

# How Should Egalitarians Cope with Market Risks?

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*Individuals in capitalist societies are increasingly exposed to market risks. Luck egalitarian theories, which advocate neutralizing the influence of luck on distribution, fail to cope with this problem, because they focus on the wrong kinds of distributive constraints. Rules of distributive justice can specify (1) acceptable procedures for allocating goods, (2) the range of acceptable variations in distributive outcomes, or (3) which individuals should have which goods, according to individual characteristics such as desert or need. Desert-catering luck egalitarians offer rules of the third type. Their theories fail because considerations of market efficiency, freedom, and dignity undermine the claims of desert to inform standards of justice for society as a whole. Responsibility-catering luck egalitarians offer rules of the first type. Their theories fail because such rules don't constrain the downside risks of market choices. To solve this problem, we need rules of the second type, which allow market forces, and hence luck, to influence distributive outcomes, but only within an acceptable egalitarian range. The ideal of equality in social relations helps us devise acceptable constraints at the top, bottom, and middle of the income range.*

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## I. EGALITARIANISM, LUCK, AND THE PROBLEM OF MARKET RISKS

Individuals in advanced capitalist societies — OECD members, plus a few others including Israel and Argentina — are increasingly exposed to market risks. Cuts in unemployment insurance, privatization of state pension schemes, the decline of defined-benefit private pension plans, tightening of bankruptcy laws, and other developments have shifted market risks from collective agents — the state and large corporations — to individuals. In the U.S., this trend of increasing exposure to market risks is highlighted by the dramatic upturn in personal bankruptcy filings and increased income volatility in the middle class.<sup>1</sup> Even social democracies such as Sweden have cut back on welfare state benefits by privatizing pensions.

Egalitarians have reason to worry about this trend. In capitalist societies, single lucky or unlucky blows often place individuals in situations of *accumulating* advantage or disadvantage. Job loss can lead to loss of health and life insurance, depletion of savings, and accumulation of crushing debts, exposing the individual and her family to further risks such as bankruptcy and home loss. A lucky break — a fortunate connection with someone in a position to open doors of opportunity — can put one on a path to steadily accumulating advantages. Insofar as excessive exposure to risk is an engine of cumulative advantage and disadvantage, moderating such exposure instrumentally advances egalitarian aims.

I shall explore three general theories of how egalitarians might deal with market risks. Each is responsive to a different complaint that might be made against luck-sensitive distributions. The first theory, *desert-catering luck egalitarianism* (DCLE), contrasts luck with desert. It claims to advance equality by neutralizing inequalities that are not deserved, while allowing inequalities that track differential merit. On this view, unlucky distributions are unjust because they are undeserved. The second theory, *responsibility-catering luck egalitarianism* (RCLE), contrasts luck with responsibility. It claims to advance equality by equalizing assets for which we are not responsible, but holds individuals responsible for outcomes that are the product of their market choices. On this view, unlucky distributions are unjust because they are the outcome of causes not connected to conduct for which the individual is responsible. The third theory, *democratic equality*, contrasts luck with security. On this view, unlucky distributions are unjust

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<sup>1</sup> JACOB S. HACKER, *THE GREAT RISK SHIFT* (2006); Elizabeth Warren, *The Growing Threat to Middle-Class Families*, 69 *BROOK. L. REV.* 401 (2003).

insofar as they disrupt egalitarian levels of security to which individuals are entitled because they need them to stand in relations of equality with others. I shall argue against the two versions of luck egalitarianism and defend a democratic egalitarian approach to market risks.

My argument evaluates three kinds of constraints that a system of justice might impose on market processes and outcomes. (1) *Purely procedural constraints* specify particular processes as just or unjust, independent of the outcomes they produce. For example, they may permit employers free choice among prospective employees, within the constraint of laws forbidding discrimination by race, gender, and the like. (2) *Range-constraining principles* limit the range of outcomes permitted by a particular process or system of principles of justice, without assigning particular individuals to better or worse outcomes within the range. For example, minimum wage laws set a lower limit to wage rates, without specifying which persons or occupations should be paid the lowest rate. (3) *Individually allocating principles* allocate different benefits and burdens to particular people, according to their individual characteristics. In general, any principle of the form "from each according to his x" or "to each according to his y" is of this type. All *desert-catering* and *need-catering* principles of justice are of this type.

This distinction among types of constraint maps on to Rawls's distinction between pure and imperfect procedural justice.<sup>2</sup> In a system of pure procedural justice, the justice of outcomes is not definable apart from the procedures that produce them. Judgments of justice attach fundamentally to rules or procedures; outcomes are just in virtue of the justice of the process that produces them. Games exemplify a system of pure procedural justice. As long as the rules of a game are fair, any outcome that results from everyone's following the rules is fair. A system of pure procedural justice might include only purely procedural rules, as in libertarian systems of *laissez faire* capitalism. Alternatively, it could contain both purely procedural rules and range-constraining rules, as in Rawls's theory of justice. In a system of imperfect procedural justice, just outcomes for individuals are definable independently of the processes that are supposed to produce them, and in relation to variations in individual characteristics such as personal merit or need. Institutional procedures are then designed to achieve these independently defined just outcomes. The paradigm of imperfect procedural justice is the jury trial, the procedures of which are just if they reliably convict

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2 JOHN RAWLS, A THEORY OF JUSTICE 74-77 (rev. ed. 1999).

the guilty and acquit the innocent.<sup>3</sup> Systems of imperfect procedural justice contain individually allocating rules.

My evaluation of the three egalitarian approaches to the problem of market risks turns on the fact that each focuses on a different type of constraint on market outcomes. DCLE is a system of imperfect procedural justice with individually allocating rules. I shall argue that this system is incompatible with the realization of efficiency and other virtues of market orderings, which require a system of pure procedural justice. The efficiency of markets essentially depends on their ability to convey price signals that disrupt the expectations of even the most deserving individuals. Undeserved luck is therefore an ineradicable element of efficient market prices. Moreover, fitting overall patterns of distribution to claims of desert is unjust, because it tramples on just claims to freedom, privacy, dignity, and security against official moralizing judgments.

RCLE is a system of pure procedural justice that contains only purely procedural rules for markets. It suggests that we need not worry about inequalities due to market choices, since people are responsible for these choices. However, considerations of responsibility cannot justify exposing people to excessive market risks or the cumulative disadvantages that attend them. Hence, this theory fails to offer an acceptable solution to the problem of market risks.

What we need is a theory of distributive justice for income and wealth that preserves the virtues of markets while imposing egalitarian constraints on market outcomes. We need a theory of pure procedural justice that contains range-constraining rules. I advance democratic equality as a promising theory for identifying these constraints. Democratic equality allows market exchanges to determine outcomes, subject to egalitarian constraints. Egalitarian social insurance sets people's security levels so as to realize a society of equals. Equality refers fundamentally to the social relations in which we stand, and only derivatively to distributive outcomes. It is compatible with market orderings and their virtues because it is realizable *through* a system of property entitlements, and hence can be realized by respecting these entitlements, without "interference" in competitive markets.<sup>4</sup>

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3 Other interests may justify rules for criminal trials that result in deviations from this standard of justice. For example, our interest in constraining arbitrary state power may justify the exclusionary rule for illegally seized evidence, even though this reduces the probability of the guilty being convicted.

4 Time and space constraints prevent me from replying in any detail to the contribution by Richard Epstein in this volume. Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES L. 309 (2008). I would, however, like to point to two large-scale disagreements between Epstein

## II. LUCK EGALITARIANISM, RESPONSIBILITY, AND DESERT: SOME PRELIMINARY DISTINCTIONS

Luck egalitarianism claims that the aim of equality is to neutralize the impact of luck on distributive outcomes.<sup>5</sup> "Neutralization" is taken to require equal distribution, and "luck" is defined negatively to include all factors for which individuals are not responsible. Thus, luck egalitarians agree that justice requires equal distribution of whatever good is the currency of justice, except to the extent that individuals are responsible for the ways in which their condition deviates from equality. However, this formula masks an important

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and egalitarians today, who, as Daniel Markovits has also noted, seek to reconcile egalitarianism with widespread reliance on private property and market mechanisms. The first has to do with Epstein's characterization of egalitarian programs as wedded to government "intervention" in an already defined system of markets and a supposedly pre-political "initial distribution of property rights in persons and things." From an egalitarian point of view, property rights are artificial, *all the way down*. A primary role of the state in a market egalitarian system is to *define* a system of artificial property rights that realizes the freedom and equality — which is to say, the personal independence — of each individual in it, to the extent possible. What Epstein disparagingly calls "tax and transfer" programs, such as social security and universal health insurance, and "interference" with the market, such as minimum wages, are construed, from the point of view of what Rawls has called a "property-owning democracy," as simply another form of artificial property right, added to others, such as patents, copyrights, and rights to the broadcast spectrum, that are obviously artificial. For more on these points, see Elizabeth Anderson, *Ethical Assumptions of Economic Theory: Some Lessons from the History of Credit and Bankruptcy*, 7 *ETHICAL THEORY & MORAL PRAC.* 347 (2004) and my blog posts on political economy, Postings of Elizabeth Anderson to Left2Right, <http://www-personal.umich.edu/~7Eeandersn/blogpoliticeconomy.html>. The second major disagreement between Epstein and egalitarians concerns the role of charity in a system for the satisfaction of individual needs. Epstein regards a system of poor relief that relies on private charity as benign. In practice, however, widespread reliance on private charity leads not to a system of free individuals, but to large-scale patron-client relations closer in spirit to Latin American latifundia, which are structured so as to lock the poor into permanent relations of personal dependence on the rich. Personal dependence of adults on specific others who may withhold their charity at will leads to relations of personal subjection, which are, like feudalism, incompatible with a free society. That is why property rights should be defined so as to avoid any adult's need to rely on the arbitrary good will of others, and why individuals enjoy greater freedom under an impersonal egalitarian system of property rights than under a libertarian or classical liberal system.

<sup>5</sup> Gerald A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 908, 932 (1989).

distinction between "attributive" and "prudential" responsibility. A person is attributively responsible for her conduct if it is a basis for appraising the person as having acted in a praiseworthy, blameworthy, or neutral way. A person is prudentially responsible if she exercises the virtues involved in acting responsibly: prudence, foresight, perseverance, effort, and conscientiousness in carrying out some project.

Different branches of luck egalitarianism tie these different notions of responsibility to a third notion, "substantive responsibility."<sup>6</sup> Substantive responsibility figures in accounts of the social division of labor, whereby we assign responsibility for performing certain tasks or securing certain outcomes to agents. Such assignments are made in a strong sense whenever we attach penalties to failures to secure the outcomes for which people are assigned responsibility. They are made in a weak sense whenever we deny standing to the people who are assigned responsibility for *x* to complain when they fail to secure *x*, or demand that others provide *x* to them. Then we say "This is your responsibility, not ours." Any theory of distributive justice entails assignments of weak substantive responsibility, making some issues a matter of collective responsibility, in which we share our fates, and others a matter of individual responsibility, with respect to which each individual is on her own.

*Responsibility-catering luck egalitarianism* links *attribution responsibility* to substantive responsibility through the following principle for justifying deviations from equality:

**Responsibility-Catering Inequality (RCI):** If A is attributively responsible for conduct *x*, then she is substantively responsible for the distributive consequences of *x* to herself.

Such theories hold that people who are attributively responsible for *x* are not entitled to complain about its distributive consequences if they go sour, and that they are entitled to keep for themselves its good distributive consequences. They also hold that A is attributively responsible for *x* if A voluntarily chose *x*.<sup>7</sup>

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6 See THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 248-49 (1998) (distinguishing attributive responsibility from substantive responsibility) and SUSAN L. HURLEY, JUSTICE, LUCK, AND KNOWLEDGE 191-95 (2003) (distinguishing attributive responsibility from prudential responsibility). My distinction between RCLE and DCLE owes much to Hurley. See also Mathias Risse & Michael Blake, Two Models of Equality and Responsibility (Aug. 23, 2006) (unpublished manuscript), available at <http://ksghome.harvard.edu/~mrisse/Papers/Papers%20-%20Philosophy/Two%20Models%20III.pdf> (distinguishing Rawls's treatment of responsibility from that of luck egalitarianism).

7 Leading advocates of RCLE include Ronald Dworkin, *What is Equality? Part 2:*

*Desert-catering luck egalitarianism* links *prudential responsibility* to substantive responsibility through the following principle for justifying deviations from equality:

**Desert-Catering Inequality (DCI):** If A and B are equally attributively responsible for conduct x, but A exercises more prudential responsibility than B, then A deserves higher rewards than B for her x-regarding conduct (or greater compensation/assistance from others, if the consequences of x are bad for her).

Desert-catering luck egalitarians also hold that if A and B are equally attributively and prudentially responsible for x, then they deserve equal rewards (or compensation/assistance for bad outcomes).<sup>8</sup>

Responsibility-catering and desert-catering luck egalitarians use different conceptions of attributive responsibility. Responsibility-catering theorists treat attributive responsibility as a bivalent concept: either a person is responsible for some conduct, or she isn't. Desert-catering theorists observe that we are not attributively responsible for many of the factors that influence our ability to be prudentially responsible. Some people, due to disadvantages in genes, temperament, upbringing, and environment over which they have no choice or control, find it difficult and painful to imagine various options, evaluate risks, foresee outcomes, choose wisely and carry out decisions with determination and effort, while resisting temptation. Others, due to good fortune, find these executive virtues easy and pleasant to exercise. To correct for these brute-luck inequalities, desert-catering theorists allow attributive responsibility to vary by degrees. For example, they would find a mentally disabled teenager to be less attributively responsible for shoplifting than a teenager of normal intelligence. They normalize assessments of prudential responsibility — deservingness — with reference to background differences in people's attributive responsibility.

RCLE and DCLE disagree about the legitimacy of market-generated

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*Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) and ERIC RAKOWSKI, EQUAL JUSTICE (1991).

<sup>8</sup> Leading advocates of DCLE include Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339 (2000) and JOHN E. ROEMER, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, in *EGALITARIAN PERSPECTIVES*. 179 (1994). Although Arneson calls his view "responsibility-catering prioritarianism," it counts as desert-catering because it licenses inequalities that track differential *prudential* responsibility, holding degrees of attribution responsibility constant. While it upholds a prioritarian rather than an egalitarian baseline against which deviations must be justified, this does not disqualify it from the luck egalitarian family. Arneson, *supra*, at 341.

inequalities and the type of distributive rule that applies to them. Suppose inequalities in assets among individuals for which they are not attributively responsible have been eliminated. If market choices are voluntary, RCI then entails that the unequal distributive outcomes of unregulated markets are just. RCLE squares this result with the general luck egalitarian aim of neutralizing inequalities due to luck by distinguishing "brute luck" from "option luck."<sup>9</sup> Brute luck encompasses factors affecting the individual that are not causally influenced by conduct for which the individual is attributively responsible. These include genetic endowments and the environment in which one was born and raised. All luck egalitarians agree that brute luck inequalities ought to be neutralized. Option luck encompasses outcomes to which an individual is exposed in virtue of choices for which she is attributively responsible. RCLE holds that inequalities due to differential option luck raise no cause for complaint, because RCI assigns substantive responsibility to the individual for bearing the costs and benefits of option luck. Because RCI accepts as just whatever distributions follow from voluntary choices according to fair market procedures, RCLE's rules for evaluating market orderings are purely procedural (once brute luck inequalities in assets are neutralized).

DCLE denies that the brute luck/option luck distinction can bear the weight of justifying the drastic inequalities and risks generated by markets. Consider the case of Steve and Sarah, who have equal capacities for prudent conduct and act with equal prudential responsibility. Each pursues the same risky market opportunity. Suppose Steve's option luck is good and Sarah's is bad. For example, each independently creates the same invention and mails a patent application at the same time. Due to quirks in the mail Steve's application reaches the patent office first. Steve makes a fortune from his patent, while Sarah loses her investment. RCLE accepts this outcome. DCLE rejects it: since Steve and Sarah are equally attributively responsible for their choices, and equally deserving, they deserve equal rewards. Since desert sets a standard of distributive justice that is independent of market procedures, DCLE is committed to a theory of imperfect procedural justice that calls for correction of market outcomes in accordance with an individually allocating distributive rule.

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<sup>9</sup> Dworkin, *supra* note 7, at 293-94.



### III. THE INCOMPATIBILITY OF DESERT-CATERING WITH THE MARKET AND ITS VIRTUES

DCLE, like most egalitarian theories today, accepts the market as an indispensable economic institution. However, any desert-catering system needs to correct market outcomes so as to neutralize the effects of undeserved factors. These include the facts that certain talents are in high demand, that few others have these talents, that their distribution is partly due to unchosen genetic endowments and advantages of upbringing, and the innumerable chance factors that figure in option luck. For each market decision, some determination would have to be made of how much its outcome can be credited to the efforts that might reasonably be expected of individuals, and how much was due to undeserved factors. Individuals' losses due to undeserved factors would be compensated for from the pool of gains that others obtained from their undeserved factors.

Can a market system survive such desert-based corrections to its distributive consequences? Friedrich Hayek famously argued that it could not. He observed that the efficient allocation of resources requires the use of vast information that is *essentially* dispersed among millions of individuals. Each of us knows mainly our own preferences and opportunities. Efforts to centrally collect this information about everyone are doomed to fail, because preferences and opportunities are constantly changing in response to new information. Free markets are the only institution capable of utilizing this information, by encapsulating it in price signals.<sup>10</sup>

Hayek's critical point is that for prices to function as efficient signals, they must respond to many factors that, from any individual's point of view, are unforeseen, unforeseeable, and uncontrollable, and are thus matters of sheer luck. *Efficient market prices are necessarily undeserved.*<sup>11</sup> The point could be put in terms of factors internal and external to the self. The aspiration of desert-based theories of justice is to reward people according to merits for which they can take personal credit. Rewards should be made on the basis of factors internal to the self. But the great virtue of markets is that they prompt individuals to respond to the demands and interests of others. These factors are external to the self: they can't be controlled or even fully anticipated by those expected to respond to them. Individuals can't know how to redirect

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10 Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

11 FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 93 (1960).

their efforts without receiving price signals that are sensitive to these external factors. To ensure that individuals respond to the demands and interests of others, they must face prices that are sensitive to such external information, even when these diverge from the most internally meritorious attempts to anticipate and meet others' interests.

Hayek's argument establishes that efficient allocations cannot be secured by interfering with market prices so as to make them track individual deserts. Could we let free markets do their signaling work, and then use extra-market mechanisms, such as taxes and subsidies, to adjust individuals' rewards to their inner merits? Any such scheme would be face insuperable epistemological obstacles. Hayek's epistemic argument for markets entails that it is impossible for anyone to know where to draw the line between desert and luck. Judgments of desert must be made relative to what individuals knew, or could have been reasonably expected to find out. But if any individual or organization could know what everyone else knew, then the problem of efficient allocation could be solved directly by central planning, without resort to markets. The same ignorance that makes markets necessary makes judgments of what individuals should have done, given what they knew, impossible.

It is even doubtful whether there is a metaphysically determinate truth for such judgments to track. Outcomes are the joint product of inner merit and external factors. Market choices are risky, strategic choices, the outcomes of which depend on the choices of other participants and on how well they anticipate the strategic choices of others. The choices that any individual makes in such market games are at best educated guesses. There is no determinate point at which the calculated guess turns into the merely lucky guess, no way to divide the gains from an instance of good option luck into the component that can be credited to factors reasonably expected to be controlled or anticipated by the individual, and the component that can be credited to mere luck.

John Roemer avoids the epistemological and metaphysical objections to responsibility judgments by arguing that they are pragmatic constructions, not attempts to track an underlying metaphysical truth about responsibility.<sup>12</sup> He suggests that we divide people into socioeconomic types, setting a different standard of reasonably expected conduct for each, based on political judgments of which sorts of external pressures and disadvantages we expect them to encounter and resist, and which we to some degree excuse them from succumbing to.

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<sup>12</sup> ROEMER, *supra* note 8.

Any such scheme of compensation would undermine market efficiency by creating perverse incentives. Instead of orienting people to serve other's interests, as expressed in the prices that signal market demand, it would orient people to do what the state merit board judges to be meritorious. But "we do not wish people to earn a maximum of merit but to achieve a maximum of usefulness at a minimum of pain and sacrifice and therefore a minimum of merit."<sup>13</sup> Being deserving is not an end in itself. Orienting compensation to inner merit organizes incentives that induce people to make this their end. They know they will be compensated for inequalities they suffer so long as they follow the state merit board's judgments. They will not be compensated if, in acting on their own judgment, they deviate from the state merit board's expectations.

Hayek anticipated and replied to Roemer's idea:

It is often contended that it is unjust to let the burden of such unforeseeable changes fall on people who could not foresee them, and that, if such risks are unavoidable, they ought to be pooled and the losses equally born by all. It can, however, hardly be known whether any particular change was unforeseeable for all. The whole system rests on providing inducements for all to use their skill to find out particular circumstances in order to anticipate impending changes as accurately as possible. This incentive would be removed if each decision did not carry the risk of loss, or if an authority had to decide whether a particular error in anticipation was excusable or not.<sup>14</sup>

The great virtue of markets is that, in giving people the freedom to use their partial, situated knowledge according to their own judgments and tastes for risk, in response to market signals, they are able to effectively utilize essentially widely dispersed knowledge for the advancement of others' interests. We share an interest in letting people act on their own judgments of how to use their knowledge and what risks to take. We do *not* share an interest in having individuals make market choices according to social judgments of the most prudent choice that can be reasonably expected of them. This could only reflect the partial knowledge of some administrative board.

Any attempt to set standards of deserving conduct for different individuals or groups would have additional undesirable effects. It would attract

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<sup>13</sup> HAYEK, *supra* note 11, at 96.

<sup>14</sup> 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 125 (1976).

moralizing busybodies to whatever agency was empowered to set such standards. It would invite stigmatizing judgments of the prudential capacities of others, giving official imprimatur to prejudicial group stereotypes. It would induce various groups to debase themselves by representing themselves as less capable of sound judgment and hard work than others, so that they need only meet diminished standards of conduct to gain entitlement to equal pay. It would focus claimants' energies and attentions on reducing standards of responsible conduct for themselves, as the easier path to monetary gain than seeking to produce things and perform services that others find useful.

A system of reward according to inner desert would also undermine liberty.<sup>15</sup> Judgments of personal responsibility are necessary when people break the rules (in criminal law and civil suits). But they should not play a normal role in determining overall patterns of distribution. The state should not look over our shoulders at each of our choices, judging how responsibly we have used our liberties. This kind of intrusive monitoring and official moralizing judgment of individual conduct is incompatible with a free society.<sup>16</sup> People should not have to go on trial simply to claim their fair share. These considerations are compelling reasons to construct a conception of fair shares that avoids judgments of inner desert.

#### IV. THE INJUSTICE OF ADJUSTING DISTRIBUTIONS TO INNER DESERT

One might argue that I have not undermined a desert-catering principle of justice, but merely argued that non-justice-based goods of efficiency, freedom, privacy, non-stigmatization, and so forth override considerations of desert. Alternatively, one could allow that these goods are included in the fundamental principle of justice, and override desert. This would not impugn the claim that justice is also desert-catering.

Thus, Richard Arneson concedes that reward according to inner merit poses insuperable epistemic obstacles, and that actual attempts to implement

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<sup>15</sup> HAYEK, *supra* note 11, at 95-97.

<sup>16</sup> DCLE must choose between invading privacy and reinforcing group stigma. Roemer's group-based standards of desert avoid invading individual privacy at the cost of making stigmatizing judgments about racial, ethnic, gender, and religious groups. Arneson's version of DCLE, which assesses responsibility at the individual level, would reduce group stigmatization at the cost of privacy.

such schemes would be disastrous.<sup>17</sup> Nevertheless, he insists that the correct standard of justice is desert-catering. The critics of desert-catering theories of justice, he claims, confuse the ultimate standard of justice with the policies that implement it. The standard may be applied to evaluate the justice of the world, even if there is nothing we can or ought to do to realize this standard. Slavery is unjust, even if it is impossible or impractical to eliminate.<sup>18</sup> Similarly, worlds that fail to reward according to desert are unjust, even if implementing such reward is impossible or impractical.

Arneson's point follows from casting the theory of justice in consequentialist mode. One first identifies a state of affairs *S* as morally best, and then defines the right act or policy as whatever best realizes *S*. *Obligatory* acts, or acts required by justice, are those whose enforcement by the state or by social sanction would best realize *S*. If intentionally pursuing *S* would prevent *S* from happening, then we should not aim at *S*, but perhaps pursue indirect policies that incidentally get us closer to *S*.

By retreating from practical principles to a disembodied consequentialist standard of assessment, Arneson's view of justice loses its grip on the distinctive features of claims of justice. Claims of justice involve not merely claims about what is good, or even about what one has most reason to do. They involve what others may *demand* that we do. They are *essentially second-person* — that is, essentially embodied in interpersonal transactions such as complaints, claims on others' actions, and holding others to account.<sup>19</sup> They are claims made by *A* (or *A*'s representative) on *B*, that *B* give *A*'s interests due regard, by performing some act *Y*<sup>20</sup> or making some state *Z* obtain. In making such claims, *A* deems *B* substantively responsible for *Y* or *Z*.

Claims of substantive responsibility go hand-in-hand with claims of authority and capacity. If *B* lacks the authority or power to do *Y* or realize *Z*, it would be absurd and unjust to hold *B* substantively responsible for *Y* or *Z*.<sup>21</sup> Hence, *because claims of justice are essentially addressed to agents*,

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17 Arneson, *supra* note 8, and Richard J. Arneson, *Egalitarian Justice Versus the Right to Privacy?*, 17 SOC. PHIL. & POL'Y 91 (2000).

18 Richard J. Arneson, *Luck and Equality*, 75 PROC. ARISTOTELIAN SOC'Y (SUPP.) 73 (2001). Gerald A. Cohen, *Facts and Principles*, 31 PHIL. & PUB. AFF. 211, 244 (2003) advances the same objection.

19 STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* (2006) provides the definitive account of the second-person status of judgments of justice and moral rightness.

20 The act in question may be simply deliberative or procedural — for instance, to weigh *A*'s interests in deciding what to do.

21 The notion of substantive responsibility in this claim is the stronger sense that

as claims on them to act, they presuppose the existence of some agent able and authorized to make things right. Or, if the agent is an institution such as a state that has not yet been established, claims of justice presuppose the substantive responsibility, authority, and capacity of persons or groups to establish such an agency.

Claims of capacity are therefore prior to claims of justice. If no individual or collective agency is able to realize some state of affairs, then no individual or collective agency is substantively responsible for the failure of the world to contain that state. And if no one is substantively responsible then a world containing that state is not unjust, because no injustice has been done by anyone, either by act or omission.<sup>22</sup> Such a world may be sad, unsatisfactory, or deplorable. But it is not unjust. No human agency has the power to realize a pattern of distribution that caters to inner desert, since the knowledge needed to realize such a pattern cannot be gathered by any such agency.<sup>23</sup> Hence, no one is responsible for the failure of the world to realize a desert-catering pattern of distribution, and this failure is not an injustice.

Claims of authority also have a special priority in any theory of justice, since assignments of substantive responsibility entail claims to authority. We must therefore ask whether we can justly authorize the state to realize a desert-catering distributive pattern. Do individuals' claims to be rewarded in accordance with their inner deserts entitle them to authorize the state to promote an overall pattern of distribution that satisfies these interests?

I think not. As I have already argued, we share an overwhelming common interest in efficiency and claims of justice to freedom, privacy, and dignity,

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could justify complaints against B for failure, not the weaker sense in which B has no complaints against anyone else for failure. Assignments of weak substantive responsibility for an outcome do not presuppose that the responsible parties have the power to achieve it. Each adult in a free society is weakly responsible for choosing a suitable spouse, in that they have no one to blame but themselves if they choose poorly. Yet they may not have the power to choose well.

22 Hayek argues that if no agent is *attributively* responsible for some distributive outcome, then the outcome is not unjust. HAYEK, *supra* note 14, at 67-70. Hence, since aggregate market outcomes are not intended or chosen by anyone, the concept of justice is not applicable to market distributions. Hayek errs. The relevant concept of responsibility here is substantive, not attributive. If the state were able to satisfy some valid claim of distributive justice that the unregulated market fails to meet, then, although no agent is attributively responsible for market distributions, the state may still coherently be held substantively responsible for correcting it.

23 This epistemic objection applies better to Arneson's individualized "inner worth" conception of desert than to Roemer's group-stereotype conception of desert, which is pragmatic rather than metaphysical. My objection from authority applies to both Arneson's and Roemer's versions of desert-catering.

which give us conclusive reasons to *deny* the state the authority to direct people to follow any collectively determined standard of deserving conduct, or to officially judge people according to such standards. Were the state to assert such authority, individuals would be entitled to complain that the state was acting unjustly.

These considerations undermine desert-catering claims, by showing that they are not entitled to public standing in a system of distributive justice. They are not even subordinate components of a publicly acceptable theory of distributive justice for the basic structure of society. This follows from the fact that it would be unjust to authorize any agent to satisfy claims of desert at the level of the basic structure. Claims of justice must be capable of being embodied in complaints that can be addressed to an agent authorized to satisfy them. If there is no agent authorized to satisfy a type of claim, and individuals may justly demand that no such agent be authorized, then there is no one to whom the claim can be addressed, and the claim has no standing as a demand of justice.

One might object that my argument proves too much. Isn't reward according to desert already implemented in different schemes of merit pay? This seems unobjectionable, even desirable.<sup>24</sup> Yet such desert-catering schemes differ from DCLE in two significant ways. First, the kind of merit rewarded by merit pay is not inner desert, but external success, which depends partly on factors external to the individual. Success-based notions of desert carry far fewer privacy, dignitary, and efficiency costs, since they don't try to probe people's inner thoughts, stigmatize them by judging their efforts against lowered expectations, or interfere with the incentives that orient people to serving others' interests. Second, these desert-catering schemes apply only at the enterprise level, not that of the basic structure. This reduces their costs to freedom, since different enterprises are free to implement various merit-based conceptions, none of which are imposed as a matter of law. Moreover, since enterprise-level desert-catering schemes do not correct for inter-enterprise differences in luck, they do not suffer from efficiency objections to implementing desert-catering at the level of the basic structure.

My detachment of the theory of distributive justice from claims of desert clashes with the conviction that the legitimacy of distributive arrangements depends on people believing that everyone gets what they deserve. I prefer to base the case for their legitimacy on the ground that they secure everyone's

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<sup>24</sup> HAYEK, *supra* note 11, at 99, allows that desert-catering principles may be implemented at the enterprise level. His argument, like mine, is directed against desert-catering principles for the basic structure of society.

entitlements to the material conditions of their freedom and equality on a basis of reciprocity, with everyone interacting with one another on terms all can accept. To the extent that people also want recognition of their deserts, this interest is best satisfied at the enterprise level. This would not fulfill any society-wide comparative conceptions of desert, whereby one person could rightly say to anyone who is less well off, "I am richer than you because I am more meritorious."

How could egalitarians want a society in which the better off could legitimately say this to the less well-off? Egalitarians should prefer that those who have more be humble about it rather than have grounds to gloat. It is far better to remind the better off that, while they may be entitled under the law to a greater share, this is no ground for them to think that they are superior to others. The social solidarity needed to support egalitarian distributions is better secured by the better off being convinced that their fortune is *merely* good fortune — that they could easily have landed in the position of the worst off — than by their thinking that they deserve every penny they have, and that those who have less are inferior.

### V. RESPONSIBILITY-CATERING LUCK EGALITARIANISM

The above arguments undermine DCLE by undermining the case for individually allocating constraints based on desert.<sup>25</sup> They do not undermine responsibility-catering luck egalitarianism. This is a theory of pure procedural justice in which unconstrained market processes determine just outcomes, once initial inequalities in resources due to brute luck have been neutralized. The core of RCLE is RCI: the principle that individuals should be held substantively responsible for bearing the costs of choices for which they are attributively responsible. RCI is problematic from an egalitarian point of view because it disables criticism of social arrangements that assign to individuals the risk of weighty costs to their choices, even when those choices are socially necessary — even when there is a shared interest in

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<sup>25</sup> Individually allocating constraints based on need are indispensable to an egalitarian society. However, the scope of directly need-based allocations is mainly confined to publicly provided or subsidized in-kind goods, such as education, health care, disaster relief, and the public transportation/communication infrastructure. Other needs can be largely provided through the market. To ensure that everyone's market-provided needs are met, a range-constraining rule providing an income floor should be sufficient.



having people make those choices.<sup>26</sup> At least two sorts of cases concern us: choices to engage in uncompensated dependent care, and risky occupational choices. Egalitarians worry that assigning the risk of weighty costs to those performing socially necessary work effectively constitutes these people as social inferiors. RCI allocates all of the costs of childrearing to parents, even though the task of raising the next generation is necessary from everyone's point of view. Given the gendered division of domestic labor, the costs of dependent care fall overwhelmingly on women who, given work arrangements that refuse to accommodate their dependent care responsibilities, are seriously disadvantaged in the job market. These unaccommodating work arrangements are objectionable from an egalitarian perspective. They reinforce a gendered hierarchy at home and work, trap women into caste-like positions in the division of labor, and produce institutions that tend to be insensitive to the interests of dependent caregivers because of their scarcity in decision-making positions in these institutions. Dependent caregivers would have better opportunities, and be better able to stand in relations of equality with others in all domains of society, if work were structured to accommodate them (for example, by requiring paid parental leave), and the costs of dependent caregiving were more widely shared.<sup>27</sup>

RCI also allocates all of the costs of risky occupations, living in risky locations, and risky investments to those who choose them, even though everyone has an interest in people making such choices. Private markets fail to cover numerous risks — for example, disability insurance for those who work at dangerous occupations, disaster relief for those who live in areas prone to hurricanes and other natural disasters, insurance against failures of banks and private pension funds — at prices consistent with avoiding poverty. We share an interest in people choosing to mine or farm, to work in areas prone to storms and earthquakes, to deposit their money in banks and provide for retirement in pensions. That is why social insurance and other forms of state-managed risk-pooling, such as federal emergency relief and pension insurance, have long been central planks of the egalitarian platform. Yet RCI advocates such as Rakowski reject disaster relief for those who choose to live in regions predictably prone to floods and hurricanes,

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26 Elizabeth S. Anderson, *What is the Point of Equality?*, 109 *ETHICS* 287, 296-97, 322-23, 287-337 (1999).

27 Seana V. Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *REASON AND VALUE* 270 (Jay Wallace et al. eds., 2004) objects to RCI's refusal to accommodate certain choices on grounds of liberty more than equality.

state-mandated disability insurance for workers in risky occupations, and similar programs.<sup>28</sup>

What could justify placing such great weight on RCI? The appeal of "You are responsible for making this choice, so you are responsible for the results" rests on an equivocation between attributive responsibility and substantive responsibility. Only slightly better is Dworkin's application of a lottery ticket analogy to market gambles.<sup>29</sup> It is fair to hold individuals substantively responsible for the outcomes of their decisions to gamble on the lottery. But the lottery analogy is inapt. Lottery gambling is gratuitous from a social point of view, avoidable by everyone, and offers a built-in floor on losses: you can't lose more than price of the ticket. None of these things are true of life in an unregulated market economy.

RCI would seem to be supported by three rationales. First, Dworkin suggests that preserving opportunities for people to pursue diverse conceptions of the good with respect to risks requires that individuals bear the costs and be entitled to claim the benefits of their choices.<sup>30</sup> If people were fully insured against bad option luck, then risk lovers would have no opportunities to pursue their conception of the good. However, this objection applies only to full social insurance. No one advocates this. Even egalitarian Sweden offers substantial opportunities for entrepreneurs to accumulate vast fortunes, consistent with generous social insurance and entitlement programs.<sup>31</sup> By contrast, RCI rules out the option to pursue conceptions of the good that allow people to avoid staking everything in market gambles.

Second, RCI might be justified by incentive considerations. Forcing people to internalize the costs of their risky choices is a way to ensure that they behave prudently. This idea cannot justify opportunity sets that put even the most prudent at risk of disastrous losses, however. It has little force against most forms of social insurance, which are only marginally subject to moral hazard. Moreover, it is often better for all if institutions are required to internalize the costs of market risks. When employers rather than workers must shoulder the costs of workplace accidents, employers

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28 RAKOWSKI, *supra* note 7, at 73-90.

29 Dworkin, *supra* note 7, at 294.

30 *Id.* at 295.

31 Despite its notoriously steep tax rates, Sweden boasts 5 of the richest 525 people in the world. Forbes.com, The World's Richest People (Aug. 23, 2006), [http://www.forbes.com/lists/2006/10/Residence\\_14.html](http://www.forbes.com/lists/2006/10/Residence_14.html). One can progress very far in an egalitarian distributive program without significantly threatening the freedom to pursue risk-loving, fortune-seeking conceptions of the good.

have an incentive to engineer their operations with due regard for the health and safety of employees.

Third, RCI seems to be backed by the thought that it is unfair to burden others with the costs of one's choices. Yet this sense of unfairness is misplaced. When everyone shares an interest in some people making risky choices — when, in effect, society has commissioned them to be farmers, miners, mothers, and so forth — it is unfair to disavow any share in the costs associated with commissioning people to take up these roles. To do so is effectively to discard people after using them. Everyone also shares an interest in being insured against exposure to excessive market risks.

The great weight that RCI places on option luck is not supported even from the general perspective of luck egalitarianism. While people may be attributively responsible for their choices, they cannot be attributively responsible for the luck they have consequent on their choices. Why, then, should they always be held substantively responsible for such luck?<sup>32</sup> Moreover, when certain risks are practically unavoidable, they are not really matters of option luck. Indeed, once we recognize that "practically unavoidable" must mean "reasonably unavoidable," we must conclude that there is no sharp distinction between option luck and brute luck: how practically avoidable a risk is depends on the cost of insuring against it, which is a matter of degree, and depends on the content of the outcomes in one's opportunity set.<sup>33</sup> Most importantly, egalitarians should not rest content with merely equalizing opportunities *ex ante*, while remaining indifferent to the drastic inequalities generated by unregulated markets *ex post*. Some outcomes are so bad that they are objectionable even if they are the consequence of voluntary choice.<sup>34</sup>

RCI is not able to evaluate the justice of the range of outcomes that people face in the economy or the severity of the risks they should bear. "The costs" of any particular choice are not natural, but in part a product of social arrangements that could be altered. These social arrangements stand in need of justification. The fact that one has voluntarily chosen an option that carries a particular risk or burden cannot by itself justify social arrangements that impose these risks or burdens on that choice, when they are avoidable. The virtues of a market system cannot be preserved without exposing people to *some* market risks. But preserving these virtues does

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32 Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 ETHICS 548 (2001).

33 Marc Fleurbaey, *Egalitarian Opportunities*, 20 LAW & PHIL. 499, 517-20 (2001).

34 Marc Fleurbaey, *Equal Opportunity or Equal Social Outcome?*, 11 ECON. & PHIL. 25, 40-41 (1995); Lippert-Rasmussen, *supra* note 32, at 557-62.

not require that people bear whatever costs unregulated markets impose on them.

It is astonishing that those who claim to be *egalitarians* are so stinting in offering protection against the downside risks of unregulated markets.<sup>35</sup> Friedrich Hayek provides an instructive contrast to RCLE:

There is no reason why . . . security [of a given minimum of sustenance] should not be guaranteed to all without endangering general freedom . . . . [T]here can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody . . . . Nor is there any reason why the state should not assist the individuals in providing for those common hazards of life against which . . . few individuals can make adequate provision . . . as in the case of sickness and accident . . . . [T]he case for the state's helping to organize a comprehensive system of social insurance is very strong . . . .<sup>36</sup>

## VI. A SOFTENED RESPONSIBILITY-CATERING LUCK EGALITARIANISM

Luck egalitarians can reduce but not eliminate the force of some of my objections by softening their doctrine. For example, advocates of RCLE could supplement their theory with a humanitarian principle like Hayek's that limits the losses that people may suffer due to their market choices.<sup>37</sup> However, while the humanitarian principle directs us only to relieve suffering, RCI also threatens social equality. Well before people's material condition falls to the point of absolute suffering, bad market luck may subject individuals to subordinating or exploitative relationships, or impair their ability to participate as an equal in public affairs. An adequate floor considerably higher than that dictated by the humanitarian principle is needed to remedy these problems. It should be possible to derive this floor from egalitarian principles themselves, rather than supply it by exogenous

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<sup>35</sup> Marc Fleurbaey, *Equality of Resources Revisited*, 113 *ETHICS* 82, 83 (2002) observes that luck egalitarians including Dworkin, Roemer, Cohen, and Arneson (in his earlier equality of opportunity theory, which he has since recanted) allow choice to legitimize catastrophic outcomes for individuals.

<sup>36</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 120-21 (1944). *See also* HAYEK, *supra* note 11, at 259; HAYEK, *supra* note 14, at 55.

<sup>37</sup> As Daniel Markovits proposes in this issue. Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 *THEORETICAL INQUIRIES L.* 271 (2008).

considerations. But luck egalitarians have no way to derive a sufficientarian floor from their thin distributive conception of equality, or from the underlying principles of luck egalitarianism.<sup>38</sup>

The force of my objection against burdening certain choices with excessive costs can also be weakened by relaxing RCI so as to permit accommodation of significant choices that people need to make to express or develop their "moral personalities."<sup>39</sup> Surely the decision to become a mother, or enter a risky occupation, would count as such a significant choice. But again, insofar as this rationale for relaxing RCI is based on non-egalitarian considerations of the value of human agency, it fails to capture the specifically egalitarian reason for rejecting RCI stressed above, with respect to choices that serve public as well as personal interests.

Daniel Markovits argues that luck egalitarianism, contrary to my complaint, *is* grounded in a substantive conception of equality in social relations, which he variously characterizes in terms of ideals of non-subordination, equal agency, and solidarity.<sup>40</sup> Yet none of these ideals justifies making RCI's choice/luck distinction fundamental to distributive justice. RCI entails what Thomas Scanlon has called "the forfeiture principle": the claim that by choosing *x*, one forfeits any right to complain about *x* or its consequences.<sup>41</sup> The ideals of non-subordination and equal agency, by contrast, take personal independence and unburdened choice as positive values rather than as conditions sufficient to license the loss of standing to complain of disadvantage. These values generate principles of substantive responsibility wholly distinct from RCI, which do not place nearly the same weight on the choice/luck distinction. For example, as I shall argue below, they require more elaborate conditions than mere voluntary choice before relations of subordination — of command and obedience — can be justified. Other conditions may remove standing to demand redress for misfortunes even in the absence of choice.<sup>42</sup>

In softening the application of RCI, Markovits suggests that the egalitarian appeal of RCI lies more in the solidarity expressed by our taking collective responsibility for people's bad brute luck than in the moralistic rigor with

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38 Lippert-Rasmussen, *supra* note 32, at 557-62.

39 Markovits, *supra* note 37, at 297-303.

40 *Id. passim*.

41 SCANLON, *supra* note 6, at 258.

42 *Id.* at 258-63 (arguing that such standing may be lost even in the absence of a voluntary assumption of risk, if the injuring party has taken sufficient precautions to prevent and limit injury to others, and has provided reasonable opportunities to avoid the injury, although these opportunities were unknown to the injured party).

which it links attributive to substantive responsibility. However, Markovits's idea that a substantive ideal of solidarity or non-subordination in social relations directly generates a prima facie claim to the neutralization of bad brute luck is under-argued. With respect to what goods are relationships of solidarity concerned? This question cannot be left open, since neutralizing bad luck with respect to one equalizand, such as welfare, generates inequalities in other goods, such as resources or capabilities. How does the ideal of solidarity help us define a conception of brute luck that can structure an acceptable system of luck-neutralization? As we have seen, luck, defined as the negation of desert, cannot fulfill this role at the level of the basic structure, since giving it this role would be unjust. The only concrete alternative that has been advanced is luck, defined as the negation of attributive responsibility. But we have seen that this conception of luck, too, is unable to answer our fundamental question, which is to determine what consequences we *ought* to assign to particular choices.<sup>43</sup> We are left with the vague claim that inequalities in social goods should not be based on morally arbitrary facts about persons — such as the arbitrary distribution of native talents — since this would amount to an illicit discriminatory preference for the lucky.<sup>44</sup> But it is misleading to label "discriminatory" the market-based advantages that accrue to those who use their greater native talents for the advancement of others' goals in the market. The inequalities at stake are not instituted for the sake of discriminating against less-preferred people, but to provide the price signals needed to direct people's choices in developing and exercising their talents in ways that are valued by others. Since such direction is inherent in the ideal of society as a system of cooperation among equals, it is hardly morally arbitrary, even if it results in distributive patterns that track morally arbitrary accidents of birth to some degree.

Most luck egalitarians take the prima facie justice of egalitarian distributions as a given, such that all and only deviations from equality need to be justified.<sup>45</sup> I do not believe that we should start theorizing from such a controversial assumption, and have not seen a persuasive argument for it. Markovits takes a step forward in agreeing with me that egalitarianism is immediately and fundamentally concerned with equality of *social relationships*, not equality in the amounts of external or personal goods one person has in relation to another. However, I am skeptical of

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<sup>43</sup> As Markovits acknowledges. Markovits, *supra* note 37, at 302-03.

<sup>44</sup> *Id.* at 286-87.

<sup>45</sup> This is the starting point of the "equality of what?" debates, including the works cited *supra* notes 5, 7, and 8.

the thought that a default preference for equal distributions can be derived from the demands of egalitarian social relationships. It seems to me that the demands of relational equality are satiable with respect to material goods and capabilities, and that they do not reach to subjective goods such as happiness or preference satisfaction at all.<sup>46</sup>

Alternatively, some post-Rawlsian egalitarians, including some luck egalitarians, start theorizing from the idea that egalitarian distributive patterns are intrinsically *good*.<sup>47</sup> Even if this were true, it does not follow from the fact that some state is desirable that anyone has the authority to demand that others realize it. Such purported facts, being unable to support second-personal claims, cannot support an egalitarian theory of justice. Moreover, I do not share this intuition. I do not see any non-justice-based rationale for caring about egalitarian distributive patterns in themselves. Distributions are important as instrumental to and expressive of egalitarian social relationships, which are demanded as a matter of justice. The value of distributions is merely derivative of the value of social relationships, and tied to the right rather than the good.

## VII. DEMOCRATIC EGALITARIANISM

Let us take stock of the argument. Against DCLE, I have argued that desert-catering individually allocating rules are incompatible with justice and with the virtues of the market system. We must allow market signals to do their work, which requires that luck influence distributive outcomes. But we should not follow RCLE in accepting all of the risks of option luck entailed by unregulated markets, or in refusing to share the costs of socially necessary labor, especially dependent care. Egalitarians have been looking in the wrong place for a solution to the problem of market risks. It lies neither in desert-catering individually allocating rules, nor in allowing unconstrained procedural rules to govern distributions after initial inequalities in assets have been eliminated. To solve our problem, we need a system that, while allowing market processes substantial latitude to determine distributions, constrains permitted outcomes within an acceptable

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<sup>46</sup> See Anderson, *supra* note 26.

<sup>47</sup> See, e.g., LARRY S. TEMKIN, *INEQUALITY* (1993) (arguing that it is bad for some people to be worse off than others through no fault of their own) and David Enoch, *Luck Between Morality, Law, and Justice*, 9 *THEORETICAL INQUIRIES* L. 23 (2008).

range. We need *range-constraining* rules in a system of pure procedural justice.<sup>48</sup>

The viability of egalitarian distributive policies depends on the fact that the signal range can be substantially compressed without degrading signal quality. Compression is a matter of imposing outcome constraints, which may be sought at the bottom of the income range, at the top, or in the middle. As Hayek's example shows, nearly everyone besides the most rigid libertarians accepts a sufficientarian safety net at the bottom. Egalitarians, more controversially, advocate constraints at the top as well. Social insurance programs in advanced capitalist countries — unemployment insurance, workers' compensation, disability insurance, old age pensions — embody constraints at the bottom and *middle* of the income range. Up to a middle income level, higher income individuals contribute more into the social insurance system. They also get a greater absolute benefit back than those with lower income, although the size of the benefit relative to income history is lower than for those with lower income. Such a system is far more generous to the middle classes than a mere safety net. Standard theories of justice, which are assumed to yield sufficientarian, prioritarian, or egalitarian distributive rules, have little to say about such middle-range constraints. What should egalitarians say about these types of constraint?

Contractualism offers one way to justify these constraints. Let individuals choose principles of distribution on the basis of what would be best for themselves. A veil of ignorance ensures that they choose principles with regard for the possibility that they could end up in any position permitted by these principles. Rationales for constraints of all types can be constructed by imputing plausible motivations to them. Individuals are averse to absolute suffering. This justifies a basic safety net. Individuals are also averse to experiencing substantial losses from their current condition, and are willing to give up chances of moving higher in the income distribution to insure against this event. This justifies middle-range constraints. If we assume, less plausibly, that individuals are willing to give up any chance of advancing higher in order to maximize their minimum prospects, we can justify strong constraints at the top, such as Rawls's difference principle.<sup>49</sup>

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48 The current discussion pertains to constraints on permissible outcomes, without regard to anyone's chances of attaining better or worse outcomes within the permissible range. I thus omit consideration of constraints pertaining to equality of opportunity, which have to do with each person's chances of attaining positions greater than the minimum acceptable. For my views on this question, see Elizabeth Anderson, *Rethinking Equality of Opportunity*, 2 THEORY & RES. EDUC. 99 (2004).

49 See RAWLS, *supra* note 2, at 132-35 (arguing that if individuals are so motivated,



While there may be something to these arguments, egalitarians should not rest satisfied with them, because they rely on asocial and hence non-egalitarian rationales. Each party to the social contract is assumed to be interested in maximizing her own prospects, without regard for how she stands in relation to others. Tendencies toward equality are an accidental byproduct of individualistic motivations. These arguments do not show how specifically *egalitarian* concerns provide reasons for the three types of distributive constraint.

Egalitarianism is fundamentally concerned with equality of social relationships. Egalitarians support distributive constraints that prevent the conversion of wealth inequality into an unjust social hierarchy, and ensure that everyone in society has enough to stand in relations of equality to others.<sup>50</sup> Distributions are objectionable from an egalitarian point of view to the extent that they are the cause (by act or omission) or effect of inequalitarian social relations, as embodied in inequalitarian social interactions, processes, or rules. Hence the ideal of equality is two times removed from distributive outcomes: first, by the gap between egalitarian social relations and distributive rules, and second, by the gap between egalitarian rules or procedures and actual outcomes.<sup>51</sup>

Egalitarian rationales for range-constraining rules should therefore start from the ideal of equality in social relations.<sup>52</sup> The relational ideal of equality focuses on the terms of our interactions, rather than on comparisons of the amount of some good that different individuals enjoy. To understand what equal social relations are, consider their opposite: hierarchical relations. Hierarchies take more than one form. There are hierarchies of *esteem*, whereby those on the top elicit honor and admiration, while those below are stigmatized and held in contempt as objects of ridicule, loathing, or disgust. There are hierarchies of *power*, of domination and subordination, whereby those at the top command those below, who must defer and obey. There are hierarchies of *standing*, whereby those at the top are empowered to

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then they will choose the difference principle, which only permits inequalities to the extent that they maximize the prospects of the least advantaged).

50 See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 2.11 (G.D.H. Cole ed. & trans., J.M. Dent & Sons 1913) (1762) ("[N]o citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself.").

51 The ideal of equality is but one element in a comprehensive theory of justice. Other claims may arise that are based on non-egalitarian considerations, such as the obligations of humanity, individualistic contractualist considerations, and so forth.

52 Anderson, *supra* note 26; MARIA H. MORALES, *PERFECT EQUALITY: JOHN STUART MILL ON WELL-CONSTITUTED COMMUNITIES* (1996).

make claims on others in their own right, and to enjoy rights and privileges, while those below are denied rights or granted an inferior set of rights and privileges, often tied to the lowly functions to which they are confined, and denied a voice to make claims on their own, or allowed only an inferior forum in which to make their claims.

Egalitarians aim to abolish such hierarchies and replace them with relations of equality — equal respect, power, and standing. Where replacement is not practical, egalitarians aim to sharply limit the grounds on which hierarchy can be based. For instance, egalitarians reject esteem hierarchies based on the circumstances of birth. They also oppose state-sponsored esteem hierarchies, such as orders of nobility. Egalitarians prefer that individuals be free to judge for themselves who merits esteem, without being held to an official standard. The expected and preferred outcome of such liberty is a plurality of conceptions of the good, which generate rival and cross-cutting orders of esteem, such that no social group comes out on the top or bottom of everyone's rankings, all are free to seek and establish a social circle in which they enjoy the esteem of their peers, and no esteem ranking counts as official, as one to which everyone is expected to defer.

Similarly, egalitarians accept hierarchies of power only under tight constraints. They reject such hierarchies based on circumstances of birth, such as caste, race, family lineage, and gender. While some command hierarchies are necessary, for instance in organizing the military defense of a community, securing law and order, and many aspects of cooperative production, no hierarchies can be justified on the ground that some people are simply entitled to rule over others or deserve the pleasures of command. All must be constrained by the rule of law, which limits the scope of legitimate command to that which is needed to carry out the functions of office, where the functions of office can only be justified in terms of service to the public interest or, for private offices, to some legitimate private interest. Hierarchies must be justifiable to those subject to command, where the terms of justification secure their free consent — not as a matter of desperation, given a lack of reasonable alternatives. Authority to command attaches to the office, not the person, with offices competitively open on an equal basis to all who are able to fulfill their responsibilities in them, and all enjoying a decent opportunity to develop the abilities needed to fill them.

Equality in social relations, then, is a complex ideal. It involves, but is not exhausted by, the following elements. Social equals are regarded as *self-originating sources of claims*.<sup>53</sup> We enjoy standing to make claims

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53 John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 546 (1980).

on everyone else, that they pay due attention to our interests. We make such claims in our own right, not on account of our position in the division of labor or rank in any hierarchy of esteem or power. We make our claims meeting one another eye-to-eye, not having to beg for consideration, nor acting as if, in recognizing others' claims, we are doing so as a condescending favor. Social equals enjoy *equal standing in discussions aimed at defining the terms of their interactions*. All accept that all are entitled to a serious hearing and a publicly acceptable justification for denial of their claim, that everyone's interests and claims must be consulted, that everyone counts for one and no one for more than one.<sup>54</sup> Social equals live on terms of *reciprocity* with one another, none imposing conditions on others that they would reject for themselves. Social equals also enjoy *personal independence*. Each person enjoys, within a wide range, real freedom to lead their own lives according to their own judgments, without having to receive permission from others, justify the ideals and priorities they adopt to others, or submit to others' moralizing scrutiny. This entails that no one live in a state of personal subjection to another, in which the other can make arbitrary demands on them by threatening to damage or withhold something important to their interests and dignity.

### VIII. DEMOCRATIC EGALITARIANISM AND DISTRIBUTIVE CONSTRAINTS

Much more could be said to fill out this ideal of relational equality, to explain why realizing it is a proper concern of justice, and why it is the proper concern of that part of the theory of justice that is egalitarian.<sup>55</sup> For now let us turn our attention to the relation between this ideal of equality and the three types of range constraint on income and wealth: at the bottom, top, and middle.

Consider first constraints at the bottom. People need a safety net to avoid falling below an acceptable level, due to bad market luck or other causes. Egalitarians insist on a higher floor than Hayek's subsistence level, due to the material prerequisites of social equality. Equality requires the personal independence of adults, which requires property. A person who

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54 A "society between equals . . . can only exist on the understanding that the interests of all are to be regarded equally" and "consulted." JOHN STUART MILL, *UTILITARIANISM* 40 (Oskar Pietsch ed., Bobbs-Merrill 1957) (1861).

55 See Anderson, *supra* note 26 and Samuel Scheffler, *Choice, Circumstance and the Value of Equality*, 4 *POL. PHIL. & ECON.* 5 (2005).

lives at the mercy of others' provision is vulnerable to exploitation and abuse at their hands, and liable to humiliating forms of subjection. Without property, individuals are unable to defend their rights or advance their claims on others in ways that command respectful attention, but must resort to groveling and begging. People also need a level of income sufficient to secure dignity in appearance. The minimal income needed to avoid personal subjection and enable effective participation as an equal in society thus sets an egalitarian floor on acceptable income variation. This floor is also related to the general level of consumption in society. The higher the general level of consumption, the more is needed by any particular individual to sustain a dignified appearance.<sup>56</sup>

Now consider constraints at the top. If money could buy only frivolities, liberal egalitarians would have only modest reasons for such constraints. To be sure, conspicuous consumption is an offense to egalitarian values, to the extent that people spitefully lord their superior wealth over others. But liberalism cannot support egalitarian sumptuary laws. The preferred liberal egalitarian alternative is to expose and denounce the snobbery and spite at the root of conspicuous consumption, and to cultivate a robust pluralism of esteem hierarchies, focusing especially on anti-materialist and non-materialist grounds for esteem.

Instead, the fundamental reason for egalitarians to seek constraints at the top is that income and wealth do not buy only frivolities. They buy political power and influence, access to positions of command, and superior social standing. In an ideal world, a comprehensive system of blocked exchanges (including, for example, limits on campaign contributions) and alternative paths to command, standing, and political power (for instance, public funding of political candidates) would prevent the conversion of income and wealth into hierarchy. Even then, such strategies may be insufficient to sustain egalitarian sentiments of solidarity and community. To the extent that the rich feel they can insulate themselves, using their private resources, from the risks and vulnerabilities to which everyone else is subject, they lack an interest in pooling their risks with others and are likely to resist social insurance policies that help everyone else.<sup>57</sup> Constraints at the top

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<sup>56</sup> ADAM SMITH, *THE WEALTH OF NATIONS* V.2.148 (Edwin Cannan ed., 5th ed. Methuen & Co. 1904) (1776) ("By necessities I understand not only the commodities which are indispensably necessary for the support of life, but what ever the customs of the country renders it indecent for creditable people, even the lowest order, to be without. A linen shirt, for example, is, strictly speaking, not a necessary of life. . . . But in the present times, through the greater part of Europe, a creditable day-laborer would be ashamed to appear in public without a linen shirt. . . .").

<sup>57</sup> I borrow this conjecture from John Roemer, *Prospects for Achieving Equality*

put everyone in the same boat, sharing common interests in social insurance. In addition, to the extent that wealth does influence politics, ensuring the fair value of equal political liberties requires policies aimed at limiting the top and not just raising the floor. Otherwise, the rich will capture the political agenda and secure public policies that specially cater to their interests, thereby converting democracy into plutocracy.<sup>58</sup>

Finally, consider egalitarian constraints in the middle. There are two egalitarian reasons for providing social insurance in the middle range, beyond a safety net. First, there are symbolic advantages to a system that prevents poverty as a side-effect of programs that deliver benefits to everyone, rather than targeting a class of people designated as least advantaged.<sup>59</sup> Universal benefits programs better express and reinforce relations of solidarity, and avoid stigmatizing those at the bottom. Second, to the extent that economic advantage and disadvantage are cumulative, laissez-faire policies with respect to middle income positions risk hollowing out the middle class and producing a bimodal distribution of income. Even if the difference between the top and the bottom is restricted by higher floors and lower ceilings, egalitarians have reason to worry that a bimodal distribution would exacerbate class divisions and undermine social solidarity — that is, the willingness of all to contribute to public policies that benefit everyone.<sup>60</sup> Egalitarians prefer not just that income inequalities be limited at the top and bottom, but that individuals be crowded in the middle of the distribution.<sup>61</sup>

Why do social insurance benefits run out past a middle level of income? While the most advantaged may find it distressing to be subject to market risks that threaten to reduce them to merely middling status, there is no

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in *Market Economies* 12 (Sept. 30, 2006) (unpublished manuscript), available at [http://www.stanford.edu/dept/EIS/equality\\_and\\_markets/papers/Roemer.pdf](http://www.stanford.edu/dept/EIS/equality_and_markets/papers/Roemer.pdf).

<sup>58</sup> RAWLS, *supra* note 2, at 197-200.

<sup>59</sup> Brian Barry, *The Welfare State Versus the Relief of Poverty*, 100 *ETHICS* 503 (1990).

<sup>60</sup> Therese Bjorkholm has suggested that egalitarian policies in Sweden are sustained by the motive of duty rather than solidarity. However, even in Sweden some sense of solidarity or common identity will need to be cultivated between native Swedes and growing immigrant populations to facilitate the latter's integration into society, which is a prerequisite for their standing in full relations of equality with respect to citizens of Swedish ancestry.

<sup>61</sup> Theoretically, egalitarians should be neutral between policies that prevent people in the middle from falling too far from their accustomed positions, and policies that ensure that others replace them in those positions. In practice, it is easier to maintain the former policies, since these can also take advantage of individualistic motives for social insurance, such as are represented in the contractualist argument for middle-range constraints.

public interest in securing them against such risks. Egalitarians prefer that there be constant circulation among the occupants of the top ranks of the distribution of income and wealth. To the extent that the rich thereby see themselves as at least potentially in the same boat as the middle class, they are more likely to support universal social insurance. The instability of the wealthiest class also prevents intergenerational entrenchment — the conversion of temporary wealth into dynasties. A society in which the wealthy are self-perpetuating is a society with an insular class of the most advantaged, liable to see itself as set apart from and antagonistic to everyone else in society, and therefore liable to pressure the state to adopt policies that protect its superiority.

Egalitarians insist that social insurance, along with other egalitarian range constraints such as the minimum wage, be regarded as *entitlements* — that is, as private property rights. This is the key to how egalitarianism can be reconciled to a system of pure procedural justice in which market processes play a weighty role in determining distributive outcomes. Markets produce distributions subject to the constraints of private property rights. Social insurance and blocked exchanges simply define some of the constraints of (not "on") private property. The resulting egalitarian system is what Rawls called a "property-owning democracy."<sup>62</sup> He contrasted a property-owning democracy with a welfare state, which conceives of social policies as implemented not through property rights but through tax-and-transfer policies that lie *outside* the market system, and which are directed toward helping the unfortunate:

The idea [of a property-owning democracy] is not simply to assist those who lose out through accident or misfortune [as in a welfare state] . . . but instead to put all citizens in a position to manage their own affairs [i.e., in a condition of personal independence] and to take part in social cooperation on a footing of mutual respect under appropriately equal conditions.<sup>63</sup>

That a property-owning democracy helps "those who lose out through accident or misfortune" is a *byproduct* of an entitlement system directed toward the *distinct* end of securing the material conditions of social equality for the members of society. The latter end may be demanded as a matter of justice, because common coercive arrangements cannot be justified except on terms of social equality.

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<sup>62</sup> RAWLS, *supra* note 2, at xiv-xv, 242.

<sup>63</sup> *Id.* at xv.

The conception of egalitarianism as embodied in a property-owning democracy provides a decisive answer to Robert Nozick's objection that egalitarian policies are irreconcilable with liberty, since "liberty upsets patterns."<sup>64</sup> Nozick argued that even if one could establish a preferred egalitarian pattern of distribution at a given moment in time, voluntary market exchanges would rapidly destroy that pattern by generating inequality. People would pay Wilt Chamberlain lots of money to be able to see him play basketball. But Nozick erred in assuming that egalitarian aims could be achieved only through a system of imperfect procedural justice based on individually allocating rules. When egalitarian policies are realized through property entitlements such as social insurance, they do not conflict with market liberties.

Hayek understood this point. This is why, despite his aversion to socialism, Hayek could in the end find no objection to Rawls's principles of justice:

[Regarding] John Rawls's *A Theory of Justice* (1972) . . . the differences between us seemed more verbal than substantial. Though the first impression of readers may be different . . . we agree on . . . the essential point [that distributive justice must be purely procedural].<sup>65</sup>

The key issue separating him from the socialists was not any supposed inherent conflict between liberty and equality, but the conflict between pure procedural justice and desert-based individually allocating rules. Once Rawls demonstrated how egalitarian objectives could be realized through a system of pure procedural justice — a property-owning democracy — Hayek had "no basic quarrel" with it:

[T]here unquestionably . . . exists a genuine problem of justice in connection with the deliberate design of political institutions, the problem to which Professor John Rawls has recently devoted an important book. . . . I have no basic quarrel with an author who, before he proceeds to that problem, acknowledges that the task of selecting specific systems or distributions of desired things as just must be "abandoned as mistaken in principle, and it is, in any case, not capable of a definite answer. Rather, the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them. If these constraints are satisfied, the resulting distribution, whatever it

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64 ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 160-64 (1974).

65 HAYEK, *supra* note 14, at xii-xiii.

is, may be accepted as just (or at least not unjust)." This is more or less what I have been trying to argue . . .<sup>66</sup>

### CONCLUSION

Luck egalitarians have been looking in the wrong place for a solution to the problem of market risks. Desert-catering luck egalitarians have focused on individually-allocating rules, in an attempt to ensure that no one is disadvantaged due to undeserved bad luck. But markets cannot operate efficiently unless prices are allowed to vary in response to mere luck. Nor should we authorize the state to correct market distributions in accordance with any standard of desert. Responsibility-catering luck egalitarians have focused on defining a domain, including nearly all market transactions, in which pure procedural rules govern outcomes, without regard to their distributive consequences. This entails that their theories are unable to provide an acceptable solution to excessive individual exposure to market risks. I urge a return to the original ideal of egalitarianism, which is a conception of equality in social relations among members of society. This ideal, in conjunction with knowledge and plausible conjecture about the causal implications of different distributions, helps us construct rules that constrain the range of permissible income variation. Such range-constraining rules cope with the problem of market risks by ensuring that no one falls so low from bad market luck as to compromise their ability to function as an equal in society. The goal of achieving a society of equals also helps justify constraints in the middle of the income range, which are a prominent and under-discussed feature of social insurance programs in advanced capitalist societies.

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<sup>66</sup> *Id.* at 100.