On Fairness and Efficiency

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Abstract

This paper is a review of Vanessa Finch's *Corporate Insolvency Law – Perspectives and Principles* (Cambridge: CUP 2002). In particular, it examines Finch's methodology for testing whether some part of this law could be considered 'legitimate'. Borrowing from Gerald Frug's well-known analysis of the strategies for attempting to legitimate corporate and bureaucratic power, Finch claims that the 'legitimacy' of corporate insolvency law is a matter of its 'fairness', 'efficiency', 'expertise', and 'accountability'. This paper asks if she provides a coherent understanding of these basic concepts, and whether her deployment of these concepts yields useful insights free of the 'inconsistencies of reasoning' that she rightly deplores in the way the law might have developed in the past.

The paper argues that Finch does not motivate her choice of 'technical efficiency' (referred to in this paper as 'transaction cost efficiency') over other understandings of this concept, does not explain the sort of costs this version of efficiency is meant to mitigate, nor the 'desired ends' in pursuit of which it is to be harnessed. Because of these deficiencies, Finch fails to notice that 'expertise' and 'accountability' are in fact aspects or components of 'efficiency'. The paper explains how the former is a function of coordination costs, the latter is a method for controlling coordination or motivation costs, and the mitigation of both types of cost is very much part and parcel of transaction cost efficiency.

The paper introduces a distinction between the 'substantive' and the 'procedural' goals of any part of the legal system. Substantive goals are the ultimate ends of some part of the law, some values or objectives whose pursuit by that part of the law shows why it is desirable to have that law in the first place. Procedural goals are about the methods the law adopts in pursuit of its substantive goals. It is argued that 'efficiency', 'accountability' and 'expertise' are procedural goals of the law, and can only make sense as benchmarks of 'legitimacy' if they are connected to the accomplishment of some substantive goal that insolvency law could be shown to be committed to. 'Fairness' in Finch's sense is, on the other hand, a substantive goal of the law. One implication of recognising this distinction is that Finch's repeated assertion that 'fairness' might sometimes have to be traded off against the other 'three' values, must be mistaken. 'Fairness' (as an end) does not compete with 'efficiency', 'expertise', and 'accountability' (which are all means), and so cannot be traded off against them.

Another implication is that Finch's normative framework would only make sense if she could provide a coherent and attractive theory of 'fairness', the ultimate end the pursuit by insolvency law of which is facilitated by the other, procedural, values. Having examined the notions of 'fairness' Finch employs throughout the book, the paper concludes that two of them are question begging, a third is probably inconsistent with the others, and none of them withstands scrutiny.

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Introduction

Vanessa Finch argues in her book[1] that insolvency law must develop according to a 'guiding philosophy' which is internally consistent, which clearly identifies the values to which this law must be responsive, and which makes explicit the trade-offs inevitably required between these values. This philosophy would also have to grapple with the essential binaries of corporate law generally, which, while being gently transformed in corporate insolvency, become here, if anything, even more acute. So, to take two examples, insolvency law unarguably has the role of enforcing private rights (paradigmatically, of creditors), but it also impinges dramatically on issues of public concern ('the lives or deaths of enterprises' which affect 'livelihoods and communities'). And while one role of this law is undoubtedly to constrain the activities of important players in this arena (directors, insolvency practitioners and institutional creditors, for example), it must also create a space within which these players can bring to bear on the proceedings, consistently with the normative aims of this law, their skills and expertise. Arming decision makers with a guiding philosophy responsive to this array of concerns would then enable them to go about the difficult task of making trade-offs between the competing values at play here with 'structured transparency', and thus, with legitimacy.[2]

The book is divided into six parts, dealing respectively with the agendas and objectives of insolvency law, the financial and institutional context in which this law operates, the purpose and role of corporate 'rescue' procedures, the liquidation process, and the impact of insolvency on the company's directors and employees. A particular strength of the book is that it draws on articles Finch has published over many years, especially on the role of the management in distress situations. It also benefits greatly from Finch's interdisciplinary perspective. There has been some fine insolvency scholarship in this jurisdiction, but most of it has been doctrinal in nature.[3] Finch draws on economics, and generally, makes good use of empirical evidence relevant to her arguments. She is at her best when examining the professional, institutional and other motivational contexts which are shaped (to some extent) by the law, but within which the law itself must find its place. The best parts of her book, dealing with the duties and liabilities of directors, and with the competence and incentives of insolvency practitioners, have great depth, dealing patiently and persuasively with the complexities involved.[4]

Finch's book is, above all, an invitation to re-think the foundational principles of insolvency law. Its most ambitious claim is that the arguments it constructs provide 'a framework' within which 'insolvency law [may] develop with coherence and purpose'.[5] This reviewer shares Finch's

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[1] *Corporate Insolvency Law – Principles and Perspectives* (Cambridge: CUP, 2002) (hereafter, 'Finch').
[2] See generally, *ibid*, Ch 2, and 'Conclusion', 573-579.
[3] For some of the impressive exceptions, see Wheeler, *Reservation of Title Clauses* (Oxford: OUP, 1991); Aghion, Hart and Moore, 'The Economics of Bankruptcy Reform' [1992] J Law, Economics & Organization 523; and Carruthers and Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford: Clarendon, 1998). Recently, the relative paucity of interdisciplinary work has begun to be remedied, especially by scholars with a Law and Economics background. Perhaps the most notable of these has been John Armour, whose co-authored work in particular has cast beneficial light in dark areas; see eg Armour and Deakin, 'Norms in Private Insolvency Procedures: The "London Approach" to the Resolution of Financial Distress' [2001] JCLS 21, and Armour and Frisby, 'Rethinking Receivership' [2001] OJLS 73. From a different angle, Armstrong and Cerfontaine promise interesting insights; see eg 'The Rhetoric of Inclusion? Corporate Governance in Insolvency Law' [2000] *Insolvency Lawyer* 38.
[4] See in particular Finch, Chs 5, 8-9, and 15.
[5] See Finch, back cover.

concern with consistency of principle in this part of the law.[6] One of the two central tasks of this paper, then, is to ask if she succeeds in providing such a framework. The argument here begins by considering the assumptions which underlie Finch's theoretical approach, her recipe (as it were) for a successful theory of insolvency law. It examines how she thinks a theory must be constructed so as to be able to ask fruitful questions about the legitimacy of this bit of the law. It is also natural to investigate whether her work actually lives up to these ideals. The argument then turns to the ingredients of Finch's theory. The concern here is whether she provides a coherent understanding of her basic concepts and with the extent to which her deployment of these concepts yields useful insights free of the 'inconsistencies of reasoning' that she rightly deplores in the way the law might have developed in the past.[7]

The argument here aims to be constructive in being critical. Since this reviewer considers himself a participant in the same general enterprise – of developing a principled framework within which insolvency law might be analysed, and as appropriate, justified or criticised – the second main concern of this paper is to provide suggestions as to how the weaknesses unearthed in Finch's approach might be made good. This happens through a discussion of the relationship between the pivotal 'benchmarks' upon which Finch's analysis turns.[8] It should be noted that this review deals with only one of several sets of issues raised in the book that are deserving of attention.

How to go about constructing a theory of insolvency law

Finch argues that since English insolvency law sometimes requires company directors to exercise power appropriately, and at other times, disables them in order to empower creditors, insolvency practitioners or courts, 'the broad insolvency process in all its dimensions and with its variety of actors… requires legitimation'.[9] Claiming to draw inspiration (though by no means uncritically) from Mary Stokes,[10] and in particular, from Gerald Frug,[11] Finch suggests the legitimating process should seek to assess not merely the efficacy of the constraints on the actions of these parties, but also the degree to which they are allowed or encouraged to exercise their skill and judgement in a way conducive to the goals of the law. The process might be based on seeking legitimation on the basis of arguments drawn from different – indeed conflicting – visions of corporate law (e.g. contractarian and communitarian), even if each of the arguments could be regarded as weak or flawed, and even if some arguments cut in the opposite direction from others. This is because the process of seeking legitimation is not 'like a chain of arguments as strong as its weakest link [but in fact] a cable able to exert force according to the collective power of its (albeit imperfect) strands.'[12] Importantly, for Finch, assessing

> the legitimacy of an insolvency process… differs from merely expressing a *political* opinion on the topic. Persons of opposing political persuasions might differ radically in their views on dealing with troubled companies… [However, to] debate legitimacy

[6] See Mokal, *Consistency of Principle in Corporate Insolvency* (London, December 2001), available at the URL: <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=327740>. See also Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford: OUP, forthcoming 2004).
[7] Finch, 1.
[8] See eg Finch, 56.
[9] Finch, 47.
[10] 'Company Law and Legal Theory', in Twining (ed), *Legal Theory and Common Law* (Oxford: Blackwell, 1986), 155. For the points on which Finch overrules Stokes, see eg Finch, 46.
[11] 'The Ideology of Bureaucracy in American Law' (1984) 97 Harvard LR 1277. See however Finch, 46 and 50, for self-conscious disagreement, and also the main text to follow.
[12] Finch, 46, including n 87.

> involves a stepping back and reference, *not to personal preferences*, but to criteria *enjoying broad acceptance as relevant*.[13]

Having put in place these requirements for a successful theory, Finch sets about meeting them by (what is variously described as) 'paraphrasing and reorganising',[14] or 'building on, but repackaging'[15] the views of Gerald Frug. Endorsing his claim that 'we have adopted only a limited number of ways to reassure ourselves' about the exercise of organisational power,[16] Finch argues that legitimacy of the processes and principles of insolvency law can be tested by reference to four values or 'benchmarks'. *Efficiency* 'looks to the securing of mandated ends at lowest cost', *expertise* 'refers to the proper exercise of judgment [sic.] by specialists', *accountability* 'looks to the control of insolvency participants by democratic bodies or courts or through openness of processes and their amenability to representations', and *fairness* 'considers issues of substantive justice and distribution'.[17]

So what are we to make of Finch's basic methodology, and of these 'core [values which provide] a framework offering guidance in the development of insolvency rules and arrangements'?[18] It is suggested that Finch's methodology is flawed, that her understanding of her 'benchmark' concepts lacks consistency, and that she is unable to provide a satisfactory account of their relationship *inter se*. There is undoubtedly much to admire in her arguments, but whatever weaknesses there are in her book can mostly be traced to these points.

Let us begin by recalling that in debating the legitimacy of a part of the law, Finch would have us appeal to 'criteria enjoying broad acceptance as relevant'. To do otherwise would be simply to express a 'political opinion', which for Finch appears to be no different from expressing a mere 'personal preference', and that of course she would not allow.[19] This is all puzzling. Consider first the status of Finch's prescription that legitimacy should be debated by reference only to criteria that enjoy broad acceptance. Now, what makes *this* criterion for the debating of legitimacy acceptable to her, something different from a mere 'personal preference'? Perhaps it is because it itself enjoys wide public support? In other words, perhaps those debating legitimacy must have resort only to widely accepted values because only *this* way of arguing about legitimacy enjoys broad acceptance? But even if true, this prescription would of course be viciously circular, equivalent to saying that God should be obeyed because He has commanded that He be obeyed! We cannot invoke the wide acceptance of a viewpoint in order to decide whether wide acceptance of a viewpoint renders it superior to others less widely accepted. Finch would need some other way of breaking out of this circularity, but none is suggested in her book.

Alternatively, it might be that Finch is doing no more here than giving friendly, prudential advice. Perhaps she is merely expressing the plausible thought that a theory of legitimacy based on widely accepted criteria would itself be much more likely to be accepted. But again, even if this is an effective strategy for persuading others, advocating it here would be to misunderstand the nature of arguments, especially those about legitimacy. Of course an ultimate purpose of any argument is to persuade. But (unless, perhaps, we are advertisers, inter-varsity debaters or politicians) we do not construct arguments so that they would be popular, nor does the popularity

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[13] Finch, 50 (emphasis added).
[14] Finch, 49 n 93.
[15] Finch, 50 n 98.
[16] Finch, 49 including n 93.
[17] Finch, 50 n 98.
[18] Finch, 55.
[19] See also, eg, Finch, 39-40.

of an argument guarantee its validity or superiority. Rather, we make the arguments we think upon reflection are valid, then hope that the fact that they are valid would make them inherently persuasive, and thus gain them acceptance amongst those who engage with the issues with sincerity and reflection and knowledge.[20] In any case, we are not merely concerned here with any odd argument, but with arguments about *legitimacy*. Upon these, 'broad acceptance' seems a particularly strange condition to impose. Think about requiring those challenging the legitimacy of racial segregation in schools in the American Deep South in the 1950s to help themselves to no more than the values whose relevance was broadly accepted by the target population! Or if that appears too far removed from the present context, then consider how a Marxist company law scholar (and there are distinguished contemporary exemplars!) might react to a similar suggestion.[21]

It seems, then, that Finch provides no alternative methodology of debating legitimacy other than by 'expressing political opinions', and – needless to say – by defending these through rational and reasonable argument.[22] Nor is it sensible to conflate this process with asserting 'personal preferences'. Expressing a personal preference is about choosing vanilla over strawberry in ice-cream flavours, say. There is little or no possibility of fallibility here: we do not generally accept that on such issues, what *is* the case might be different from what we *take* to be the case. There is nothing you can say to persuade me that strawberry ice-cream tastes better than vanilla after all. In a very different way, expressing a personal preference might be about buying the playfully flowery yellow shirt rather than the fashionably austere black one. Political opinions are different precisely because they are *political*, put forward as appropriate in regulating some aspect of the life of one's community and not just oneself, and which one is ready to defend other than by the assertion of personal whim. Indeed, Finch's own preferred methodology is either to be understood along the same lines – as the political (and more importantly, interpretive) claim that the legitimacy of laws is *in fact* best (not just popularly) understood in this context as a matter of fairness, efficiency, accountability and expertise – or it should be dismissed as an undefended assertion, something akin to a personal preference.[23]

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[20] Generally on the most appropriate methodology for arguing about normative matters, see eg the excellent paper by Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87; and those in McDowell's collection, *Mind, Value and Reality* (Cambridge MA: HUP, 1998). For an accessible introduction, see Dworkin, 'Indeterminacy and Law', in Guest (ed), *Positivism Today* (Dartmouth: Aldershot, 1996).

[21] The announcement that Finch would have us debate legitimacy only by reference to broadly accepted values seems even stranger because it comes a few sentences after her rejection of what she takes to be Frug's claim that the exercise of power can only be 'rendered acceptable… on the grounds that it is 'objective in some way''; see at 50. Yet 'objectivity' for Frug involves an appeal to 'values of organizational life that everyone is considered to hold in common' (see n 11 above, 1286; there is no indication, by the way, that Frug intends 'everyone' in this statement to be read literally). So is the debate about legitimacy to be carried on by reference to 'objective' values (in this sense) or is it not? From Finch, 50, it seems that it is to be and not to be.

[22] For the useful (though not inevitable) distinction between the rational and the reasonable, see eg Scanlon, *What We Owe To Each Other* (Cambridge MA: HUP, 1998), Ch 1, and Mokal, 'The Authentic Consent Model' [2001] LS 400, 427-9.

[23] Contrary to what she thinks (Finch, 51), there is no viable alternative to asking one's audience to 'convert' to (less adversarially and more accurately, to share in) 'a particular ethical or political vision' of what legitimacy demands.

About the 'efficiency' benchmark

The principles on which this 'benchmark' is based do not receive too much attention from Finch. She says only that '*Technical efficiency* is concerned with achieving desired results with the minimal use of resources and costs and the minimal wastage of effort'.[24] However, it is not made clear why 'desired results' may not be achieved with the 'minimal use of resources' in the first place, what sort of 'costs' we wish to avoid here, and how effort might be 'wasted'. Further and importantly, is Finch's notion of efficiency neutral as to the sort of 'desired results' it might be directed at achieving? Remember after all that it is a benchmark for the *legitimacy* of insolvency law, and legitimacy is of course a moral concept. So do the results that efficiency aims to achieve at minimum cost also have to satisfy certain moral requirements? Also, would a conception of legitimacy which did *not* invoke some notion of efficiency be deficient in some way? Finally, Finch presents a list of different versions of efficiency, then simply declares that she would be using a particular one of them. She does not motivate her choice, does not explain why she plumps for *this* version rather than any other. Is this one of those 'personal preferences' that might be altered at whim? It is submitted that leaving all these vital questions unanswered renders Finch's approach both incomplete and internally inconsistent.

As it happens, this reviewer shares the view that only one version of efficiency – the one that Finch in fact selects – may be used as a benchmark to judge the legitimacy of a branch of law.[25] As it also happens, explaining why this is so then allows us to do several constructive things with Finch's analysis. What follows has several aims, then. We will explore why Finch's preferred notion of efficiency – referred to in this reviewer's previous work as *transaction cost efficiency* – should be regarded as superior to others, what sort of relationship it has with her other benchmarks, and what sort of desired results it can be directed towards. This will lead us to reject Finch's mistaken view that her benchmark values are conceptually on par in some way, so that fairness and efficiency may be traded off against each other.[26] It will also enable us to see that 'expertise' and 'accountability' have no separate standing of their own, and should be absorbed within 'efficiency'. This conclusion will then help us resolve some very revealing tensions within Finch's theory.

Why transaction cost efficiency?

So what is wrong with the other notions of efficiency on Finch's list? Pareto efficiency, named after the Italian economist credited with its invention, provides the usual starting point for discussion of this subject. A distribution of resources (or opportunities or entitlements) is Pareto optimal (or efficient) if any further change would not make even one person better off and would make at least one person worse off, judged both times by the person's own standards.[27] To understand what this means, suppose there are only two people (A and B) affected by a transaction which consists of taking an asset away from A and giving it to B. The change is Pareto superior if B compensates A fully for that loss, and is still better off himself. Likewise, a change which affects numerous people is Pareto superior if all potential losers from the change

[24] Finch, 52 (original emphasis).
[25] See Mokal, n 6 above, Ch I.6, upon which the following discussion draws.
[26] See eg Finch, 25, 29, 34-5, 43, 51, 55-6, 407, 559, etc. See also at 53, where however the discussion is directed at Kaldor-Hicks efficiency, and 483.
[27] This is an accepted paraphrase of Vilfredo Pareto, *Manual of Political Economy* (translated by A. Schwier), (edited by A. Schwier and A. Page) (New York: A. M. Kelly, 1971), 261. See eg Posner, *Economic Analysis of Law* (New York: Aspen, 5th ed, 1998), 14, and Lawson, 'Efficiency and Individualism' (1992) 42 Duke LJ 53, 85.

have been fully compensated, and the gainers are still better off because of it. A distribution is Pareto optimal (or efficient) when all such mutually beneficial exchanges have been fully exhausted. Now clearly this notion has immediate and obvious appeal. 'In a Pareto superior transaction, somebody gains and nobody loses. Who could possibly object?'[28] A transaction is Pareto efficient only if it would secure the unanimous consent of all those affected by it, and 'Who can quarrel with unanimity as a criterion of social choice?'[29]

However appealing the notion of Pareto efficiency might seem, it is not very useful.[30] Hardly any transaction in the world – perhaps none – satisfies the criterion of Pareto superiority. Almost every transaction affects countless parties, at least some of whom are made worse off because of it. At the very least, almost any transaction changes the pattern of demand for the resource exchanged (by satisfying someone's demand for it). It thus affects the market price of that resource, thereby reducing the prices of identical or substitutory goods and adversely affecting the suppliers of those goods.[31] Further, given that few Pareto superior transactions can be made, it follows that almost any state of affairs is Pareto optimal: 'What *is*, is Pareto optimal'![32] Not much guidance can be gained about the real world from a set of criteria which outlaws virtually every transaction, and which validates almost any distribution of resources.

Kaldor-Hicks efficiency, named after its British inventors, is often put forward as a more useful replacement.[33] That it is sometimes referred to as 'potential Pareto efficiency' provides a clue. Consider the simple two-party transaction again, where an asset is taken from A and given to B. The transaction is Kaldor-Hicks superior if B *could have* compensated A fully for the latter's loss and still been better off. The feature which makes this version of efficiency different from the previous one is precisely that no *actual* compensation is required here, so long as the gains to the winners are larger than are the losses to the losers.[34]

This conception of efficiency suffers from serious problems, however.[35] First, recall the formula just given, that a transaction is Kaldor-Hicks efficient if the gains to those who 'win' from it are larger than the losses to the losers. Consider how those losses are to be reckoned. The only coherent measure available is the consent of each of the losers. So a transaction would be efficient only if the party losing out could have been fully compensated to its own satisfaction, while still leaving a surplus for the party benefiting from the transaction (call this the 'K-H surplus').[36] It follows, however, that if *any* person affected by a transaction objects very strongly

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[28] Posner, *ibid* 85.
[29] Posner, *ibid* 14.
[30] Nor does its 'appeal' have any substance, as explained below.
[31] Dworkin, 'Is Wealth a Value?' (1980) 9 J Legal Studies 191, 193; Posner, n 27 above, 14. The theoretical point is no less real even if the adverse effect is tiny in some circumstances.
[32] See eg Calabresi and Bobbit, *Tragic Choices* (New York: Norton, 1978), 83-87 ; Lawson, n 27 above, 87, including the reference in n 91.
[33] See Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 Econ J 549, and Hicks, 'The Foundations of Welfare Economics' (1939) 49 Econ J 696.
[34] Posner, n 27 above, 14.
[35] Apart from those considered below, see also the discussion in Kornhauser, 'Constrained Optimization: Corporate Law and the Maximization of Social Welfare', in Kraus and Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (New York: CUP, 2000), 87, 98-110.
[36] Others possibilities, like those aggregating the utility of losers *as a group* , depend on the making of interpersonal comparisons of utility. Now, aggregation of this sort would be possible only if the utility of each member of the group of losers could be measured and put into the scales together. However, utility as employed in Law and Economics is derived from the satisfaction of preferences, and is thus an experiential state unique to the individual whose preferences have been satisfied. Interpersonal comparisons of the

to being deprived against his will of an asset or entitlement, so that a very high level of *ex post* compensation would have to be offered to redress his grievance at being treated thus, then the efficiency of the transaction becomes doubtful. Obviously, the greater the harm to the losing party, the higher the compensation required to remedy it, and so the greater the possibility that there is no K-H surplus.

> All it takes to make the universe of Kaldor-Hicks-efficient transactions an empty set is one person who sincerely cannot be bought – that is, a person who values autonomy, either his own or that of others, so highly that no amount of after-the-fact compensation could possibly leave him as well off as he would have been[,] had the loss never been inflicted (without consent) in the first place.[37]

Again, transactions in the real world affect countless people. This is even truer of a rule or policy, potentially governing *multiple* transactions, that we might seek to test using the criterion of Kaldor-Hicks efficiency. This raises the probability that one of those affected by that rule or policy would be someone 'who sincerely cannot be bought' in the sense specified above. Even if that is not the case, it is likely there would be little or no K-H surplus in many, perhaps most, instances, given the large number of adversely affected persons. So Kaldor-Hicks efficiency is scarcely more useful than the Pareto version.

Second, arguments based on Kaldor-Hicks efficiency violate the fundamental egalitarian principle that all persons are to be regarded as equals. One embodiment of this moral equality is the maxim that they must be treated as ends, not as means.[38] However, reliance on Kaldor-Hicks efficiency to defend a rule or policy would imply that the mere fact of a gain for a large group of people justifies losses to a smaller one. It would follow that those losing out because of the rule or policy were being used merely as means towards the ends of others. Even great harm to them would be acceptable, as long as a sufficiently large number of others derived small individual benefits which, taken together, were even larger. To illustrate this objection, we can imagine a transaction that inflicts loss on A, such that £100 of compensation would be required to make him whole. The same transaction also, however, brings benefit to two hundred other people, each of whom would be willing to pay £1 for that benefit. The K-H surplus is then £100 (the gain of £200 minus the loss of £100), and so the transaction is efficient. The problem, however, is that, once the existence of the K-H surplus is established, *no compensation need actually be provided to A* for the requirements of Kaldor-Hicks efficiency to be satisfied. As noted, this is unacceptable to anyone committed to the basic egalitarian principle.[39]

Finally, a problem common both to the Kaldor-Hicks and the Pareto versions of efficiency. On either conception, whether the transfer of an asset from X to Y is efficient depends on whether Y could compensate X for the loss and still be better off. However, Y's ability to compensate X

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extent or intensity of this state are thus incoherent, as, therefore, are attempts to aggregate the utility of different individuals; see the insightful discussion in Lawson, above n 27 especially 66-71. For an excellent and comprehensive treatment of the broader questions on this point, see Dworkin, *Sovereign Virtue* (Cambridge MA: HUP, 2000), Ch 1.

[37] Lawson, n 27 above, 91-2, citing Coleman, *Markets, Morals and the Law* (Cambridge: CUP, 1988), 138.

[38] For an insightful explanation of this well-known maxim, see Korsgaard, 'Kant's Formula of Humanity' in her *Creating the Kingdom of Ends* (Cambridge: CUP, 1996), 106-132.

[39] Of course rules or policies might be justified even though they result in *some* losses to X and greater gains to Y. But the process of justification should not be merely consequentialist, moving simply from this fact to the conclusion that the rule or policy is thus justified. For such a rule or policy to be justified on egalitarian grounds, it would have to be shown that its selection resulted from a process which, at the very least, provided due and equal protection to certain fundamental interests of all the relevant parties.

depends (among other things) on the *prior* distribution of resources. Very simply put, a rich Y would be able to offer a larger payment to X for the transfer. What is more, note the dependence of both types of efficiency on the preferences of individuals for a resource or an entitlement. Efficiency is achieved when such a resource or entitlement is vested in the person who places the greatest value on it, thus satisfying the recipient's relevant preference. But a person's preferences themselves are a function (*inter alia*) of his initial wealth and income. This is easier to understand if we remember that as defined in economics, wealth includes a person's native endowments, his skill at a sport or his possession of two healthy kidneys, etc.[40] So a physically weak person would have a greater preference for a legal entitlement to bodily integrity than someone stronger.[41] And a person might have a greater preference for leisure at one income level than at another.

It follows that 'If income and wealth were distributed differently, the pattern of demands might also be different and efficiency would require a different deployment of our economic resources.'[42] This shows also that simply because a transaction is efficient says nothing about its normative merits. Efficiency depends on the prior distribution of income and wealth amongst the parties, and that distribution may itself be unjust. If the initial distribution of resources is unjust, attaining an efficient allocation of those resources would be simply meaningless, since it would make that allocation no more desirable from the ethical point of view than if it were inefficient. So efficiency of either sort says nothing about the ultimate justifiability of any transaction, and thus, *a fortiori*, of any rule or policy.

The relationship between fairness and efficiency

For all these reasons, we must conclude that efficiency *in itself* does not provide a goal that any area of the law should aim at. It creates no reason for the law to be one way rather than another. This shows why efficiency concerns cannot be on par with fairness concerns, which *do* create good reasons for the law to be one way rather than another. So *contra* Finch, fairness and efficiency cannot be traded off against each other.[43] But note the emphasised qualification, that efficiency does not 'in itself' provide any goals for the law. Here is how this is to be understood. Let us draw a distinction between what might be called *procedural* and *substantive goals* of the law. A substantive goal of a certain branch of the law (or indeed of the law as a whole) would be an end that it seeks to pursue. Taking corporate insolvency law as an example, the substantive goals of this law might be stated, at different levels of abstraction, as 'To be just to all the relevant parties', 'To treat parties as equals', 'To provide a fair scheme of co-operation under the circumstances peculiar to insolvency', 'To show equal concern and respect for the interests of all those facing such circumstances', and so on. Substantive goals, then, are those which justify the existence of this part of the law by showing it in its best light, by demonstrating why it is worthwhile having it.

Procedural goals, on the other hand, are about *how* the law goes about attaining its substantive goals. For example, procedural goals would be concerned with the *methods* the law adopts to implement a fair scheme of co-operation in the circumstances of corporate insolvency. This

[40] See eg Calabresi, 'About Law and Economics: A letter to Ronald Dworkin ' (1980) 8 Hofstra LR 553, 555 (referring to Dworkin, n 31 above, and Dworkin, 'Why Efficiency?' (1980) 8 Hofstra LR 563). For a fuller discussion, see Johnsen, 'Wealth *is* Value' (1986) 15 J Legal Studies 263, 268-270.
[41] See eg the classic, Calabresi and Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard LR 1089.
[42] Posner, above n 27 15.
[43] Thoughtful practitioners of Law and Economics have themselves long accepted some version of this point; see eg Calabresi, above n 40, 555-558. More on this below.

perspective enables us to clarify the statement made above: efficiency can never be a *substantive* goal of the law. It can never by itself confer justification on any part of it. However, efficiency – understood properly – is quite indispensable as a procedural goal. Once a set of substantive goals has been exogenously specified (e.g. using a theory of justice), efficiency can be used to judge between various proposed schemes for implementing it.

Suppose we specify that a branch of the law should attain a set of substantive goals. Suppose also that there are two proposals about how to bring about these goals. Now it is obvious no proposal can be operationalised and implemented costlessly. Some resources will inevitably be consumed simply in putting in place any such proposal, and in maintaining it in operation. Remember also that most resources are scarce. So the more resources that are consumed in implementing a particular scheme, the fewer that will be available for other worthwhile objectives. It follows that if there are two methods of bringing about a certain goal in these circumstances, we must choose the method which is less costly to implement, other things being equal. Any other decision would amount to wasting resources, since the same objective could have been attained *and in addition*, a surplus would be available for application towards other valued goals. This waste is morally objectionable, then, to the extent that the attainment of those others goals is morally desirable.[44]

This provides an understanding of transaction cost efficiency.[45] A method of implementing a set of substantive goals is efficient in this way when the resources it consumes in the process of implementation are lower than would be consumed by adopting any other feasible method of implementation. Put differently, a method is efficient, given a particular amount of resources dedicated towards implementation, when it can operationalise the set of substantive goals to a greater degree than would be possible for any other feasible method.[46] It is obvious that to attain transaction cost efficiency should be a (procedural) goal of every part of a morally defensible legal system. This, it is submitted, is how efficiency analysis should be employed in arguments about the law, i.e., to determine whether it attains its substantive goals in the cheapest feasible way.

This also helps us better understand why we must reject Finch's repeated assertion that fairness may sometimes have to be traded off against efficiency. These two 'rationales' cannot 'pull in opposite directions'[47] because substantive goals and procedural ones, ends and means, do not compete! This is perhaps the most deeply engrained confusion in her work, and it creates glaring inconsistencies in it. So for example, she emphasises at one point that efficiency is about producing, 'at minimal cost and without waste[,] whatever social and distributional goals are set by society'.[48] *This* is an accurate statement of the relationship between substantive and procedural goals: the latter can be attained only by reference to the former, which means substantive goals must be settled upon *before* procedural ones are chosen. Put another way, we cannot even understand what counts as efficiency 'costs' and 'waste' until we decide what ends we wish to pursue.

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[44] A similar point is made by Grunebaum, *Private Ownership* (London: Routledge & Kegan Paul, 1987), 159.

[45] This draws on, but is not identical with, the discussion of efficiency in Milgrom and Roberts, *Economics, Organization & Management* (New Jersey: Prentice-Hall, 1992), 22-30.

[46] See Milgrom and Roberts, ibid, 24.

[47] *Contra* Finch, 50.

[48] Finch, 190 including n 12. For another acknowledgment of this, if only implicitly and incompletely, see her specification of a 'point' by reference to which efficiency may be judged, at 60, second paragraph.

This might sound strange, so consider this simple example. Suppose a company's directors have signed contracts with the company which create incentives for them to run it so as to further the interests, predominantly, of the shareholders as a group. Now if the end is to maximise shareholder value, then the directors' contractual allegiance to shareholders is desirable and should be encouraged. On the other hand, if the end is to ensure directors operate impartially as amongst shareholders, creditors and employees, then their exclusive allegiance to shareholders is a 'cost' and should be mitigated. Now consider the following sort of assertion: 'In assessing whether the law's treatment of employees leads to efficiency in insolvency processes, it is necessary to keep the efficiency question separate from the issue of fairness or distributional justice'.[49] This is incoherent (as well as inconsistent) if, as Finch herself suggests above, one can only think about efficiency in terms of distributional goals which have *already* been selected. We can keep the efficiency question separate from the issue of fairness (or else some other substantive goal) precisely to the same extent that we can ask directions without specifying where we want to go.

As for the trade-offs which *are* the stuff of social decision-making, potentially the most misleading situation arises when we have a rough idea about what our substantive goal is, and a strictly limited pool of resources with which to accomplish it. Here, the temptation to see a competition between, say, distributional goals and efficiency, is strong. However, the competition is only between different versions of the substantive goal (or two sufficiently similar substantive goals), and this competition might well be judged by using, as a medium or scale, the amount of resources available. Space will not allow adequate treatment of this point, but an example would be helpful.[50] Consider the problem of distributing the residual estate of an insolvent company (i.e. whatever is left after statutory, proprietary, and contractual preferential claims have been met), which is one way of allocating the loss resulting from the insolvency. One of the factors relevant here would be the respective ability of the claimants to bear that loss. So one might wish to investigate the characteristics of the claimants to determine who among them should get priority. The sort of factors which might arguably be relevant would be their relative vulnerability to serious detriment, and whether this vulnerability resulted because a particular creditor had been less cautious in planning for this type of loss than all the others, or because he had more expensive tastes for consumables. At the end of this process, however, the sums to be distributed would generally be minute, and the costs of investigation of these factors would be vast. 'So in order to save these costs', as we might say, the law settles instead for a proportionate distribution according to the famed *pari passu* principle.

As noted, it is tempting to see this as a conflict between justice or fairness (distribution of the estate according to deep luck-egalitarian principles) and efficiency (the need to save the costs of investigating the parties' characteristics). What is more, it might also be taken to show that in such a conflict, fairness or justice might sometimes be trumped by efficiency. This temptation leads to conceptual (and moral) error and should be resisted. Remember that we start off having accepted that the estate is to be distributed, to the extent possible, amongst the claimants. So the actual competition is between two interpretations of this goal. Given the small pool of assets which is to be distributed, but from which also the costs of distribution are to be met, the choice is between either spending a lot on investigating who should get what and then distributing, at most, a minute proportion of the estate amongst the claimants, or, softening the demands made on the investigation process in order to distribute a larger proportion to them. The choice, then, is about how much of the goal (more abstractly construed) should be implemented, and this itself is to be determined using fairness or justice reasoning. The *pari passu* principle is (only) appropriate as a

[49] Finch, 559. See also at 490.
[50] The following draws on and develops Mokal, 'Priority as Pathology' [2001] CLJ 581, 613-4.

residual, fall-back mechanism because there must come a time when the fairness benefits of making any further enquiries about who should get what are outweighed by the fairness disadvantages of dissipating the estate so that the remaining claimants as a group get little or nothing.[51]

Collapsing 'expertise' and 'accountability'

Because Finch does not provide substance to her 'efficiency' benchmark,[52] she treats 'expertise' and 'accountability' as distinct attributes on par with fairness and efficiency, and so presumably, liable to be traded off against either or both. However, once we understand more fully what transaction cost efficiency is, and what sort of 'costs' it aims to minimise, we will see that this is a mistake.

To set the scene, here are some general considerations which indicate that Finch's division is problematic.[53] First and as already noted, she provides no statement or general description of the sort of 'costs' the elimination of which would result in efficiency. Nor does she provide any understanding of 'expertise', and in fact this benchmark seems more or less redundant in her discussion.[54] Second, a moment's thought reveals 'expertise' and 'accountability' must bear the same sort of relationship to 'fairness' as does 'efficiency'. Fairness is a substantive goal of the law, whereas expertise and accountability are procedural ones. Fairness even by itself might be an ultimate criterion of legitimacy, but this is true of neither expertise nor accountability.[55] Finch's argument suffers because she fails to distinguish between the diverse nature of her benchmarks. So in commenting on the fact that insolvency practitioners sometimes use their repeat-player

[51] This reasoning would be acceptable to parties bargaining in the choice position of the Authentic Consent Model; see Mokal, n 22 above. For Finch's objections on these grounds, see Finch, 34-5 and 43. For the reasons given in the text, it is submitted these objections are misconceived.

[52] And because she appears to misread Frug's (already badly flawed) argument as claiming that his four 'models' capture *distinct* methods or 'stories' to justify bureaucracy. In fact, Frug opens his article (n 11 above, 1278) with the ringing declaration that all these are 'no more than variations on a single story' weaved around what for him is the fundamental 'objective'/'subjective' dichotomy (this, to simplify, is the tension between the need in social organisation for both external controls and room for personal self-expression).

[53] At Finch, 421, there is a hint that accountability and expertise are attributes of mechanisms or procedures, while efficiency is an attribute of principles. However, any such distinction is illusory because procedures too are governed by principles or consist of practices whose efficiency we might be interested in testing, while asking directly whether a procedure is efficient is hardly novel.

[54] Here is one perspective: of the ten references in the book's index under this heading, nine consist, on average, of just over one page each. The tenth, an excellent analysis of the directors' disqualification provisions, at 521-40, begins by declaring that in it, the question considered is whether the law encourages directorial behaviour which is 'expert, honest and free from incompetence'. However, could not this law be regarded as part of the 'accountability' benchmark, requiring directors to explain their use of limited liability? If one aspect of the discussion is about their honesty, why is this not a matter of 'fairness' towards the creditors, employees, and other counter-parties the directors might have caused their company to be dishonest towards? And is incompetence not one of the main factors leading to 'inefficiency' (at least popularly, and we know Finch does not provide a technical account)?

[55] The fact that the Nazi legal system ensured great expertise in the rounding up and shipping off of some people to the death camps and that it provided an efficacious system of accountability for the officials concerned in how effectively they went about their murderous job, would provide no legitimacy to the system. Nor do references to 'democracy' help. Far from being self-evident, democracy is an inherently contestable concept (witness Korean People's Democratic Republic of North Korea), and *contra* Finch, 51, we would first need to be told what Finch's preferred 'ethical or political vision' of it is. For a persuasive statement, see eg the classic, Ely, *Democracy and Distrust* (Cambridge MA: HUP, 1980).

expertise to overwhelm and sideline creditors at creditors' meetings, she adds, as if as an afterthought, that 'Such an account, of course, emphasises the danger of evaluating insolvency processes by using a benchmark of expertise without reference to objectives: liquidation may be a process that lends itself to certain misdirections of expertise'.[56] It should be obvious that far from being a sort of optional extra, this consideration is of the essence if one wishes to use 'expertise' – and indeed 'accountability' and 'efficiency' – as criteria of legitimacy. Like efficiency, the 'other' benchmarks also can only be understood by reference to the contribution they make to the attainment of substantive goals. It will be argued below that failure to distinguish between substantive and procedural goals considerably weakens Finch's approach.

Returning to efficiency, there are two broad (and overlapping) categories of transaction costs (i.e. the costs inherent in implementing a set of substantive goals) relevant here.[57] *Co-ordination costs* are the costs arising from the fact that there are limits on what people in the real world can foresee, and on their cognitive capacity for selecting the appropriate response to a set of circumstances presented to them. These costs also arise because there are informational asymmetries, e.g. information relevant to the common plans of both A and B is available only to the former, or is available to him to a greater degree than to the latter. An example from the corporate insolvency context is that of the co-ordination problems faced by the creditors of a company on the verge of insolvency.[58] One implication, given the aim of implementing any set of substantive goals requiring co-operation, is that some resources would have to be expended either ensuring that information is available to a fuller and more uniform degree to all the relevant actors, or that the adverse effects of this not being the case are remedied.

With this in mind, this reviewer suggests that co-ordination costs are a function, *inter alia*, of expertise. This is for several reasons. First, on the assumption that there are inherent differences amongst individuals as to the potential to develop certain skills, some of the social resources earmarked towards the imparting of those skills would have to be spent finding the right candidates to impart them to.[59] Then there are search costs involved for a potential buyer of expertise in locating it. Information that there is an expert who can do the job within the constraints set by her financial resources, say, has to be discovered by the buyer, information that there is a set of tasks his expertise would allow him to perform rewardingly has to be discovered by the seller, and there will seldom be a perfect overlap in what the buyer requires and the supplier provides.[60] Third, the greater the complexity of the tasks involved and the more knowledge available on how to perform them, the greater will be the division of labour amongst the experts in the area, and so the greater the co-ordination costs of their working together.[61]

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[56] Finch, 396.

[57] The two categories are drawn from, but again are not identical with, those in Milgrom and Roberts, n 45 above, 29-30.

[58] It has been famously argued that insolvency law should be regarded (to use the terminology introduced above) as having as its sole substantive goal the alleviation of those problems; see eg Jackson *The Logic and Limits of Bankruptcy Law* (Cambridge MA: HUP, 1986).

[59] Spending £x on training the young Maurice Greene to run the 100 metres in under ten seconds is likely to be more successful than spending the same amount attempting to do the same with the young Luciano Pavarotti (the latter's athletic past notwithstanding); *vice versa* when it comes to grooming them to become great tenors.

[60] An example of this can be found at Finch, 227-8.

[61] Co-ordination costs might in fact place limits on the degree of specialisation that is feasible; see Becker and Murphy, 'The Division of Labor, Coordination Costs, and Knowledge' (1992) 107 Quarterly J Economics 1136. For an example of the point in the text, see Finch, 348; the two paragraphs on this page are particularly important because they demonstrate not only that expertise is a component of efficiency,

Finally, there is the risk, given the expert's cognitive limitations, of his choosing the non-optimum strategy for dealing with the task at hand, one requiring ten hours of work when it could have been performed in eight, say. Take these together and it is clear Finch's 'expertise' benchmark is very much an aspect of efficiency, since it is mostly about such costs, and efficiency is about attempting to reduce these costs.

The second category of transaction costs is *motivation costs*. These arise because, once again along with asymmetric information, different actors have different incentives about how to behave in any situation, since they perceive their interests not to lie in the same direction. Again given the aim of implementing a set of substantive goals requiring co-operation, some resources would have to be expended aligning their interests in such a way that the actors would be encouraged to pursue those goals. In English corporate insolvency law, a good example is found in the wrongful trading provisions in section 214 of the Insolvency Act 1986, which seek to align the interests of managers of firms on the verge of insolvency with the interests of the firm's creditors.

Once again, it is suggested that to the extent that 'accountability' is concerned with issues distinct from those considered under the 'expertise' benchmark,[62] it is a function of motivation costs: the greater the latter, the greater the need for the former, and *vice versa*. We can test this by imagining a situation where the agent can be reliably 'programmed' to do precisely what is in the principal's interests. In this case, the need for accountability disappears.[63] And divergences from the principal's interests can arise, broadly, for any of two types of reasons. They can arise either through the agent's incompetence or poor judgement, in which case we are back to considering issues of 'expertise' and therefore are dealing with co-ordination costs as described above. Or they can arise because of the agent's fraud, cheating, or shirking, so that we are squarely within the ambit of motivation costs. There is strong evidence in Finch's text that she is being compelled by this logic to put 'accountability' under the 'efficiency' umbrella. This is clear, for example, in her discussion of the latter benchmark, of 'the office-holder's need to justify claims to remuneration' and to 'explain the nature [and rationale] of the main tasks undertaken' to stakeholders.[64] And in the context of devising effective 'rescue' mechanisms, she explains accountability by reference to opportunistic behaviour and the costs of ensuring access to the proceedings for, and supervision by, the relevant parties.[65] This is all the very stuff of motivation costs.

The burdens of 'fairness'

So far we have examined three of the four benchmarks that Finch claims must be present for a part of the law to be legitimate. It was suggested above that Finch's discussion of these attributes suffers from a lack of coherence, because, apart from brief definitions, she does not reveal the principles governing them, nor the factors which distinguish them from each other. The result is that various of her arguments seem to have been thrust almost randomly under one heading when

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but also that so is the accountability often required to overcome conflicts of interest; see the discussion of motivation costs, below.

[62] I am grateful to Peter Jaffey for drawing my attention to a potential overlap here.

[63] In situations of public decision-making, accountability has a symbolic role in addition to its role in controlling the motivation costs of public functionaries. Note, however, that even the symbolic role of the institution of accountability may *only* have meaning and value in a context where there are motivation costs. And second and even if this is not the case, the resource-starved world of insolvency law does not seem to permit room for much symbolism.

[64] Finch, 154.

[65] Finch, 193. See also at 495.

they could easily have been discussed under either of the other two. The problem with this, of course, is that insight gained from a coherence of perspective and a comparison of like with like might be lost. The discussion above attempted to remedy this deficiency by providing a justification for Finch's choice of transaction cost efficiency, by showing how it necessarily encompasses the other two benchmarks, and by thus bringing out both unnecessary duplications and meaningful distinctions in the analysis.

Most importantly, a distinction was drawn between the ultimate ends of the law, and the methods it adopts in attempting to achieve those ends. It was pointed out that the 'three' benchmarks so far considered are about means not ends, and therefore, that their invocation is entirely question begging unless it can be connected to a clear statement of the ultimate aims the law is attempting to attain. Only in that case would we be able to evaluate the fruitfulness of Finch's analysis in helping us understand the law's efficiency in attaining those ends. Her 'fairness' benchmark provides a suitable candidate – as noted, fairness can undoubtedly serve as a substantive goal of the law. In view of this, her discussion of fairness bears a heavy analytic burden. So finally in this review, that is what we must now consider.

Fairness is utilised throughout the book in Finch's analysis of the legitimacy of various parts of the law.[66] It is unfortunate, then, that yet again, nowhere does she provide a statement of her conception of fairness, let alone a defence of her theory of it. As noted above, we get a hint that 'fairness considers issues of substantive justice and distribution'.[67] Yet even this minimal understanding of what she might mean by 'fairness' is not secure. This is because, in criticising contractarian justificatory models, Finch asserts that in them, the 'distinction… between principles of fairness and justice and principles governing the allocation of other goods such as wealth is… problematic'.[68]

Casting an eye back on Finch's own suggestion about what fairness is, the reader would see why this muddies the waters considerably. How can there be a *distinction* of this sort, when Finch herself recognises that fairness *is* (in some appropriate way) about the justice of distributions? Surely this includes distributions of 'goods such as wealth'? Nor is it plausible to suppose that she regards this 'insight' too occult to have been accessible to contractarians. Amongst those contractarians who are explicitly interested in fairness and justice (so that the early Thomas Jackson, for example, is excluded),[69] it is well known that many regard the justice of a decision to be dependent upon the fairness of the decision-making process. And, to take some examples mentioned by Finch herself, Rawls understands justice to be about the distribution of certain 'primary goods', including wealth; Korobkin takes justice in insolvency situations to be a matter of the distribution of influence over the strategies and actions of the distressed corporation;[70] and for this reviewer, it is about the distribution of rights in the insolvent company's assets.[71] Since

[66] See generally Finch, 261-5, 292-4, 398-418, 548-51, 567-70.
[67] Finch, 50 n 98.
[68] Finch, 35. She reveals the source of her confusion by citing P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon, 1990), 262-263. Craig is discussing Rawls' principles of justice, but Finch takes his arguments to be directed at contractariansim generally. So the rebuttal simply consists of a restatement of the obvious: one might accept Rawls' contractualist methodology as an appropriate way of arguing about justice without being required in any way to accept the distinct claim that the methodology yields the two principles of justice, or that (and this is Craig's broad concern in the pages cited by Finch) the principles are related in the way Rawls suggests.
[69] For an explanation, see Mokal, n 22 above, 407-8 and 413-4.
[70] Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas LR 541, 570-571.
[71] Mokal, n 22 above, 435.

Finch acknowledges that contractarian theories *are* concerned with 'principles of fairness and justice', then, and since she also accepts that fairness and justice are (at least partly) about principles governing distributive issues, it is difficult to understand what 'distinction' between these and the so-called 'principles governing the allocation of other goods such as wealth' she would require contractarians to render more 'unproblematic'. What is more, given that this makes it seem that there might for Finch *be* such a 'distinction', it becomes even more difficult to understand what she means throughout the book when she talks about 'fairness'.

Now, even though there is no *general* or *abstract* statement or theory of what Finch understands by 'fairness', she writes copiously about it in *particular* contexts. It could be, then, that a reasonably accurate picture of her conception of fairness could be built up through an analysis of these more specific discussions.[72] It is important that we have such a picture: since Finch is committed (and rightly so) to 'philosophical consistency', we need reassurance that, say, the conception of fairness invoked by her to approve one part of the law does not fall by the wayside when another part of it is condemned. If, on Finch's preferred view, fairness demands X in state-of-affairs 1, then in state-of-affairs 2, which is similar in all relevant respects, it should not demand Not-X. Of course if this were the case, we would either have to reject at least one (or perhaps both) of those analyses, or require a principled justification of the apparent inconsistency.[73] Finch also of course needs to explain *why* she has chosen the theory which demands X in state-of-affairs 1 in the first place.

However, poring over Finch's various discussions of the 'fairness' benchmark is not reassuring. She appears to invoke at least three notions of fairness, at least two of which are questions-begging, and two of which conflict with each other at least prima facie. Her discussion of receivership provides an interesting case study. At one point, Finch appears to condemn the institution as 'unfair' because, among other things, the floating charge holder is not required to consider the interests of any other party, and could take decisions affecting their interests without their consent.[74] However, even assuming that fairness requires the consent of those affected by a decision,[75] Finch pays no attention to the questions *how* such consent might appropriately be obtained. This is unfortunate because, mirroring debates further afield, *this* is the question attracting most of the controversy in insolvency scholarship. So for example, Hobbes and Kant,[76]

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[72] One possibility should be raised only in order to be dismissed. Finch is of course not a moral particularist. The main claim she makes on behalf of her book is, after all, that it provides 'philosophical consistency' in the analysis of the law by seeking out and condemning inconsistency of principle (see eg 420, 530, 573, etc.). And there is no commitment to the priority of the particular: legitimacy itself, after all, is a moral concept, one she explicitly makes a centrepiece of her analysis, and the 'constituents' of which she claims to apply consistently from area to particular doctrinal area. Nor is there a disavowal of the invariability of reasons; see eg the discussion of unfairness at 407. For valuable introductory discussions of moral particularism, see eg Gilliland, 'Aristotle, Moral Particularism, and the Indeterminacy of Principles' (Undated, available at the URL: <http://panther.bsc.edu/~rgillila/jobs/MP5.htm#_edn1>, and Dancy, 'Moral Particularism', The Stanford Encyclopedia of Philosophy (Summer 2001 Edition), Zalta (ed), URL: <http://plato.stanford.edu/archives/sum2001/entries/moral-particularism/>.

[73] Finch would not disagree: see, eg, her condemnation of adopting inconsistent 'models of fairness' at 364-5.

[74] Finch, 262 (echoing concerns expressed by the Insolvency Service).

[75] So eg, any utilitarian worth his salt would put up stiff resistance here, yet to this and similar, readily-anticipated attacks, Finch provides no defence at all. See also Dworkin, n 40 above, 574-579, on 'the importance of distinguishing between fairness and consent'.

[76] Hobbes, *The Leviathan* (1651), and Kant, eg, *Groundwork of the Metaphysics of Morals*.

Gauthier and Rawls,[77] Posner and Dworkin, [78] and Jackson and Korobkin, [79] – and even your reviewer[80] – all might agree or be willing to assume that the consent of those affected by a decision is relevant to its fairness (in Finch's sense), yet still have *very* diverse views about what is thereby entailed for theories of fairness, and about how consent might be sought. What a consent theorist thinks fairness recommends would of course be different – often, dramatically so – depending on their answers to these questions.

So for example, in response to the suggestion that receivership might be regarded as 'fair' because floating charge holders have paid for their right to appoint a receiver in the form of lower interest rates on their loans, and because trade creditors enjoy higher profit margins than the charge-holding banks, Finch retorts that this would not do because 'markets [may] not allow high profit margins, that the institution of receivership offers a means for the better placed banks to exploit their positions, and that the interest rates charged by the floating charge holders are excessively profitable because risks are loaded onto unsecured creditors'.[81] However, even to someone committed to the relevance of consent, this is all question begging. In the famous Creditors' Bargain model, for example, the unsecured creditors' alleged weaknesses are part of their very identity, and so *should* be reflected in the process through which consent is sought and fairness thus established.[82] Now Finch apparently rejects this model's notion of consent. [83] But she also rejects the alternative luck-egalitarian (Rawlsian) conception (which might condemn decisions that reflect the weaknesses Finch claims unsecured creditors suffer from).[84] And crucially, she suggests no method herself of determining whether consent is present, and if it is, whether it has been validly given. It follows that the consent-based arguments she makes or endorses are quite question begging, since they could be rejected by adopting some ways of determining the presence and validity of consent, upheld by adopting others, and Finch has no consistent way of arguing for or against any of these.

Secondly, there is sometimes an appeal to the existence of 'conflicts of interests' to sustain a charge of unfairness. For example, on the page following the one where Finch makes the arguments discussed above, she says that 'an important aspect of fairness in decision-making is the disinterestedness of decision-makers'.[85] She uses this observation to raise doubts about the practice whereby 'receivers are appointed from firms of accountants who have advised and

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[77] See Gauthier, *Morals by Agreement* (Oxford: Clarendon, 1986), and Rawls, *A Theory of Justice* (Cambridge MA: HUP, 1971).

[78] See Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 Hofstra LR 487, and Dworkin, n 40 above, especially 574-579.

[79] See Jackson, n 58 above, and Korobkin, n 71 above.

[80] See Mokal, n 22 above, which also explains the implications for the analysis of insolvency law of the contractarian/contractualist divide traced in these pairings.

[81] Finch, 263. For other examples of an understanding of fairness linked to apparently egalitarian concerns about the natural and 'market' characteristics of the parties, see at 165 (the role of insolvency practitioners), 398 and 402 (avoidance of transactions), 407 (creditors dealing with groups of companies), 453 (security), 467-9 (retention of title clauses), and 482 (*Quistclose* trusts). Note also that, whatever the precise egalitarian nature of these concerns, their invocation is of course problematic for Finch, who would not wish to ask her readers to 'convert' to a 'particular ethical or political vision' such as luck egalitarianism; see at 51.

[82] See eg Posner, n 79 above, 499; Jackson and Scott, 'On the Nature of Bankruptcy' (1989) 75 Virginia LR 155, 160; and Gauthier, n 78 above, 256.

[83] See Finch, 31-32.

[84] See Finch, 33-35.

[85] Finch, 264.

advocated receivership' to the major creditors in the first place.[86] This particular argument is unfortunate, since it also displays Finch's very occasional tendency to speak gently about empirical evidence if it stands in the way of a satisfying polemic![87] Ignoring that, though, and focussing on her general strategy, it is submitted that it is question-begging to assert that 'conflicts of interest' and a lack of disinterestedness on the part of decision-makers create 'unfairness'. Suppose A and B find themselves in a position where their interests conflict, and where X would have to decide whose interests should prevail. Assume (uncontroversially) that a 'conflict of interest' arises when a decision-maker's interest and duty might conflict. In that case, we must decide whose interests should prevail as a matter of fairness *before* we can decide the nature of decision-maker X's duty. Only at that point are we in a position to say whether X faces a 'conflict of interests' (in the usual normative sense) that we should be concerned to remedy, and about whether the lack of disinterestedness on her part is unacceptable on fairness grounds.

This is clear from the example considered above concerning directors' duties. Suppose that, as a matter of fairness, the interests of the shareholders of a solvent company as a group (A) should be given priority over the interests of all other 'stakeholders' (B). If so, then the fact that the company's directors (X) have signed contracts with the company which create incentives for them to run the company so as to further the interests, predominantly, of the shareholders as a group, does not create an objectionable 'conflict of interests', nor is the directors' disinterestedness in this matter something to be desired. It is in fact *right* on fairness grounds to orient the managers' interests in the same direction as the interests of shareholders, because the shareholders are the very parties owed the benefit of directors' (fairness-based) duties in the first place. Our conclusions about such contracts would however be different if, as a matter of fairness, solvent companies should be run in a manner that is impartial between the interests of shareholders, creditors, and employees. *Now* there would be a need to interfere to sever the connections between what is to the shareholders' and the directors' advantage, since these connections are unfair, *and therefore* create a 'conflict of interests' between the directors' interests and their fairness-based duties. Finally, though, suppose we start off having no information about what fairness demands here, but once again, are informed that the sort of contracts mentioned above had been concluded. Unless we allow external intuitions to be smuggled illicitly into our reasoning here, it seems we simply have no fairness-based reason for interfering in the situation, nor indeed for judging there to be a 'conflict of interest' in the normative sense.[88]

This shows that the question of whose interests should prevail as a matter of fairness is prior to any determination of whether the law tolerates an objectionable 'conflict of interests', say, in the

[86] Similar concerns are expressed at 161 and 163.

[87] After making this argument earlier in the book, she notes, at 164, the finding that there were 'no significant differences in the recommendations made by [insolvency practitioners, or IPs] acting as investigating accountants with no expectation of receivership appointments and those made by IPs who might have had such expectation'. One might think the existence of contrary evidence was a reason to consider this argument badly crippled. Yet not only is it wheeled out exactly a hundred pages later, this time there is no explicit mention of the conflicting evidence either (though there is a reference back, at n 150, to where it is originally discussed). For other examples, see Finch, 85, 90, 141, 189 n 7, and 257-258; some of the arguments on each of these pages are contradicted by the evidence in Franks and Sussman, *The Cycle of Corporate Distress, Rescue and Dissolution* (IFA Working Paper 306, 2000), which she mentions, eg at 236 n 9, but the implications of which she does not discuss.

[88] On Finch's understanding of efficiency, a conflict of interest based on efficiency considerations could not exist either, as explained above.

way receivers are appointed.[89] It follows that Finch's appeals to alleged 'conflicts of interests' to *establish* the existence of 'unfairness' gets things the wrong way around. There must be a prior laying out and defence of a theory of fairness, a determination of whose interests should prevail on these grounds, *in order to* establish a fairness-based duty in the first place, and *thus* to show the existence of a 'conflict of interests' in the sense relevant here. And this Finch does not provide. In addition to all this, the *way* in which decision-makers should be disinterested is intensely controversial,[90] but nothing in Finch's book shows us how to resolve those controversies.

Matters are made worse because, on the same page that she relies on a 'conflict of interest'-based notion of 'fairness', Finch invokes yet another conception of this benchmark. This one is apparently 'fairness' to 'society as a whole', and seems based either on social wealth maximisation (Kaldor-Hicks efficiency) or Pareto-efficiency.[91] The problem, however, is that not only are both of these versions of '*efficiency*', which for Finch is a benchmark in its own right distinct from 'fairness',[92] but neither is capable of functioning as a defensible notion of fairness in any case.[93] What is more, the dramatic tendency of this alleged form of 'fairness' to clash with those which regard justification *to the individual* as central (such as those based on notions of consent, including at least one considered above) is well known.[94]

Conclusion

None of this detracts from the valuable contribution that Finch's book makes to the literature. Not only is it the first sustained attempt in this jurisdiction to provide a non-doctrinal analysis and critique of this important area of the law, but also, at its best, it provides a deep, provocative, and ultimately persuasive account of several of its individual parts, and of how they operate in practice. There is also an impressive breadth in the scholarship. In fact, one of the most important uses of the book may well be that it brings together analyses from a hugely diverse range of perspectives, thus providing the starting point for any detailed examination of this law.

However, it is difficult to avoid the conclusion that the promise of 'philosophical consistency' is rather far from being kept. With a little imagination, the three versions of 'fairness' discussed above could be used to condemn almost anything as unfair while at the same time upholding it as fair. And in the absence of a clear statement of what substantive goals the efficiency – and thus the accountability and expertise – criteria are directed towards, all we are left with is a repeated appeal to raw, unsystemised intuitions.

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[89] To understand this point, simply assume the law to be committed, for reasons of fairness to creditors and other counter-parties, to the objective of removing directors from their managerial role at the merest hint of corporate distress. The point is not to assess the wisdom of such a goal, but merely to emphasise that the concept of 'conflict of interests' here is an *evaluative* and *loaded* one, in the way indicated in the text.

[90] By analogy, see eg the discussion of the Real Parties, and Natural and Dramatic Ignorance conditions in Mokal, n 22 above, 404-14, 423-4, 429-32, and 440-43. Some might argue putting decision makers in a state analogous to Natural Ignorance would guarantee impartiality; others might insist that only Dramatic Ignorance would do.

[91] See Finch, 264. The qualifications in the text are necessitated by the lack of clarity in Finch's formulation.

[92] For Finch's acknowledgment of this, see at 53 n 102.

[93] See above.

[94] Space does not allow a fuller treatment of this point here; however, see eg Dworkin's discussion of conceptualising 'society' as a big person, n 31 above, eg at 200 and 204. For an example of a situation where, at least on the face of it, consent-based and 'society as a whole' notions of 'fairness' might conflict, see Finch's conclusion about the justifiability of the present system of secured credit, at 464.