence G. Sager*

Underlying much of the commentary in the Symposium on Efficiency as a Legal Concern is the question of what relationship is shared by efficiency and justice. That the two are thought to have anything in common at all is a surprise to the naive observer. That the two might be thought to enjoy a relationship approaching equivalency is, I suspect, a little startling even to most of those fully initiated into the mysteries of economic analysis. The arguments that range between these poles take a variety of turns, but two themes emerge with some regularity. First, there is the claim from Pareto efficiency; second, there is the claim from consent.

Both Pareto efficiency and consent have an inherent appeal. At the heart of Paretian analysis is the stipulation that no one loses in those situations which are Pareto preferred; and the logic of consent carries with it the conclusion that consented-to arrangements are to everyone's perceived self-interest. As a result, there is a tendency to assume that both Pareto efficiency and consent enjoy a significant connection to justice.

In this Article, I attempt to take a step back and challenge some of this ground, which is often conceded to those who argue for efficiency on justice-related grounds.

I do not intend to elaborate or defend a view of justice for these purposes. Instead, I will stipulate in quite general terms the view of justice which makes the inquiry into efficiency and justice interesting, and which I think is accepted by most of the protagonists to this debate, if only for purposes of argument. This opera-

* Professor of Law, New York University. B.A., Pomona, 1963; LL.B., Columbia, 1966. I am very much in the debt of two of my colleagues, both of whom were contributors to the first round of this symposium. Ronald Dworkin conducted a seminar at N.Y.U. in the Spring of 1980 which first introduced me to the problems with which this paper grapples, and his dazzling example has been a goad to these efforts. Lewis Kornhauser has been extraordinarily generous in sharing his ideas, criticism, and bag of economist's tricks with me. Without his help this paper could not have been written.

1. 8 HOFSTRA L. REV. 485 (1980).
tive view of justice has the following characteristics:

1) It is nonutilitarian;
2) It is fairness based;
3) Accordingly, distributional inequalities are disfavored and require some justification.

In considering what relationship Pareto efficiency and consent bear to justice I have in mind the perspective of the social decisionmaker. The question thus becomes under what circumstances, if any, there are justice-related grounds for choosing a particular state of affairs because of its Pareto advantage or because it has been consented to.

**PARETO SUPERIORITY AND JUSTICE**

As no reader of the symposium can have escaped learning, the operative notion in Paretian analysis is that sometimes the choice between two states of affairs will involve one state which seems obviously to be preferred over its alternative in that at least one person is better off in this preferred state and no person is worse off. Where this can be said of state B as compared to state A, state B is described as *Pareto superior* to state A. Where, further, it can be said of state B that no other state of affairs enjoys as to it a relationship of Pareto superiority, then state B is described as *Pareto optimal*. Paretian analysis traditionally concerns itself with welfare, that is, with the subjective preferences of individuals within a society for various states of affairs. A more precise statement of Pareto superiority would thus be: "State of affairs B is Pareto superior to state of affairs A when at least one person prefers state B to A and no person is less content in state B than in A."

Paretian analysis seems to enjoy a distinct and favored status in discussions of the relationship between efficiency and justice. Thus, Professor Posner rests his case for wealth maximization in part upon an imperfect variant of Pareto superiority, and even an avowed skeptic about the claims for attending to wealth in the service of justice like Professor Dworkin appears to concede that Paretian ethics is embossed with the cachet of justice.

3. See Dworkin, *Why Efficiency?*, 8 Hofstra L. Rev. 563, 581-83 (1980). I am not intimating that Professor Dworkin is an avowed Pareto booster. Indeed, he observes that he does not mean to suggest "that Pareto justifications are wholly unproblematical." *Id.* at 583. Still, such reservations as he expresses are attributed by him to "a deep-egalitarian theory of absolute equality of welfare," *id.*, a theory
Our question is whether there are justice-related grounds for choosing a particular state of affairs because of its Pareto advantage. In addressing this question, I will set out and consider a ladder of more specific claims concerning the relationship between Pareto superiority and justice. Of the five claims I consider, the first three are not, I think, plausible enough to merit anything but summary treatment, and the fifth and last proves on analysis to be correct but relatively trivial. It follows that most of the attention centers on claim 4—"If state of affairs B is Pareto superior to state of affairs A, then state B is more just than state A." But the other claims are useful as means of delineating the area of serious analytical interest.  

To launch this process, consider the following claim, which lies at the extreme end of our ladder:

**Claim 1: If State of Affairs A is Pareto Optimal then it is Just.**

This claim is quite simply false. Imagine a simple, two-person (Jack and Jill) world with one commodity (water by the pail) from which both persons ordinarily derive the same degree of satisfaction. If we stipulate that a total of 50 pails of water can be pro-

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which he elsewhere appears to disavow in favor of a different "deep equality" theory. *Id.* at 568-69.

4. To make sense of these various claims it is necessary to elaborate a little on our stipulated model of justice and on a vocabulary which fits that model. I am presuming a model of justice pursuant to which we in effect conceive of an ideally or perfectly just state of affairs and measure the justness of any given state of affairs according to the completeness of its participation in those attributes which mark the ideally just state. The quality of justness is thus multi-attributed, and continuous in the sense that we can rank or compare various states according to their relative justness. A state is "more just" than another when it more fully participates in the attributes of the perfectly just state, and "equally just" when it participates to the same degree in those attributes. In determining whether one state more fully participates in the attributes of the perfectly just state than does another, trade-offs among attributes may be required to produce an aggregate judgment as to the level of participation. One state can be more just than another, or two states equally just, while all the states in question are less than perfectly just, indeed are less just than other states of affairs of which we can readily conceive.

Under such a model, there are various ways we might choose to define the phrases "state of affairs X is just," and "state of affairs X is unjust." I will stipulate these definitions:

* A state of affairs is just if it is or closely approaches the most just attainable state.
* A state of affairs is unjust if it is not and does not closely approach the most just attainable state.

5. I am excluding from consideration here the concepts of sympathy or envy which could complicate this picture somewhat. *See* notes 6 and 9 *infra* and accompanying text.
duced and can be distributed in any way between Jack and Jill, the point can be made readily. Under these circumstances any distribution of all the pails is Pareto optimal. This is true of Jack 50/Jill 0, Jack 0/Jill 50, Jack 25/Jill 25, and any other 50-pail distribution. Under any plausible theory of justice, some of these distributions are going to be significantly unjust.

All this is quite obvious, of course, but worth tarrying over for what it reflects about the relationship between justice and Pareto superiority. Let me offer the following observations. First, justice is a multi-attributed quality. Second, Pareto optimality is a relatively minor attribute of that quality. And third, there is no readily apparent correlation between Pareto optimality and more central attributes of justice, like distributional equity. It is the confluence of these points that makes it so simple to adduce apparently unjust circumstances that qualify as Pareto optimal. As we shall see, these same points take their toll on much more modest and plausible descriptions of the linkage between justice and Pareto virtues.

For the moment, though, consider this next step on our ladder:

**Claim 2: All Pareto-Optimal States are Equally Just.**

This claim is logically independent of claim 1, but the same obvious swings of distributional equity that undermine claim 1 apply here. An ethical system that equated all Pareto-optimal states would be at radical odds with the general sense of justice under which we are undertaking this inquiry.

**Claim 3: If State of Affairs A is Pareto Suboptimal and State of Affairs B is Pareto Optimal, then State B is More Just than State A.**

Once it is recognized that Pareto optimality can play over an essentially limitless range of justness, it follows that claim 3 is as transparently false as are its predecessors. A simple example borrowed from our Jack-and-Jill, 50-pail world makes this clear:

<table>
<thead>
<tr>
<th></th>
<th>Jack</th>
<th>Jill</th>
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<tbody>
<tr>
<td><strong>A</strong></td>
<td>20</td>
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State $B$ is Pareto optimal, while state $A$ is Pareto suboptimal. (Incidentally, $A$ and $B$ are Pareto noncomparable as to each other, since you cannot move from one to the other without impairing the welfare of either Jack or Jill.)

Consider, then, a more narrow claim, and the first that is worthy of serious attention:

**Claim 4:** If State of Affairs $B$ is Pareto Superior to State of Affairs $A$, then State $B$ is More Just than State $A$.

In general terms the argument for recognizing this relationship between Pareto superiority and justice is that it is unjust to deny some persons in a society benefits to their welfare that can be secured without harm to other persons in the society. How such an argument fits within an analysis of justice, however, bears some further reflection.

Consider these distributions:

<table>
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<td>$A$</td>
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$B$ is Pareto superior to $A$, and indeed, under our 50-pail production hypothesis, is Pareto optimal. But there are several difficulties with the move from this observation to the conclusion that state $B$ is more just than $A$.

The first of these emerges if we suppose that Jack would be or is deeply envious of Jill in $B$ and thus strongly prefers $A$. The possibility of envy\(^6\) substantially complicates our picture. A strict

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6. Actually, there are at least three different ways in which increasing the resources of some persons can make others less content: (a) In a market economy, the relative prices of goods that are desired by persons in the unbenefited group could be raised, rendering these persons less well off in objective, resource terms; (b) if social standards of the good life—expectations—are elevated, persons in the unbenefited group could become less content with the resources they have; and (c) persons in the unbenefited group could experience discontent because others have resources they desire. Only the last of these phenomena is what is commonly called envy.

It should be noted that increasing the resources of some persons can in some circumstances make persons in the unbenefited group *more* content. Relative prices of
Paretian evaluation of the situation would limit a finding of Pareto superiority to those instances where Jack experienced no envy or where his envy was fully offset by some improvement in his lot, so that in balance he was at least as content in each of the compared states. This approach preserves the coherence and simplicity of Paretian analysis, but it further narrows the already rather limited range of cases to which it applies.

Alternatively, Paretian analysis could be modified so as to exclude some sorts of preferences from the pertinent calculations. Some theorists are already predisposed to such a modification on other grounds, namely, that liberal theories of personal rights either demand or depend upon such a modification. The preclusion of raw envy from the Pareto consideration, for example, is arguably consistent with Professor Dworkin’s purging of “external preferences” from the utilitarian calculus generally. But such goods that persons in the unfavored group desire could drop as a consequence of such an increase. Further, sympathy, rather than envy, could be excited among persons in the unbenefited group.

7. Professor Sen’s “Liberal Paradox” is bottomed on a demonstration that absolutely minimal conditions of liberalism (namely, that there exist in the society at least two persons who are each entitled to make at least one decision for themselves, e.g., whether to sleep on one’s back or stomach) will conflict in some cases with the pursuit of Pareto advantage. He raises the possibility, but stops short of recommending, that preferences “based on excessive nosiness about what is good for others” be ignored. See A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 78-88 (1970).

8. Professor Dworkin would justify claims of personal rights against the state of the sort captured in the American constitutional tradition by a chain of argument which begins with the proposition that, in a society that treats its citizens with “equal concern and respect,” an individual’s preferences as to the assignment of goods or opportunities to other individuals ought not to figure in social decisionmaking. Where a decisionmaking environment is polluted by such “external preferences,” persons who are disadvantaged by the resultant decision have a claim of right against the tainted decision. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 266-78 (1977).

9. While I think that Professor Dworkin would consider envy to be in the nature of an “external preference,” I have some difficulty in doing so. A candid expression of envy might run like this: “I am unhappy because this good fortune has been realized by Jones, and I wish it had been realized by me instead.” While it is true that the envious person would probably be happier if neither he nor Jones were smiled on by fortune than if Jones alone were favored, envy kindles in him the desire to have for himself that respect which Jones has obtained. In this respect, envy may not be symmetrical with sympathy.

This observation connects to what I regard as a general weakness of the personal/external preference distinction as the principal engine of rights production. Unless one seeks to establish boundaries on those things in the world that a person is entitled to desire on his or her own behalf, there are in fact very few contexts in which it will be possible to say that a person’s preferences for a given state of affairs are wholly or even largely external in character. And if a theory is generated which
parsings of preferences is by no means uncontroversial.\textsuperscript{10} While it may save Paretian analysis from the fate of being rendered a harmless abstraction by the play of envy, it also deprives that analysis of the simplicity and neutrality that are among its central virtues.

But let us pass this difficulty and turn to a more fundamental problem with the proposition that it is unjust to deny benefits to individuals if the conferral of the benefits in question would injure no one. Consider again these distributions:

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$B$ is Pareto superior to $A$, but if we assume that a perfectly just distribution of pails would entail a division that deviated only slightly from an even split, then one's first impression of the move from $A$ to $B$ is that it is a move away from a just distribution, not a move towards such an ideal state of affairs. How valid is this sense of discomfiture?

As a means of unraveling this question, let me make the following temporary stipulation: $A$ and $B$ are the only two possible states of affairs in our world, now or in the conceivable future. Thus, the pairwise comparison of $A$ and $B$ on justice grounds is not merely a strategy to rank states in the abstract, or a prelude to a proposed step along a road of social evolution, but is actually exhaustive of the options of which our society is possessed. Under these circumstances, is state $B$ more just than state $A$? After all, our stipulation does not remove the fact that Jack and Jill occupy less equal and, we assume, less equitable positions in state $B$ than in state $A$.

One attempt to justify a justice-based preference for state $B$ might rest on some version of the following story. It is closing time on

so limits personal preferences, it will presumably depend upon the same sort of analysis that would directly support the claim of right in question.

However one deals with envy under Professor Dworkin's analysis, it should be remembered that the connected phenomena of relative price disadvantage and rising expectations, see note 6, supra, remain to bedevil Paretian analysis. The discontent generated by these cannot in any event be said to rest on external preferences.

Christmas Eve, and I, a butcher, discover that I have remaining in
my shop a large plump goose, for which I have no use. There is a
blizzard outside, which effectively limits my options to (a) throwing
the goose away, (b) giving it to my rich neighbor Scrooge, who is
probably confining himself to a meager, unappealing dinner be-
cause of his miserliness, or (c) giving it to the poor Cratchits around
the corner. Surely I ought to give the goose to someone instead of
throwing it away, and surely I ought to give it to the Cratchits in-
stead of Scrooge. But now I discover that the blizzard has made
the Cratchits' flat inaccessible to me. It seems very wrong to say
that I ought to throw the goose away in preference to cheering
up old Scrooge, even if giving the goose to Scrooge exacerbates
the inequalities of opportunity suffered by the Cratchits as against
Scrooge.

There is some persuasive weight to this story. The affirmative
component of that weight is easy to identify: it reflects, I think, the
intuitive force of the basic proposition that it is unjust to deny
some persons in a society benefits to their welfare that can be se-
cured at no cost to other persons in the society. But what about
the negative component of the story's persuasive weight: why is it
that the widening of the welfare gap between Scrooge and the
Cratchits does not overbear any justice-based impulse to give the
goose to Scrooge?

For a classic utilitarian thinker, of course, there is nothing dif-
ficult about the problem at all. The choice of a Pareto-superior
state over its Pareto-inferior alternative effectuates a net increase in
the aggregate welfare of society, an increase which can be recog-
nized and applauded without resolution of the nagging problem of
interpersonal comparisons of welfare. After all, by Pareto hypothe-
sis, there have been only additions to the welfare pool. But our
concern here is with a nonutilitarian, fairness-based model of jus-
tice pursuant to which the increase in net welfare would not be a
self-evident virtue and pursuant to which the exacerbation of in-
equality should count as an embarassment. Given this stipulated
concern, the story about the goose has to be recognized for what it
is—an intuitively appealing restatement of the claim that Pareto su-
periority is a justice-related virtue, but not an argument that ex-
plains this claim in terms of a fairness-based theory of justice.

Since I plan scrupulously to avoid being drawn into elabor-
ating anything like a comprehensive theory of justice here, and
since this basic claim linking Pareto superiority and justice can be
conceded without conceding the justification of a general social
preference for Pareto-superior states, it is tempting merely to note the analytical difficulties which attend even the basic claim and pass on to the heart of my argument. But a little more attention to these difficulties is merited because they reflect in an interesting way on some perceptions of justice that surface within and without the symposium.

Prominent in modern nonutilitarian theories of justice is an emphasis on the separateness, the independent and discrete worth, of individuals. From such an emphasis there flow claims—usually expressed in the language of "rights"—which place issues of the treatment of individuals above those of aggregate social welfare. In fairness-based theories, this theme is placed in an egalitarian key by an emphasis upon the parity of each individual with his or her compatriots. Typically, though, this parity does not resolve into the prescription of strict equality of treatment. Consider for example the work of John Rawls.

Two distinct aspects of Rawls' well-known theory are pertinent. First, there is the "original position," an hypothesized state in which rational persons choose among competing social principles and institutions without any knowledge of what roles, attributes, or status they will enjoy in the resulting society. Second, there is one of the overarching principles of justice for which Rawls argues persons in the original position would opt: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." So postulated, Rawls' view of justice does not support the choice of a Pareto-superior state over its Pareto-inferior alternative where the worst-off members of society would be indifferent between the two states. Our most recent Jack-and-Jill matrix and

11. Rights theories can point in quite different social directions, as the diametric work of professors Nozick and Dworkin well illustrates. See, e.g., R. Nozick, Anarchy, State, and Utopia (1974); R. Dworkin, supra note 8; Hart, supra note 10.


13. Professor Rawls' other and primary principle is: "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." Id. at 60.

14. Id. at 83.

15. At points, Professor Rawls seems actively opposed to Pareto-superior moves where worst-off persons would not benefit. Id. at 75. Elsewhere, he appears not to have included such a case anywhere on his map of social justice and injustice. See id. at 78-79.
our Christmas-goose story present such cases of worst-off indifference and would not, under Rawls' theory, excite a preference for the Pareto-superior alternative.

But if we consider the original position from which Rawls mines his insight, the roots of a preference for Pareto superiority emerge. To the person who has assumed the "veil of ignorance" dictated by the original position, a Pareto improvement in the world promises at worst to leave him as well off as he was before the change and at best better off. A Pareto-superior move gives persons in the original position an opportunity for improvement of their lot at no cost; it is a free lottery ticket. Thus, at least if we keep to our stipulation that there are only two possible states of affairs in our world, one of which is Pareto superior to the other, it would seem that persons in the original position would opt for the Pareto-superior state, or for principles and institutions which would generate the Pareto-superior state. The only possible reason to suppose otherwise would be if we assume that persons in the original position value equality on some independent grounds, more basic than the original position itself. Rawls, at least, provides no support for such a supposition.

This brief tour through Rawls does show, I think, that a fairness-based theory of justice can support a preference for Pareto superiority, which was the purpose of the trip. But one should not be misled by this observation to the conclusion that Rawls' failure to reflect any such preference in the principles he derives from the original position is a weakness or incompleteness of his theory. It may well be that when we release our analysis from the quite artificial stipulation that we are concerned only with a choice between two states, now and forever, that the analytical support for Pareto superiority that the original-position device provides will vanish. There are, as we shall see, powerful objections to the pursuit of Pareto advantage which present themselves when this stipulation is removed, and these objections might well dissuade persons in the original position from adopting principles or institutions that pursue Pareto advantage.

Although we have stopped short of decisively establishing the justice-based claim for Pareto superiority, it should by now be clear that a substantial basis for such a claim does exist. Further, the mere fact that a Pareto-superior move may entail the creation or accentuation of distributional inequality does not of itself rob the
claim of its force. But these conclusions depend, as we have emphasized, upon the stipulation that we are concerned only with a given Pareto-superior state and its inferior alternative. It now remains to consider how they fare in an analytical environment that does not include such a stipulation.

Pairwise comparisons are a useful means of establishing an order or ranking of anything we might be moved to rank by some standard of judgment or measurement. Computer-sorting techniques depend on such comparisons, as does my ten-year-old daughter when she undertakes to rank in order of their overall appeal the 20-odd characters who populate a detective game she plays. If the relationship in question is one that can yield an ordering,\(^\text{16}\) then successive pairwise comparisons will eventually produce this result. Even where a complete ordering is impossible, pairwise comparisons can often yield a useful partial ordering of the pertinent states of affairs.\(^\text{17}\)

But our ability to achieve an abstract ranking of various states of affairs by successive pairwise comparisons should not be confused with the process of making social choices. Once we move to a world in which more than two states of affairs can be conceived, the use of pairwise comparisons as a guide to social choice is subject to certain limitations, limitations that are quite corrosive of the justice-based claim for Pareto advantage.

The first of these limitations emerges in the following primitive exercise. Imagine that I am standing on the floor of the NYU faculty library, and that I have accepted the challenge of getting to the highest point in the room that I can reach in the fewest number of steps possible. Close by me are three stools of different heights, each of which is accessible in one step from where I stand.

\(^{16}\) The most obvious characteristic that a relationship must possess in order to yield an ordering as formally defined or commonly understood is transitivity. Transitivity is a quality that we intuitively expect but do not always find in relationships. It is illustrated by the relationship “heavier than.” If \(Y\) is heavier than \(X\), and \(Z\) is heavier than \(Y\), then \(Z\) is heavier than \(X\). This relational consistency is described as transitivity.

\(^{17}\) Some relationships are incomplete in that there exist some pair or pairs of states which cannot be ranked by the relational quality. Pareto superiority is an incomplete relationship, of course, since there exist many states of affairs that are Pareto noncomparable. All Pareto-optimal states are Pareto noncomparable as to each other; so too is any pair of states where neither can be derived from the other without some person’s being made less content as a result of the change.
Now imagine that I step on the lowest of the stools and explain my decision on the ground that it is higher than the floor.

The obvious problem with so rationalizing my decision might be called the problem of local comparison. It is no objection to behavior which improves the world that there remain respects in which the world can bear further improvement. The practical necessity of incremental change is something with which none would quarrel. But where we are trying to justify the social choice of a given state of affairs on the basis of a stipulated criterion and where by that criterion there exist significantly better, attainable states of affairs, the case for the inferior option simply collapses. If we capture the quality of attainability in a geographic metaphor, it is the unfavorable comparison with local options that is fatal to the inferior state of affairs.

This first order local-comparison problem is easily overcome by looking beyond one's initial pairwise comparison ("Y stool is higher than the floor") to comparisons of all attainable states ("Y stool is the highest place I can reach in one step"). But the matter becomes more complicated when the relationship in question is multi-attributed and the relevant comparisons are restricted to a single attribute of the relationship. This wrinkle on the problem of local comparison is what wreaks special havoc with justice-based claims for the choice of Pareto-superior social options.

Remember our last Jack-and-Jill matrix:

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<th>Jack</th>
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<td>A</td>
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<td>B</td>
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Let us suppose that inquiry reveals that readily attainable are these additional options:

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<th></th>
<th>Jack</th>
<th>Jill</th>
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<tbody>
<tr>
<td>C</td>
<td>20</td>
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<td>D</td>
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</table>
Now states $B$, $C$, $D$ are each: (1) Pareto superior to state $A$; (2) Pareto optimal (given our stipulated 50-pail production maximum); and (3) Pareto noncomparable as to each other.

Under these circumstances, choosing state $B$ on grounds of justice is absurd. Assuming that state $B$ is indeed more just than state $A$, the availability of states $C$ and $D$ voids of any force the justice-seeking rationale for $B$. It's like our Christmas-goose story with the option of delivering the goose to the Cratchits revived. Moreover, unlike the case of local comparison simpliciter, the utility of Pareto analysis cannot be preserved by simply broadening the inquiry beyond the initial pairwise comparison to comparisons among all attainable states. Pareto analysis gives no guidance to the choice among states $B$, $C$, and $D$. Thus, while in a strictly dichotomous world an argument for choosing the Pareto-superior alternative in the name of justice can be made, in a more realistic setting no particular state can be chosen on the basis of its Pareto advantage. We are in effect returned to the observation in claims 1 and 2 as to the broad swings of justness countenanced in Pareto optimality.

But this aggravated form of the local-comparison problem is not in itself fatal to the usefulness of Pareto analysis in social decisions where justice is the goal. A confirmed Pareto partisan could make the following response at this point. All that has been shown is that Pareto optimality is a necessary but insufficient characteristic of a perfectly just state of affairs. Accordingly, the utility of such analysis in justice-directed decisions is restricted but significant. In our expanded Jack-and-Jill matrix, for example, decisionmaking can be advanced by the exclusion of state of affairs $A$ and any other Pareto-inferior state from consideration, since states $B$, $C$, and $D$ are each more just than $A$. Moreover, in any decisional instance where one state is Pareto superior to all other attainable states, Paretian analysis will function as a justice-serving rule of decision.

While responsive to the problem of local comparison, this narrowed claim for Paretian analysis encounters a second major limitation on the use of pairwise comparisons as guides to social choice. This might be called the false-path problem.

Suppose that I undertake to climb to the highest point in the library that I can reach, with some premium placed upon doing so in the shortest time, or with the least effort necessary, or with the stipulation that I cannot descend even temporarily but must continue laterally or upward. Nearby are a chair and a table, the latter being higher, and the two being the only perches I can reach di-
rectly from the floor. Should I climb on the table since it is higher? Unless the table and chair are the only ultimate eyries available to me in the room, I need more information to guide my choice. The chair may lead to a bookcart and thence to the top of the bookcase, the highest point in the room I can reach; the table on the other hand may be a dead end as far as elevation is concerned. The choice of the table as my first step would thus be fatal to the exercise. The table, on this hypothesis, is a false path to the highest accessible point in the room.

The false-path problem presents itself in any context where the following propositions are true:

1) state $B$ has more of desired quality $Q$ than does state $A$;
2) state $C$ has more of desired quality $Q$ than does state $B$; and
3) in some contextually significant sense, it is more “difficult” to move to state $C$ from state $B$ than it is from state $A$.

It is this problem of the false path, presented in a quite unsubtle form, which gives rise to the sense that the move from state $A$ to state $B$ in our wellworn matrix is a move away from, not a move towards, an ideally just state of affairs:

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If we assume that perfect justice would entail a nearly even split of pails between Jack and Jill, then this sense is sound. If we want eventually to reach or approach an even division, then it appears quite likely that it will be more difficult to do so from state $B$ than from state $A$. In the real world, patterns of resource distribution are not readily remade; political constraints and transaction costs create, in effect, a distributional inertia. Thus, the social decision-maker concerned with justice might well opt for state $A$, despite its Pareto inferiority.

The false-path phenomenon, of course, can arise in almost any decisional context. And since our ability to project options and consequences beyond local, attainable states is generally very limited,
it often may be a sensible, pragmatic strategy to opt for the best attainable state—best, that is, in that it is most blessed by the desired quality. At least, one might accept the best attainable state as having a presumptive claim for selection, to be overborne only when there is a clear indication of false-path complications.

Even when the false-path problem is plainly involved in a particular social-choice context, the “true path” may not always commend itself. The true path would entail the choice of that attainable state from which the ultimately superior social state could be reached most expeditiously. But consider the following situation. Assume that we are choosing among states with an eye towards making our society perfectly just. In the nature of mortal affairs, we are aware, our society will surely fall short of this goal, now and in the foreseeable future; nevertheless, we are doing our best. Suppose now that we are confronted with a choice between two attainable states. State A is considerably more just than state B, but there is a false-path complication. It appears that the choice of state B is likely to lead to a path of options that would make possible a society in fifty years’ time which would be considerably more just than any that could possibly evolve from state A. As to the ultimate goal of a perfectly just society, our powers of projection fail us. Under these circumstances, ought we to choose state A or state B? The problem is at least a difficult exercise in social strategy if we imagine that our society will be composed of the same individuals fifty years from now; if we recognize that we are in fact parsing justice among generations of persons it becomes a serious and quite unclear problem of principle as well.

These observations complicate the problem of the false path in social choice. They also tend to dilute the force of a claim in a particular social-choice context that the choice of the “best” attainable state may lead to a false path. Given the limitations of our powers of projection and the practical and moral complexity of parsing social virtues over time, the strategy of choosing the “best” attainable state may often have substantial appeal, if only by default.

But the false-path problem involved in pursuing Pareto superiority in the name of justice cannot be overlooked on these grounds. A nonutilitarian, fairness-based theory of justice will have as one of its central concerns some notion of distributional equity. Pareto superiority, as we have seen, can include in those states of affairs which are favored some states that are markedly less equitable than their Pareto inferiors. The possibility that a Pareto advantage will point to the wrong path is thus very real. Further, extending
one's analysis to include future consequences and options in this context merely aggravates the capacity of Pareto analysis to mislead. Nothing about the very imperfect relationship between justice and Pareto advantage in the short run argues for the redemption of Pareto over time. To the contrary, Pareto-directed errors are likely to accumulate over time, moving the realized state of affairs further and further away from that of an ideally just state.

What follows from the local-comparison and false-path problems of Pareto analysis is that Pareto superiority is neither a sufficient nor a necessary component of the attainable social state of affairs for which we should opt if justice is our goal. This is so despite our sense that if there were only two states to choose between, now and forever, considerations of justice might well direct the choice of the Pareto-superior state.

There are two ways in which we might choose to characterize the relationship between Pareto superiority and justice pursuant to this analysis. We might say that claim 4—"If state of affairs $B$ is Pareto superior to state of affairs $A$, then state $B$ is more just than state $A$"—is true but that it does not follow that Pareto superiority should guide social choice, given the local-comparison and false-path problems which undo the justice-related virtues of Pareto superiority. Alternatively, we could say that claim 4 is false.

Were we dealing with some physical quality in the world like height, the first of these two ways of expressing the situation would plainly be the appropriate one. Noting the local-comparison problem, we would say something like, "Of course the stool is higher than the floor, but . . ."; or responding to the false-path problem, "Of course the desk is higher than the chair, but . . . ." Here, however, we are dealing with an abstract judgment of value. It seems odd in such a context to assert that one state is valued over another in particular terms only to ultimately deny that proposition. Yet, if we say "State of affairs $B$ is more just that state $A$ but is not to be preferred over state $A$ on grounds of justness," we are doing just that. Accordingly, it seems more direct and sensible to simply say that claim 4 is false.

There is one amendment to this bleak appraisal of the justice-based claims for Pareto advantage; it concerns what might be called local events. Sometimes choices between social states of affairs will present the question of Pareto advantage in contexts which are so limited and transient in their impact as to be quite severable from any social-path analysis. Choices of this local character present a claim for Pareto superiority which is very much like the choice be-
between what are stipulated to be the only two possible states of affai-
s, now and forever. In such a case Pareto superiority apparently
does have a justice-based claim. This local-event sense, I think,
generates the appeal of the Scrooge option in the Christmas-goose
story. Note though, that even where local events are concerned,
the claim is merely that Pareto superiority is a necessary compo-
nent of the state of affairs which should be chosen on justice
grounds; it is not sufficient to identify that state in the presence of
Pareto-noncomparable options.

Claim 5: A Perfectly Just State of Affairs Would be Pareto
Optimal.

Here, at last, is a claim on behalf of Pareto advantage which may
be correct. If we posit the existence of a perfectly just state of af-
s, then neither the local-comparison problem nor the false-path
problem should operate to interrupt the force of the basic justice-
serving claim on behalf of Pareto superiority as it applies to the
characterization of this perfectly just state. By hypothesis there
could be no more just state of affairs and hence the local-
comparison problem is inapplicable. And since by hypothesis, hav-
ing arrived at the perfectly just state of affairs we would have
arrived at our goal, the idea of a false path is similarly inapt. Ac-
cordingly, to the extent that we are persuaded that in the abstract
and in isolation a Pareto-superior state is more just than its Pareto-
inferior alternative, we ought to be attracted to claim 5.

Such difficulty as claim 5 has is in the very idea of a perfectly
just state of affairs, which is itself somewhat problematical. Imagine
that we have attained a state which, if frozen in time, would be
deemed perfectly just. When reality thaws this perfect state, the
question of its maintenance over time immediately presents itself.
Suppose, while in time-suspension our “perfect” state is ideal, it is
in fact less stable over time than some alternative state. This
alternative state, in a time-suspended analysis, might be less just,
but were we to opt for it now there are reasons to believe that in
n years’ time we would find ourselves in a more just state than we
would be likely to find ourselves in if we were to opt now for the
“perfectly just” state. Suddenly, there is a dizzying return to the
problems of strategy and principle raised above as complications to
the idea of ever seeking the “right path” to perfect justice. Now it
appears that the idea of “perfect justice” may itself be imperiled.

The simplest way out of this difficulty is to recognize that the
idea of a perfect state of justice involves the invocation of an ab-
An abstract ideal, a paradigm, for purposes of comparison and evaluation of the real world but that the ideal itself may be unattainable in any society at any time. This being the case, we can endow this ideal with the attribute of stability as well as any other aspects of perfect justice, thus avoiding the real-world embarrassment of dynamic social states. This does not spare us the difficult problems of strategy and principle by which future-looking decisionmakers are in fact plagued, but it does make some analytical sense out of claim 5.

Let us assume then that claim 5 is true: the appropriate construct of the ideal state of affairs should endow that state with the quality of Pareto optimality. What follows from this proposition?

It should be clear by now that I do not think it follows that it counts as a justice demerit of any given social state that it is Pareto suboptimal. Our discussion of claim 4 was intended to dispute precisely this point. There is good reason to doubt that the perfectly just state could ever exist save as an analytical paradigm. In any event, it is quite plain that we consider social choices today in environments that fall short of this ideal. As a result, the false-path problem intervenes fatally in the apparently smooth sailing from claim 5 back to claim 4. Accordingly, we are left in claim 5 with an interesting abstraction which is unlikely to inform social-choice theory or practice in any significant way.

Consent and Justice

I now want to turn to consent and its relationship to justice. I am concerned here with the question of actual, express consent to a particular state of affairs by all the individuals affected by that state of affairs. Superficially, such unanimous consent seems to be a powerful reason for favoring the chosen state. Considered more closely, however, the extent to which determinations of justness can be rooted in consent is surprisingly limited.

When people consent to certain states of affairs, two different aspects of the act of consent may move us to think that the creation or maintenance of that state of affairs is just. First, there is the promissory aspect of consent, which creates in other persons what is essentially a reliance claim that the promise inherent in the act of consent be kept. Second, there is a welfare-registration aspect of consent, the force of which depends upon the perceived relationship between the act of consent, the preferences, and, ultimately, the well-being of the consenting individual.
Of these two facets of consent, it is welfare registration which is most likely to secure a substantial connection between consent and justice. While we plainly attach moral significance to the keeping of promises and generally treat as just the legal enforcement of promises, the promissory aspect of consent does not, I think, offer much by way of support for the justice-bearing attributes of consent. Imagine that we are evaluating a society the basic social arrangements of which are all the product of bargained exchanges. I attack these arrangements as fundamentally unjust. A defender of the society rejoins "But everyone has kept his promises." If not a nonsequitur, this seems at best a rather feeble defense of the fundamental justness of basic social arrangements.\(^\text{18}\)

The idea of bargained social arrangements does suggest, however, the appeal of the welfare-registration aspect of consent. It may help to isolate and explain this appeal if we imagine a small group of persons who come to comprise a new society (islands usually come to mind at story-conjuring times like this). In close conversations with each of the members of our society we elicit honest, considered views about dominant social arrangements, including most major issues of governance, production, distribution, and personal obligation. Miraculously, everyone offers up the same set of arrangements as his or her first preference.

In the face of this extraordinary convergence of social preferences, our instincts may well incline towards treating the designated state of affairs as just. However, it is not obvious why this is so. If we conceive of justice as a quality about which reasoned discourse and criticism are possible, it is not apparent that even unanimous agreement about a set of basic institutional arrangements should dispose of the question of whether those arrangements satisfy the objective criteria of justice.

The link between the unanimous expressions of preferred social arrangements in our story and fairness-based theories of justice, I believe, is the presumed relationship between these expressions and the well-being of the persons who make them. The interplay of social equity and personal autonomy in such theories can pre-

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18. In so regarding the promissory aspect of consent, I have in mind day-to-day bargains between individuals. I do not mean to dismiss contractarian notions pursuant to which persons in a society are understood to enjoy the benefits and suffer the burdens of a social compact. Nor do I mean to dismiss the very different approach of Professor Rawls, where the pertinent contract is an analytical figment—part of an experiment undertaken in one's mind to test and shape our notions of what is fair. See RAWLS, supra note 12, at 108-14.
sent a weak and a strong view of this relationship. Under the weak view, the preferences of an individual for one state of affairs over another is evidence that the individual would in fact be objectively better off in the preferred state. Under the strong view, concerns of autonomy lead to the conclusion that individual well-being consists of the satisfaction of one's preferences; hence by hypothesis an individual is better off in the state of affairs that he or she prefers. Both the weak and the strong view are subsumed for our purposes under the label welfare registration.

Under either view, our island vignette presents a strong case. Two of its features are prominent. First, the expressed preferences are unanimous; and, second, the favored state of affairs apparently is preferred as against all other possible social arrangements. The significance of unanimity is obvious: even under the weak view, we have good evidence to the effect that everyone is better off under the favored arrangements. The global scope of the expressions of preference is essential to the picture, since it answers the question "better off as opposed to what options?" with "better off as opposed to all other possible social arrangements." Many different theories of justice could be expected to converge in the support of such a uniquely favored state of affairs.

This brings us back to consent. Superficially, states of affairs to which affected persons have given their consent seem to be small slices of our dream world. Consent by all affected persons, after all, constitutes a unanimous expression of preference for a given state of affairs. But there is a rub, of course. The question in any instance where consent is offered up to justify social arrangements is over what range of options an expression of preference is being made.

Consider the nature of the consent that grows out of a bilaterally bargained transaction. Each party agrees to give up some-

19. In ways that do not, I believe, affect my thread of argument, this characterization of the strong view of the welfare-registration aspects of consent blunders into some problems. One might well believe that persons sometimes knowingly prefer states of affairs pursuant to which their own self-interest suffers; this, I take it, is the operative notion in the concept of altruism. One might also observe that on some occasions the immediate preferences upon which people act are inconsistent with other deeper preferences they hold. But even recognizing either or both of these possibilities, one might hold people's immediate preferences to be the stuff with which justice is concerned. This last is all that I mean to capture as the strong view, and my use of the terms "welfare" or "well-being" should not be understood to preclude the idea that people behave against their self-interest or make mistakes within their scheme of preferences.
thing in return for the receipt of something else. At best, what can be said of such a consensual transaction is that each party believes that he or she will be better off after than before its consummation. Each party, in other words, prefers—or more precisely, anticipates that he or she will prefer—the transacted state of affairs to the status quo. (It can also be presumed that each party prefers the transacted state of affairs to any other state of affairs to which the other party was expressly agreeable; but there is no necessary unanimity involved as to these latter presumed preferences.)

Without more, this can have only limited bearing on the justness of the transacted state of affairs. Since the options over which a unanimous preference has been expressed are limited to the status quo and the transacted state, the strongest possible claim that can be made is that the transacted state is more just than the status quo. This claim could be correct and yet the transacted state could be deeply unjust and much less just than other attainable social states.

It is not difficult to adduce examples that support this proposition: the impoverished head of household who anxiously consents to employment under conditions which ought to be deemed deeply unjust; the person charged with murder who mortgages his or her life to a wealthy lawyer. It should be noted, however, that this ob-

20. See note 22, infra.

21. For example, suppose that Jack and Jill are bargaining among the express options of the status quo (SQ) and changes $C_1$, $C_2$, and $C_3$. Asked to rank the options, their preferences would be these (1 for first choice, 4 for last):

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<th>Jack</th>
<th>Jill</th>
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<tbody>
<tr>
<td>SQ</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>$C_1$</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>$C_2$</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>$C_3$</td>
<td>1</td>
<td>3</td>
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Suppose further that Jack and Jill agree to move to $C_2$. We can assume without reference to this preference matrix that both prefer $C_2$ to the status quo. We can also assume that Jack prefers $C_2$ to any other option to which Jill would have agreed (viz., $C_1$), and conversely that Jill prefers $C_2$ to any other option to which Jack would have agreed (viz., $C_3$). We cannot, however, assume that Jack and Jill agree that $C_2$ is superior to $C_1$ or that $C_2$ is superior to $C_3$. Indeed, as our matrix indicates, they do not so agree.
ervation about consent is not limited to instances of such extreme personal hardship. The point is not that there exists some threshold of coercion which suddenly robs consent of voluntariness; rather it is that consent always implicates choice, and that support for claims of justness from consent can reach no further than the boundaries of the pertinent choice. For this purpose, the contract signed with a gun pointed at the promisor's head is continuous with other bargains struck under what are generally considered to be voluntary circumstances. But a correct understanding of the contract is that it represents a choice between the anticipated consequences of signing the contract and those of failing to sign.

Thus, consent can at most support the claim that a transacted state of affairs is more just than the status quo ante transaction to which it was unanimously preferred. And in many instances, that claim will little favor the transacted state of affairs against claims of injustice.

These observations are not limited in their reach to classic bargaining situations. In any situation where unanimous consent is invoked in support of the justness of the favored state of affairs the same analysis holds. In an election, for example, even the unanimous votes of the electorate can be understood as supporting on justice grounds the chosen state of affairs only as against the other available options, which may or may not include the status quo. Likewise, group decisions arrived at by the consensus of all those present are for these purposes indistinguishable from bilaterally bargained transactions.

One response to this line of analysis might be that I have prejudiced the case against consent by stipulating that my benchmark is a fairness-based notion of justice. If autonomy is recognized as the chief virtue of the just society, the argument would run, it would be the voluntariness of resource transfers which made them just, not the equity of the resulting distribution. This objection concedes the limited nature of the claim linking equity and consent, and given the narrow scope of our inquiry, I am largely content with this concession. But one serious difficulty with the argument from voluntariness is closely connected with aspects of our discussion of consent and is worth a brief note here.

This difficulty concerns the relationship between the virtues of voluntary choice and the availability of options among which to choose. As our discussion of consent indicates, a consent-dominated regime of social choice by no means assures a wide range of personal options, only that individuals can choose among those op-
tions which society offers them. Personal choice for any given individual may thus lie among a very few and thoroughly disagreeable options. Accordingly, it is somewhat difficult to grasp precisely what it is that makes such potentially narrow choice voluntary in any sense that ought to sway our ethical judgments. If the answer lies in the direction of maximizing the sum of individual ranges of social choice in some sense, then we have been neatly returned to utilitarianism, and the emphasis on the discrete worth of the individual has been lost along the way. If the answer builds upon an analytical cleavage between restraint by the state and restraint by the marketplace, where personal rights and concerns of justice are understood to run exclusively to the former, then support for so severe a cleavage must be forthcoming.

**PARETO SUPERIORITY AND CONSENT**

Now that we have assessed both Pareto superiority and consent as weights on the scale of justice, it is interesting to consider how these two claims relate to each other.

Suppose Jack and Jill, the only affected persons, consent to a move from state of affairs A to state B. We can assume that B is Pareto superior to A if our welfare-registration hypothesis is correct. Without more, however, this argues very little for state B, as we have seen. Is there more?

In consent situations, it could be argued that a more stringent version of the Pareto test is likely to be satisfied. If both Jack and Jill agree to the move from A to B, we can expect that both anticipate benefits from the move, since an indifferent Jack would have little incentive to confer an uncompensated benefit on Jill. This behavioral assumption about an indifferent party considering a Pareto opportunity for others is certainly not beyond challenge, but let us accept it for the purposes of this inquiry. If we redefine Pareto advantage to stipulate that “State B is Pareto superior to state A when everyone prefers state B to state A,” is our earlier anal-

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22. Even this assumption gives consent more than its due. Parties engaged in the bargaining process may miscalculate and take irreversible steps which leave them with options less desirable to all concerned than options once available. This can be true, for example, in any situation where some opportunity of mutual advantage is time dependent and the parties are unable to agree before the opportunity passes.

23. This Pareto variation is called the “weak Pareto principle” by Professor Sen, supra note 7, at 24, 37. It is comparatively “weak” if offered as a condition on rational choice such that any general rule of social choice should prefer state B as so
ysis of Pareto superiority altered in any significant way? The answer, I think, depends on precisely what we mean by “Everyone prefers state B to state A.” If we merely mean that given a choice between his or her lot in the two states, considered in isolation, each person prefers state B, then no headway is made against either the local-comparison problem or the false-path problem. Consider a very slight variation on our bad-penny matrix:

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This satisfies our stringent Pareto test but is still vulnerable to the objections we raised to Paretian analysis taken straight.\(^{24}\)

The picture changes only if we understand “Everyone prefers state B to state A” to mean that each person, in the real world and more or less aware of the future implications of present distributions, prefers to be in state B rather than state A. Given this reading, our stringent Pareto test would reduce the false-path problem somewhat. By stipulating that present well-being includes projections of one’s future well-being we reduce the vagaries of the false path. In our most recent matrix, for example, we can assume that Jack would prefer state A if he thought that it offered up the hope of a better distribution to him in the future. Consent situations satisfy this future-looking variation on the stringent Pareto test, since they involve actual, real-world decisions to support a particular state of affairs.

But note that the false-path problem is only reduced; it is by no means eliminated. Jack is not in a position to prefer state A as against all materially better states except the most just one. He can prefer A to a materially better alternative only if his future expectations under A justify this preference. Thus Jack, pessimistic about the future likelihood of a more equitable distribution, might well opt for state B and take its small benefit. Yet B in such a case could lie along a false path to the perfectly just state of affairs.

\(^{24}\)See discussion pp. 919-23 supra.

defined over state A. It is comparatively “stringent” in the obvious sense that fewer states can be said to be Pareto superior under such a definition.
Moreover, the local-comparison problem remains in full force where states of affairs to which persons have consented are concerned. We can perhaps say that the consent-bearing state is to be preferred over the status quo and any other unanimously repudiated state. We cannot say that it is as just or more just than other attainable states of affairs.

**Conclusion**

One unfortunate aspect of the role of critic is that one is left at the end of the enterprise with propositions that sound only in the negative. Here I can claim no more. What I think the foregoing demonstrates is that two prominent resources for partisans of efficiency—Pareto superiority and consent—have very limited force in a social-decisionmaking context where a fairness-based model of justice prevails.