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Taking Distribution Seriously

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Article Abstract

Taking Distribution Seriously

Robert Hockett

It is common for legal theorists and policy analysts to think and communicate mainly in maximizing terms. What is less common is for them to notice that each time we speak explicitly of socially maximizing one thing, we speak implicitly of distributing another thing and equalizing yet another thing. We also, moreover, effectively define *ourselves and our fellow citizens by reference to that which we equalize; for it is in virtue of the latter that our social welfare formulations treat us as "counting" for purposes of socially aggregating and maximizing.*

To attend systematically to the inter-translatability of maximization language on the one hand, equalization and identification language on the other, is to "take distribution seriously." It is to recognize explicitly, and to trace the important normative consequences that stem from, the fact that all law and policy are as distributive and citizen-defining as they are aggregative. It is also to recognize therefore that all law and policy treat us as equals in some respects – respects in terms of which they identify and "count" us as politically relevant – and as non-equals in other respects. Attending explicitly *to these "respects" brings transparency about the degrees to which our laws and policies identify, "count," and treat us as equals in the* right *respects.*

This Article accordingly seeks to lay out with care how to take distribution seriously in legal and policy analysis. It does so by two means, keyed to the principal guises in which distribution is typically implicated in legal and policy analysis: First, by careful attention to the internal structures of the social welfare functions favored by most present-day legal theorists and policy analysts. And second, by systematic reference to what linguists call the "cognitive grammar" of non-formal distributive language, a structure that mirrors the structure of distribution itself. The payoffs include both a workable method by which systematically to test proposed maximization norms for their normative propriety, and an attractive distributive ethic that can serve as an ethically intelligible normative touchstone for legal and policy analysis.

Taking Distribution Seriously

ROBERT HOCKETT[*]

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[*] Associate Professor of Law, Cornell Law School. Many thanks to [Matt Adler, Dick Arneson, Kaushik Basu, Brian Bix, Robin Boadway, Kevin Clermont, G. A. Cohen, Mike Dorf, Ronald Dworkin, Dan Farber, Marc Fleurbaey, Robert Frank, Henry Hansmann, Alon Harel, Aristides Hatzis, Dan Kahan, Daniel Markovits, Jerry Mashaw, John Mikhail, Trevor Morrison, Eduardo Peñalver, Jeff Rachlinski, John Roemer, Larry Solum, Alexander Somek, Brad Wendel… I'd like to dedicate the Article to Marilyn Inge, whose struggle with cancer commenced and concluded while it was underway. You are much missed.]

INTRODUCTION

Suppose you are a legal theorist, welfare economist, or policy analyst committed to some normative "master principle." You believe law and policy ought to concern themselves solely or mainly with "welfare," say, or with "well-being," "utility," wealth, happiness, or some other such thing. Chances are, in such case, you will say we should "maximize" this thing. And chances are likewise, if you employ formal methods in conducting and communicating your analyses, that you will employ maximization formulae – most likely Bergson-Samuelson social welfare functions or some variant thereof – in so doing.[1]

Now if you fit this description, it might have escaped notice thus far that in doing these things you do other things too. Implicitly, you are thinking and advocating in terms not only of maximizing, but also of distributing and even of equalizing. For in socially maximizing anything, we always are spreading another thing and equalizing yet another. What is more, we are effectively *defining* ourselves and our fellow citizens *by reference* to that which we equalize. For the attributes in virtue of which we are "counted" for social maximizing purposes are the attributes in virtue of which we are treated as socially relevant, hence the attributes to which, in effect, we are "reduced" for legal and policy purposes.

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[1] The locus classicus is Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 QUARTERLY J. ECON. 310-34 (1938). See also PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947); and KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). I provide formal characterizations of my own in the Appendix below and in Robert Hockett, *The Impossibility of a Prescriptive Paretian* (working paper, on file with the author). The apparatus of social welfare functions is illuminatingly adapted to legal and social policy analysis in Matthew Adler, *Well-Being, Inequality, and Time: The Time Slice Problem and Its Policy Implications* (working paper, on file with the author). Also illuminating, though ultimately insupportable, is LOUIS KAPLOW AND STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002). A hint of the trouble with the latter is seen at once on its face, the title itself manifesting a rudimentary category error: "Fairness" denotes a pattern of distribution, "welfare" an object of distribution which itself is distributed fairly or unfairly. Foundational errors of precisely this sort are among those I hope to put an end to by means of the mode of analysis proposed in this Article. More on objects and patterns of distribution infra, II.C. and II.D.

Suppose, for example, you advocate that we socially maximize aggregate utility. In that case you are effectively suggesting that we distribute such things in such manners as enhance that utility. You are also suggesting that those whose utility functions figure into your social welfare function be counted as equals in a particular respect – here, in respect of their utility functions.[2] The respect in which you count these individuals as equals, in turn, is the identifying feature to which you assimilate or reduce them: If you are strictly utilitarian as per the present example, individuals just *are* their utility functions so far as your conception of social welfare is concerned.[3] One's utility function is the sole attribute in virtue of which she "counts" in your social welfare analyses.[4]

We can make the example more concrete:[5] Say Beatrice and Benedict each have enough resources to subsist upon. Say further that society has an additional three units at its disposal of what I'll call "benefit stuff" – resources available to direct toward Beatrice and Benedict.[6] Say finally that Benedict derives marginally more utility from benefit stuff than does Beatrice, until he has received two units.[7] Thereafter Beatrice receives marginally more utility from benefit stuff than does Benedict. If we are utilitarians and accordingly wish to maximize feasible social utility under these circumstances, we'll give

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[2] Precisely this fact is what underwrites some utilitarians' attempted justifications of their utilitarianism on putatively egalitarian grounds – by claiming that everyone's utility function counts "for one" in the social welfare function. See infra, note 15, and accompanying text.

[3] Assuming that each individual's utility function counts precisely for "one" in the social welfare function. See infra, note 14. It also is possible to weight different persons' utility functions differently – counting the utility functions of the handicapped or desperately ill for more, for example, as some "prioritarian" social welfare functions might do. In such case it is her *weighted* utility function with which the individual is socially identified, and the objectionability or otherwise of the identification will ride on the reasons that underwrite the differential weightings. Fuller treatment infra, Part II.D, and the Appendix.

[4] Assuming that yours is an unalloyed, "strict" welfare function. More on "strict" and "mixed" functions infra, Part II.D, and Appendix.

[5] We can also render it more abstract and formal. A summary rendition of this kind is provided infra note 14. I'll generally relegate such technical summations to notes and Appendix.

[6] You can think of it as money if you like, or some other resource transformable into utility. See infra, II.C.

[7] I prescind here from worries about interpersonal comparability, as do utilitarians themselves. More on such measurement matters infra, II.C.

the first two available units of benefit to Benedict, then give the final available unit to Beatrice.

Call the benefits, *after* they are distributed in this way, "aggregate-maximizing" units, or "maximizers" for short.[8] Call the benefits, *prior* to distribution, "generic benefit" units, or "benefits" for short. Then there are three, even four distinct ways to characterize what we have done in distributing things in the manner described.[9] We can say that we've maximized social utility. We can say we've distributed generic benefit units – or benefits – unequally ex ante, two to one in favor of Benedict over Beatrice. Or we can say we've distributed aggregate-maximizing units – or "maximizers" – equally ex post over Beatrice and Benedict, and in that but no other sense treated Beatrice and Benedict, whom we take for no more than their utility functions, as equals. In sum, we have distributed benefits unequally in a manner that treats Beatrice and Benedict as equals in respect of the utility functions with which we identify them – though in no other respect[10] – and in doing so have maximized something believed by utilitarians to exist, aggregate social utility.[11]

Now the reason to take cognizance of this form of inter-translatability as between maximization, distribution, equalization and identification formulations is this: Maximization language and formulae tend to lead us, quite naturally, toward *thinking* in

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[8] They are accordingly characterized, not just in terms of their ex ante material attributes, but in terms of their aggregate ex post utility effects when distributed over a given population of individuals. These effects, that is to say, are "internal to," or "constitutive of," the things as thus individuated. Thank you to Matt Adler and Jeff Rachlinski for pushing me to make this point more clearly. I hope I've succeeded.

[9] Three ways if we *assimilate* equalization to identification, four ways if we attend to these as distinct characterizations in their own rights.

[10] The "in no other respect" qualifier proves important for reasons that emerge presently.

[11] The existence in question is often contested, partly on measurability grounds. More infra, II.C. I prescind from such objections here.

terms of maximization.[12] And speaking *exclusively* in such terms leads us to thinking exclusively in those terms as well.[13] We're accordingly apt to lose sight of the fact that in maximizing we're also distributing, and that in distributing we likewise are equalizing some things while "disequalizing" other things over our fellow citizens. And then we are apt not to notice that we are reducing those fellow citizens to some single attribute of themselves – for example, their utility functions – in respect of which we exclusively maximize.[14]

These potential blindspots present us with a normative problem. It is a problem of normative epistemics, or "framing," as we might nowadays call it. Our tendency to cast legal and policy inquiry exclusively in maximizing terms is potentially problematic, first, because it is as individuals – as recipients of distributions of various kinds – that our fellow citizens engage our collective concern in the first place. The same tendency is potentially problematic, second, because most of us wish to accord one another *equal*

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[12] They bear, to employ the increasingly popular idiom, "framing effects."

[13] You likely know the word "maximandum" or its elliptical rendition, "maximand." Do you know the words "equalisandum" or "equalisand"? They're in the same dictionaries as their maximizing counterparts.

[14] Here's a summary rendition of the point in formal terms: Maximization imperatives typically are expressed as injunctions to "Max" the social aggregate of something called "W," the aggregate measure of which varies with something experienced by individuals called "u." W is accordingly, in the typical case, said to be a "function" of individuals' summed u-measures. Hence $W = W(u_1, u_2, u_3, \ldots u_m)$, where the numeric subscripts index the u-functions of the m individuals who constitute the citizenry. And the imperative is to "Max $W = \sum u_i$, where the Greek letter sigma indicates that we are summing, and the "i" subscript indicates that we are to count each individual i's u-measure in the sum. (This summing of course requires interpersonal comparability, more on which later, II.C.)

Each individual's u-measure, in turn, is itself typically viewed as a function of benefits and burdens received or experienced by, hence distributed to, the individual. So for each individual i, $u_i = u_i(b_1, b_2, \ldots b_n)$, meaning simply that the individual's u-measure is a function of a vector (or "basket") of n distinct benefits and burdens. (A positive function of the former, and a negative function of the latter. Comparative contributions and detractions made by distinct b's to the u-measure of course imply commensurability, hence something like "price ratios," among the b's. More on that infra, II.C.) W is accordingly, in the final analysis, a composite function $W \circ u_i \circ b_j$, or $W(u_i(b_j))$, meaning that W is a function of aggregated u-measures, which are themselves functions of aggregated b-measures.

A quick formal way of putting the points made over the previous few pages, then, is that maximizing W generally entails distributing b's to individuals i, who are "counted" and treated as equals for policy purposes solely in virtue of their u-functions.

concern of some *appropriate type* – a type keyed to some politically appropriate conception of who or what we are – in our always inherently distributive legal and policy decisions. Talking and thinking exclusively in maximizing terms tends to obscure this. That in turn makes it harder to discern not only whether we are distributing, equalizing, and individuating ourselves by reference to the *right* things, but indeed even whether we are *maximizing* the right things.[15] For the inter-translatability to which I am calling attention runs both directions: We maximize the right things only when we distribute, equalize, and define one another by reference to the right things.[16]

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[15] Suppose, for example, we believe in equal opportunity to engage in the production of wealth. Then what we believe ought to be maximized isn't just wealth, full stop, but wealth produced under conditions of equal opportunity. Call it "equal-opportunity-grounded wealth." Call wealth not thus produced "opportunity-indifferent wealth." Then to act as to maximize opportunity-indifferent wealth is to act as to maximize the wrong maximandum, by the lights of our commitment to equal opportunity. It is best, then, to pay close attention to the linkages among all four phenomena – maximization, distribution, equalization, and identification. That way we enable ourselves to make use of the implications of competing proposed laws and policies upon all four as *checks* upon one another, in order in turn to ensure that we're maximizing, distributing, equalizing, and identifying each other in respect of, the right things.

[16] To see this more graphically, imagine by way of one final example a simple variation on the story of Beatrice and Benedict considered above. Our society aims now to maximize aggregate forehead height rather than utility. Assume Benedict's forehead is higher than Beatrice's, and that forehead height is genetically transmitted. Transmission in turn correlates in straightforward linear fashion with resource consumption, we'll suppose. (That is, more resources straightforwardly improve the chances of genetic transmission. Please ignore for present purposes such complications as diminishing returns and any gendered determinants of forehead measures that there might be.) Now in the name of maximizing aggregate forehead height, we distribute all three available units of benefit stuff to Benedict. Maximization of social forehead height, equal treatment of individuals in respect solely of forehead heights, and disparate treatment of individuals in consequence of their equal treatment in respect of their forehead heights, then, come to the same here, just as before in the case of utility. The foreheadist might even offer the utilitarian's own favored pseudo-egalitarian rejoinder to your cry of eugenics. He says, "but we have counted each forehead only once!" See, e.g., John Harsanyi's putatively egalitarian justification of utilitarianism *in Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955).

Monstrous, you say. Agreed. But why? Surely it is because it is monstrous for legal and policy purposes to identify a human being with her forehead height, which is precisely what the maximizing "social forehead function" just countenanced as legal and policy guide does. But is an individual any more legitimately identified with her utility function than with her forehead? Are you any more responsible for your endorphin count – the innate neurochemical basis of your capacity to transform resources into utility – than you are for your forehead height? Is that what your fellow citizens should reduce you to being? I think we'll agree it is not. But this means we both disagree with utilitarianism, as here – and as typically – construed. Yet we're not apt immediately to see this when we think of the latter in terms only of what it maximizes, rather than also in terms of what it distributes, what it equalizes, and, therefore, what it take us for being. For who but the most churlish could be against "maximizing" something so vaguely benign-

We would do well, then, I shall maintain, systematically to crack open our "maximization-speak" and maximization formulae, in order to lay bare their inherently distributive, equalizing, and ultimately individual-characterizing *internal structures*. Moreover, I'll suggest, once we have done the dismantling and then turn to querying how we ought, if at all, to amend or restructure our formulations in light of what we find, we would do well to do something further: We should adopt a policy of addressing the maximization, distribution, equalization and individual-characterization components of the inquiry in *reverse order*.[17] For there is a critical sense, we shall see, in which the question of what we take ourselves to be for legal and policy purposes is normatively prior to the others.[18] But none of this is fully transparent until we open the internal structures of our maximization norms to systematic inspection.

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sounding as "aggregate utility," when distracted from fully considering what that means for each one of us as individuals and co-citizens?

We feel more immediately troubled by the forehead suggestion, I suspect, because we think immediately of foreheads as individuals' attributes, hence see immediately that "aggregate forehead maximization" is reducing persons to no more than their foreheads. ("Head-counts" with a vengeance.) "Utility," by contrast, tends more to strike us as a mysterious substance – widely spread "good stuff" – that none but curmudgeons could fail to want there to be more of. It is only upon reflecting that this "utility" is produced physiologically and that "maximizing" it therefore requires we channel resources disproportionately in favor of those with the utility-equivalent of high foreheads – steep utility curves – that we see the moral equivalence. Hence the importance of those forms of inter-translatability as between identification, equalization and maximization I wish here to emphasize.

[17] Thank you to Trevor Morrison for suggesting that I emphasize this point.

[18] Why? In short, because our principal care is with what we are and whether we're treated accordingly. Plausible answers to the question in what respects we are properly regarded as equals then proceed immediately from answers to the identification question. Plausible answers to the question of what ought to be distributed in what patterns and measures, in turn, proceed at once from our answers to the equalization question. And thereafter, in turn, the appropriate form of maximization takes care of itself: Distribute the right things to the right people in the right measures, and you will have maximized that which it makes sense to maximize. But more on this infra. It comes out most starkly below in Part II.D.

Note also that many of those who seem most wedded to maximization formulae seem ironically if nevertheless unwittingly to be logically committed to precisely this claim. For the so-called "individualist" social welfare functions they champion acquire what ever intuitive attraction they carry from an inarticulate understanding that it is by reference to the individuals who constitute it that a society fares well. Where the articulation peters out for these people is at the point where we note that there are *many* different *respects* in virtue of which individuals can be individuated for legal and policy purposes, some of which are normatively arbitrary and others of which are not. More infra, II.C. The term "individualism" used in connection with social welfare functions appears to originate with SAMUELSON, supra note 1.

To attend systematically to the internal structure of maximization language and maximization formulae, I shall argue, is a way to "take distribution seriously" – if I may join others in using this now familiar locution.[19] It is to recognize explicitly, and to trace the more normatively significant consequences of the fact, that all law and policy are as distributive as they are aggregative – even when expressed solely in maximization language. It is also in consequence both to recognize, and to respond appropriately to the fact, that law and policy always in effect define and individuate people as equals in some respects, non-equals in other respects. It is thus finallly to recognize that the question before us is always, at bottom, whether our laws and our policies treat us as equals in, and thus individuate us by reference to, the *proper* respects.

Taking distribution seriously is, in both the proverbial "final analysis" and indeed *all* well conducted analyses, to *frame and thus aim our attention* correctly in law and policy-evaluation. It is ultimately, in consequence, a way of *taking our fellows* more seriously when we are engaged in those forms of evaluative activity. And it is therefore a way also of taking *ourselves* more seriously, both as co-citizens and as mutually responsible legal and moral agents, when working to ascertain what we ought to be doing collectively.

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[19] See, of course, RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Others on whose shoulders I would be standing include Richard Crasswell, *Taking Information Seriously: Misrepresentation and Disclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y. U. L. REV. 45 (2000); Daniel Farber, *Taking Slippage Seriously*, 23 HARV. ENV. L. REV. 1 (1999); George A. Berman, *Taking Subsidiarity Seriously: Federalism in the European Union and the United States*, 94 COLUM. L. REV. 1 (1994); Michael Bratman, *Taking Plans Seriously*, 9 SOC. THEORY & PRACTICE 271 (1983). More waggish forays include Mark Kelman, *Taking* Takings *Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986); William E. Forbath, *Taking Lefts Seriously*, 92 YALE L. J. 1041 (1983); and David A. J. Richards, *Taking* Taking Rights Seriously *Seriously*, 52 N.Y.U. L. REV. 1265 (1977).

I thus propose in this Article to lay out with care what it might look like to take distribution seriously in normative legal and policy analysis.[20] I aim to specify in detail what I believe to be the conditions and the appropriately structured mode of analysis, respectively, under which normative distributional assessment is called for and apt to bear fruit. To succeed in discharging this task is to afford means of bringing systematic moral-conceptual clarity to legal and policy analysis bearing normatively assessable distributive import. The key is to focus on something that I have referred to a few times already – what I call "distributive structure." That structure is manifest not only in all fully analyzed social welfare functions, as suggested above and as shown in more detail below, but also in the grammar of less formal distributive language itself. I shall accordingly be attending to both.

The remainder of the Article, then, proceeds as follows: Part I preliminarily characterizes the conditions under which normative distributional assessment is called for. These are the circumstances under which who holds what can intelligibly be, and thus ethically ought to be, evaluated as globally right, wrong, better or worse. Though these conditions are foundational and ought to be evident, their brief enumeration serves both to ground, and to facilitate fuller assimilation of, the more detailed discussion that follows. They also appear to have gone oft-forgotten in much of the theoretical literature.

Part II then systematically examines five classes of question to which all law and policy bearing distributive consequences potentially give rise. These classes of question jointly constitute what I am calling "distributive structure." They also prove neatly tractable by reference to what linguists will recognize as the cognitive grammar of "to

[20] And hence, among other things, what an ethically intelligible welfare- or economic analysis of law might look like. More infra, Part III.

distribute" and cognate infinitives – verbs like "to allocate," "to apportion," "to mete out," etc.[21] The gaps opened up by this grammar – in effect, "variables" for those who distribute, those to whom they distribute, what they distribute, per what pattern and by what means they distribute – afford helpful bearings for purposes of systematically structuring simultaneous attention to the *full range* of normative questions that legally determined distribution invariably implicates. And it is precisely this form of plenary attention that I believe we must now make a practice of employing, if we are to avoid "framing-blindspots" of the kind over which I've been raising red flags.[22]

It turns out, intriguingly and in the end instructively, that the variables I mention are not only syntactically, but also semantically interconnected:[23] That is to say, selection of particular values to fill one or more variables tends to constrain the ranges of values with which we can plausibly fill others. At least that is so given core values that we appear to share concerning what we are, what we most care about, what we are responsible for, what in consequence is fair, and thus what we implicitly acknowledge that we owe one another.[24] In consequence, a single distributive upshot – one essentially

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[21] More on this grammar below in Part II. It should not be surprising, on reflection, that the structure of distribution would be mirrored in the language in which we communicate about it.

[22] One might draw an analogy here to the general equilibrium analysis favored by more sophisticated economic theorists. The founding idea in both that case and this is that when items figuring into analysis are interdependent and in that sense constitute a system, the system itself is the appropriate unit of analysis. In the present case the system in question is the set of variables carried by "to distribute" and cognate infinitives, all of which must be filled before a distributive claim can be determinate, and each of which must be filled in a manner compatible with the manners in which the others are filled.

[23] Traditionally, "syntax" pertains to the ordering of linguistic units, "semantics" to the "meanings" or "cognitive contents" of those units. One of the more interesting upshots of recent developments in cognitive linguistics is that the traditional boundary turns out to be somewhat more porous than used to be thought. But again more infra, Part II.

[24] Insofar as we think of the recipients of distributions as responsible agents, for example, it strikes us as more sensible to think of that which we ought to distribute as resources rather than utility, since responsible agents "produce" their own utility out of the resources they're given. It is interlinkages of this sort that I have in mind here, and that I map throughout Part II.

Let me, while at it here, preemptively add that in employing the first person plural I make claims that are corroborated in two ways. First, I anticipate that the reader, on reflection, will agree that the value commitments to which I refer are indeed her own. And perhaps more helpfully second, in Part II I shall

invariant, abstractly specifiable pattern of normatively appropriate allocation – appears both to follow upon and to constrain differing plausible fillings of any particular variable: Plausible conceptions of appropriate distribution turn out to be rather like locations along an isoquant – a fair allocation "indifference curve," to put the point metaphorically.[25]

The discussion over Parts I and II accordingly converges upon what seems to be our logically entailed consensus understanding of the *correct* macro-social allocation "isoquant." This is, in short, the abstractly schematized normative distributional template – or if you prefer, the conception of justice – entailed by our core value commitments, as systematized via the grammar-grounded metatheory that structures our analysis.[26] It is the way that we appear logically committed to prescribing that distribution should proceed, given our broadly shared conception of ourselves as fundamentally equal rights-endowed, boundedly responsible forgers of well-faring lives out of scarce, antecedently allocated material opportunity. It is also, by dint of the linkages among distribution, equality, and self-identification on the one hand, maximization on the other hand, a view of appropriate distribution that commits us to a view of what we should actually be

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cite empirical evidence from the behavioral economics and sociological literatures indicating that these values are indeed widely shared, irrespective of partisan political identification. Much such evidence is summarized in TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1998); JOHN H. KAGEL & ALVIN E. ROTH, HANDBOOK OF EXPERIMENTAL ECONOMICS (1997); NORMAN FROHLICH & JOE A. OPPENHEIMER, CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY (1993). Thanks to Kevin Clermont and Alon Harel for balking here.

[25] An isoquant is simply a curve, different locations along which all take the same value in some formal inquiry. Probably the most familiar isoquants are the indifference curves endemic to microeconomic analysis. Changing x-coordinates along the same curve are said to be "compensated for" by changing y-coordinates, such that points corresponding to ordered pairs (interpreted, say, as "commodity bundles") are at home on the same curve and thus correspond to the same "utility" enjoyed by a consumer. If we think of normatively appropriate distributions of benefits and burdens as isoquant curves, we'll see that here we are able to remain on the same "curve" by changing characterizations of what we distribute, for example, in response to changing characterizations of the pattern pursuant to which we distribute it. If, by the way, you are inclined here to balk as did Kevin Clermont and Alon Harel, please see supra, note 23. There's much more infra, II.D.

[26] I refer to the upshot of Part II's grammatically-structured analysis as "meta-theoretic" because it involves explication of the structure of *all* complete theories of appropriate distribution – a structure that is manifest in the cognitive grammar of "to distribute" and cognate infinitives.

maximizing – something that I shall call "equal-opportunity-grounded welfare." I'll trace implications of this claim both for what forms our social welfare formulae should take, and for what forms our law and policy should take.

Part III then shows how readily the Part II-derived conception of appropriate distribution (hence identification, equalization, and maximization) lends itself to practical realizability, in view of legal and institutional design considerations on the one hand, correlative feasibility constraints on the other. Indeed, this Part shows, the correct conception of appropriate distribution looks to be much more readily realizable than are its chief competitors – welfare and wealth maximizing views on the one hand, prioritarian views such as "maximining" Rawlsian justice theory on the other. Moreover, much if not most of our law and the principles that animate it prove to be best interpreted as aimed at vindicating the distributive ethic upon which the lines of Part II all converge. That bears obvious practical consequences for legal interpretation on the bench as well as for future law-making in the legislatures. It also bears critical theoretic consequences for those who debate the comparative merits of "law and economics," "welfarism," "Rawlsianism," and competing normative approaches to law and legal theory.

Not surprisingly, then, I conclude the Article with some suggestions as to its implications for the future agendas of a more ethically intelligible, as well as more conceptually and formally rigorous, mode of legal and policy analysis.

I. DISTRIBUTIVE CIRCUMSTANCES

Most things we find in the world are in some sense distributed, allocated, meted or spread out, etc. Not all such spreads lend themselves to intelligible normative critique. The chairs and the table in your kitchen are laid out in a certain arrangement, say:

They're "distributed" over the floor in some geometrically specifiable pattern. They could be redistributed over that surface in many alternative ways. Absent some purpose or value the vindication of which rides upon such arrangements, however, there will be nothing to say whose upshot is that the arrangement "ought" to be changed.

It also happens that many distributions of things *do* implicate values and purposes, some of them pressing or urgent. Such distributions accordingly fall subject to one or another mode of normative assessment. Insofar as you are sensitive to considerations of "feng shui" or geomancy, for example, even the spread of your furniture will lend itself to a form of normative evaluation. Some arrangements will aesthetically dominate others, such that you might incline toward redistributing your furniture until it accords with the "best" possible arrangement. Counterpart remarks hold in respect of any other value under the aspect of which the furniture arrangement might be intelligibly evaluated – ease of reading in the late afternoon light, for example.

Normatively evaluable *legal* arrangements and public policies have the effect of distributing not simply tables and chairs over floors, but perceived goods and ills over persons. Evaluation accordingly strikes us as more pressing in these cases. Legal rules and rulings, statutory enactments, government programs and policies of various sorts all tend to yield "winners" and "losers" – recipients of benefits and burdens at the receiving end.

Patterns of such policy-wrought wins and losses amount, relative to each status quo ante they displace, to *re*distributions of perceived *goods and ills*. These redistributions, like each status quo ante they supplant, are subject to normative critique as readily as are furniture arrangements. Indeed they are more urgently so. For they

implicate the ethical propriety with which we are treated. And the comparative ethical valences of varying distributive arrangements are more compellingly salient than the aesthetical ones: More than merely recommending actions as do the latter, the former such valences typically require them.[27]

This much is more or less obvious on reflection, I take it. What seems to be less obvious to some legal and policy analysts is that even when allocations wrought by legal rules and policies are neither foreseen nor intended, they remain ethically assessable: Once brought to attention, they are subject to "ought" claims whose upshots are that the arrangements are right, wrong, better or worse, and are therefore to be improved or deliberately left in place accordingly. In this light we are well advised to take at least summary stock of the types of circumstance under which distributive consequences can be said to be ethically better or worse. The set is small, but important. We'll call its members the prerequisites to normative distributional assessment's being "implicated," or "apt." I'll specify them as minimally and rudimentarily as possible. Fuller detail will build on the present foundations as we turn to distributive-ethical assessment's full logical form in Part II.

I take it that the minimal conditions to distributive-ethical assessment's being apt are these: First, there must of course be things that *can* be variably distributed – "distribuenda," we'll call them below. Second, there must be beings to whom these things can be distributed – "distribuees," as we'll call them below. Third, those to whom

[27] There is of course overlap, though it falls short of extensional equivalence, between ethical and aesthetic assessment. Dastardly people or deeds are found "ugly," "warped," "grotesque," etc. (The term "tort" itself is derived from the same Old French root-word as "torture." The root connotes twisting.) *Just* actions, persons, and patterns often are found "beautiful," "balanced," "harmonious," etc. Fair allocations, moreover, like beautiful arrangements, often appear to share some form of *symmetry* in common. (The word "fair" itself derives from an Old English root that refers to the beauty of an attractive, symmetrical face.) Would there were space here to limn these connections yet further.

the things can be distributed must hold *preferences* or *interests* in respect of their receiving or not receiving them: The items must be regarded or properly regardable as beneficial or burdensome by, hence productive of some form of welfare or illfare among, their prospective recipients. This restricts the class of distribuenda that are of normative interest.

Fourth, the recipients of items who hold preferences or interests in respect of the same must hold legal or ethical *claims to our regard*. They must be entitled to our consideration of their preferences or interests as we distribute. We for our part must reciprocally be under obligation thus to consider the claimants' preferences or interests. It is this entitlement and its correlative obligation that render our assessment of distributions to the preference- or interest-holders *normative*, or *ethical*, in nature. It means we are dealing with *rights* held by the distribuees.

Finally fifth, all items the distribution of which would be subject to ethical assessment must be "scarce": There must be potential for interests or preferences to diverge or conflict. Distributions to some subclass of the full class of claimants must entail the nonsatisfaction of another subclass of claimants' preferences. Note that this prerequisite, combined with the previous one, entails a need for *adjudication*: We require both principled and practical means of balancing distribuees' potentially conflicting rights-claims against one another.

The first condition, though necessary, is not sufficient to implicate distributive-ethical assessment. For it holds of any circumstance in which any form of distributive assessment, ethical or otherwise, is apt. The second condition is necessary for distributive-ethical assessment to be implicated, but presumably not so for distributive

assessment more generally: There need not be beings with interests or wants in the case of aesthetic assessment, for example.[28] The third condition also is necessary for distributive-ethical assessment to be implicated, but not for distributive assessment more generally. The reason is the same as just mentioned in connection with the second condition.[29]

The fifth condition – I'll return to the fourth presently – is trivial in the sense that it holds of all forms of distributive assessment, but not trivial of the class of all things that might be distributed: There are some items that are sufficiently plentiful as not to require zero-sum choices in their distributing, even though they are very much needed or desired.[30] Distributive-ethical assessment is apt only in respect of situations involving distributed things not of this type – in short, under conditions of scarcity. *Adjudication*, hence distributive norms, come into play only under such conditions.

The fourth condition is that in which specification of intelligible distributive-ethical assessment's prerequisites begins most seriously to "cut" – to impart potentially controversial information. The reason is that it contestably deems some distributive claims to be what might be called, by analogy to legal causes of action, "ethically non-cognizable." Why? Because typically the class of ethical claimants whom we consider *entitled* to our regard is smaller than the class of those who might literally claim: There are sentient creatures who presumably want things, or to be free of things, whom not

[28] Unless we regard physical places as "beings to whom things – e.g., furniture – can be distributed." That seems not to have been all that uncommon in centuries past, when sacred places were occasionally personified; and there appear to be some cultures where norms like these still are encountered.

[29] Unless, again, we are animists who believe physical locations to hold preferences. In such case aesthetics would extensionally merge into ethics in more or less plenary fashion. Locations would be viewed in effect as inhabited by spirits who desire things.

[30] In most places, breathable air is an obvious example. Thus far.

everyone agrees to bear rights to have those wants considered.[31] We'll consider this matter more fully below, in II.B. For now it suffices simply to have marked the potential, and to have characterized the legally relevant distributive terrain.

II. DISTRIBUTIVE STRUCTURE

Distribution is internally complex. It bears a structure, a logical form. Its form, unsurprisingly, is tracked by the form of the infinitives that name it. What linguists call the "case," "cognitive" or "valence" grammar of infinitives cognate with "to distribute" manifests the structure that distribution itself always bears.[32] The same grammar accordingly manifests much of the structure that normative distributional assessment must take if it would be both complete and intelligible. To take distribution seriously in normative legal and policy analysis, then, we do well to attend to distributive structure, as tracked by the grammar in which it is manifest.

Call a claim concerning the rightness or wrongness, betterness or worseness of some law- or policy-wrought distribution a "distributive claim." For such a claim to be complete hence determinate, it must fill all the gaps opened by the case grammar of "to

[31] There are non-citizens, for example, who seek some of what citizens seek. Unborn fetuses might for their parts in some sense "prefer" to be permitted to reach full term. Among unambiguously non-human beings, in turn, bovines, pork, fish, and fowl presumably do not wish to be killed and eaten. At any rate they often seek to avoid the violent prerequisites to their being eaten. More infra, Parts II.A, II.B.

[32] Case, cognitive, or valence grammars divide sentences into predicate functions – typically verbs – and their argument places. Most of the latter are then filled by nouns and noun phrases, but in some cases they're filled by adverbs – predicates of predicates, hence second-order predicates. The number and kinds of arguments that a predicate can take constitute its "valency." See generally Charles J. Fillmore, *Toward a Modern Theory of Case*, in MODERN STUDIES IN ENGLISH 361-361-75 (David A. Reibel & Sanford A. Schaner eds., 1969); Charles J. Fillmore, *The Case for Case*, in UNIVERSALS IN LINGUISTIC THEORY 1-88 (Emmon Bach & Robert Harms eds., 1968); STUDIES IN LINGUISTIC SEMANTICS (C. Fillmore & D.J. Langendoen eds., 1971). The analysis of predicates as argument-taking functions appears to have originated with Frege. See Gottlob Frege, *Begriffsschrift, eine der arithmetischen nachgebildete Formelsprache des reinen Denkens*, in FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC 5-82 (Jan van Heijenoort ed., 1967); GOTTLOB FREGE, FUNKTION UND BEGRIFF (1891).

distribute." It must assign values to the variables that this and all cognate infinitives carry with them unfilled.

The variables are, in effect, the pronouns and proadverbs that figure into the following questions: Who is being addressed by the distributive claim? What does the claim take for being distributed, or suppose ought to be distributed? To whom does it take that for being distributed, or suppose that it ought to be distributed? What *pattern* does the claim take properly to characterize permissible distributions to such recipients? And how – by what physical means – does the claim take the distribution to be effectuable?[33]

Call the values with which syntactically well formed and semantically complete claims fill the variables: distributors, distribuenda, distribuees, distribution formulae, and distribution mechanisms. The middle three variables must be filled for a distributive-ethical claim to be semantically complete – i.e., for the claim to bear determinate cognitive content in respect of whether a successfully individuated and characterized spread of goods or ills over persons is or would be right, wrong, better or worse than some other conceivable such spread. The first and last variables must be filled for the claim to be what might be called "pragmatically" complete – i.e., for the claim successfully to prescribe some possible course of action that might actually be taken.[34]

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[33] In effect I supplement pure semantics-based case grammar here with argument-places additionally derived from linguistic pragmatics. For a claim actually to be made rather than simply entertained propositionally, it must be addressed to someone, and must take into account means by which addressees can effectively respond to it. In making this observation I am in effect melding classical valence grammar with what Paul Grice would have called "conversational implicature." See, e.g., H. P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS, 3: SPEECH ACTS, (P. Cole & J. Morgan eds., 1975); H. P. Grice, *Further Notes on Logic and Conversation*, in SYNTAX AND SEMANTICS, 9: PRAGMATICS, (P. Cole ed., 1978); H. P. Grice, *Presupposition and Conversational Implicature*, in RADICAL PRAGMATICS 183-98 (P. Cole ed., 1981).

[34] Semantic completeness is necessary, but does not suffice, to confer pragmatic completeness.

Counterpoised sides of overt or implicit distributive disputes, with apparently varying degrees of cognizance of the fact, are effectively disagreeing over how one or more of the just-enumerated variables should be filled. The fact that such disputes often are implicit affords us one reason to bring the variables more explicitly into the foreground – viz., the interest of clarity as to what, if anything, really is in dispute. But there is another reason for attending explicitly to the variables and, thereby, to the internal structure of distribution that they jointly constitute: It is that most of us by far, I believe, actually agree about how the variables ought to be filled when we attend explicitly to them.

These claims can most effectively be shown, I believe, by elaborating and critiquing the leading variable-valuing candidates that have been either expressly or impliedly proposed. Some of these will look at least passingly familiar. But they do not appear thus far to have been considered together, in systematically structured relation each to all others at once. It is precisely this lack of systematic treatment, I believe, that renders the obscurity I lamented in the Introduction – obscurity as to the relations among distribution, equalization, self-identification, and maximization – possible.

In an important sense, then, the argument that follows is cumulative: No one point will be *fully* appreciable until *all* points are made. But one has to start somewhere, and one can make piecemeal points at least provisionally appreciable. So I'll treat variables and candidates for filling them in sequence, doing my best in each case to look ahead and/or backward to other variables as necessary while proceeding. The order in which I'll proceed will be that in which I've enumerated the variables above.

A. *Distributors*

Law and policy, we have observed, typically bear distributive consequences. That means that those enact and then act upon law and policy effectively distribute things. So, in a derivative sense, do or would those who assess or evaluate law and policy. For in the act of assessing or evaluating laws and policies bearing distributive consequences, one prescribes in respect of those consequences. One says, in effect, how she would distribute. Another way of putting the point is to say that distribution, like "to distribute" and other infinitives that name it, always takes some singular or collective *subject*: There must be distributors – those who distribute, or who prescribe or determine how distribution ought to or is to proceed.

Who we understand the distributors to be naturally will tend to play some role in determining our particular distributive-ethical norms – our "ought" claims in respect of distribution. The converse, of course, also holds: Particular duties and those whom we take to be subject to such duties must categorically "fit" one another. Who, then, are they whom we take to owe each of us the benefit of acting in conformity with our distributive "ought" claims?

That question is probably the easiest that we'll have to address in this Article. For there seems to be little disagreement over who the effective distributors are in most modern legal and policy disputation, at least in modern democratic polities. "We" – the sovereign we, all who effectively are addressed by normative legal and policy arguments over distributive propriety – are in effect taken to be the distributors.

We are "the people" – the citizenry or humanity at large, all who bear rights to take part in deciding what is distributively right. Or we are "the policy community" – judges, legislators, advocates, analysts, academics and others assumed to be thinking and

acting on behalf of that broader constituency. The latter constituency, in such case, includes ourselves as its proxies or representative members. In either case, then, we are effectively distributing over ourselves so far as legal and policy debate are concerned. One consequence is that the class of distributors, particularly in modern polities, typically converges with that of distribuees – the next variable that we shall address.

Were we gods or, perhaps somewhat more humbly, elites looking over a polity in which formal political-decisional rights were allotted unequally in our favor, there might be some wedge between "us" and the distribuees: We would be considering what "we" should distribute to "them," pursuant to what patterns and means.[35] Much this disparity between would-be distributors and would-be distribuees characterizes discourse about animal rights, for example.[36] But the "we" and the "they" of most mainstream distributive discourse are one and the same: We are speaking of how we should apportion goods and ills among ourselves. How, then, should we characterize *ourselves* when considering what is to be distributed, pursuant to what patterns and means?

B. *Distribuees*

Distribution, like "to distribute" and other infinitives that denote it, takes not only subjects, but indirect objects as well: Where there are distributions, there are distribuees – those to whom things are distributed. Just as there must be "fit" between our distributive-ethical norms and how we characterize distributors, moreover, so must there be fit between those norms and how we characterize the distribuees whose rights those

[35] Some theorists view "analysts" as radically distinct from the citizenry at large. See, e.g., KAPLOW & SHAVELL, supra note 1 at 382-402.

[36] See, e.g., PETER SINGER, ANIMAL LIBERATION (1976). A not entirely dissimilar disparity as between distributors and distribuees is of course encountered in debate over the ethics of abortion, though in this case a critical feature of the dispute is precisely the issue of whether the distribuees are members of the distributor class. That is one reason why this dispute is more contentious than that over animal rights.

norms vindicate. How, then, do we or should we construe the recipients of distributed benefits and burdens? How should we characterize or identify them, what should we take them to be?

The fact that "they" are in fact "we" here affords us a critical clue: Our being the distributors, and our being accordingly *responsible*, in the final analysis, for the distribution that concerns us says something important about us as distribuees. Curiously, however, not everyone seems to have caught the hint. For many legal and policy theorists and analysts, via positions they take as to how we should characterize distribuenda and distribution formulae as discussed below, effectively commit themselves to a view of distribuees that conflicts with the view that their likewise being *distributors* would seem to entail. It is tempting to hope we might end this conflict simply by bringing it to light. First, then, the gradually emerging consensus view of distribuees – the one on which most seem to agree when the question of how to construe them is explicit. Then we shall turn to the view that's implicitly held only when analysts fail to examine the presuppositions to which their proffered distribuenda and distribution formulae effectively commit them.

1. Responsible Agents

The gradually emergent consensus view of distribuees among those who concern themselves explicitly with the ethics of distribution is that which is in harmony with their simultaneous role as the would-be distributors. It is the view according to which distribuees are best considered what I shall call "boundedly responsible agents."

Boundedly responsible agents largely, though not completely, determine their own well-being. It is accordingly appropriate to hold them responsible, in some measure,

for doing so. Not so to hold them is inconsistent with our according distribuees – hence with our according one another – appropriate respect as freely choosing, morally autonomous human beings. But boundedly responsible agents also are constrained, to not fully determinable degree, in effecting their welfare by the environments into which they are born. That is what "boundedness" means in this context. Our inherited capacities, incapacities, advantages and disadvantages – themselves features of our environments – permit us wide, and yet nevertheless limited, latitude in altering or exiting our environments.

This construal of ourselves in our role as distribuees seems to be that which is most consonant not only with our role as the ultimate distributors implicated by normative distributional disputation, but also with our experience of action. We experience ourselves and others both as freely choosing and as constrained to but vaguely determinable degree in the choosing. That experience is reflected in our capacities to experience guilt, shame, ambition for and frustration with self, resentment of and gratitude to others. It is also reflected in cognate "reactive attitudes" we often experience, attitudes which are intelligible only under conditions of relative freedom.[37] The same complex of experiences of action – in this case, the "boundedness" portion – moreover, underwrites our capacities to feel and extend mercy, forgiveness, sympathetic understanding and charity toward self and toward others.

The construal of distribuees as boundedly responsible agents carries a cluster of interlinked consequences for normative distributional assessment: First, to the degree

[37] Notice of the link between responsibility and "reactive attitudes" bears a venerable pedigree. See, classically, P.F. Strawson, *Freedom & Resentment*, in FREE WILL 59 (Gary Watson ed., 1982). See also Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299 (1992).

that we view distriubuees as freely choosing, we find it appropriate to hold them *responsible* in part for what they choose, hence to live with the consequences of many of their choices. This is not merely a matter of punitive attitude, nor even of incentives-sensitive productive efficiency, though of course such considerations can sensibly underwrite the view. It is, more compellingly, a matter of human dignity, of respect. It is part of what it is to *view* persons as agents – as practical forgers of fate – rather than simply as patients or addicts – mere passive objects of fate, akin to children who "do not know any better" or "couldn't help it."[38]

Second, an often ignored corollary of this form of respect is the imperative that all agents be viewed as *equally* dignified and *equally* deserving of most *forms* of respect. This should not be surprising upon reflection, in light of what we observed in the Introduction: For with a conception of who we are comes a conception of the features in virtue of which we are morally equal for legal and policy purposes. And with the latter, we'll see borne out, comes a conception of what ought to be distributed, in what patterns and measures. Below we shall see that one upshot is that we owe one another equal "material respect" – i.e., access to such exogenously given resources and opportunities as figure into the responsible forging of successful human lives.

Another consequence that stems analytically from the view of distribuees as boundedly responsible agents, then, is this: To the degree that we hold agent-distribuees largely responsible for authoring their own lives, we commit ourselves to conceptions of appropriate distribuenda, distribution formulae and distribution mechanisms as those that

[38] It is tempting to suppose that some such commitment is what ultimately underwrites the Kantian idea of a "right to punishment." See, e.g., P.S. Greenspan, *Responsible Psychopaths*, at http://www.philosophy.umd.edu/Faculty/PGreenspan/Res/rp.html; Randy E. Barnett & John Hagel III, *Assessing the Criminal: Restitution, Retribution and the Legal Process*, at http://www.randybarnett.com/assessing_the_criminal_.html.

give latitude to the *operation* of responsible agency. Appropriate distribuenda will be conceived as ex ante *inputs* to individual welfare or utility functions, if we think in such functional terms – functions whose "outputs" in turn are in significant measure the responsibility of distribuees themselves. Appropriate distribution formulae, for their part, will speak to the *ex ante* distribution of such responsibility-exogenous inputs. Our formulae will not be directly concerned with ex post, responsibility-endogenous welfare-outcomes as such. Instead they will treat these as byproducts, mediated and endogenized by distribuees' responsible agency as brought to bear in transforming resource and opportunity inputs into deserved, because individually produced, welfare outputs. Preferred distribution mechanisms, in turn, will accordingly be those that give most effective expression to these ideals. We'll see this borne out below.

2. Patients & Addicts

The residuum left by incomplete agency – the "boundedness" portion – might be called "patienthood." To the degree that one *really* "cannot help himself," he is a patient – an object of fate or of others, acted upon rather than acting. Or he is an addict – one who quite literally "cannot resist."[39]

To the degree that our agency is bounded, we are all patients. But we are not generally apt to admit this. Indeed we are apt to feel disgust or contempt, rooted perhaps in the perceived threat that's posed by exemplars with whom we subconsciously but reluctantly identify, for those who are too quick to admit limitation. Owing to that fact,

[39] I intend "patient" as used here, like "agent" before, in its grammatical sense – as the recipient of rather than the initiator of an action. See, e.g., JOHN LYONS, AN INTRODUCTION TO THEORETICAL LINGUISTICS 340, 350 (1967); BERNARD COMRIE, LANGUAGE UNIVERSALS AND LINGUISTIC TYPOLOGY: SYNTAX AND MORPHOLOGY 42-43, 58-61 (2d ed. 1989). Also RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 303 ("addicts"); Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE. L.J. 2291, 2295f. (2003) ("patients").

along with the indeterminacy of the boundary between choice and chance in the many borderline cases each of us experiences each day, we tend generally to let the boundary "take care of itself." We do so simply by trying as hard as we can, then forgiving ourselves once we finally "let go" when we must.

Doubtless for reasons that are rooted in facts such as these – including related concerns with incentives[40] – few if any legal or policy analysts wittingly construe distribuees as patients. Instead they effectively *commit* themselves to that construal. They do so, we'll see, via the positions they take in respect of appropriate distribuenda, distribution formulae, and distribution mechanisms – positions whose logical consequences they don't seem to appreciate.

Because welfare or "utility" draw attention to outputs rather than inputs, for example, it is difficult, absent a Byzantine distribution formula, to be unambiguously welfarist or utilitarian without effectively treating distribuees as not being responsible for outcomes – hence as patients.[41] Similarly, because resources and wealth are readily viewed as welfare inputs – inputs to distribuees' welfare functions – advocates of ex post egalitarian resource or wealth distribution even apart from the working of distribuees' responsible choices likewise treat distribuees effectively as patients.[42]

Finally, insofar as any distribution mechanism might fully instantiate some distribution principle such as that just mentioned, it too treats distribuees as mere

[40] Those incentives and their consequences are traced infra. In brief, letting agents too readily "off the hook" results in the unjustifiable conscription of those who act responsibly by those who do not. It also, and equivalently, results in ethically cognizable inefficiency.

[41] See infra II.C, II.D.

[42] Again see infra, II.C, II.D.

patients.[43] Insofar as it *fails* to be egalitarian *prior* to or *apart* from the operation of distribuees' responsible choices, by the same token, it violates ethical equality and respect for agency. It does so by effectively treating some distribuees as deserving of less than others even when what is being considered is pre-choice, action-antecedent claims to material opportunity upon which action and choice are to operate. But more on this in due course.

C. *Distribuenda*

Distribution and its infinitives take, in addition to the subjects and indirect objects that implicate distributors and distribuees, direct objects as well: There are always distribuenda – distributed things.

There has generally been more overt dispute in the theoretical literature over appropriate distribuenda than over who or what the distributors and distribuees are. This is likely the product of what I lamented above – our failure thus far to think-through the linkages among all of distribution's constitutive variables. One consequence is that alternative proposed distribuenda turn out to be ethical touchstones. They serve as flags under which other disputes – disputes over distribuees and distribution formulae in particular – are pursued.

1. Welfare/Well-Being

A particularly venerable family of proffered distribuenda have gone by such names as "utility," "welfare," "well-being," "happiness," "satisfaction" and cognate expressions. Although there are subtle distinctions from one author to the next in

[43] This prospect of course suggests that distribution mechanisms might be composite in nature: Market allocations followed by taxation and redistribution would constitute a familiar case in point. The suggestion is borne out infra, Part III.

construing the terms, they all share distinct family resemblances rooted in one apparently guiding idea. The latter runs thus: Faring well is what matters to people. Indeed this is trivially so, in view of the meanings of words such as "good" and its adverbial form, "well," themselves. Indeed these terms, like "utility," "satisfaction," "happiness," and related such terms of art often are even *defined* simply as being what ever is effectively "produced" by people's preferences (or on some readings, their interests – "enlightened," "rational," "ideally informed," or otherwise) being satisfied. Law and policy, then, this line of thinking concludes, should aim at enhancing these magnitudes. For to do so is simply to satisfy people.

Note that nothing as yet is implied here as to what such "enhancing" or "satisfying" would look like. Things remain pitched at a high level of abstraction. Attending to welfare and cognates as thus counseled accordingly seems unobjectionable – again, trivially so – so far as it goes. One might then wonder why anyone would propose anything *other* than welfare as distribuendum. I think what's objected to is not welfare as abstract normative distributional touchstone. Rather, what people protest is either (a) "welfare" as *construed*, by some of its more eccentric or irresponsible advocates; relatedly (b) welfare as mere output that's aggregated and socially "maximized," without regard to the way in which it is produced; or (c) welfare as literal, *direct* distribuendum. I treat these in turn.

Construal-based objections take various forms. Most are prompted by unduly narrow or bizarrely overbroad stipulations by advocates as to what is to count as well-faring. Some early utilitarians, for example – Bentham and Edgeworth probably best known among them – sometimes suggested that all that should count as well- or ill-faring

was hedonic experience. Bentham named his rendition of this commitment the "Pleasure Principle." Edgeworth for his part predicted that one day a "hedonometer" would be developed, with which we would measure utility as readily as temperature. Ramsey and von Neumann made similar suggestions. It is even now often suggested that utility and disutility are reducible to endorphins and C-fiber counts, respectively, rather as "water" has come to be specified with definitive precision as H_2O.

Suggestions like these prompt predictable objections and equally predictable responsive refinements. Best known among the latter are those of such thinkers as the later Mill, Sidgwick, and more latterly Griffin. These have sought to take seriously the prospect that a well-faring human life might be something more than an extended orgasm or itch-scratching.[44] They nevertheless tend to treat the refined form of welfare as a mysterious sort of substance the aggregate quantum of which ought to be maximized, at least until their conceptions grow so refined as no longer to lend themselves to scalar aggregation.[45] But more on this in connection with distribution formulae, below.

Latterday exponents of the earlier Benthamite crudity do not banish all welfare that isn't hedonic in nature. They push instead to the other extreme, counting as ethically cognizable "welfare" the satisfaction of any preference what ever.[46] And so they've

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[44] See, e.g., J. GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE (1986). Griffin's refinements have turned out to be so extensive that he has ultimately found himself compelled to abandon consequentialist ethics altogether. See J. Griffin, *The Human Good and the Ambitions of Consequentialism*, 9 SOC. PHIL. & POL'Y 18 (1992).

[45] See, e.g., Griffin, *id.*

[46] See, e.g., KAPLOW & SHAVELL, supra note 3 at 421-22 ("The idea of an analyst substituting his or her own conception of what individuals should value for the actual views of the individuals themselves conflicts with individuals' basic autonomy and freedom."). The short answer is that imprisonment, too, "conflicts" with basic autonomy and freedom – that of convicts. Few, if any, disapprove of autonomy and freedom, just as few disapprove of welfare or well-being. But the question has always been how we are to demarcate individuals' *legitimate* spheres of autonomy satisfactorily, and that question of satisfactory demarcation is part of the question of fair allocation. See infra II.D. The "we don't want to judge" disclaimer accordingly avails nothing. Determining fair allocation is judging period. All law and policy

occasioned predictable objections, as well as refinements reminiscent of Griffin's. Objections in this case take account of the fact that a preference itself can be ethically problematic, either in itself – because, say, expressly or even recursively anti-ethical – or as the product of, hence as endogenous to, antecedent distributive circumstances that are themselves ethically objectionable.[47]

It is deeply incoherent, for example, to say of the thief that "he fares well," or that "his well-being improves," when he succeeds in stealing more goods.[48] For the thief is by definition the person who violates distributive norms – norms in conformity to which "good" and "well" must themselves be defined.[49] To call the thief's satisfaction "welfare" rather than "satisfaction" is to conflate desire with desert. It is therefore to lose the distinction between description and prescription, positive and normative, "is" and "ought." It is accordingly to relinquish the capacity to prescribe or evaluate at all, hence to abandon normative legal or policy analysis themselves.[50]

It would seem likewise if less starkly misleading, in most cases, to say of the slave who has come to accept what she's told of her putative race-rooted "inferiority," that she is "better off," or that "her welfare improves," relative to some alternative

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require such determinations. Use of the ethically loaded *terms* "welfare" or "well-being" rather than less deck-stacking terms such as "preference-satisfaction," moreover, registers precisely such judgment.

[47] On recursive preferences, see Robert Hockett, *Recursive Social Welfare Functions* (working paper, on file with the author). Also Robert Hockett, *Reflective Intensions: Two Foundational Decision-Points in Mathematics, Law, and Economics*, 29 CARDOZO L. REV. 1 (2008) (forthcoming). On preferences that are endogenous to unfair antecedent distributive circumstances, see, e.g., G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989); A. K. Sen, *Equality of What?*, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES (Stephen Darwall ed., 1995).

[48] Or that Nazis are "better off" when they murder more "non-Aryans," etc.

[49] See, Hockett, *Prescriptive Paretian*, supra note 1. See also Robert Hockett, *Why Paretians Can't Prescribe: Preferences, Principles, and Imperatives in Law and Economics* (working paper, on file with the author).

[50] See sources cited *id.*

circumstance in which she rejects her race-rooted identification and demands respect.[51] It can be conceded that because, unlike the thief, she is presumed faultless, we are able to view her having come to terms with her situation as affording some good in mitigating her otherwise bad lot. But to say that her "welfare" is improved in this way is nevertheless misleading for its failure to register the wrongfulness of the circumstance that renders her resignation consoling. If we are to maintain the distinction between positive and normative with precision, then, it is again more accurate in these "tamed housewife" cases to say "she's resigned to her unjust circumstances" than that "her welfare is higher."

Non-construal-based objections to welfare as distribuendum are rooted in the fact that welfare is not a directly measurable or distributable substance. The physical distribution problem is the most immediately apparent: Whether understood as endorphins, preference-satisfactions, idealized or fully-informed or ethically-laundered preference-satisfactions, etc., welfare just isn't a thing that's directly doled out. It is, rather, at best "produced" by distribuees, from physical things that are doled out. That opens two lines of concern flagged by theorists who do not count themselves unalloyed welfarists.

First, in order practically to be welfarist, one must operationally be "something elseist" as well – e.g., wealthist, resourcist, etc.[52] Second, since welfare emerges from what distribuees *do* with what ever is literally distributed, and since the latter materials are in most cases scarce, would-be distributors must decide how to respond to distribuees' capacities and responsibilities for producing their *own* welfare out of what

[51] Even if the respect is not forthcoming. But see ARTHUR SCHOPENHAUER, DIE WELT ALS WILLE UND VORSTELLUNG (1844) (recommending, in Vol. I, Bk. 4, Vedantic resignation).

[52] More on wealth, resources, etc. infra next subsection.

they are allotted. The fuller significance of these opened lines will emerge presently, both in connection with competing proposed distributenda, and in connection with distribution formulae, below.

There are also, finally, familiar measurability concerns occasioned by welfare as proposed distribuendum: On most present-day construals, as noted above in II.C.1, welfare no more lends itself to practicable quantifiability or interpersonal comparability in the holding than it does to direct distributability. Commensurability is the one measurement task for which welfare does not present difficulties, since in theory it serves as a numéraire in terms of which more concrete items might be comparatively valued. The trouble, of course, is that in view of its unamenability to actual quantification or interpersonal comparison, it can serve as numéraire *only* "in theory." It is of no *practical* use at all. But please hold that thought till we cover the next proposed distribuendum.

We shall presently see that in these just mentioned respects, "subjective" welfare is, measurability-wise, the inverse image of more "objective," physical distribuenda. In fact it appears that the two things – welfare and the physical items from which distribuees derive it – must be *brought together* in some way for distribuendum-measurement problems to be addressed in an ethically intelligible manner. This too, along with its practical consequences, will emerge presently as we proceed.

2. Resources/Wealth

The principal competitors to welfare as proposed distribuendum have historically been material resources or wealth of one sort or another. And resources' more specific construals, like welfare's, have ranged from simple and abstract to complex and concretely particular. The simplest and most abstract characterization is simply as *wealth*

– some index-tied medium of exchange or scalar "stuff" that recipients can transform into welfare purchasing and consuming more variegated goods and services.[53] More complex and concretely particularized characterizations include Rawlsian "primary goods," among others.[54]

As indicated at the end of the previous subsection, the advantages and disadvantages of resources as prospective distribuenda can be viewed as the inverse image of the disadvantages and advantages of welfare. As for advantages: First, resources are directly distributable. Relatedly second, they are readily measurable, at least in respect of simple quantification and interpersonal comparability in the holding, as noted above in II.B.1. And finally third, they provide space for the working of distribuees' at least partial responsibilities for effecting their own well-being: What satisfactions distribuees enjoy will ride partly upon what they *do* with their resource allotments. That seems to most people both ethically right and, incentives-wise, efficient. More on that when we turn to distribuees, distribution formulae and distribution mechanisms below.

Resources' disadvantages are straightforward functions of the degree to which, if any, considerations of the propriety of their spread are detached from considerations of welfare. Where the severance is complete and entire, resourcism devolves into fetishism. In such case the stuff that is spread is best viewed as – though surprisingly not observed in the literature to be – not even so much as *cognizable* as "resource," "wealth" or the

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[53] Including risk-bearing services, the fuller significance of which emerges below in III.A.2. This rough characterization of wealth, incidentally, is cognate with but not identical to that offered by Posner in the 1980s, as discussed below in III.A. A suitable synonym for my usage would be "purchasing power."

[54] See, e.g., J. RAWLS, A THEORY OF JUSTICE 54-55, 78-81, 358-65 (rev'd ed., 1999). I prescind from those complexities here. They are not germane to present purposes and bracketing them accordingly does no harm. Fuller discussion is found in Robert Hockett & Mathias Risse, *Primary Goods Revisited* (under revision for ECON. & PHIL.).

like. They cannot be so any more than, say, Nazis' or thieves' preference-satisfactions are ethically cognizable as "well-being."

We should always bear this in mind: Resources are, trivially and yet oft-forgottenly, in every case resources *for* something. They *count* as resources, as distinguished from merely insipid, ethically inert substances, only by reference to purposes, hence preferences, that users have for them. "Wealth" for its part, derived as it is from the Middle English "weal" as in "common weal," is cognate with "well-being" itself. So resources or wealth, even to count as such, have to be tied in some manner to that which concerns the distribuees who engage our normative distributional concern – well-being. The question thus opened is: In *what* way, precisely? The full answer emerges only once we've arrived at proposed distribution formulae and distribution mechanisms, below.[55]

Relations between resource and welfare implicate *measurement* matters too. As noted before, resources raise no direct challenge where quantification and interpersonal holdings-comparison alone are concerned. But they do raise an *indirect* challenge where the *ethical relevance* of quantities and holdings are concerned. For ethical relevance here, as just observed, is tied partly – though critically – to welfare-yield. And for related though distinct reasons, resources raise a *direct* challenge where *commensurability* is concerned.

The indirect challenge is this: Suppose that a given distribuendum yields differing welfare measures to differing distribuees. Suppose also that welfare is ultimately what matters. Suppose finally that welfare itself is, as observed earlier, not practicably quantifiable or interpersonally comparable in the holding. If we accept those

[55] Infra II.D and III.A.

three plausible suppositions, then it is not immediately apparent what *ethically cognizable* advantage is offered by resources' quantifiability and interpersonal comparability advantages.

The direct challenge is this: Suppose resources are disparate. Suppose also that each is not properly subject to its own distribution formula. Then some means of indexing must be developed for such terms as "total resources" or "wealth" to bear content. But now note that de facto valuation occurs when comparative weightings are assigned to vector components in fashioning the scalar along which "total resources" or "wealth" are to be quantified. Note also that ethically satisfactory such valuation must again involve measurement-challenging welfare. It follows, in such case, that indexing too will be problematic. How, then, to make resource-measurement ethically intelligible?

Fortunately it happens, again as we'll see, that a well specified distribution mechanism allows both for unobjectionable indexing and for ethically intelligible coupling of readily measurable disparate resources (or wealth) and human welfare. I must then again ask the reader to bear with me until we've completed this Part.

3. Opportunity/Access

One perceived difficulty attending resources as proposed ditribuenda is a counterpart to the objectionable preference problem attending many construals of welfare. It has in consequence occasioned a distribuendum candidate that differs in the articulation, but at bottom amounts to a mere fuller naming of resources.[56] The idea is

[56] The difficulty was flagged just above: It's the danger of fetishism. The sense in which it is counterpart to objectionable preferences in welfare-construal is this: The danger that afflicts welfare is that *all* preferences – even admittedly antiethical ones – might illicitly be counted, when satisfied, as affording normatively cognizable "welfare." The danger that afflicts resources is at the other extreme: It is that *no* preferences will be considered when labeling ethically inert, non-valued substances "resources."

this: Because welfare, or "advantage," is what matters to people, material stuff in itself is not ethically salient. Moreover, since material resources are variegated and accordingly in need of commensuration if they are to be spread under one distribution formula, some common denominator is required: And that's again welfare, or advantage. Accordingly, the item whose spread can intelligibly engage our distributive-ethical concern or assessment, even if material in nature, must be understood as "opportunity for welfare," or "access to advantage."[57]

For reasons that will be plain in light of II.C.3 just above, I think that "opportunity for welfare" and "access to advantage" as so described are best understood simply as alternative christenings of resources or wealth. Their advantage over the *terms* "resources" or "wealth," if such they carry, stems merely from a possibility noted above: That some people have grown numb over time to the fact that resources or wealth, to *be* resources or wealth as distinguished from unwanted hence ethically inert material, just are opportunities for welfare.[58] They are modes of access to advantage. Resources and wealth represent, one might say, "*material* opportunity" – opportunity to satisfy wants, to effectuate plans, to build lives, hence potentially to enhance welfare, well-being, etc. Henceforth I shall accordingly use the terms "resource," "wealth," and "material

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"Resource," like "welfare," is an ineluctably value-laden term. It is worth noting that "resource" is subject to objectionable over-inclusive construal as well, just as "welfare" is subject to objectionable under-inclusive construal: Just as it is philistine to treat welfare as solely hedonic, it is grotesque to claim all things the possession of which might afford pleasure can be counted as "resources." Slaveholders and some husband seem often to have viewed human beings in this way, for example.

[57] See, e.g., R. J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); R. J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. (1990); Cohen, *Currency*, supra not 43. An analogue in the case of welfare would be someone's suggesting we use "ethically compatible preferences" instead. Just as the term "welfare" already connotes such conditions (in contrast to "satisfaction" or "utility"), the word "resources," I am claiming, already connotes the conditions I note here.

[58] Rather as some seem to have grown numb to the fact that well-being is not ethically unevaluated pleasure.

opportunity" by and large interchangeably, with occasional caveats registered where necessary.[59]

D. *Distribution Formulae*

"To distribute," like other verbs, is subject to adverbial modification. Distributive claims effectively mandate conformity to one or another such modification: They say, in effect, "things should be distributed thus: ..." Such mandates are themselves in turn subject to feasibility constraints that figure into further adverbial modifications – claims of the form: "Things *can* be distributed *thus*: …" In sum, then, we ask both "how ought?" and "how can?" The class of possible replies to the second question effectively constrains plausible replies to the first.

In posing the first question, we are asking for specification of what I call a "distribution formula." In posing the second question, we ask for specification of what I call a "distribution mechanism." I treat of the first here, the second in Part III.

Historically there have been three leading candidate-families on offer as distribution formulae. I call their advocates "maximizers," "maximiners," and "egalitarians" of one stripe or another. Each family is best known through one or two of its historically most influential members. Each also has featured one or more members argued for by appeal to hypothetical veiled choice scenarios. I'll accordingly first discuss each of the distinct families of candidates by reference to its best known members. Then I will briefly discuss veiled choice scenarios as employed in respect of all three. Then I'll

[59] Such caveats as I'll register concern the distinction that one must draw, in some cases, between what I'll call "ethically exogenous" and "ethically endogenous" resources, wealth and opportunity. Ethically exogenous holdings are those one is not responsible for. Ethically endogenous holdings are those one is responsible for. The discussion of distribution formula, below, elaborates the normative significance of this distinction. The relevance of the distinction at present is simply that the terms "material opportunity" and "resource" possibly connote ethical exogeneity immediately to many, while "wealth" probably does not.

conclude with (a) observations on the inter-formulability of maximizing and equalizing formulae, and (b) cognate observations on the distributional equivalence of many formulae with differing "mixes" of variable-valuations.

1. Naïve Maximization

The best known maximizing distribution formulae on offer are those I call "naïve" such formulae.[60] The operative ideal behind such formulae is disarmingly simple: It is that what ever is distributed should be distributed in such manner as maximizes the quantity of some aggregate taken to be normatively salient. Typically, that means somehow-aggregated wealth or welfare, summed over the distribuees who hold or enjoy it.[61] If distribution D_1 yields aggregate wealth or welfare W_1, D_2 yields W_2, and W_2 exceeds W_1, then D_1 ethically dominates D_2 on this view. Our goal, simply put, is:

$$\text{Max} \sum_{1\,n} W_i,$$

where "*i*" indexes by distribuee and "*n*" designates the number thereof in the society in question.[62]

Maximization in so unalloyed a form has, unsurprisingly, provoked objections. These include charges of (a) fetishism, (b) objectionably unequal treatment of distribuees, (c) objectionable treatment of distribuees as nonresponsible patients, or less often (d)

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[60] Strictly speaking, maximization can no more be literally a distribution formula than welfare can be a literal distribuendum. It serves, rather, like welfare, as a touchstone or focal point. The idea is to distribute in such manner as will maximize some aggregate, just as in the case of welfare as distribuendum one is to distribute something other than welfare in such manner as produces welfare in distribuees. For this reason it turns out, as claimed in the Introduction, that maximizing and equalizing formulae are interformulable. See infra II.D.4.

[61] Welfare aggregation and maximization are associated with utilitarian ethics. Wealth maximization is associated with normative economics of law. More infra, III.A.

[62] Please bear in mind that this is the form of "naïve" maximization formulae. More on departures from the basic form as we proceed. See also supra, note 14, and infra, Appendix.

some combination of these. It is insufficiently observed, I believe, that the combined objection, (d), is analytically the most satisfactory. For the separate objections are not really orthogonal. One tends conceptually to entail the others, as we'll now demonstrate.

The fetishism charge is more typically aimed at naïve would-be wealth-maximizers than welfare-maximizers, though this fact reflects a confusion that should be unveiled. The idea is that maximizing wealth for its own sake, shorn of the proper ethical regard for wealth-makers and -takers, is ethically indistinguishable from maximizing, say, the quantum of blue-colored surface-area in the universe. There seems no ethically cognizable *reason* for such pursuit if it does not entail proper treatment of distribuees person by person. And if it is indeed individuals who ultimately matter to us, then what constitutes proper treatment of individuals should be explicable without reference to any aggregate; it must be independently specifiable.[63]

Though it is less often, if indeed ever, observed, naïve welfare-maximizing is subject to precisely the same charge of fetishism as is naïve wealth-maximizing. Welfare might well be – indeed might stipulatively or otherwise trivially be – "what matters" to people. But if produced by means that are indifferent to the proper identification and treatment of numerically distinct, politically equal distribuees, it is no less ethically inert than is wealth or blue surface-space. For again, normative concern for individuals requires attention to the deserved or earned wealth or welfare of *each* antecedently equal-rights-bearing citizen, one by one. Individualist normativity takes no cognizance of any antecedently defined aggregate – even a welfare aggregate – in terms of which individuals' rights are but posteriorly defined and apportioned. To hold otherwise just is to hold that the aggregate's distribution does not normatively matter, hence that

[63] For reminder of the basis of this supposition, please see supra, notes 19, 20, and associated text.

individuals and their political equality do not matter.[64] And that is precisely what's fetishist.

The unequal treatment charge leveled at naïve maximization is, in view of the foregoing, readily seen to be deeply connected to the fetishism charge: It stems from the possibility that what ever is maximized might be maximized by means that effectively treat persons as being of ethically differing status, even before or apart from their ethically endogenous, responsible choices.[65] It can in theory turn out, for example, that aggregate welfare or wealth would be maximized simply by euthanising faultless depressives or handicapped persons.[66] Or it might be that maximization would be best effected by channeling resources or wealth toward persons blessed with high endorphin counts or otherwise highly resource-responsive welfare functions. Those would be people who, like Benedict in the Introduction, derive disproportionate pleasure from what they receive.[67] The fact that naïve maximization imperatives do not prohibit such measures in principle – and indeed seem to welcome them – it is argued, demonstrates maximization's unsuitability to the task of articulating an ethically defensible distribution formula.[68]

The patient-treatment objection to naïve maximization is the flipside of the unequal treatment objection. Hence it is, like the latter, also conceptually wedded to the

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[64] Some such intuition underlies Robert Nozick's "utility monster" objection to utilitarianism. It is not accidental that Nozick commences his essay with the observation that "individuals have rights." See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974).

[65] In such case we might say they are treated as being "antecedently" or "exogenously," hence *ethically essentially* unequal.

[66] Richard Posner professed in the early 1980s to be troubled by this possible consequence in the case of welfare-maximization, but then puzzlingly dismissed the concern in the case of wealth-maximization. See infra III.A.

[67] See again Nozick, supra note 69. An internal relation, then, between unethically unequal treatment and fetishism.

[68] It is no answer to say that this does not typically happen in practice. Normativity concerns not happy accidents, but principles.

fetishism objection: It is, in effect, that distribution effected on the basis of morally arbitrary features of faultlessly disadvantaged persons[69] does more than treat the latter as effectively expendable and non-rights-bearing. It also treats morally arbitrarily *advantaged* persons[70] as being of meritlessly higher ethical or political status. And, crucially from the vantage of this objection, it does so quite apart from that which constitutes the beneficiaries as *fellow citizens* – their responsible human agency.

There is a deep sense in which the latter is, so to speak, "metaphysically" patronizing. The advantage enjoyed is disturbingly contingent, and in consequence alienating and demoralizing: One's birth into a right to larger distributive shares than those enjoyed by others is the product of a dubious "blessing." It is effectively her birth into a polity that treats her as a patient and, indeed, as an object. For she is treated as one whose politically honored advantages are not really her own – not the product of her agency – but instead a conditional gift conferred by society in virtue of an accident. They are conferred simply because the beneficiary is, so to speak, "productively blonde."[71] In such a polity she is only contingently favored, by mere accident of birth. She is a mere funnel into which the channeling of resources simply happens to produce a higher

[69] Depressives and handicapped persons, say, as just countenanced.

[70] "Utility monsters" and talent-Übermenschen, say.

[71] Imagine a society in which blondes were so rare that birth with blonde hair was viewed as a sign from the gods. A rare blonde is in consequence treated as an avatar, maintained in a temple and endowed with sacramental gifts. I there not an obvious sense in which such "lucky winners" would experience themselves as freakish, radically separated off from others? The sense in which this is damaging to the putative beneficiary will be familiar to those who have read of the psychological damage experienced by many members of royal and celebrity families. It is also a staple of fiction concerning the longings of celebrities, royalty, avatars and even angels to lead ordinary lives. See, e.g., MARK TWAIN, THE PRINCE AND THE PAUPER (1882). Also such films as *Roman Holiday*, *The Last Emperor*, and *Wings of Desire*.

aggregate. That, it can be argued, is deeply disrespectful and ultimately harmful of the self – that of the fortunate as well as of the unfortunate.[72]

A final objection to naïve maximization is rooted in measurement challenges of the kind surveyed above in II.B.1. Where welfare is held out as maximandum, the objection is that welfare is not sufficiently amenable to interpersonal comparison in the holding as to lend the idea of its aggregation and "maximization" any workable content. Where wealth is the proposed maximandum, the measurement-rooted objection finds its ground ultimately in commensurability: One objects that the absence of markets in many valued or potentially valued goods and services – including risk-bearing services – renders the "wealth" that is maximized an ethically incomplete index. Or, relatedly, one points to one or another variant of the so-called "Scitovsky paradox" and concludes that, since two states can be Kaldor-Hicks superior to one another and the Kaldor-Hicks criterion accordingly does not yield an ordering, "wealth" likewise is not sufficiently determinate an aggregate as to be amenable to intelligible maximization.[73]

Naïve maximizers offer well-worn rejoinders to these objections. To the fetishism charge, the rejoinder is either that welfare is what matters to people (in the case of welfare-maximizers) or that wealth affords opportunity to satisfy preferences hence

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[72] Because the favorable treatment is contingent upon morally arbitrary, accidental features, and is accordingly withdrawable immediately upon even accidental loss of such features. Some such intuition as this would appear to underwrite the expressions of alienation, anxiety, and even humiliation sometimes heard from people who are found physically attractive by large numbers of others. Analogous concerns sometimes are registered by opponents of affirmative action programs who have been beneficiaries of such programs. See, e.g., CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007). There is a link here to the notion of a "right to punishment" as well, per note 60 above. The link is well drawn in FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (1866).

[73] See Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941); also Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980). The determinacy objection also is grounded in distribution. More infra III.A.

welfare (in the case of wealth-maximizers). In both cases, it is concluded, maximizing cannot, in consequence, be fetishistic.

This rejoinder is a non sequitur. The fetishism charge is not that welfare and wealth do not matter.[74] It is that their naïve maximization does not matter. It is that naïve maximization misunderstands the *ways* in which welfare and wealth matter. As themselves, these of course matter by definition, hence trivially, to everyone. But as maximized in aggregatum pursuant to a merely additive maximizing formula, they at best matter only, or objectionably disproportionately, to those lucky enough to attract distributions in owing to such of such unearned advantages as happen to be welfare- or wealth-productive *for them*. Welfare or wealth will *not* in such case matter to "us," whose collective role is that of evaluating a distribution formula's ethically appropriate treatment of each rights-bearing constituent member of the distributing polity that we jointly constitute.

To the unequal- and patient-treatment charges, naïve maximizers also have offered rejoinders that amount to non sequiturs. In the case of the unequal treatment charge, the rejoinder is that maximization counts each person's utility or wealth-production function for one in the social welfare function. One individual function, the claim runs, one "vote," hence equal treatment. We encountered this "Hail Mary" play above, in the Introduction.[75]

The reply is a non sequitur for reasons also noted above, in the Introduction: It unethically reduces distribuees to their welfare- or wealth-production functions. That

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[74] The rhetorically rich but perhaps overstated title of a well-known article by Dworkin might be partly responsible for this misunderstanding. See infra, III.A. The misunderstanding itself permeates D. Bruce Johnsen, *Wealth* Is *Value*, 15 J. LEG. STUD. 263 (1986).

[75] See supra note 17 and associated text.

mis-identification amounts to a form of fetishism in respect of distribuees on all fours with naïve maximization itself's fetishism in respect of distribution formulae. One is no more one's wealth- or welfare-function than one is one's nose. If people are both faultlessly and non-creditably born with differing such functions,[76] then equal treatment of those functions is unequal treatment of those born with them. And it is precisely that, in effect, to which those who level the unequal treatment objection object.

To the treatment-as-patients objection the rejoinder is cognate with, but is a partial misappropriation of, the claims about distribuees made by the objectors themselves. The claim here is that, since distribuees are boundedly autonomous agents who act partly to produce their own welfare or wealth, and since distributing so as to maximize welfare or wealth is to distribute disproportionately to the best, "most efficient" such welfare- or wealth-producers, maximization effectively *coincides* with agent-rewarding.

This rejoinder is half right, half non sequitur, and so we shall find it half-echoed in what turns out to be the most plausible characterization of the correct distribution formula further below: The problem is that it places the cart before the horse, so to speak, and in so doing fetishizes – attributes life to – the cart. If distribuees bear rights to equal treatment as agents ex ante, prior to engaging in the actions for which they are responsible, then the "horse" should be distribution considered prior to the consequences for any ex post aggregate. For that aggregate is as much the product of agents' responsible actions as it is of the ex ante distribution. Attend to the propriety of the latter, then, and the appropriate aggregate – the nonfetishist, ethically cognizable aggregate –

[76] As is the case most dramatically, though not exclusively, in the case of congenital depressives and handicapped persons.

will effectively take care of itself: It will be maximized quite "automatically" ex post by responsible agents, as the output of their actions upon the correctly, ex ante distributed inputs.[77]

Maximizers do not appear to have arrived at a canonical rejoinder to the measurement-rooted objections to maximization. I think that's no accident. The key to an answer, I believe, again lies in turning away from the assessment of distributive welfare-outputs altogether, in favor of the assessment of distributive resource-inputs. Once we do that, ready answers to all measurement challenges are immediately forthcoming. I'll defer elaboration to Part II.E, on distribution mechanisms.

I should note here before moving on that those who derive maximization imperatives from hypothetical *veiled choice* scenarios have better, though still problematical, answers to objections to maximization than those I've surveyed in the foregoing paragraphs. I defer treatment of these to Part II.D.4. For veiled choice arguments are commonly offered to defend the remaining two distribution formula candidates as well, and are all most efficiently dealt with at once.

2. Prioritarian Maximining

A recently influential family of candidates for distribution formulae, so-called "prioritarian" views, are prompted by some of the shortcomings of naïve maximizing just discussed. We shall see that they are not, however, adequately responsive to them. Probably the best known prioritarian distribution formula is also one of the earliest. I

[77] Cognate observations apply to those maximizers who observe that maximizing might tend to coincide with equalizing in view of the diminishing marginal utility of wealth, or of what ever else is distributed. Quite apart from the claim's ignoring responsible agency and its reliance upon the happy accident of concavity, it invites the question: If you're serious about equality, why bother with naïve maximizing at all? More infra, II.D.4.

refer to the "maximin" formula defended most thoroughly by John Rawls. The principal motivating idea behind Rawls's and many other prioritarians' arguments is this: Many of the differences among persons that effectively recommend disparate treatment of them in the service of naïve maximizing imperatives are, as Rawls put it, "arbitrary from a moral point of view."[78] Such differences, Rawls concludes, precisely *because* they are morally arbitrary, should not be distribution-determinative. They must, if we're to be serious about identifying and treating one another as moral equals, in some way be neutralized.

Now neutralizing such differences altogether, Rawls seems to have recognized, would result in our pursuit of an *egalitarian* distribution formula of some sort. Indeed it might even result in an outcome-egalitarian formula, though this isn't clear.[79] But Rawls shied away from full-bore egalitarian distribution of any sort, on the theory that some departures from equality might render even the "worst-off" among unequals "better-off" than they would be under conditions of equality. In consequence, Rawls concluded, departures from equal distribution are morally tolerable if, but only to the degree that, they tend to better the lot of "the worst-off."[80]

Rawls labeled this Grundnorm "the difference principle." If naïve maximizing is tide-raising, we might say, and if a rising tide not only lifts all boats but lifts them so high that the lowest are raised higher than they would have been under an egalitarian distribution formula, then maximization will be ethically permissible. But it will be so only on condition that – and differing egalitarian distributions will be socially preference-orderable precisely according as – "the minimum" is maximized too. The aim, then, is:

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[78] RAWLS, supra note 41 at 72.
[79] The sense in which it's not clear will emerge presently.
[80] There's quite a leap here. But I aim here to exposit, not defend, Rawls's chain of reasoning.

$$\text{Max} \sum_{1\ n*} W_i,$$

where "*i*" again indexes by distribuee and "$n*$" designates the best-off member of the worst-off class, hence the cut between "worst-off class" and all others. Maximin is accordingly the formulaic upshot of Rawls's difference principle.

Both the difference principle and maximin turn out on reflection to be only a bit better than non sequitur responses to Rawls's specific objections to naïve maximization. They turn out in consequence to be rather crude, coarse-grained remedies, if indeed determinate remedies at all.

For one thing, "the worst-off" class is quite *in*determinate: Not only is it unclear whether it is the worst off person, the worst off .1% of persons, the worst off centile or decile or quintile or what ever: It is unclear even how we are to decide. No principles are on offer, nor does any particular rationale seem to offer itself.[81] That's a bit troubling given that maximin is meant to neutralize morally arbitrary determinants of distributive shares and thus afford ethically satisfactory guidance to law-makers.

A closely related difficulty is that the idea of the "worst-off class" does not even seem to be clearly conceived or intelligibly motivated, let alone defined, by Rawls with any view to the *reasons* for anyone's being worst off. Rawls draws no distinction, for example, between those who are worst-off by chance and those who are in effect worst-off by choice, say in owing to self-destructive behavior, for example. Yet if any

[81] Rawls's failure to offer a basis on which to make the cut does not seem to me accidental. There is no principled basis. And that, I believe, stems directly from the difference principle's failure directly to address its own motivating concern – the concern with morally arbitrary distinctions among persons that result in their differential faring. The only principled means of addressing that concern, in turn, not only supply a satisfactory theoretical baseline, but also to render the difference principle itself quite superfluous. Rawls thus emerges as an unstable resting point en route from naïve to ethically cognizable maximizing – or what is the same thing, from ethically noncognizable to ethically cognizable equalizing. More infra, II.D.3, II.D.4, III.A.2.

distinction of interest to normative distributional evaluation is *not* "morally arbitrary" – and surely there must be *some* that are not if the predicate is to do any work – one would think it would be that one.

Why, then, do Rawls and other prioritarians not consider such questions in connection with "the worst-off" and their proposed distribution formulae? No answer is forthcoming. That is strange and troubling, particularly given Rawls's own proffered reasons for abandoning naïve maximizing. For insofar as there is divergence between those who are responsibly worse-off on the one hand, accidentally worse-off on the other, maximining looks no less "morally arbitrary" than naïve maximizing. *Both* maximize morally arbitrarily; they differ only in maximizing different maximanda. That means in turn that maximining no more treats distribuees as moral equals and responsible agents than does maximization.

Almost as if to register that he was at least obliquely aware of these problems, Rawls's full theory of appropriate distribution employed two more devices apparently meant to bring a modicum of responsible agency and equal treatment back into the account. The first device was the familiar "veil of ignorance" alluded to earlier. Rawls's claim here was in effect that distribuees in their roles as distributors, choosing distribution principles with which they would subsequently have to live as distribuees, and not knowing ex ante who they would turn out to be ex post in the after-choice polity, "would" select maximin.[82]

The veiled choice scenario is of course most immediately prompted by the aim to ensure ethical equality via anonymity and consequent impartiality: Choosers are prevented from choosing to benefit themselves over others, because features that

[82] The reason for the scare-quotes round "would" will emerge momentarily.

distinguish them from others are hidden from view behind the veil. What was perhaps less explicitly recognized, however, was that that veiled choice's being the product of a *choice* scenario would render maximin at least partly a *responsible choice as well*. Insofar as it did, choosing agents could appropriately be held to the choice.[83] The degree to which this feature of the scenario explicitly prompted Rawls is unclear. But it is tempting to suppose that it constituted at least part of its attraction, consciously or otherwise. That is so partly because of the linkages between ethical equality and responsible agency noted above. And it is so owing to some of the language Rawls used in motivating the second responsibility-sensitive wrinkle to which I've alluded – Rawls's selection of distribuendum. On, now, to that.

The second device by which Rawls in effect partly addressed the responsible agency and ethical equality problems afflicting his difference principle was his characterization of the appropriate distribuendum. Rawls prescribed distribution of what he called "an index of primary goods" – in effect, a lumpy and only incompletely scalable vector of disparate, broadly conceived resources.[84] Rawls was at least partly cognizant of the agency/equity value that this prescription offered. For, first, his explanations made some overt reference to the fact that the selection of primary goods as distribuenda effectively held distribuees partly responsible for the production of their own welfare.[85] And second, Rawls expressly noted that treating primary goods as distribuenda required distribuees to internalize the costs that their lifeplan-rooted preferences for primary goods

[83] More corroboration here, I believe, of the deep interconnectedness of ethical equality and responsible agency noted at various points in the foregoing subsections.

[84] RAWLS, THEORY, supra note 41 at 54-55, 78-81, 348, 358-65. In light of the incomplete scalability, of course, the index is but incompletely an index. See supra Part II.C.1. Also Hockett & Risse, supra note 57.

[85] Or in Rawls's preferred idiom, the formulation and successful pursuit of their own "plans of life." See THEORY, supra note 41 at 80.

imposed upon others.[86] So Rawls appears, in his brand of veiledly-chosen, primary-goods-distributive maximining, to have been at least an incipient exponent of resourcism and equal responsible agency.

The problem for Rawls lies in the "incipient" part of that characterization. Note, first, that primary goods as distribuenda bear no necessary connection to maximin as distribution formula. Indeed, they amount to little more than a clumsy and ultimately incoherent graft-on. They render Rawls a responsibility-tracer in respect of his distribuendum selection, yet a moral accident-allower in his selection of distribution formula.[87] Why? Because the "worst off" in respect even of *primary goods* holding *still* might be poorly off either by chance or by choice.[88]

The treatment of maximin as a product of veiled choice might, in theory, at least partly have rectified the unstable mixture just noted. At least this might have been so had the choice actually been made, or if there were any reason to suppose that it "really would" have been made. But it is widely understood that the choice theory implied by Rawls's selection of maximin as distribution formula is "exotic" to say the least.[89] The choice it imputes is extensionally equivalent, preference-schedule-wise, to such as would be made only by those who are "infinitely" risk-averse.[90] There accordingly seems little

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[86] Id. at 359.

[87] This is not surprising given Rawls's ambivalence about responsibility. On the one hand, he defends his selection of primary goods as distribuendum by reference to the importance of responsibility. On the other hand, at other points he argues deterministically (and confusedly) that people are not responsible unless able to choose freely, and that they are not able to choose freely because they do not choose their faculties for choosing. See RAWLS, THEORY, supra note 43 at 90-93, 182. Also infra, note 101 and accompanying text.

[88] See, e.g., Richard Arneson, *Primary Goods Reconsidered*, 24 NOÛS 429 (1990). Note that if leisure were counted a primary good, we wouldn't even be able to say that those poor in other primary goods through voluntary nonworking were poorly off at all. See infra note 96.

[89] See John E. Roemer, *Egalitarianism Against the Veil of Ignorance*, 99 J. PHIL. 167, 168 (2002).

[90] See, e.g., Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245, 254 (1973); L. Hurwicz, *Optimality Criteria for Decision Making Under Ignorance*, 370

reason to suppose that the choice even "would" be made, let alone that it has been made. Hence it affords little if any real trace of responsible agency to Rawls's characterization of the appropriate distribution formula.

Rawlsian justice theory, then, seems in sum an unstable admixture of agent/patient, responsibility-tracing/accident-permitting distributive-ethical prescription. And maximining – the distribution formula that gives partial expression to that mixture – for its part appears little more free of ethical arbitrariness than the naïve maximizing it is meant to supplant.

3. Equalizing: Naïve and Sophisticated Varieties

There are a number of influentially proposed *egalitarian* distribution formulae. Some of these can usefully be viewed as "purifications" of original Rawlsian insights, others not. Proposals of the former, sophisticated sort, we shall see later, also are characterizable as more ethically plausible forms of maximization. Proposals of latter, naïve variety share flaws with naïve maximizing and Rawlsian prioritarianism that I'll draw out below.

The guiding intuition underwriting the more sophisticated proposals can be articulated thus: Suppose that some differences among persons are both partly causative of their differential faring and yet "arbitrary from a moral point of view." Then the most immediately satisfactory distribution formula would be one that simply partitions each person's holdings into portions R_i traceable to moral arbitrariness and $1 - R_i$ traceable to responsible agency. It would then mandate equalization of the former, while facilitating agents' own maximization of the latter.

STATISTICS 1 (1951); GEOFFREY A. JEHLE & PHILIP J. REMY, ADVANCED MICROECONOMIC THEORY 260 (2d ed. 2001).

The morally arbitrary portion of any one person's holdings, R_i, would be invariantly valued across all persons i. The nonarbitrary portion, call it E_i, would for its part be permitted – indeed required – to vary across persons according as they expended varying degrees of responsible effort in productive activities varyingly valued by a market comprising themselves and others.[91] The correct distribution formula accordingly would be most straightforwardly characterized thus:

$$\forall i\text{: } H_i = E_i + R_i = E_i + R/n,$$

where "$\forall i$" is read "for all i," "H_i" designates each person i's holdings, "E_i" and "R_i" designate what they were said just above to designate, n is the number of persons i,and "R/n" designates the constant which is each i's pro rata share of the exogenously given residuum, R.[92]

R can be called "luck," "ethically exogenous resources," "ethically exogenous opportunity," "the exogenous endowment," "the responsibility-indifferent residuum," and so on. Those who would equalize R_i across persons can accordingly be labeled "luck-egalitarians," "resource-egalitarians," "responsibility-tracing egalitarians," "opportunity-egalitarians," and so on. I shall call them the latter, for reasons analogous to those

[91] Leisure in such case would then not count as part of one's "holdings." But it could be so counted. Hence the scare-quotes around "productive," and the "themselves and" placed before "others" in the characterization. Were we to count leisure as part of one's holdings, we then would say that E_i's *composition*, rather than E_i itself, varies across persons i. A consequence would be that maximization of the full vector of goods one enjoys "takes care of itself," as a straightforward consequence of responsible choices made by distribuees as to the disposition of their resource endowments – R_i. Implications of "varying degrees of responsible effort in activities varyingly valued by themselves and others" are traced and treated below. The basic idea is that any surplus you end up with over your mandatorily equalized ethically exogenous endowment is properly a matter of what others give to you in exchange for what you give to them. This proves particularly important in connection with the treatment of distribution mechanisms infra, III.B.

[92] R would be the sum of each person i's R_i. That is, $R = \sum_{1}^{n} R_i$. Summing here of course requires commensuration and interpersonal comparability.

offered above at III.B.3 for treating "resources," "opportunity for welfare" and "access to advantage" as all being variants of "material opportunity."

Most adherents to the opportunity-egalitarian view regard Rawls as having been an incipient such egalitarian. On this view, Rawls simply had not managed to purge his views fully of the naïve utilitarian maximization imperative that he sought to replace with an individualist distributive-ethical ideal. The full purge, this thought would continue, is that which *consistently* treats distribuees as boundedly responsible agents, distribuenda as *fully* indexed goods and services rather than lumpy Rawlsian "primary goods," and the correct distribution formula as that which distributes goods and services in a manner that is *systematically* responsive to the cut between faultless chance and responsible choice.

Opportunity-egalitarians are, of course, not without challenges. The mentioned cut between chance and choice – "R_i" and "E_i" above – for example, can be difficult to draw, for a number of reasons.[93] There also are problems of commensuration such as plague any mode of distribution that takes heterogeneous material goods and services as distribuenda. Particularly poignant among the latter is this one: Opportunity-egalitarianism confronts all morally arbitrary determinants of wellbeing head-on. But among such determinants are such deeply "personal" or "internal" resources as talents and handicaps. This means that to be thoroughgoing and consistent, opportunity-egalitarians require some means of commensurating these "personal" – physiologic – resources and deficits along with all "external" – non-physiologic – such inputs to welfare functions.[94] That looks initially difficult.

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[93] See generally Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 74-75 (2005); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means*, 79 SO. CAL. L. REV. 45 (2006).

[94] This is a challenge, not a fault. The fault lies, on this view, with views that do not so much as notice that such "resources" are among those that clearly are morally arbitrary.

It is important, however, to be clear that these challenges amount merely to partial discounts applied to the unquestioned advantages that the opportunity-egalitarian position affords. Competing positions – naïve maximizing and maximining – we should remember, do not so much as attempt to reap those advantages. They remain in consequence not merely practically, but *foundationally* short of the unquestioned ideal. Failure to appreciate this, I think, stems from failure to appreciate that there is an ordered set of "*n*th bests" to the opportunity-egalitarian ideal, in a way that there is not in the cases of naïve and prioritarian maximizing. I'll show this in Part III, upon turning to distribution mechanisms..

Two final points should be made in connection with equalization as a proposed distribution formula: First, the opportunity-egalitarian principle straightforwardly coheres with the view of distribuees as ethically equal, boundedly responsible agents discussed above at II.B. It shows better "fit" with that construal of distribuees than do naïve or prioritarian maximizing – or naïve equalizing, for that matter, as we'll see below. It likewise coheres with the view of appropriate distribuenda as material inputs to individual welfare that distribuees are themselves partly responsible for producing. That is to say, it better "fits" the construal of appropriate distribuenda as material opportunities. The same cannot be said for other historically proposed – indeed, "naïve" – egalitarian distribution formulae, as I'll now show.

Some utilitarians, for example, have argued for wealth-equalization quite apart from any consideration of distribuees' ethical equality or responsibility for wealth- or welfare-production. They have done so on two conjectured grounds: First, that the utility functions are roughly the same from person. And second, that the marginal utility

of wealth is diminishing per those functions. These conjectures, if true, would jointly entail that rough equalization of holdings would maximize aggregate welfare.

This view treats distribuees as patients just as any other form of utilitarianism does. It takes us for ethically inert, "automatically" operating welfare manufactories into which wealth is fed rather like worms into chicks' beaks. It also, relatedly, treats distribuees as at best but contingently equal, while more deeply unequal. For distribuees are treated as "equals" only in respect of a contingently identical feature – again, their utility functions. Responsibly diligent distribuees, moreover, are expropriated on behalf of, and thereby conscripted for the purposes of, the non-diligent. For again all that is treated as mattering is the utility aggregate, not the way in which it is produced. Finally, this view treats aggregate welfare, not wealth, as distributive focal point.[95] In short, then, it remains a version of naïve maximization, only a contingently (by dint of a posited accidental feature of utility functions) income-equalizing one.

Non-utilitarian welfare-egalitarians are another group of equalizers who have historically construed distribuees in effect as patients and thus ethical non-equals. They have done so by taking the following positions, which jointly, even if unwittingly, entail the characterization just offered: First, these welfare-egalitarians acknowledge differing welfare functions across persons. Second, they advocate differential wealth-inputs across persons in contemplation of that fact, so as to equalize individual welfare-outputs. Third, in so doing, they hold distribuees entirely unaccountable for their own welfare. And fourth, in doing that, like the utilitarian and wealth-egalitarians countenanced above, they effectively accept conscription of the diligent to subsidize even the willfully non-diligent.

[95] It is also, of course and in consequence, another case of cart's being placed before horse. If wealth-equalizing is sought only by dint of its putative aggregate welfare-maximizing, it is sought in pursuit of a fetish.

Some advocates of this position presumably would abandon it were they fully cognizant of its entailments. Others, perhaps, hold the position in owing to some confused metaphysical belief about agency: They are determinists, on which view all persons "really" are patients – patients of God or of fate or of "nature" – through and through.[96]

In light of this latter observation, we can see here a sense in which naïve welfare-egalitarianism can be reconciled with – or better, be said to amount to a degenerate case of – the opportunity-egalitarian position: Were it somehow possible, for example, both intelligibly to maintain and empirically to establish that nobody "really" is responsible for anything, then welfare-egalitarianism would extensionally coincide with opportunity-egalitarianism: One would simply set E_i trivially at zero for all values of i in the formula set out above. This would formulaically express the idea of no one's "really" being responsible for anything, including for any portion of her own holdings. There would then be no ethical point in distinguishing between opportunity-input and welfare-output. I mention this prospect, however, as a mere theoretical curio. I don't see how the antecedent conditions – establishing that we are not "really" responsible for anything – could be satisfactorily satisfied. Even so much as to articulate the position would seem to be self-refuting.

Symmetrical remarks, incidentally, would hold of welfare-maximizing utilitarianism as described above in II.C.2: Were it plausible to hold persons responsible

[96] I admit to finding it difficult to make sense of this position. By its own criteria it would be prompted in the saying by metaphysical necessity rather than the proponent's free acceptance of the truth. We who hear the claim likewise will do what ever we do as mere effects of the same occult causes rather than in response to reasons. Reason-giving itself, such as determinist claims amount to, seem to presuppose freedom of the only kind that matters – that which underwrites attribution of responsibility. But alas, I must leave the free will problem there for the present.

for everything rather than nothing – even the entireties of their utility functions[97] – then we might set R_i trivially at zero for all values of i in the above-stated opportunity-egalitarian formula in recognition of that "fact." Persons i would be treated as equals by dint of their each counting for one and there *being* no ethically *exogenous* residuum, for which they were *not* responsible, to be spread objectionably *unequally*.[98] Again there would be no more point in distinguishing between opportunity-input and welfare-output. Once again, however, the antecedent condition here – distribuees' being responsible for everything – looks impossible to maintain.[99] We seem to be stuck with the cut – that between chance and choice – recognizition of which is opportunity-egalitarianism's theoretic blessing and (largely surmountable) pragmatic curse.[100]

A final point that bears noting in connection with equalization has to do with the latter's relation to fairness. "Fairness," on all semantically informed understandings of the word, connotes impartiality or even-handedness:[101] Commonly proffered synonyms of "fair" include "equitable," "just," "impartial," "unbiased," "even-handed," "treating like cases alike," and the like.[102] To treat parties fairly is to treat them as equals for purposes of the treatment. It is to eliminate or neutralize inequities that are exogenous to the purposes of the treatment, and to retain or vindicate inequities that are endogenous to the purposes of the treatment – precisely in proportion to their endogeneity.

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[97] Demanding a Panglossian happy attitude, say, or Schopenauerian resignation or Neitzschean *amor fati*.

[98] On such a view you could presumably be held responsible for your forehead height too. You'd be responsible for everything. Hence you could be identified with everything. Another reason here, I suppose, to call people like the early utilitarian Sidgwick "eyes of the universe." See BART SCHULTZ, HENRY SIDGWICK: EYE OF THE UNIVERSE, AN INTELLECTUAL BIOGRAPHY (2004).

[99] Neither Schopenhauer nor Nietzsche managed to pull it off, for example. And Pangloss of course was the butt of a joke.

[100] "Largely surmountable," again, for reasons that emerge infra, Part III.

[101] It bears virtually no recognizable relation, incidentally, to Kaplow & Shavell's proffered definition in the book cited supra, note 1.

[102] See, e.g., *Black's Law Dictionary* 595 (6th ed. 1990).

Say, for example, that the purpose of the treatment in a particular context is to distribute in accordance with responsible human agency and nothing else – i.e., no morally arbitrary feature of the distribuees. Then fair treatment in this context will be that which allocates value to distribuees in proportion to their creditability for value-production.[103] It will also, then, a fortiori, be treatment that *equally* allocates value for the production of which *no one* is responsible, since everyone is equally responsible for that residuum. (Zero equals zero, across the full population.) Fair allocations, in short, will be those that equalize holdings of such stuff as no one is responsible for, and require holdings for which persons are in fact responsible to vary in proportion to their responsibility. If this is so, then the class of fair allocations would seem to be precisely the class of opportunity-egalitarian allocations.

4. Interformulability

The immediately foregoing discussion of distribution formulae suggests an obvious formal means of rendering the point with which I introduced this Article. I said that to maximize one thing is to distribute another thing and to equalize yet another thing – the latter thing amounting, in turn, to some attribute with which we identify distribuees. The observation made just above, that certain equalization formulae can be construed as degenerate cases of maximization formulae and vice versa, amounts to a further corroboration of the point. Let us now generalize it formulaically.

The following translation rule captures the basic idea. For any aggregative maximizing imperative of the form:

[103] "In proportion to … creditability for value-production" requires, if it is to bear content, commensuration of disparate items and services, then cardinal valuation of agents' inputs along the resultant index. We'll get to that infra, III.B.

$$\text{Max} \sum u_i,$$

in which u-factors are summed, simply translate the summand, u_i, into its counterpart equalisand, u_i*, and state the imperative thus:

$$\forall i\text{: Eq } (u_i^*),$$

where "$\forall i$" is read, "for all i," and "Eq" means to "Equalize" just as "Max" means to "Maximize." In short, rather than summing u factors and maximizing the sum, we enjoin functionaries, equivalently, to equalize the summand's egalitarian counterpart, u*. Since there is always a counterpart, we always can work the translation.[104]

Two brief, concrete examples will make the point plain. Suppose first we are garden variety utilitarians. We accordingly wish to maximize aggregate utility. We aim, then, to maximize the sum of u_i measures over individuals i. The summand in this case is each individual's "welfare," or "utility" measure, as ordinarily construed by utilitarians. That summand's egalitarian counterpart, u*, is clear here: It is what summing utilitarians call "weighting" in determining the utility aggregate. Each individual's utility function receives equal weight in the social welfare function, a weight of one. That weighting is accordingly what the social welfare function equalizes. Precisely this point is what underwrites some utiltiarians' claim to be egalitarian, as we noted earlier.[105]

What these same utilitarians appear not to have noticed is this: That feature in virtue of which a social welfare function treats individuals as equals – their utility functions – is also the attribute with which those who act in conformity with the function

[104] Though of course conceptual and idiomatic dexterity would be required in many cases, in some of which there would be little more than theoretical interest in the translation exercise.

[105] See supra, note 17, and associated text.

identify or "count" individuals for policy purposes. The social welfare function "reduces" counted individuals to their utility functions. That reduction might not cohere very well with our view of distribuees if, say, we construe them as boundedly responsible agents per the emergent consensus discussed above in II.B. This points the way to a second example that can instructively be compared to the utilitarian.

Suppose we object, then, to utilitarianism by dint of the way it construes us in our capacity as distribuees. What it had set before us to maximize – "utility" – sounded inoffensive enough on first blush, if for no other reason that it was vague and mysterious. But then we find, on analysis, that what it effectively tells us to equalize and identify ourselves with is out of sync with what we know ourselves to be. It misidentifies that feature of ourselves in virtue of which we legally and politically matter. How, then, to give formal expression to our amended view of what law and policy should be directed toward?

Here is the proverbial kicker: We can give formal expression to what we take for a more satisfactory legal and policy imperative in precisely the *same* schematic terms as the utilitarian did. We simply convert what we take for the more appropriate form of individual-identification and equalization – i.e., the better construal of distribuees and distribuenda – into a maximizing formula. We proceed, that is to say, from u^* to u in this case, simply reversing the order by which we arrived at utilitarianism's de facto u^* in analyzing its maximized sum of u's.

Let's trace the steps. Suppose we are opportunity-egalitarians, per II.C.3. We wish, then, to equalize the distribuendum discussed at II.A.3 – material opportunity – over distribuees whom we take for boundedly responsible agents, per II.B.1. The latter

are people who actively transform opportunities into welfare. Note now that in transforming their opportunities into welfare, these agents are in aggregate generating a form of social welfare. It is what we can call "equal-opportunity-grounded welfare."

The latter, then, is precisely what we seek to see maximized, is it not? It is that maximandum which corresponds to what we take for the appropriate equalisandum. The only difference between this form of welfare and that of which utilitarians speak is that this form proceeds from antecedent conditions of equal opportunity and is produced in part by responsible agents.[106] Utilitarian welfare, by contrast, is indifferent to the opportunity backdrop and to the responsible agency of distribuees. Its welfare aggregate is accordingly differently generated, and is in that sense a different species of welfare aggregate. Process is partly constitutive of product, we might say.[107]

This all suggests that the *formal* renditions of utilitarian and opportunity-egalitarian norms can be rendered schematically identical, hence are themselves structurally identical. They are isomorphic. Only the particular valuations given the schematic variables u and u^* above vary between them. Both equalize u^* over individuals, and both maximize the sum of individual u-measures. They differ only in respect of *what* they equalize and maximize.

Where they differ is, first, in utilitarianism's calling u^* the weighting assigned to individuals' exogenously endowed, birth-conferred utility functions; while opportunity-egalitarianism calls u^* the material opportunity afforded those same individuals. They

[106] The role played by the agents in generating the aggregate, in turn, suggests that our task as an operational matter is to equalize opportunity, leaving the transformation of that opportunity into welfare to the distribuees. "Leave the driving to us," the distribuees might say. More on this infra, Part III, in connection with distribution mechanisms.

[107] The description under which the product in question is individuated, that is, includes essential reference to the generation-process. Process is "internal" to product in such case. See supra, note 9.

differ, second, in utilitarianism's calling the *u* whose sum over individuals is to be maximized "utility," a measure that is indifferent to individuals' agency, responsibility, or opportunity; while opportunity-egalitarianism calls that *u* "equal-opportunity-grounded" welfare, a measure that is not thus indifferent.

The important point, then, is that both maximize something, both equalize something, and in both cases we can on pain of incoherence take the maximandum to be the right thing to maximize if and only if we take the equalisandum to be the right thing to equalize. It is worth noting a corollary while we are at it here: There is much unnecessary confusion in the theoretical literature concerning a putative distinction between the so-called "consequentialist" nature of maximizing imperatives on the one hand, the "deontological" nature of fairness – i.e., equalizing – imperatives on the other.[108] It even is claimed sometimes, surprisingly, that norms of the latter sort are inherently "ex post" in orientation, while those of the former sort are more "ex ante" in orientation.[109] The ready interformulability of equalizing and maximizing formulae immediately suggests that this distinction is arbitrary. It is no more than an artifact of the symbolism we happen to employ.

This suggestion is borne out by the following consideration: "Deontology" refers simply to the logic – the form, or structure – of duty. "Consequentialism" refers simply to the belief that consequences matter. All imperatives, whether cast in maximization or equalization terms, are laid down as duties: Functionaries are obligated to "Max" this or "Eq" that. The duties, in turn, speak to consequences. Utilitarianism lays down a duty to seek this consequence: A maximized aggregate that is the sum of equally weighted

[108] A case in point is Kaplow & Shavell, supra note 1.
[109] Id.

individual utility measures. Opportunity-egalitarianism lays down a schematically identical duty to seek this substantively alternative consequence: A fair distribution of material opportunity such as results in a maximized aggregate of equal-opportunity-grounded welfare. Both norms are as "consequentialist" as they are deontic; they simply articulate duties to seek different consequences.[110]

As for the putatively "ex post" orientation of "deontological" norms and "ex ante" orientation of "consequentialist" norms, it is difficult to know what to make of the claim. I doubt sense can be made of it. I note, though, that opportunity-egalitarianism speaks directly to the ex ante spread of opportunity, thereafter allowing the ex post equal-opportunity-grounded welfare aggregate "take care of itself." It does so precisely because it is for agent distribuees to produce that aggregate out of the antecedent opportunity spread. Utilitarianism, by contrast, speaks directly to the ex post welfare aggregate, without regard for the ex ante spread of opportunity over responsible agents. Things look to be quite the reverse, then, of how they have been characterized, assuming I've managed to make sense of the characterization.

III. DISTRIBUTION MECHANISMS

I noted earlier that "to distribute" is subject to *two* forms of adverbial modification. One is by "ought" adverbs, which implicate distribution formulae as discussed just above. The other is by "can" adverbs, which implicate feasible distribution mechanisms, hence institutions and laws. We proceed now to the latter. Treatment of

[110] The term "consequentialism" as a name for utilitarian and cognate maximizing imperatives seems to have been introduced by G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958). Anscombe was, to be sure, a remarkably penetrating thinker. But it is tempting in hindsight to conclude that her singling out ethical systems by reference to their attention to consequences has ultimately led to more muddling mischief than salutary clarification

this subject receives a Part of its own because it is here, as we'll see, that the more "purely" theoretic concerns of Part II find detailed *application*. In turning to distribution mechanisms we move from "Grundnorms" to specifically legal norms – the stuff of statutes, regulations, and judicial decisions.

One might imagine many means by which to effect distributions of benefit and burden. Such means might be specified, in turn, at varying levels of abstraction. The possibilities here run from micro-detailed description of existing institutions, on up to the quite broadly schematized, variably instantiable designs contemplated in axiomatic mechanism theory.[111] Surprisingly, most normatively oriented legal and policy analysts have been quiet on the subject of feasible distribution mechanisms. That's regrettable for at least two reasons. For one thing, "can" limits "ought," as is commonly recognized. Hence "ought" claims that *ignore* "can" limitations risk being merely idle. But for another thing, *some* "can"s render *some* "ought"s particularly attractive. They do so not merely by rendering option menus more manageable via elimination of non-feasible alternatives. They do so also by highlighting ways we can sidestep even some *theoretic* conundrums, as I shall demonstrate.

One distribution mechanism that I shall specify appears to "fit" the most acceptable conceptions of distributor, distribuendum, distribuee and distribution formula discussed above in Part II very gracefully and, as it happens, uniquely. That renders those conceptions more attractive on feasibility grounds, of course. But it also does more than that. The process of schematizing and justifying this mechanism further illuminates why those conceptions are independently attractive in the first place.

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[111] See, e.g., L. Billera & R. Bixby, *A Characterization of Pareto Surfaces*, 41 PROC. AM. MATH. SOC'Y 261 (1973); E. Kalai & M. Smorodinsky, *Other Solutions to Nash's Bargaining Problem*, 43 ECONOMETRICA 513 (1975).

I'll begin, then, by first briefly characterizing the rough-hewn, composite mechanism-type that seems to be taken for granted as background condition by most normative legal and policy analysts. It amounts to a vaguely specified mélange of decentralized market allocation, partly centralized private law rights-vindication by courts, and more centralized ad hoc intervention by legislatures and regulatory authorities. I then briefly demonstrate a broad normative gulf running between this composite and most of the Part II-assessed theories that seem to assume it. Those theories, that is to say, are not equipped to underwrite specific prescriptions concerning what precise *shape* the composite should take.

Once I have shown this, I'll show that one normative vision discussed in Part II – the opportunity-egalitarian ideal – does recommend a particular, detailed configuration that the composite mechanism should take. Indeed, I maintain, this configuration seems even to constitute the institutional ideal toward which our more public good oriented legal, policy, and institutional designing is directed. The mechanism that's actually prescribed in detail by a Part II distributive ethic, that is, is an ideal toward which we appear to have been striving, with varying degrees of awareness, all along. I'll call it the ideal of an "efficient, democratically regulated, endowment-neutral market."

A. *Mechanisms, Laws, Governments*

First, then, the rough-hewn composite to which I've referred: Most who speak normatively in respect of distributive questions take the following for granted: First, that most of the material things that matter to people – the "resources" or "material opportunities" of II.B above – are distributed by various forms of private bequest and exchange. Second, that the latter presuppose antecedently defined private law rights

sounding in civil obligation – property, contract and tort – that are vindicable in courts. And third, that these rights are in turn subject to occasional amendment or alteration by centralized legislative action. Things seldom grow more fine-grained than this.[112]

What ever the reasons for or causes of this want of detail, the consequences of mechanism-nonspecification are vitiating. And not simply implementation-wise vitiating, but indeed theory-vitiating. For distributive-theory-building just is, in its actuating ambition, institution-designing. Without imagining in some detail what the "outward expression" of prescriptive theory would look like, one remains unclear about what actually is being prescribed. It is as though one were attempting to think without language. Thought itself is left lumpy, ill-formed, inchoate. The full content's not there.[113] We find this in all of the leading distributive-ethical theories currently on offer. What is missing in these theories comes to light most starkly precisely when we ask what it would be to instantiate them. We can see this quite readily by briefly considering the best known such theories – those considered above in Part II under the other distributive categories.

1. All Dressed Up and No Place to Go: Utilitarianism

Consider first utilitarianism – i.e., naïve welfare maximization. Collecting the information assembled in Part II, we know that a utilitarian polity will wish to aggregate its patient-distribuees' unweighted welfare outputs and maximize the resultant sum. It will, moreover, be willing to do so "by any means necessary." For the utility aggregate is

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[112] For example, not one of the sources cited supra, Part II describes or prescribes any distribution mechanism in more detail than just sketched.

[113] Similar concerns animate Joseph Carens's and Robert Goodin's interesting work on institutional design. See JOSEPH CARENS, EQUALITY, EFFICIENCY AND THE MARKET (1990); ROBERT GOODIN, THE THEORY OF INSTITUTIONAL DESIGN (1998).

the sole normative touchstone guiding utilitarian policy, both as a matter of personal and of political morality.

But now consider: First, in view of the difficulties noted in II.C to afflict direct welfare-measurement, it is indeterminate what means *would* suffice or be necessary. If you cannot know when utility is maximized, can you know what to do in order to maximize it? Notwithstanding that inconvenient question, the utilitarian will regard a high degree of centralized government action as warranted and probably even required. For he will consider such authority to be necessary both for the regular collection of utility data and for the regular redistribution of holdings in order to maintain a maximal aggregate utility reading. And he will take the utilitarian planner to be unconstrained by any rights held antecedently by citizens.[114] The latter are utility-factories, not autonomous rights-bearing agents.

What is one to make of so dystopian and incoherent a picture? A government stunningly empowered in principle, which for theoretical reasons nevertheless literally could not actually perform the function upon which that surprising degree of power is predicated: All dressed up and no place to go. In view of such difficulties as these, which are not merely implementary but foundational, utilitarianism looks to be a nonstarter where determinate distributive-ethical prescribing is concerned. Its non-instantiability does not point toward a "second best." Rather, the *reasons* for its non-implementability reveal a sense in which it is not even a merely accidentally non-

[114] This is not even the mention redistribution's effects on effort-expense, hence goods and services production, hence the size of the utility aggregate itself. In view of utility's functioning as a fetish, incidentally, the need of an extensive governmental apparatus should not be surprising. In effect, the utility aggregate is a contemporary analogue to the pyramids of Egypt and the ziggurats of Mesopotamia and Mesoamerica. Societies organized around such monistic and inhuman pursuits have historically been both theocratic and autocratic.

implementable "first best" – or even so much as a specified "good": It is prescriptively sterile or stillborn au fond, while its advocates' leaving the mechanism variable unvalued has served to conceal the fact.

2. More Tastefully Dressed, Still No Destination: Rawlsian Justice

Observations reminiscent of those made in connection with utilitarianism hold of Rawlsian justice theory as well. Rawls himself was refreshingly candid about this. He admitted that his concern was solely with what he called "the basic structure" of a just society. The problem, alas, is that the structure he seems to have had in mind is *so* basic that we don't know what Rawlsian principles have to say about matters as "basic" as a society's constitutional order itself, let alone subsequent legislation and private law doctrine.

Rawls left such matters for what he called "later stages" of polity-constituting, with which his work was said not to be immediately concerned. There seems to have been a rough expectation that there would be property rights and market exchange.[115] But Rawls claimed his principles would be realizable in socialist societies as well.[116] We are accordingly left to wonder how Rawls's principles might so much as even begin to be operationalized. This raises a worry that the principles as articulated impart no determinate prescriptive information. Note further that this is a worry that already arose earlier, in connection with the indeterminacy of "the worst off class" in Rawls's prescribed distribution formula.

As in the case of utilitarianism, then, so here we find the lack of attention paid questions of mechanism not simply leaving implementary and "second best" questions

[115] RAWLS, THEORY, supra note 43 at 52.
[116] Id. at 55.

unanswered: Rawls allows even the matter of "first bests" to remain undetectedly underspecified. We are left wondering whether there's any "here" here. The theory so underdetermines its own implementation that we don't know what to make of the theory itself – or, perhaps better put, what to make *with* it. How much is it actually telling us if it is equally realizable in any number of possible polities with radically divergent property, tort, contract, and other legal arrangements? Put differently, how do we recognize a Rawlsian society upon seeing one?

3. Locally Determinate, Globally Indeterminate Prescription: Normative "Law & Economics"

Apart from the opportunity-egalitarian mechanism I'll schematize below in III.B, the only serious mechanism-proposals one finds in the distribution-concerned legal and policy literatures is that done by normative economists of law.[117] Unlike utilitarians and Rawlsians, these analysts generally attend carefully to micro-institutional detail. Indeed their bailiwick is precisely the Kaldor-Hicksian wealth-aggregate effects wrought by alternative choices available at the simplest unit of institutional structure – the rule. Yet by what might at first blush seem a curious irony, this is precisely their undoing from a distribution mechanism point of view. In the end there is less irony here than at first might appear, however. For the problem stems ultimately from a gap between macro-objective and micro-detail akin to that I've just noted in Rawls.[118]

The foundational mechanism problem for mainstream economics of law is rooted in a fallacy of composition: Suppose that each of n rules $R_{a/1}$, $R_{a/2}$,… $R_{a/n}$ tends, within the confines of its particular domain *1*, *2*, …or n, to be wealth-maximizing in comparison

[117] That is, practitioners of normative "law and economics."

[118] Rawls ignored micro for macro, at macro's expense. Normative economics of law ignores macro, we'll see, at micro's expense.

to its envisaged competitors *b*, *c*, *d*, etc. in that domain.[119] It does not follow from this that the full vector of rules $R_{a/1} \ldots R_{a/n}$ will be wealth-maximizing as compared, say, to some other vector $R_{b/1} \ldots R_{b/n}$ that would come to the theorist's mind only were he to contemplate a fuller institutional backdrop. The latter is be a backdrop that simply is not on the agenda when all that is being asked is which of $R_{a/1}$, $R_{b/1}$, $\ldots R_{m/1}$ is wealth-maximizing in domain *1* considered in isolation. And this is what practitioners of normative economics of law do: They consider domains one at a time, without reference to other domains or to interactions between domains.

But realistically speaking, choices in nominally distinct domains *1* … *n* cannot reasonably be expected to be linearly independent, as any student of general equilibrium theory – or, for that matter, of the proverbial "seamless web of the law" – will recognize.[120] Rules within one domain will affect the distributive consequences wrought by rules in other domains. It will accordingly again be illicit to conclude from $R_{a/1}$'s dominating $R_{b/1}$ in domain *1* that the full vector $R_{a/1} \ldots R_{a/n}$ dominates $R_{b/1} \ldots R_{b/n}$, let alone any other available vectors $R_{m/n}$.

There is, then, a foundational gap in mainline economics of law between normative ideal – wealth-maximization – in macro, and mechanism-evaluative practice – rule-evaluation – in micro. The gap here, moreover, is inherently unbridgeable, not

[119] Think of a "particular domain" as, for example, the question of what kinds of damages ought be available for a particular tort, or what rules should constitute the "consideration" regime in contract, or what should be required of pleadings in suits brought in fraud, etc. I designate such domains here with numerals – 1, 2, 3, etc., on up to *n*. I am then designating alternative proposed rules within domains by lower case letters commencing with *a*. If 1 is the domain of contract remedies, then, and *a* is specific performance, *b* is liquidated damages, *c* is compensatory damages, etc. in that domain, then the rules to that effect are here designated *Ra/1*, *Rb/1*, etc. Shift to another domain 2 – e.g., remedies for battery – and lay out another menu of options *a*, *b*, *c*, etc., and there will be rules with names *Rb/1*, *Rb/2*, etc.

[120] Indeed normative "law and economics," like much of the Marshallian/Pigouvian (as distinguished from Walrasian) welfare economics from which it descends, is confined to partial equilibrium modes of analysis.

merely accidentally unbridged. There is, that is to say, a reason that normative economists of law consider domains in isolation rather than in aggregate, in such manner as leaves them speechless as to what the macro-social distribution of entitlements ought to be. The reason is that normative economics of law's guiding ideal – Kaldor-Hicksian "wealth-maximization" – is itself normatively indeterminate in macro.[121] One simply cannot prescribe an initial distribution of entitlements on the basis of that distribution's effect upon total "wealth."

Why? Because "wealth" as the name of a putative mechanism-maximizable maximandum cannot be so much as defined until *after* an assignment of legal entitlements has already been carried out. This is not an empirical accident; it is a conceptual, definitional truth. There is no concept of "wealth" that is understandable apart from an antecedent distribution of entitlements.[122] Hence there is no "wealth" aggregate to employ as a normative touchstone in deciding how best to distribute those entitlements.[123] That means that normative economics of law cannot prescribe a macro-distribution of legal entitlements.[124] It is, in the end, as prescriptively sterile as are utilitarianism and Rawlsianism.

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[121] The seminal articles from which the pseudo-normative concept of Kaldor-Hicksian "wealth" derives are Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); and John R. Hicks, *Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

[122] The matter is ably treated in Coleman, supra note 91.

[123] This is, in effect, normative economics of law's manifestation of welfare economics' "Scitovsky Paradox" – the possibility for two states of the world to be Kaldor-Hicks superior to one another. See Scitovsky, supra note 91 and associated text. Note that utility, were it measurable, would not be vulnerable on this score, even though it would be fetishist for reasons given supra, II.C.

[124] Posner, to his credit, accepted criticism to this effect early on. He then went on blithely to observe that the problem did not afflict what I am here calling the "micro" choice problem of selecting between possible rules within a single, more limited domain. But that is precisely what I am claiming here to *be* the problem for normative economics of law from a mechanism-prescriptive point of view. If the macro backdrop must be normatively evaluated but is literally unevaluable by one's normative theory, one's micro-critiques have not been made normatively intelligible. See the ensuing paragraphs.

This fact is masked solely by dint of normative economics of law's restricting its attentions to micro-distributions. Our attentions are deflected away from the macro-distribution, hence from the fact that normative economics of law is conceptually incapable of evaluating that distribution, hence in turn from the fact that normative economics of law cannot intelligibly evaluate micro-distributions either. Where macro-evaluation is impossible, micro-evaluations lack ultimate normative content. They are in consequence normatively uninteresting.

The reason is that they are conducted by reference to a normatively arbitrary aggregate – the special form of "wealth" invented by normative economics of law itself. That aggregate is normatively arbitrary because produced by normatively arbitrary means. It is produced by normatively arbitrary means because it is produced against a normatively arbitrary backdrop – i.e., on the basis of a normatively arbitrary antecedent distribution of entitlements which, again, normative economics of law simply lacks the conceptual resources to evaluate and make recommendations about. The "wealth" of normative economics of law is accordingly no more ethically interesting than, say, the aggregate of "forehead height" countenanced above in the Introduction.

Yet again, then, insufficient attention paid to the unseverable coupling of practical distribution mechanism to others of distribution's more "purely theoretical," grammar-opened variables results in a theory-vitiating blindspot. We fail to notice that certain would-be distributive prescriptions are not merely difficult to implement, but in fact misfire at the stage of prescription itself. We get nowhere – we don't even point anywhere – until we work *completely* to specify valuations of *all* of the variables opened by distributive infinitives at once.

B. *One Satisfactory Mechanism*

The previous subsection might seem to underwrite pessimism. One might fear, given the failings of normative distributional theories thus far even to come close to prescribing determinate distribution mechanisms, that the problem is simply intractable. But fear not. There is a mechanism that determinately realizes the best vector of values proffered in Part II to fill the distributive variables. Intriguingly, moreover, this fact does not seem to be mere happy accident: The "how"s of this mechanism's vindicating the best valuations illumine yet further the independent attractiveness of those valuations themselves. That's an attraction additional to the practical advantages offered by this mechanism's capacity to realize the best valuations. What is more, I shall indicate, our laws, policies, and institutions appear to be animated, at least inchoately, by a shared societal commitment to realizing precisely this mechanism.

1. One Fully Specifiable Mechanism: Real Opportunity-Spreading

Here, first in idealized form, is the mechanism that I have in mind: Begin by assuming, for heuristic purposes, a "complete" market. That is a forum in which all and only desired, voluntary trading occurs.[125] Assume that this trading is in, first, all goods and services that can practically be made available and that anyone values. These, then,

[125] Market "completeness" in this sense includes trading in contingent claims, more on which over the course of the next several paragraphs. I'll also argue that completeness in this sense is a function, in part, of what I shall presently label "neutrality," a fact which appears to go largely ignored. The classic sources on the role of contingent claims in completing markets are JOHN R. HICKS, VALUE AND CAPITAL (1940); Maurice Allais, *Généralisation des Théories de L'Equilibre Economique Général et du Rendement Social au Cas du Risque* 11 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 81(1953); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières par la Répartition la Meilleure des Risques*, 11 ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE 41 (1953); and GERARD DEBREU, THEORY OF VALUE (1954). Completeness is more precisely characterized by formal means. Its presence bears many ramifications, only some of which can be treated here. For fuller treatment, *see* Robert Hockett, *Just Insurance Through Global Macro-Hedging*, 25 U. PA. J. INT'L. ECON. L. 107 (2004). For state of the art plenary treatment, *see* MICHAEL MAGILL & MARTINE QUINZII, THEORY OF INCOMPLETE MARKETS I (1996).

would be in the terms of II.C above all things that are intelligible as normatively interesting distribuenda.[126] Assume that the trading is in, second, "Arrow securities." These are contingent claims to compensation upon the occurrence of such eventualities as distribuees might *dis*values. The compensation is payable by anyone willing to take the opposite sides of what amount to "bets" on the disvalued contingencies.[127]

Assume next that the market I describe also is "neutral." It is neutral first in this sense: Each participant enters it with an initial endowment of ethically exogenous assets – i.e., the "material opportunities" of II.C.2 – equal in value to that with which everyone else enters it. Call this form of neutrality *entry neutrality*.

The market I have in mind also is neutral in a second sense: Regulatory norms prevent such collusively, strategically, or expropriatively opportunistic behaviors as can yield a particular consequence: Namely, some participants' coming to possess greater or lesser holdings, or price-affecting effective demand powers, than are traceable solely to (a) the participants' ethically exogenous initial endowments, and (b) their ethically *en*dogenous – i.e., responsible – transaction histories. Call this form of neutrality *process neutrality*.[128]

This mechanism strait-forwardly instantiates a particular set of valuations of the distributive variables discussed above at II.A through II.D. It also, simultaneously,

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[126] Assume also, for obvious reasons, that valued "goods" and "services" do *not* include among them the nonconsensual expropriation of others' entitlements, which would violate the neutrality conditions I next describe. I'll also explain how to apportion and determine entitlements, hence what counts as expropriation.

[127] See sources cited supra, note 121, in particular Hockett. See also Robert Hockett, *Gaming as Micro-Insurance: How and Why to Regulate, not Eliminate, Online Gambling* (manuscript under review, on file with the author).

[128] Please set aside, just for the moment, the questions of means by which endowments would be measured and endowment-equalization effected. We'll get to those shortly.

sidesteps the three critical measurement concerns discussed at II.C, in a manner that no other mechanism so much as begins to attempt.

First those valuations of the distributive variables: Note first that the mechanism honors distribuees as boundedly responsible agents, as characterized above in II.B.1. Distribuees transact voluntarily pursuant to their own, autonomous relative valuations of material goods, ills, and contingencies that they prefer and disprefer. What they hold or enjoy at any given moment is, moreover, a function of those same autonomous valuational and transacting decisions.

Note next that the mechanism treats as distribuenda what ever non-neutrality-violative goods or services, including risk-bearing services, the agent-distribuees themselves value or disvalue. These goods and services are the resources or material opportunities countenanced above in II.C.2 and II.C.3. They are that from which, in conjunction with their choices, agent-distribuees' welfares derive.

Note finally that the mechanism, via the entry neutrality imposed upon it at the outset and the process neutrality retained throughout, equalizes what is ethically exogenous – that which is not traceable in the holding directly to a responsible choice. At the same time, it allows holdings over time to vary with ethically endogenous – i.e., responsible – transactional and other decisions. The distribution formula to which the mechanism gives expression, then, is the opportunity-egalitarian formula characterized above in II.D.3.

Now the measurement challenges: Note first that the mechanism sidesteps, in an ethically satisfactory way, the problem of cardinal welfare measurement discussed at II.C.1. It does so by enabling agent-distribuees, via their voluntary trading activity, to

maximize welfare in a manner consistent with two conceptually equivalent, normatively required conditions: First, ethically exogenous endowment equality among market participants, per the opportunity-egalitarian requirement characterized in II.D.3. And hence second, by way of corollary, an equally shared scarcity of the exogenously given resources from which agents "produce" their own welfare.[129] Note that the maximization of this, normatively intelligible form of welfare[130] is effectively "guaranteed" to occur: That is a straight-forward entailment of the "first fundamental theorem of welfare economics"[131]

Now note that, similarly, the mechanism unobjectionably sidesteps the problem of interpersonal welfare comparison discussed at II.C.1. So long as the material opportunity components of welfare-manufacture[132] are counted[133] among the exogenous endowments that must be equalized over participants, the following will hold true: What *ever* the absolute or comparative quanta of welfare enjoyed by distribuees, these will be the "highest" that they can be consistent with Part II.D.3's opportunity-egalitarian

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[129] In essence, we are describing an economy characterized by so-called "equal division Walrasian equilibria," or "EDWEs." The technical literature on the theory of EDWEs and fair allocation more generally is vast, though curiously ignored by economically oriented legal academics. A canonical sampling would include: T.E. Daniel, *A Revised Concept of Distributional Equity*, 11 J. ECON. THEORY 94 (1975); Duncan Foley, *Resource Allocation and the Public Sector,* YALE ECON. ESSAYS 7, at 45-98 (1967); E.A. Pazner & David Schmeidler, *Egalitarian-Equivalent Allocations: A New Concept of Economic Equity*, 92 Q.J. ECON. 1 (1978); Elisha Pazner & David Schmeidler, *A Difficulty in the Concept of Fairness*, 41 REV. OF ECON. STUD. 441, 441-43 (1974); H.R. Varian, *Equity, Envy and Efficiency*, 9 J. ECON. THEORY, 63, 63-91 (1974); H.R. Varian, *Two Problems in the Theory of Fairness*, 5 J. PUB. ECON. 249 (1976). The work from which these studies take departure is LEON WALRAS, ELEMENTS OF PURE ECONOMICS (William Jaffé trans., 1954) (1844). Walras appears to have anticipated, indeed even inchoately to have intended, precisely such developments as these. *See* WILLAM JAFFÉ'S ESSAYS ON WALRAS 17-52, 326-42 (Donald A. Walker ed., 1983).

[130] For reminder of the contrasting, normatively unintelligible form of welfare, see supra, Introduction and II.C.1.

[131] See, classically, Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, PROC. SECOND BERKELEY SYMP 507 (1951).

[132] Including physiological determinants.

[133] For example, in the form of drugs, prostheses, or contingent claims to those and other forms of compensation.

distribution formula and the consequently equally shouldered constraints posed by the exogenously given environment.

Finally, the mechanism "automatically" *commensurates* distribuenda, per the discussion of II.C.2, in the only way that ethically matters: That is via the implicit comparative valuations of autonomously transacting agent-distribuees.[134] We need not, that is to say, concern ourselves with how much of some good G_2 "would" or will compensate person P_1 for a deficit of good G_1, let alone seek to construct a "perfectionist" index of *all* such goods and ills.[135] Our distribuees themselves will, in effect, autonomously and with equal voice construct the only normatively *salient* index – in effect, a spontaneously emergent *price* index. And so long as entry and process neutrality are maintained, this latter amounts to the ethically relevant "*social*" valuation of goods and ills. That is a valuation in the construction of which each participant has exercised, by dint of neutrality itself, an equal "vote."[136]

2. Instantiability-Challenges & Ordered "*N*th Bests"

The opportunity-egalitarian market mechanism, then, insofar as it can be instantiated, simultaneously assists in realizing what looks to be the most plausible vector of Part II distributive values, while meeting or neutralizing each of the principal measurement challenges. The ways in which it does so, moreover, serve to reinforce the independent normative-theoretic attractiveness of the indicated Part II values themselves

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[134] *See* Hockett & Risse, supra note 97.

[135] *Id.* The claim that the need to index commits one to perfectionism – the proposition that some goods are inherently more worthy of collective pursuit than others – figures into a prominent criticism of Rawlsian primary goods leveled by Arneson. *See* Richard Arneson, *Primary Goods Reconsidered*, 24 *NOÛS* 429 (1990). The criticism is addressed in Hockett & Risse, *id.*

[136] Again, provided that there exist market completeness and neutrality in the senses explicated above. Trading here is voting, and voting rights are equally spread in the only sense that ethically matters – equal bargaining power involving the apposite form of equality, viz., equality of ethically exogenous endowments.

– distributors and distribuees as boundedly responsible agents, distribuenda as material opportunities, and distribution formula as opportunity-egalitarian.

Three obstacles, however, might seem to stand in the way of the mechanism's realization. Dispatching them will be necessary if we are to be confident that opportunity-egalitarianism is any more practicable, or even prescriptively determinate, than its competitors addressed in III.A. The process of addressing the challenges, however, ends up affording affirmative advantages as well. For in addressing them we come to notice a number of other things.

Among the things worthy of notice are the following: First, that the mechanism actually amounts to a normative refinement and completion of the mechanism unsatisfactorily and incompletely specified by mainline economics of law. Second, that the mechanism is progressively instantiable over time, in a manner that ordinally replicates a normative scale from "*n*th best" to "first best." Third, that our laws, policies, and institutions appear to be actuated by the implicitly shared goal of ascending that scale.[137] And finally fourth, that there are means by which to ascend further – hence by which more fully to realize the mechanism – that we are not yet employing.

I'll specify, then address, each of the challenges in serial order. I'll note the just-mentioned "fringe benefits" that addressing them produces as they are implicated.

The first challenge arises in connection with market-neutrality, in particular with entry neutrality: If we are to equalize holdings of the material opportunity endowments with which agent-distribuees enter the market, we must presumably commensurate those endowments. But how are we to do that *prior* to the operation of the equal-endowment

[137] Hence we'll see reason to displace even "positive" economics of law with a more convincing picture.

grounded market mechanism, when it is that mechanism itself that affords the ethically satisfactory method of commensuration? Is there not a pragmatic indeterminacy here ultimately just as vitiating as the foundational indeterminacies found in III.A to afflict utilitarianism, Rawlsian justice theory and normative economics of law?

The answer is no. To show why not we proceed in three steps: First we demarcate certain classes of material opportunity endowment that are unambiguously ethically exogenous in the holding; call these "core endowments." Second we indicate means by which holdings of those can be readily equalized. Finally third, we show that any forward movement in these directions is unambiguous movement toward the ethically optimal distribution. The upshot is that the ideal mechanism is straightforwardly approached in continuous upward-sloped fashion. (Note that this means we'll corroborate the second and fourth noteworthy facts mentioned a moment ago.)

First, then, core endowments: At least four classes of endowment are uncontroversially ethically exogenous in the holding: First, the genetic determinants and obstacles, so far as we are able to determine them at any given time, of and to successful welfare-pursuit: Many handicaps are obvious and incontestably undeserved; many talents are likewise incontestably unearned. With the advance of empirical science we grow ever more able to sort out, at least probabilistically, what is predisposed and what is not. Second, childhood healthcare and education: Children do not earn or deserve greater or lesser access to such assets, particularly when very young. Their degrees of responsibility gradually grow as they move toward adulthood. Third, inherited nonhuman capital, i.e. money-valued wealth: Like other forms of inheritance this one is

morally arbitrary. Moreover, it does not grow less so with time and maturation. Finally fourth, opportunity to shed or share unforeseeable risk through trade or collective risk-pooling action. This is best seen as non-confiscatory compensation for deficits in other resources or material opportunity.[138]

Now note that core endowments of these types not only are manageable in number, but with the advance of empirical science also are growing more readily quantifiable, directly allocable, and indeed allocable equitably. They are also in little if any need of commensuration inter se. If we distinguish between beneficial and burdensome endowments, moreover, we see that this is particularly so of the beneficial ones: early education, healthcare, and inherited non-human capital. The burdensome endowments are somewhat more difficult, since they disproportionately include physiologic resources. But they too are far from unmanageable.

The hardest of the latter is genetically poor health or handicap. Some such deficiencies can be valued by reference to current prices affixed to their mitigation – prostheses, medicines, etc. There seems no harm in beginning to address such deficits with compensation equal to the going rates. Other such deficits are not so readily mitigated. There the best that we can do is to estimate the compensation afforded by insurance policies that typically are, or perhaps "would," be purchased against such contingencies were they available.[139]

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[138] Some seek to include the presence of counter-traders in the opportunity set here. See, e.g., COLIN M. MACCLEOD, LIBERALISM, JUSTICE, AND MARKETS: A CRITIQUE OF LIBERAL EQUALITY (1998); Markovits, supra note 81. I think this position mistaken – in effect, a retreat from the position from which one treats distribuees as responsible agents – by dint of its treating co-citizens and their responsible tastes as resources. So I count only infrastructure.

[139] *See* Hockett, *Whose Ownership,* supra note 101 at 217-37; DWORKIN, *supra* note 115 at 307-50. Real, rather than "hypothetical" such insurance is proposed in Hockett, *Global Macro-Hedging, supra* note 121; *and* in Alexander Tabarrok, *Trumping the Genetic Tarot Card*, 9 CONTINGENCIES 20 (1997). *See also* J.H. Cochrane, *Time-Consistent Health Insurance*, 103 J. POL. ECON. 445 (1995).

Clearly there is some guesswork here, but it need not be whistling in the dark. With the growth of empirical knowledge we grow better at estimating with greater reliability. We do what we can to repair the ship at sea, if I may borrow Neurath's old simile. The more such repairing we do, the better able the mechanism grows to improve itself. I'll show this below in connection with "*n*th bests," thus completing the challenge to neutrality's attainability. First I'll address the second challenge to mechanism instantiability, however. For my subsequent treatment of "*n*th bests" completes the addressing of that one as well.

The second challenge to mechanism-instantiability concerns completeness as the first concerns neutrality. It runs thus: Is it reasonable to require that "all and only desired trading" occur? Is that possible, and should we even wish it? Wouldn't we have to abandon our market-inalienability norms and "commodify" everything?[140] And if we don't do that, can the opportunity-egalitarian market mechanism that I have described discharge the tasks I've assigned it?

This challenge is more easily addressed than that directed to neutrality. First divide it into its desirability and feasibility halves. Then dispatch the first of these first: To begin with, consider the core opportunity endowments again: All of these are subject, in principle, to unobjectionable market-valuability already. We've already "commodified" what most needs commodifying here.

Next consider what *else* might be traded – in the earlier idiom, "all that enters into responsible agent-distribuees' welfare-pursuit." It is easy enough simply to bracket out

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[140] The classic contemporary objection to "commodification" is Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). See also MICHAEL SANDEL, PUBLIC PHILOSOPHY (2005). Contemporary protests of commodification revive concerns raised repeatedly in the past. Two classic Victorian-era objections are THOMAS CARLYLE, PAST AND PRESENT (Robert Thorne ed., 1890); *and* JOHN RUSKIN, UNTO THIS LAST AND OTHER WRITINGS 155-228 (Clive Wilmer ed., 1985).

of market transactions such things as we might adjudge shouldn't be commodified – babies, blood, or human organs, for example – and still approximate to distributing goods and services as best as we thereby permit ourselves to do. For again, as I'll show, there are "second" clear down to "*n*th bests" that are ordered equivalently to ordered degrees of neutrality and completeness.[141]

That's the desirability side of the "completeness" challenge. The feasibility side comes in the transaction- and information-cost barriers to market-completion in the technical sense. It goes like this: Is it reasonable to suppose that all parcelings of ownable and tradable goods, and that payment-claims defined in terms of all specifiable contingencies, might be made tradable? Can we really "complete" markets in the sense you require?[142] Here the problem, the guise of which is more technical than the alienability guise, can be handled in three ways.

The first way is to note that it is by now a well established theorem of general equilibrium- and stochastic calculus-rooted financial theory that complete markets can be simulated through a comparatively small number of hedging strategies.[143] Moreover, many more contingent claims markets are providable than currently provided. And the

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[141] The baby allusion is of course to Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), one of the bugbears that prompted Radin, *id.* The blood and human organ allusion is of course to Titmuss. See, classically, RICHARD TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1970).

[142] Thank you to Henry Hansmann for first pressing me on this score.

[143] *See* Robert C. Merton, *Lifetime Portfolio Selection Under Uncertainty: The Continuous-Time Case*, 51 REV. ECON. & STAT. 247 (1969); Robert C. Merton, *Optimum Consumption and Portfolio Rules in a Continuous-Time Model*, 3 J. ECON. THEORY 373 (1971); Robert C. Merton, *Continuous-Time Portfolio Theory and the Pricing of Contingent Claims*, Working Paper No. 881-76, A.P. Sloan School of Management, MIT (1976).

number of such claims that can be made tradable is growing almost by the day. I exploit those facts elsewhere.[144] So we can do a lot more completing than thus far we've done.

The second and third ways of addressing the completeness challenge are more immediately satisfying. Note for one thing that greater entry-neutrality itself yields greater completeness. Here is why: First, completeness rides in part upon all desired trading's being available. Second, more trades per unit of wealth occur at lower levels along personal wealth curves. Third, entry neutrality accordingly opens market doors to larger numbers of participants who enter at the low end. Hence greater entry neutrality results in more trade.

Note for another thing that the completeness-feasibility problem has no more than an illusory "bite" here. For as my answer to the third, final challenge will show, more complete and more neutral always means more consistent with an opportunity-egalitarian allocation: There is an ordered set of "*n*th bests" that is ordinally equivalent to the set of "more" complete and "more" neutral markets. Let me, then, turn to the third challenge.

The third challenge is this: Suppose you cannot achieve full completeness and neutrality of the sort that characterizes the ideal mechanism. In such case, might you not in seeking merely more completeness and neutrality than you presently have, ironically end up farther from your ideal end-state? Hasn't Hart, for example, proved that the move from less to more complete markets short of full completeness can incur Pareto-losses?[145]

The suggestion, then, is that ascending degrees of completeness and neutrality might not be ordinally equivalent to a scale of *n*th bests. The suggestion happens to be

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[144] See Hockett, *Global Macro-Hedging, supra* note 121; Hockett, *Gaming as Micro-Insurance*, supra note 121. Also Hockett, *What Kinds of Stock-Ownership Plans Should There Be? Of ESOPs, Other SOPs, and "Ownership Societies*," 92 CORNELL L. REV. 1 (2007).

[145] *See* Oliver D. Hart, *On the Optimality of Equilibrium When the Market Structure is Incomplete*, 11 J. ECON. THEORY 418 (1975).

false. I'll explain why intuitively, reserving technical treatment to the formal Appendix. The intuitive reply is that the suggestion turns crucially on a normatively uninteresting conception of efficiency. Indeed it turns on a conception of efficiency that we have already found, in effect, to be ethically noncognizable above at II.D.1 and III.A.3.

"Efficiency," in the everyday sense of the word, connotes the maximization of output given a stipulated input, or the minimization of input given a stipulated output. It means roughly "more" or "the same," respectively, for "the same" or for "less." The more technical understandings of "efficiency" familiar to welfare economists and normative economists of law amount to variations on that theme:

Pareto-efficient distributions of goods or ills to persons are best understood, intuitively, as distributions the quasi-aggregated preference-satisfactions deriving from which cannot be raised without lowering the individual preference of at least one person. That is the sense in which it amounts to a form of "efficiency," the one sense in which it can warrant the use of that word. Pareto efficiency is the maximization of aggregate preference-satisfaction as constrained by a polity-conferred "veto." The veto in this case is that wielded by any distribuee – including a thief, per the discussion in II.C.1 – who stands to suffer a satisfaction loss in consequence of some departure from a given distribution.

Kaldor-Hicks efficiency is yet closer to the workaday understanding of "efficiency." The reason is that it is unapologetically aggregative rather than quasi-aggregative: Distributions are efficient in the Kaldor-Hicks sense if there is no departure from them that would render some parties' aggregated gains greater than other parties' aggregated losses. The guiding intuition, then, again is that the scalar welfare output of a

given wealth-distributive input vector is, given the individual welfare functions (input vector components) that we have to work with, the "highest" it can be.[146]

But now consider what this means. It means that Pareto and Kaldor-Hicks efficiency alike are forms of "naïve maximization," in the parlance of Part II.D.1. They are in consequence normatively inert. Their maximanda – distributive-ethically unfiltered preference satisfaction in the one case, opportunity-indifferent "wealth" in the other, per II.C.1 and II.C.2 above – are ethically irrelevant magnitudes. They are no better than forehead height, to recur to an example discussed in the Introduction.

Efficiency on either the Paretian or the Kaldor-Hicksian, then, is devoid of normative interest. The only form of welfare that matters is what we called in Part II.D "equal-opportunity-grounded welfare." The only form of efficiency that matters, accordingly, is that form which maximizes this form of welfare. And the maximization of this form of welfare, as we saw in II.D.3, "takes care of itself" as we work to equalize the distribuendum that is material opportunity over the distribuees who are boundedly responsible agents.[147] The upshot is that the third challenge facing the opportunity-egalitarian market mechanism evaporates.[148]

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[146] One "produces" welfare, in the Pareto and the Kaldor-Hicks senses, by distribution operations. Those are the *variable* inputs, so to speak, while persons' utility functions are the fixed inputs.

[147] Recall that the opportunity-egalitarian distribution formula laid out at II.D.3 requires not only that ethically exogenous holdings of that from which ethically endogenous wealth and welfare are derived – material opportunity, "*Ri*" – be equalized: It also requires that ethically *endogenous* such holdings – "*Ei*" – be left to *vary* with the responsible choices that produce them.

[148] The third challenge should not be confused with another possible challenge – that some means of affording more completeness or neutrality in one sphere of activity might lessen the degree of completeness or neutrality in another. To what extent such interactions occur is an empirical question, not one of "high theory." I'll address it below in connection with the matter of comparative institutional competencies.

3. The Role of Law

I mentioned at page 83 that among the advantages offered by reflecting upon how to instantiate that distribution mechanism which gives best expression to the most plausible distributive ethic is this: We notice in doing so that the laws, policies, and institutions typically encountered in the advanced political-economies seems intended in large part to foster and buttress some such mechanism as that I have just sketched and defended.[149] If this is so, then thinking along the lines of III.B.1 and III.B.2 just above offers further advantages.

First, it will enable us better to interpret our own legal tradition, and thus to extend the tradition in a manner more in keeping with its own animating ideals. Second and relatedly, it will position us well to improve the laws, policies, and institutions that we have, with a view to rendering the resultant mechanism both more complete and more neutral, hence more fully in keeping with its own opportunity-egalitarian ideal. And third, by way of theoretic side-benefit, it will enable us better to see what mainline economics of law has got right and got wrong, hence better to fashion that discipline itself in a manner that leaves it less prescriptively mute than it is presently. Let me, then, at least preliminarily bear out the interpretive claim.

Much familiar private law doctrine seems to be transparently opportunity-egalitarian and responsibility-vindicating in character. In connection with the latter, consider the centrality of the concept of "diligence" across property, contract, and tort, for example. Likewise adverse possession in property, mitigation of damages in contract,

[149] We might say, then, that early normative economics of law was positively incorrect in a manner precisely analogous to that in which it was normatively incorrect.

and comparative negligence in tort. Even the presumption in favor of contractual freedom seems rooted in respect for autonomy – i.e., responsible agency.

As for opportunity-equality, consider the treatment of bargaining power and capacity in contract and testament. In remedies, concern for "making the plaintiff whole" per the compensatory damages regime looks straight-forwardly actuated by considerations of corrective justice: It is a matter of equalizing present circumstances to a status quo ante. And the many doctrines of equity jurisprudence that pervade our law are of course transparently exogenous circumstance equalizing and responsibility vindicating in nature, as both the term "equity" and the doctrines' Thomist-Aristotelian roots would have led one to anticipate.

Turning from private to public law, the best interpretation of most market-regulatory norms in advanced political-economies is as attempts to afford something like greater neutrality and completeness of the sorts I've assayed just above. Laws prohibiting invidious discrimination on the basis of racial, gender, and other ineluctable or morally arbitrary traits, for example, look to be straightforward cases of process-neutrality-promotion. Public education and sundry forms of government-facilitated social insurance for their parts are aimed at promoting entry-neutrality. They work to equalize ethically exogenous material opportunity endowments – the "R_i" of Part II.D.3. Such neutrality-boosting measures, moreover, for reasons noted earlier tend to enhance market completeness as well.

There are other completeness-enhancing measures that advanced political economies have taken steadily over the past decades and even centuries. The trend in respect of "commodification," for example, seems by and large to have been to permit,

and indeed in many cases even to foster, the trading of more and more goods and services, including contingent claims. Witness the government-fostering of secondary debt "securitization" markets in the US since the 1930s, for example, as well as its funding much research that's lead to the design of derivative securities.[150]

The trend in re "commodification" also has been to "unbundle" more and more once-conjoined items into separately traded items. Conspicuous cases of such market-fostering include government regulatory and start-up support for active markets in securities, derivatives, and more recently pollution rights trading, for example. Conspicuous cases of *mandated* unbundling – which incidentally show again the linkage between neutrality and completeness – include antitrust action against large telecommunications concerns in the 1980s and software manufacturers in the 1990s.

The fact that such measures can often be argued to enhance aggregate social welfare, wealth or consumer surplus should not surprise us. Nor should it be taken for unalloyed indication that legislatures or common law judges do, let alone ought, to craft law, doctrine or policy with a view to such goals. All the less should it be taken for encouragement to conceive "improvements" we think likely more fully to effect aims of that sort. For we have seen now that opportunity-indifferent aggregate-maximizing is normatively empty. *And* we have seen that equal-opportunity-grounded maximizing nevertheless overlaps in part, short of full coextension, with other forms of maximizing.[151]

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[150] See, e.g., Hockett, sources cited supra, note 153. See also Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means*, 79 SO. CAL. L. REV. 1 (2006).

[151] Recall that EDWEs, for example, happen also to be Pareto-efficient, as observed above in note 134 and accompanying text.

That fact itself explains how "positive" economists of law in the past were able to suppose common law judges subconsciously actuated by Kaldor-Hicksian wealth-maximizing aims. We would effectively fine-tune mainline economics of law, then, by interpreting our legal arrangements as being aimed at edging us closer to the responsible agency, equal opportunity ideal, and framing our own efforts at improvement in keeping with the same.

If I am correct in what I suggest here, then a substantial new research agenda is opened for what might be called an "ethically intelligible economics of law." Some actual or proposed rules thought wealth-maximizing in ethically inert ways, for example, will prove suboptimal by lights of the opportunity-egalitarian ideal. Responsive amendments to such rules might accordingly carry us further along in the direction of realizing the ideal mechanism I have schematized. Parallel remarks of course hold of our efforts to interpret and extend the rules that we have, as well as to formulate, legislate, and administratively implement the best new policies and programs we can.

4. Comparative Legal & Institutional Competencies

I should, in closing this discussion of distribution mechanisms, perhaps say a few words about what I am *not* claiming. Certainly I do not mean to suggest that courts should attempt to make general determinations of litigants' overall material opportunity allotments in deciding cases. Even less do I mean to imply that they should allow such determinations to enter into decisions as to who should prevail in litigated cases, as if courts were engines of non-case-specific compensation or distribution more generally. Nor do I even intend here to recommend that legislators or policy-makers as a general rule amalgamate spheres of human activity in their thinking so as to prescribe, say, that

citizens who fare unjustifiably poorly in one sphere of activity be held to different standards in other spheres of activity, in order that they may be "compensated overall."

My gut intuition, which I take to be widely shared,[152] runs in the other direction. It is that the integrity and longterm stability of institutions operating in the many different "spheres" of activity that jointly constitute a pluralist society require we *not* typically determine individuals' outcomes in one sphere by reference to their outcomes in other spheres.[153] Hence my intuition is that full opportunity-equality among citizens requires our working severally – but simultaneously – toward opportunity-equality sphere by sphere. Severally, for the sake of institutional integrity sphere by sphere. But simultaneously, because the opportunity-egalitarian ideal is best realized in each when well realized in all.[154] But this is, alas, not the place either to commit to or argue for these provisional judgments. More is required to think-through the question effectively than space permits here.

My claim here is accordingly more modest. It is simply that, where rules or programs or policies are crafted or drafted, the crafting and drafting ought to be done with equal regard for citizens conceived as boundedly responsible agents. It is also that doing this in turn requires that judges, legislatures, and administrative agencies view their role in this way: First, they are to *equalize* such benefits and burdens as both (a) they are themselves institutionally authorized to be effectively bestowing, and (b) are *ethically exogenous* in the holding by the citizens in regard to whom they are acting. And at the

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[152] Indeed I take the intuition to be broadly Toquevillean, and perhaps in that sense particularly "American."

[153] Others who seem to think so include, e.g., JON ELSTER, LOCAL JUSTICE (1993); ALISTAIR MCINTYRE, AFTER VIRTUE (1979); DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE (1999); MICHAEL WALZER, SPHERES OF JUSTICE (1983); H. PEYTON YOUNG, EQUITY IN THEORY AND PRACTICE (1996).

[154] For reasons discussed in III.A.3, in connection with the non-independence of domains.

same time second, they are to dispense in proportion to differential *responsibility* such ethically *endogenous* benefits and burdens as they are institutionally authorized to be effectively bestowing. One entailment of this latter claim, in light of the foregoing subsections, is that legal doctrine and legislative policy ought generally be elaborated with a view to broadening the reach and improving the operation of the distribution mechanism I've schematized.

These observations bear some possible implications for a thus far inconclusive discussion on institutional roles taking place in the legal-economic literature. One strand of this discussion has it that courts are better suited to maximizing aggregate wealth in the incremental crafting of legal doctrine, while distributional concerns are more efficiently (more deadweight-loss-avoidingly) handled through tax policy.[155] I must defer fuller discussion of such matters to another venue. Two comments, however, can be offered in light of the foregoing discussion.

First, in light of what has emerged over the previous pages, the "efficiency" appealed to in these debates just will not be of normative interest if decoupled from the responsible agency, equal material opportunity ideal. Second, assigning distributional tasks on the one hand, naïve maximizing tasks on the other to separate institutional spheres raises considerable and possibly inescapable risk. One is that the normatively intelligible maximandum itself cannot be identified *apart* from the equal material opportunity backdrop against which normatively relevant maximizing activity on the part

[155] For recent discussion of this long-contested claim, see, e.g., Chris W. Sanchirico, *Taxes versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEG. STUD. 797 (2000); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEG. STUD. 821(2000). Fuller consideration would require discussion of the sizeable optimal taxation literature, in particular the contributions of Hammond, Mirrlees, and Vickrey. Regrettably I must pass this over in silence for now.

of responsible agents takes place. Another is that the institutional decoupling of welfare or income reward from discrete transactional settings tends to undermine the continued practice of responsible agency itself.

A practical corollary implied by the more fine-grained nature of the mechanism we have seen best to instantiate the responsible agency, equal opportunity ideal, we might say, is a principle of subsidiarity: Rewards to responsible agency should follow as proximately to particular exercises of such agency as possible. The want of precisely this form of proximity, recall, is one of the flaws that we found to vitiate veiled-choice distribution scenarios, including Vickrey's, Harsanyi's, and Rawls's. And its tying minute-by-minute distributive changes as closely as possible to the voluntary transactions that immediately produce them is itself part of what recommends the more micro-detailed distribution mechanism that has been this Part's principal preoccupation.

CONCLUSION

We have covered much ground here. As we have seen, though, there is much ground to clear, and perhaps that fact itself affords warrant for coverage. Notwithstanding what we have done here, it is clear that much more has to be done. Indeed, if I'm right in what I have been arguing, there is more to be done than we have hitherto realized. For it seems we have been on the wrong track now for years, where the normative theory of law's links to economy is concerned. We have been fixated upon end-states that are not only in the end unmeasurable, but are normatively uninteresting even as aims. And all the while we should have been looking toward ethically salient opportunity "inputs" whose right distribution allows rightful "outputs" to take care of

themselves. Just as our deep opportunity-egalitarian commitments have been found here, upon distributive structure-sensitive analysis, to counsel.

If collective action affects distributions of benefits and burdens to our fellow citizens, we cannot *help* but think-through the *ethics* of distribution: We *must* "take distribution seriously." And if we find, on analysis, that distributive ethics call out for the growing and spreading of material opportunity, we must think-through how that can be done. Consider the breathtaking sweep of the research agenda that opens.

What are the real determinants of real, equal-opportunity-grounded well-being – the real material opportunities? What means can we develop for more accurately limning the boundary between ethically exogenous and ethically endogenous such opportunities? How might we best design means of spreading the former, so that the latter – the sole ethically intelligible maximand – might be maximized? What institutions are better at what in that project, and how much functional specialization of the sort rendering institutions less visibly part of just wholes can endure? All of these questions and others press upon us urgently, the moment we see that we can't really dodge them.

For far too long now – just over a century, in fact – Paretian complacency and its bedfellow, Kaldor-Hicksian wealth fetishism, have worked as a mere ball and chain. They've conferred vetoes upon beneficiaries of morally arbitrary distributions, for literally no normatively cognizable reason what ever. Now that we see they are not only unnecessary, but in fact incompatible with prescription itself, it is high time we tossed them.[156]

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[156] See Hockett, *Why Paretians Can't Prescribe: Preferences, Principles and Imperatives in Law and Economics* (working paper, 2007); also Hockett, *Prescriptive Paretian*, note 1.

Think of how liberating that will be. It will be freeing of us and our fellows in our roles as citizens, whose lives and life prospects together will vastly improve. It will be freeing of scholarship too – of work that can now be both practically useful and theoretically sound, not to say edifying. Think also of what this will mean both for law and for economics: Both will be reconciled again to their origins, in ethics. Both will again be what once they were admitted to be – moral sciences.[157] Both will be *healthy* again. For they will be home.

[157] Ethics and economics were of course once united under the Cambridge "Moral Sciences Tripos." See, e.g,. ROBERT SKIDELSKY, JOHN MAYNARD KEYNES (1983). And of course Adam Smith, seemingly the patron saint of Chicago, lectured and wrote not only on political economy, but upon ethics and jurisprudence as well.