

# Putting Distribution First

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*It is common for normative legal theorists, economists and other policy analysts to conduct and communicate their work mainly in maximizing terms. They take the maximization of welfare, for example, or of wealth or utility, to be primary objectives of legislation and public policy. Few if any of these theorists seem to notice, however, that any time we speak explicitly of maximizing one thing, we speak implicitly of distributing other things and of equalizing yet other things. Fewer still seem to recognize that we effectively define ourselves by reference to that which we distribute and equalize. For it is in virtue of that which we distribute and equalize that our policy formulations treat us as politically “counting” or “mattering” for purposes of social aggregation and maximization.*

*To attend systematically to this form of inter-translatability, with a view in particular to that which maximization formulations latently prescribe that we distribute and equalize, might be called “putting distribution first.” It is explicitly to recognize the fact that all law and policy are implicitly as equalizing and citizen-defining as they are aggregative and maximizing, and to trace the many salient consequences that stem from this fact. It is likewise to recognize that all law and policy treat us as equals in some respects and as non-equals in other respects. Putting distribution first by attending explicitly to these “respects” yields greater transparency about how well or poorly our laws and policies manage to identify, count, and treat us as equals in the right respects.*

*This Article works to lay out with care how to put distribution first in normative legal and policy analysis. The payoffs include both a workable method by which to test proposed maximization*

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*norms systematically for their normative propriety, and an attractive distributive ethic that can serve as a workable normative touchstone for legal and policy analysis. Indeed, the Article concludes, much — though not yet quite all — of our law can illuminatingly be interpreted as giving inchoate expression to just such an ethic.*

## INTRODUCTION

Many legal theorists, welfare economists, and other policy analysts either explicitly embrace or implicitly commit themselves to some normative “master principle” in conducting and communicating their analyses.<sup>1</sup> They argue that all law and policy ought to concern themselves solely or mainly with “wealth” or “wellbeing,” for example, or with “welfare,” “utility,” or some cognate value. Most in such cases then say we should “maximize” the degree to which the preferred value is realized. And so they’ll employ maximization formulae — usually some variant of the venerable Bergson-Samuelson social welfare function — when they use formal methods in conducting or communicating their analyses.<sup>2</sup>

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1 See Robert Hockett, *Why Paretians Can't Prescribe: Preferences, Policies, and Imperatives in Law and Policy*, 18 CORNELL J.L. & PUB. POL'Y 391 (2009).

2 The *locus classicus* is Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310 (1938). See also KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* (1947). I provide formal characterizations of my own in Robert Hockett, *Pareto Versus Welfare* (Cornell Law Sch. Research Paper No. 08-031, 2008), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1114&context=lsrp\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1114&context=lsrp_papers), as well as where appropriate below. 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* (Univ. of Pa., Inst. for Law & Econ., Research Paper No. 07-17, 2007) (on file with author). Also illuminating, in a backhanded sort of way, is LOUIS KAPLOW & 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. Essentially the same error figures in the title of Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008). 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. For more on objects and patterns of distribution, see *infra* Parts IV and V. For discussion of distributors and recipients of distributions, see *infra* Parts II and III.

It seems to escape notice that in doing these things, the theorist or analyst does other things too. Implicitly, she thinks and advocates in terms not only of maximizing, but also of distributing and, as importantly, *equalizing*. This is because in socially maximizing anything, we always effectively distribute another thing and equalize yet another thing. Moreover, we effectively *define* ourselves, qua citizens, by reference to that which we *equalize* in these cases. For the attributes in respect of which we are “treated as equals” are those in virtue of which we are deemed politically to “count” for purposes of social aggregation and maximization. They are the attributes in virtue of which we are taken to be worthy of social, political, or legal consideration. And these are the attributes to which we effectively “reduce” or assimilate ourselves for legal and policy purposes.

Suppose, for example, that our analyst proposes we maximize aggregate utility after the fashion of Bentham. In such case, she effectively suggests we distribute benefits and burdens in manners that enlarge or enhance the utility aggregate. She also effectively commits herself, however unconsciously, to the proposition that those whose utility functions figure into her social welfare function should be counted as moral or political equals in a particular respect: to wit, in respect of their utility functions. For each person’s utility function, she will say, is to be counted “exactly once” in constructing her social welfare function.

The respect in which our analyst counts these individuals as equals, in turn, is the identifying feature to which she assimilates or “reduces” them for purposes of collective political action. In the eyes of the strict utilitarian countenanced here, for example, individuals are no more and no less than their utility functions, so far as her conception of social welfare is concerned.<sup>3</sup> The citizen’s utility function is the sole attribute in virtue of which she is “counted” — i.e., in virtue of which she “counts” — in the Benthamite utilitarian’s social welfare analyses. It is that attribute in virtue of which she is counted “exactly once” just like everyone else, and that attribute in virtue of which she “matters” for purposes of social welfare analysis.<sup>4</sup>

Now note the sense in which the observations just made amount to observations concerning a form of what I shall hereafter call *inter-translatability*.<sup>5</sup>

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- 3 Assuming that each individual’s utility function counts precisely for “one” in the social welfare function. See *infra* note 13. 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.
  - 4 Assuming that yours is an unalloyed, “strict” welfare function. For more on “strict” and “mixed” functions, see *infra* Part V.
  - 5 Where analyses are conducted using formal methods, I shall refer to inter-translatability as “interformulability.” See *infra* note 10; *infra* Part V.

Assume first that each of citizens Anscombe and Bentham has sufficient resources upon which to subsist. Assume also that “we” as a polity have — or that “society” has — an additional three units of resources available, which we can direct toward Anscombe, toward Bentham, or toward both of them.<sup>6</sup> Assume finally that Bentham would derive marginally more utility from the resources in question than would Anscombe, until he has received two units.<sup>7</sup> Thereafter, Anscombe would derive marginally more utility from the resources than would Bentham. If we are utilitarians and thus wish now to maximize feasible aggregate social utility here, we shall give the first two available units of resource stuff to Bentham, then impart the final available unit to Anscombe.

Call the resources, *after* they are distributed in this way, “maximizing units,” or simply “maximizers.”<sup>8</sup> Call the resources, *prior* to distribution, “generic resource” units, or simply “resources.” Then there are three, even four ways to describe what we have done in distributing things as described.<sup>9</sup> We can say we have “maximized” social utility, or “social welfare.” We can say we have “unequally distributed” generic resource units — or resources — *ex ante*, two to one in favor of Bentham over Anscombe. Or we can say we have “equally distributed” aggregate-maximizing units — “maximizers” — *ex post* over Anscombe and Bentham. And, of course, we can say that in this latter, but in no other, sense we have counted Anscombe and Bentham, whom we identify with their utility functions, as equals.<sup>10</sup>

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6 You can think of it as money if you like, or some other resource transformable into utility.

7 I prescind here from worries about interpersonal comparability, as do utilitarians themselves.

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. I thank Matt Adler 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 Here is a summary rendition of the point in more 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  $W = W(u_1, u_2, u_3, \dots, u_m)$ , where the numeric subscripts index the u-functions of the m individuals who constitute the citizenry. And the imperative is to  $\text{Max } W = \sum u_i$ , where the Greek letter sigma indicates that we are summing, and the “i” subscript

In sum, we have distributed resources unequally in a manner that counts Anscombe and Bentham as equals in respect of the utility functions with which we identify them — though in no other respect.<sup>11</sup> And in so doing we have maximized something believed by utilitarians to exist and to be normatively interesting: aggregate social utility.<sup>12</sup>

This form of inter-translatability is more than a mere terminological curiosity. Maximization-speak leads us to *think* in terms of maximization. And speaking *exclusively* in such terms leads us to *think* exclusively in such terms.<sup>13</sup> That in turn conditions us to elide over certain normatively critical questions — in particular, whether in maximizing one thing we are distributing, equalizing, and identifying ourselves by reference to the appropriate correlative things,

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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.) 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  $i$ ,  $u_i = u_i(b_1, b_2, \dots, b_n)$ , 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, too, below).  $W$  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 paragraphs, then, is to say 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, and in that sense are "reduced to" or "identified" with those functions. In what follows I shall argue that we should change our focus from that which is maximized to that which is equalized, precisely in order to facilitate closer attention to what our policy prescriptions — often erroneously, I shall argue — take us to be. We can do this partly by changing our notation. I show how upon turning to what I call "inter-translatability" and "interformulability," below.

- 11 The "in no other respect" qualifier proves important for reasons that emerge presently.
- 12 The existence in question is often contested, partly on measurability grounds. I prescind from such objections here.
- 13 You likely know the word "maximandum" or its elliptical rendition, "maximand," for example. Do you know the words "equalisandum" or "equalisand"? They're in the same dictionaries as their maximizing counterparts. If you're unfamiliar with the terms, I suspect it is owing to the literature's tending to proceed in the language of maximization-speak.

and hence whether we are even *maximizing* the right things.<sup>14</sup> For inter-translatability works both ways: we maximize the right things when — and only when — we distribute, equalize, and define one another by reference to the right things.<sup>15</sup>

It is methodologically desirable, then, for all of us who aim to contribute to normative legal theory or policy analysis systematically to analyze our “maximization-speak” and maximization formulae with a view to their inherently distributive, equalizing, and ultimately citizen-defining internal structures. Once we have done this work of explication, moreover, we should do something

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- 14 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 for 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.
- 15 To see this more graphically, imagine a simple variation on the story of Anscombe and Bentham considered above. Our society aims now to maximize aggregate forehead height rather than utility. Assume that Anscombe’s forehead is higher than Bentham’s, and that forehead height is genetically transmitted. Successful transmission in turn correlates in straightforward linear fashion with resource consumption, we’ll suppose. Now in the name of maximizing aggregate forehead height, we distribute all three available units of benefit stuff to Anscombe. Maximization of social forehead height, equal treatment of individuals in respect solely of forehead heights, and disparate resource-distributive 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. My guess is that you find this monstrous. The reason, I suggest, is that it is monstrous to identify persons with their foreheads. And this is in turn why we will not be persuaded by, say, a foreheadist’s rendition of the utilitarian’s favorite pseudo-egalitarian defense of utilitarianism, to the effect that “we’ve counted each utility function only once.” See, e.g., John Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955). Counting every forehead “exactly once” is no more licit for purposes than is counting everyone’s capacity to produce endorphins “exactly once” for that purpose, and that is because societies are constituted by persons, not foreheads or utility-factories.

further: we should always be prepared to address the maximization, distribution, and equalization components of our inquiries *in reverse order*.<sup>16</sup> For the question of what we take ourselves to be for legal and policy purposes is, in a sense I shall soon indicate, normatively prior to the others; and the clearest indication of what we are taking ourselves to be is what we are equalizing.<sup>17</sup>

Let us call the sum of these tasks — these “should”s — the task of “putting distribution first.” This Article aims to commence the task of putting distribution first for purposes of normative legal and policy analysis. It does so pursuant to the following progression.

Part I sets the stage first by clarifying maximization and equalization norms’ roots in what it calls “normative distributional assessment,” then by preliminarily specifying the conditions under which such assessment is called for. It then proceeds quickly to characterize five classes of question that all law and policy bearing distributive consequences implicate, questions readily derived from the grammar of verbs such as “to distribute.” The questions are those concerning who is or ought to be distributing, what it is that they are distributing, to whom, pursuant to what pattern, and via what practical modalities.

After Part I has briefly schematized these normatively salient questions, Parts II through VI systematically examine the best-known answers to them proffered by legal theorists, philosophers, welfare economists and others in recent decades. These classes of question jointly constitute what I call “distributive structure.” Parts II through VI map this structure by reference to what some linguists and philosophers will recognize as the cognitive grammar of “to distribute” and its cognates. The “gaps” opened up by this grammar — that is, the aforementioned “variables” for those who distribute, those to whom they distribute, what they distribute, per what pattern and by what means they distribute — yield guideposts that will prove useful as we seek to structure our simultaneous attention to the full range of normative questions that all law and policy bearing benefit- and burden-distributing effects unavoidably implicate.

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16 I thank Trevor Morrison for suggesting that I emphasize this point.

17 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. For more on this matter, see *infra* Part V.

Part VII suggests that a particular conception of appropriate distribution — and in particular of what should be equalized and hence what should be maximized — can be seen gradually to have emerged out of the discussion over Parts II through VI. It also indicates that this conception lends itself to readily practicable realization even in the face of feasibility constraints and related legal- and institutional-design considerations. Part VII additionally suggests that much of our law, and the normative considerations to which our law gives expression, are best interpreted as an ongoing attempt to vindicate the distributive ethic upon which the lines of Parts II through VI converge. This prospect bears obvious practical consequences not only for lawmaking in legislatures and, to a lesser extent, rulemaking in administrative agencies, but also for legal interpretation on the bench.

In the latter vein, the Article concludes with suggestions concerning the future agendas of a more ethically intelligible, as well as more conceptually and formally rigorous, mode of legal and policy analysis informed by the considerations of the foregoing Parts. It foresees a bright future for legal and policy analysis that puts distribution first.

## **I. DISTRIBUTIVE CIRCUMSTANCES AND DISTRIBUTIVE STRUCTURE**

Before systematically discussing the distributive questions implicated by all law and policy, it will be helpful quickly to perform two preliminary tasks: first, to take brief stock of the circumstances in which the normative assessment of distribution is called for; and second, to catalogue the implicated normative questions themselves. This Part does both. It does so in preparation both for Parts II through VI's careful assessment of the answers to each of those questions that have been favored by legal theorists and policy analysts to date, and for Part VII's attempt to set forth what I believe we have been groping for all along.

### **A. Distributive Circumstances**

Just about everything we find in the world is in some sense “distributed.” Although not all such distributions are obviously subject to normative critique,<sup>18</sup>

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18 The chairs and the table in one's kitchen will be laid out in a certain arrangement. They are “distributed” over the floor in a geometrically specifiable pattern. They could be redistributed over that surface in many alternative ways. In the absence of any purpose or value implicated by such arrangements, however, there will be nothing to say whose upshot is that the arrangement “should” or “ought to” be changed.



many of them do implicate values and purposes — values and purposes ranging from pragmatic to aesthetic to full-on ethical.<sup>19</sup> Sometimes these values or purposes are pressing. Normatively evaluable *legal* arrangements, for example, have the effect of distributing perceived goods and ills over persons. Evaluation can accordingly be quite normatively urgent in these cases. Legal rules and rulings, statutory enactments, government programs and policies all tend to yield “winners” and “losers” — recipients of benefits and burdens at the receiving end, recipients by whom we wish to do right.

Patterns of such policy-wrought wins and losses amount, relative to each status quo ante that they displace, to *redistributions* of perceived goods and ills. These, like each status quo ante they supplant, are subject to normative critique too. For they implicate the ethical propriety with which we are treated. And the comparative *ethical* valences of varying distributive arrangements of benefits and burdens are as compelling as any arrangements can be. More than merely recommending actions, they typically require them.<sup>20</sup>

This much seems obvious once pointed out. What is perhaps less obvious to some theorists is that even when allocations wrought by legal rules and policies are neither foreseen nor intended, they remain ethically assessable with a view to their distributive propriety. Particularly once brought to attention, they are subject to normative claims to the effect that the arrangements are right, wrong, better or worse, and should therefore, when possible, be improved or deliberately left in place accordingly.

In this light, we will do well 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

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19 If you are sensitive to aesthetic or related 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, so that you might incline toward redistributing your furniture until it accords with the aesthetically “best” feasible arrangement. Like remarks will be apt in connection with 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.

20 There is of course overlap, though it falls short of extensional equivalence, between ethical and aesthetic assessment. Dastardly people or deeds are sometimes described as “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.)

prerequisites to normative distributional assessment's being "implicated," or "apt." I'll specify them minimally and rudimentarily. Fuller detail will build on the present foundations as we turn to distributive-ethical assessment's full logical form in Parts II through VI.

The minimal conditions for distributive-ethical assessment's being apt appear to be these: First, there must be things that *can* be variably distributed — "distributed benefits and burdens," we'll call them. Second, there must be beings to whom these things can be distributed — "beneficiaries or victims," we'll call them. Third, those to whom the things can be distributed must hold *preferences* or *interests* in respect of their receiving or not receiving them. This delimits the class of distributed benefits and burdens that are potentially of normative interest. Fourth, the recipients of distributions 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. Finally, fifth, all items the distribution of which would be subject to ethical assessment will typically be "scarce." There must be potential for interests or preferences to diverge or conflict. It is in such cases that we require principled and practicable means of "balancing" beneficiaries' potentially conflicting claims *against* one another.

So much for distributive circumstances, of which we shall find occasion to remind ourselves periodically below. Now to the more interesting matter of distributive structure.

## B. Distributive Structure

Distribution, like any activity or action, is internally complex. It bears a structure, a logical form. That form, unsurprisingly, finds expression in the form of the infinitives that correspond to distributive action — verbs that include "to distribute," "to allocate," "to mete out," etc. Call a claim concerning the rightness or wrongness, betterness or worseness of some distribution of benefits or burdens wrought by law or policy a "distributive claim." For a distributive claim to be complete, hence determinate — that is, for it actually to say or prescribe anything at all — it must fill all gaps opened up by the "case," "cognitive," or "valence" *grammar* of "to distribute."<sup>21</sup> It must assign

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21 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

values to the variables that this and all cognate infinitives in effect “carry with them.” For the claim to be intelligible, in turn — i.e., for it to “make sense” — it must fill these variables in grammatically permissible ways.

I shall call any would-be distributive claim that fails to fill all requisite variables “semantically incomplete.” I shall call any such claim that fails to fill the variables in a grammatically permissible manner “syntactically ill-formed.” The contraries of these terms, unsurprisingly, will respectively be “semantically complete” and “syntactically well formed.” I shall also make use of a concept that I’ll call “pragmatic” completeness or incompleteness, which will be easier to define momentarily, after I say a bit more about the “variables” to which I’ve referred.

Two central claims that I aim to substantiate in what follows are these: First, that a surprising number of influential normative legal-theoretic and distributive claims found in the literature are semantically incomplete, syntactically ill-formed, or both. And second, that some superficially incompatible normative legal-theoretic or distributive theories turn out on closer, “grammatical” analysis of the kind that I here recommend, to be quite compatible. Their compatibility is masked by the fact that two theories that fill one variable in distinct ways can fill other variables in what I’ll call “compensating” ways that produce extensionally equivalent distributive recommendations. The sense in which this can be so, like the concept of “pragmatic completeness,” will emerge as we turn now to the “variables” themselves, and to the ways they can plausibly be filled.

What, then, *are* these “variables?” The short answer is that they are simply the pronouns and what I shall call “pro-adverbs” that occur, italicized, in the following questions: *Who* is the claimant addressing with what I am calling a distributive claim? To *whom* does the claimant take the distributed item to be distributed, or claim that it ought to be distributed? *What* does the claimant take to be being distributed, or claim ought to be distributed? *What pattern* does the claimant believe ought to characterize permissible distributions to those recipients? And finally, *how* — by what literal means — does the

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ENGLISH 361 (David A. Reibel & Sanford A. Schaner eds., 1969); Charles J. Fillmore, *The Case for Case*, in UNIVERSALS IN LINGUISTIC THEORY 1 (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 GOTTLÖB FREGE, FUNKTION UND BEGRIFF (1891); Gottlob Frege, *Begriffsschrift, eine der arithmetischen nachgebildete Formelsprache des reinen Denkens*, in FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC 5 (Jan van Heijenoort ed., 1967).

claimant take the distribution to be practicable or feasible?<sup>22</sup> As I say, this is the short answer. The longer answer is what Parts II through V are devoted to fleshing out.

I believe that the antagonists on opposite sides of many explicit or implicit distributive disputes, when they really disagree at all, effectively disagree over how one or more of the variables I have just catalogued should be filled. The fact that such disputes often are *implicit*, however, enables this fact to go hidden. It also, accordingly, yields one reason for bringing these variables explicitly into the foreground: doing so affords clarity as to what, if anything, is actually in dispute. Most of us, I believe, agree more than we typically recognize on the question of how the variables ought to be filled. Many apparently antagonistic distributive ethics actually prove, that is to say, upon closer analysis to be quite compatible.

The variables I mention constitute a syntactic unity in the sense that any sentence describing an action with distributive consequences implicates them; it always makes sense to ask “*who did this distributing,*” “*what did they distribute,*” and so on. But these variables also are semantically interconnected; selection of particular values to fill one variable tends to constrain the ranges of values with which we can plausibly fill others. At least this is so given the foundational values that most of us seem to share concerning who we are, what matters most to us, what we are responsible for, what in consequence is fair, and hence what we ultimately owe one another.<sup>23</sup> In consequence, we shall see, a single distributive upshot — one essentially invariant, abstractly specifiable pattern of normatively appropriate allocation — appears both to follow upon and to constrain differing plausible fillings of the distributive

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22 In effect, I supplement semantics-sensitive case grammar here with argument-places additionally derived from linguistic *pragmatics*. For a claim to be actually 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, *Further Notes on Logic and Conversation*, in SYNTAX AND SEMANTICS, VOL. 9: PRAGMATICS 113 (Peter Cole ed., 1978); H.P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS, VOL. 3: SPEECH ACTS 225 (P. Cole & Jerry L. Morgan eds., 1975); H.P. Grice, *Presupposition and Conversational Implicature*, in RADICAL PRAGMATICS 183 (Peter Cole ed., 1981).

23 If we think of the recipients of distributions as responsible agents, for example, it seems 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. For more on this issue, see *infra* Part II.

variables. Plausible conceptions of appropriate distribution turn out in this sense to be rather like locations along an isoquant — a fair allocation “indifference curve,” to put the point metaphorically.<sup>24</sup>

These claims are bound at first blush to ring somewhat surprising, if not downright mysterious. But they can and should be substantiated. The best way to do so will be to elaborate and critique the leading variable-valuing candidates thus far expressly or impliedly proposed in the canonical normative legal-theoretic and policy-analytic literature. Some of these candidates will look at least passingly familiar to the general reader. 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 accounts for the obscurity I lamented in the Introduction: obscurity as to the relations among distribution, equalization, self-identification, and maximization.<sup>25</sup>

## II. CONDUCTORS OF DISTRIBUTION: DISTRIBUTORS

Both policy and the laws through which policy finds expression generally bear distributive consequences — in most cases intentionally so. Those who enact and then act upon law and policy distribute things, whether intentionally or merely in effect. So, then, derivatively speaking, “would” those who assess

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24 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. More on this when we turn to what I call “inter-translatability,” below.

25 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 must start somewhere. And one can make piecemeal points at least provisionally appreciable, pending further substantiation as one proceeds. Hence, I shall treat all of the variables, and the best known candidates for filling them, in sequence. And I shall do what I can in each case to look either forward or backward to other variables in the sequence as necessary while I proceed.

or evaluate law and policy.<sup>26</sup> For in assessing or evaluating laws and policies that bear distributive consequences, one effectively *prescribes* in respect of such consequences. One says, in effect, how we ought, and how she would, distribute. Who we understand the distributors to be, in turn, naturally will tend to play some role in determining our particular distributive-ethical norms — our “ought” claims concerning distribution. The converse holds just as true. The duties we assert and the parties we take to be subject to them must categorically “fit” one another.

Who, then, are the parties we take to owe each of us the benefit of acting in conformity with our distributive “ought” claims? This question is probably the easiest that must be addressed. For there seems little if any disagreement over who the ultimate “distributors” are in most modern legal and policy disputation, particularly in democratic polities whose governmental agents are accountable to the citizenry. “We” — the sovereign populace or policy community, all who are directly or indirectly addressed by normative legal and policy claims of distributive propriety — are in effect treated as the distributors.

We are “the people” — the citizenry of a particular polity or perhaps humanity at large. We are all who take part, or bear rights to take part, in deciding what, in the way of policies bearing distributive consequences, is or ought to be done. Or we are “the policy community” — legislators, administrators, judges, advocates, policy analysts, legal or political academics and others assumed to be thinking or otherwise acting on behalf of that broader constituency.

In any of these cases, we effectively understand *ourselves* to be distributing *to or over ourselves* so far as legal- or policy-theoretic debate is concerned. One consequence of this fact is that the class of effective distributors in a modern polity converges with that of effective beneficiaries — the next variable that we shall address.

### III. RECIPIENTS OF DISTRIBUTIONS: BENEFICIARIES

Distribution, like the infinitives that denote it, implicates not only subjects, but indirect objects as well. Where there are distributions, there are beneficiaries or victims — those to whom desirable or undesirable things are distributed. And just as there must be “fit” between our distributive-ethical norms and the way that we construe the distributors whom those norms always implicate, so must there be fit between those norms and the ways that we characterize the beneficiaries whose rights those norms vindicate.

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26 I place scare quotes around “would” because the subjunctive tense in which I mean to use the word here has grown less familiar than it once was.

How, then, should we characterize or identify the recipients of normatively interesting distributions of benefit and burden? What should we take them to be? The fact that “they” are in fact “we” here affords guidance. Our being the distributors, and our being accordingly *responsible* for the distribution that concerns us, suggests certain salient facts about us in our roles as beneficiaries. This appears not to have been widely recognized. Many legal and policy theorists and analysts whom I shall discuss, by dint of the ways that they characterize distributed benefits or burdens and distribution formulae (as discussed below), effectively commit to a view of beneficiaries that lies in tension with those beneficiaries’ likewise being *distributors*.

I am hoping that we might dissipate this tension simply by bringing it explicitly into view. First, then, I shall sketch what appears to be the gradually emerging consensus view of beneficiaries — the one on which most theorists appear to agree when the question of how to construe them is explicitly before them. Then I shall turn to the view that appears to me to be (implicitly) held only by theorists who neglect to examine the presuppositions to which their characterizations of distributed benefits and distribution formulae in effect commit them.

### A. Recipients as Agents

The consensus construal of beneficiaries that seems to have emerged over the past several decades among those theorists who concern themselves explicitly with distributive ethics meshes nicely with those beneficiaries’ simultaneous role as would-be distributors. On this view, beneficiaries are construed as what I shall call “boundedly responsible agents.”

Boundedly responsible agents, in large but not quite full measure, produce their own wellbeing out of an antecedent stock of resources and opportunities. It is therefore not only appropriate, but indeed requisite, that we hold them — that is, ourselves — responsible in some measure for doing so. Boundedly responsible agents also are constrained, to some not fully determinable degree, in producing their welfare by the environments that they inhabit. That is part of what “boundedness” means. Our innate or inherited capacities, vulnerabilities, advantages, and disadvantages permit us broad, yet limited, latitude in altering or exiting the environments in which we find ourselves.<sup>27</sup>

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27 This understanding of ourselves in our distributive-beneficiary role seems to be that which is most consonant with our role as the distributors implicated by normative distributional disputation. It also coheres with our experience of action. For we experience ourselves and others both as choosing and as indefinitely constrained in that choosing — somewhat in the way that we recognize an

To conceive beneficiaries as boundedly responsible agents opens the door to several salient, interlinked consequences for normative distributional assessment. First, insofar as we view beneficiaries as freely choosing, we also find it appropriate to hold them *responsible* in part for what they choose, and hence to live with the consequences of many of their choices. This is not simply a matter of punitive attitude. Nor is it even a matter merely of incentives-sensitive efficiency, though such considerations can of course afford further justification for the view. The responsibility correlate of agency is, more compellingly, rooted in that form of dignity, or worthiness of respect, that seems to be imminent in agency itself. It is part of what it is to *view* beneficiaries of distributive ethics as agents — practical forgers, or subjects, of fate — rather than as patients or addicts — mere passive *objects* of fate — like children who “didn’t know any better” or “couldn’t do otherwise.”

Second, what strikes me as a surprisingly oft-ignored corollary of this form of respect is the imperative that all agents must be viewed as *equally* deserving of all forms of respect rooted in their agency. The reason for this was suggested in the Introduction to this Article: with any conception of who or what we are, there comes a corresponding conception of the features in virtue of which we are taken to be moral, juridical, or political equals for purposes of law and policy. And with the latter, as we shall see momentarily, comes a conception of what we ought to be distributing — what we owe to each other, so to speak — as well as in what patterns and measures.<sup>28</sup>

A third entailment of our construing beneficiaries as boundedly responsible agents segues out of the second: insofar as we hold agent-beneficiaries in some measure responsible for constructing or “authoring” their own selves or lives, we will effectively commit ourselves to conceptions of distributed benefits, distribution formulae, and distribution mechanisms that *cohere* with that construal. We will commit ourselves, in other words, to such conceptions as give corresponding latitude to the *operation* of responsible agency.

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indefinite boundary surrounding our visual fields. Our “boundedly choosing” experience of action, in turn, finds reflection in our capacities to experience guilt and shame, pride and triumph. It is surely what underwrites ambition for and frustration with self, resentment of and gratitude to others, and a host of other such rationally contoured emotions. It also underwrites a host of cognate “reactive attitudes” that we tend often to experience. All of these are attitudes that “make sense” or are intelligible only under conditions of some degree of freedom. The same complex of experiences of action — here in particular, the “boundedness” portion — surely underwrites our tendencies to feel and extend mercy, forgiveness, sympathetic understanding and charity toward self and other.

28 With the “owing each other” motif I am of course riffing on the illuminating monograph of TIM SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).



We will thus view distributed *benefits* as ex ante *inputs* to individual welfare or utility functions, assuming we think in such welfare-functional terms as do many today.<sup>29</sup> The functions in question in turn will be functions whose “outputs” are largely the responsibility of beneficiaries themselves. The *distribution formulae* that correspond to this view of beneficiaries, in turn, will speak to the ex ante distribution of the mentioned responsibility-exogenous inputs. Those formulae will not be directly concerned with ex post, responsibility-endogenous welfare-outcomes. They will treat these as byproducts, mediated and endogenized by beneficiaries’ responsible agency itself, as brought to bear in transforming resource and opportunity inputs into welfare outputs.

Preferred distribution mechanisms, finally, will be those that give most effective expression to these ideals. Such are the consequences of what I have called “fit” among views of beneficiaries of distribution, objects of distribution, and distribution formulae and mechanisms. We shall see this abundantly borne out below.

## B. Recipients as Patients

The remainder left by incomplete agency — the “boundedness” portion of “boundedly responsible agency” — can be thought of, in the technical idiom of grammar, as “patienthood.”<sup>30</sup> Insofar as we *really* “cannot help ourselves,” we are patients — objects of fate or of others. We are acted *upon* rather than *acting* in such cases. Or we are children or addicts — people who literally cannot resist or do otherwise than as we do.

Precisely to the degree that our agency is bounded, we are *all* patients. But we don’t lightly admit or acknowledge this. Indeed, we are likely to feel a touch of contempt, rooted I think in the perceived *threat* posed by exemplars with whom we subconsciously but reluctantly identify, for any who are too quick to admit limitation. This fact, along with the indeterminacy of the boundary between choice and chance themselves in the many borderline cases we seem to experience every day, I think gives rise to another tendency: we tend

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29 See again *supra* notes 2, 10 and accompanying text.

30 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., BERNARD COMRIE, LANGUAGE UNIVERSALS AND LINGUISTIC TYPOLOGY: SYNTAX AND MORPHOLOGY 42-43, 58-61 (2d ed. 1989); JOHN LYONS, AN INTRODUCTION TO THEORETICAL LINGUISTICS 340, 350 (1967); see 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, 2295 *passim* (2003) (“patients”).

generally to let the boundary “take care of itself” rather than attempt precisely to limn it.<sup>31</sup> We do so simply by trying as hard as we can, prospectively, for as long as we’re able, then forgiving ourselves, retrospectively, when finally we have to “let go.”

I suspect that it is for reasons rooted in facts such as these — as well as in related concerns with incentives<sup>32</sup> — that few legal or policy analysts appear wittingly or deliberately to construe beneficiaries as patients. Some, though, even if inadvertently, turn out effectively to *commit* themselves to that construal. They do so through the positions they take in respect of appropriate distributed benefits, distribution formulae, and distribution mechanisms — positions whose logical consequences they don’t always appreciate.<sup>33</sup> We’ll see this in detail below as we turn to accounts of the mentioned benefits, formulae, and mechanisms.

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31 For an attempt “pragmatically” to limn it that demonstrates considerable ingenuity, see John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 *ECON. & PHIL.* 146 (1993); see also JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (1998). For a persuasive technical critique, see Mathias Risse, *What Equality of Opportunity Could Not Be*, 112 *ETHICS* 720 (2002).

32 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.

33 “Welfare” or “utility,” for example, when taken for the appropriate distributed benefit, fixes attention on outputs rather than inputs. It accordingly proves difficult, absent a Byzantine distribution formula, to be unambiguously welfarist or utilitarian without effectively treating beneficiaries as patients, since focus on outputs ignores agents’ roles in producing such outputs from inputs. Similarly, because resources and wealth figure readily as inputs to beneficiaries’ welfare functions, those who advocate ex post egalitarian *resource or wealth* distribution, irrespective of beneficiaries’ responsible choices, *likewise* treat beneficiaries as patients. In fact, *any* distribution mechanism that gives effect to some such distribution principle as those just mentioned will effectively treat beneficiaries as patients. By the same token, insofar as it *falls short* of egalitarian *prior* to, or *apart* from, the operation of beneficiaries’ responsible choices, it will violate ethical equality among beneficiaries and hence respect for their agency. It will do so by in effect treating some beneficiaries as deserving of less than others even when what are being considered are action-antecedent claims to material opportunities upon which action and choice operate. More on all of this as we proceed to our other distributive categories.

#### IV. OBJECTS OF DISTRIBUTIONS: BENEFITS (AND BURDENS)

Distribution and the infinitives that name it of course take more than the subjects and indirect objects that implicate distributors and beneficiaries. They take direct objects as well. Where there is distribution, there must be distributed things — in the present context, distributed benefits and burdens.

Distributed benefits and burdens turn out to be ethical touchstones or “focal points” for much distributive-ethical disputation. For whatever reason, they have tended to serve as the principal banners under which other distributive-ethical disputes — especially disputes over beneficiaries and distribution formulae — are conducted. This will become clear as we proceed.

##### A. Welfare and Wellbeing

Probably the best known contemporary conception of aptly distributed benefits has appeared under the names “utility,” “welfare,” “wellbeing,” “happiness,” “satisfaction,” and cognate expressions. While we do find subtle distinctions among various authors in construing these terms, they all share distinct family resemblances that appear to stem from one guiding idea.

The idea seems to be something like this: “Doing,” or “faring” well is by definition what matters to all of us. So, then, does well-faring, or “welfare,” and so too does anything named by “welfare” synonyms — terms of art such as “utility,” “satisfaction,” “happiness,” and so forth. Moreover, since it seems natural, particularly in a pluralist society, to suppose that a fitting measure of “faring well” is the degree to which one’s hopes, wishes, desires, or preferences are satisfied, it becomes tempting even to *define* such terms as naming whatever is effectively “yielded” or “produced” by the satisfaction of preferences (or on some more perfectionist readings, whatever is produced by the vindication of “interests,” be these “enlightened,” “rational,” “ideally informed,” or otherwise). The line of thought here accordingly concludes that law and policy ought to aim at “maximizing” welfare, wellbeing or utility, since to do so is to maximize the degree to which preferences or interests are satisfied and to which people accordingly fare well. Who but a curmudgeon or misanthrope could object?

There are, as it happens, perfectly non-misanthropic objections. Cavils to utilitarianism or “welfarism” typically target one or more of the following features. First, its conception of “welfare” *as construed* by one or more of its more eccentric or irresponsible advocates. Second and relatedly, its treatment of welfare as a mere output that is summed up and socially “maximized,” without regard to the way in which it is produced or distributed. And finally, third, its treatment of welfare as literal, *directly* distributed benefit, which

seems an impossible thing. I'll briefly elaborate these objections in the order just stated.

Construal-based objections to welfare as touchstone take a number of forms. Most seize upon certain unduly narrow or strangely overbroad stipulations by advocates as to what ought to count as well-faring. Some early utilitarians, for example — Bentham and Edgeworth are probably best known among them — suggested that all we should count as well- or ill-faring was hedonic experience. Bentham dubbed this commitment the “principle of utility.”<sup>34</sup> Edgeworth predicted that one day some manner of “hedonometer” would be developed, which would equip us to measure utility much as we now measure temperature.<sup>35</sup> Ramsey and von Neumann made similar suggestions.<sup>36</sup> Some even today suggest that utility and disutility are reducible to endorphins and C-fiber counts, respectively, much as “water” is now specified with definitive precision as H<sub>2</sub>O, or “salt” as NaCl.

Suggestions of this sort draw predictable objections and equally predictable responsive refinements. Best known among these, I suspect, are those of the later Mill, Sidgwick, and more latterly Griffin.<sup>37</sup> These responses take seriously the observation that a life that fares well might be more than a years-long orgasm or itch-scratching. Unfortunately, they continue to treat even their refined renditions of welfare as singular substances of mysterious character, the aggregate quantum of which is to be maximized. At least this is so until such conceptions are sufficiently refined as no longer to lend themselves to simple aggregation and scalar quantification. We'll find more to say about this upon turning to distribution formulae in the next Section.

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34 See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1789):

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do. . . . By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question.

35 F.Y. EDGEWORTH, MATHEMATICAL PSYCHICS 81 (London: C. Kegan Paul and Co. 1881) (the “hedonometer”).

36 J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 17 (1944) (“Even if utilities look very unnumerical today, the history of the experience in the theory of heat may repeat itself, and nobody can tell with what ramifications and variations.”); F.P. RAMSEY, *Truth and Probability*, in PHILOSOPHICAL PAPERS 52 (D. H. Mellor ed., 1990).

37 See JOHN STUART MILL, UTILITARIANISM (1863); HENRY SIDGWICK, METHODS OF ETHICS (1906); JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE (1986).

Today's exponents of the earlier Benthamite crudity take a much different tack than do the refiners just mentioned. Instead of disregarding all welfare that isn't hedonic in nature, as Bentham and Edgeworth did, they push to the other extreme. They count as ethically cognizable "welfare" the satisfaction of literally any preference whatever. If you want it, your getting it enhances your welfare, end of story. This tack too has drawn predictable objections, sometimes followed by refinements reminiscent of Griffin's. Objections of the form I have in mind here observe that a preference itself can be ethically problematic. It can be so either "in and of itself," so to speak — because, say, expressly and even self-consciously anti-ethical — or as the product of, hence as endogenous to, antecedent distributive circumstances that are themselves ethically problematic.

It rings somehow dissonant if not ethically incoherent, for example, to say of a terrorist cell that "it fares well," or that "its wellbeing improves," when it succeeds in killing more innocents. Like remarks hold in the case of a pirate, a rapist or molester, a thief, or what have you. The thief, after all, is by definition the person who violates distributive norms. These are norms in conformity with which "good" and "well" themselves must be understood, if we aim to be able to make determinate prescriptions in respect of rightly and wrongly distributed benefits and burdens at all. This is the sense in which "the right" is indeed "prior" to "the good" — a deeper sense, I believe, than that Rawls asserted; goodness, wellness and welfare must be understood in manners that do not conflict with rightness — i.e., with distributive propriety.<sup>38</sup>

To call the malefactor's satisfaction — that is, the satisfaction of one who violates a distributive norm — "welfare" rather than "satisfaction" is to confound his desert with his desire. That is in turn to jettison the distinction between description and prescription, positive and normative, "is" and "ought," altogether. And *that* is in turn to relinquish the capacity to prescribe or evaluate at all, hence to abandon normative legal or policy analysis themselves. Those who construe welfare in this manner saw off the branch upon which they sit; they effectively deny themselves the conceptual capacity to pursue the vocation they aim to pursue — namely, to contribute to normative, as distinguished from positive, legal, political, or economic theory.<sup>39</sup>

It is likewise misleading, if somewhat less jarringly so, to say of a slave who has resigned herself to the alleged truth of what she is told of her putative race-rooted "inferiority," that "her welfare has improved" relative to what it would be in some alternative circumstance in which she rejects the inferiority

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38 For further development and elaboration of this line of criticism, see Hockett, *supra* note 1; and Hockett, *supra* note 2.

39 Hockett, *supra* note 1; Hockett, *supra* note 2.

claim and demands due respect. True, in contrast to the thief, we presume her to be faultless in the hypothetical; hence we are able to view her acceptance of her situation as affording some cognizable good that might partly mitigate her otherwise unambiguously bad lot. But to claim without more that her “welfare” is better when she believes false assertions of her putative inferiority and accepts her enslavement is nevertheless misleading. For it fails to register the profound wrongfulness — the distributive impropriety — of that very circumstance which renders her resignation consoling, and thereby suggests that the circumstance is legitimate. In this sense, it works a bit in the way that a simple “no” in reply to the falsely premised “have you stopped beating your spouse” question serves as accessory to the false premise itself. If we are to maintain the distinction between positive and normative with any degree of precision, then, it will be better in these so-called “tamed housewife” cases to say that our protagonist “is resigned to her unjust circumstances,” rather than that “her welfare is higher.”<sup>40</sup>

Objections to welfare as distributed benefit not rooted in particular construals thereof, for their part, take root in the fact that welfare is not a directly measurable or distributable substance. The physical distribution problem is the most immediately transparent: whether we assimilate it to endorphins, preference-satisfactions, “enlightened” or fully-informed or ethically-laundered preference-satisfactions, etc., welfare just isn’t a thing we can directly mete out. At best it is, rather, produced as an “output” by beneficiaries from physical “inputs” — items literally meted out. This feeds into two lines of concern raised by theorists who are not unalloyed welfarists.

The first is that those who would practically speaking be welfarist must operationally be “something elseist” as well. Practically speaking, they must advocate distribution of wealth, resources, opportunities, or some other such thing from which welfare can be “produced.” The second concern is that, because (a) welfare emerges from what beneficiaries *do* with whatever is literally distributed, while (b) the distributed things are generally scarce, even welfarists face the question of how to respond to beneficiaries’ capacities, and hence arguably their responsibilities, to produce their *own* welfare out of what they are allotted. The fuller significance of these lines of concern will emerge more fully below when we turn to competing proposed benefits and proposed distribution formulae.

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40 I allude here to the instructive “Tiny Tim” and “tamed housewife” objections raised by Gerald Cohen and Amartya Sen, respectively. See G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3 (1997); AMARTYA SEN, *THE STANDARD OF LIVING* (1987).

Finally, there are well-known measurability concerns raised by welfare as proposed distributional benefit. On most present-day understandings, welfare no more lends itself to practical 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 distributional benefit.

We shall presently see that in these mentioned respects, “subjective” welfare is, measurability-wise, the inverse image of more “objective,” directly distributable benefits. In fact, we shall find that both of these things — welfare and the physical resources from which beneficiaries derive it — must be *brought together* for distributed benefit-measurement problems to be addressed in an ethically intelligible manner. This too, along with its practical consequences, will emerge more clearly as we proceed.

## B. Resources and Wealth

The principal competitors to welfare as proposed distributed benefit in the literature take the form of material resources or wealth, further construed in one manner or another. The more specific construals range from simple and abstract to complex and concretely particular. The simplest and most abstract characterization is simply as *wealth* — an “index” of some sort whose internal complexity is ignored for theoretic purposes, or some ultimately price-index-associated medium of exchange (in effect, money) that recipients can transform into welfare by purchasing and consuming more variegated goods and services.<sup>41</sup> Characterizations whose internal complexity and concrete particularity remain transparent include Rawls’s “index of primary goods,” among others.<sup>42</sup>

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41 This rough characterization of wealth, incidentally, is reminiscent of, but preferable to, that offered by Posner in the 1980s as criticized below in Part VI. *See, e.g.*, RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1983). A suitable synonym for my usage would be “purchasing power.”

42 *See, e.g.*, JOHN RAWLS, *A THEORY OF JUSTICE* 54-55, 78-81, 358-65 (rev. 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* (Cornell Law School Research Paper No. 06-030, 2006), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1054&context=lsrp\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1054&context=lsrp_papers) (under revision for *Economics & Philosophy*).

Resources as prospective distributed benefits offer several advantages over welfare. First, resources are directly distributable. Second and relatedly, they are, in a sense shortly to be explained, reasonably measurable. Finally, third, they leave space for the working of beneficiaries' (bounded) responsibilities to "produce" their own welfare. The satisfactions that beneficiaries enjoy can ride largely on what they *do* with their resource allotments. This strikes most people — particularly those who attend to recipients' agency — as both ethically right and, as a matter of incentives, efficient. This will emerge more fully when we turn to distribution formulae and distribution mechanisms below.

Resources' only *disadvantages* as distributed benefits stem from the degree to which a theorist might sever questions concerning the propriety of their spread from considerations of welfare. Where the severance is complete and entire, resourcism devolves into fetishism. A case in point would be a theorist who advocated the distribution of sand to everyone, under conditions in which sand lacked significant use or exchange value. In such case the stuff that is spread is best viewed as being not even so much as *cognizable* as "resource," "wealth" or the like. It cannot be so any more than, say, Nazis' or thieves' preference-satisfactions are ethically cognizable as "wellbeing." Needless to say, no theorist has advocated any such "resourcism" as this. But some, as we'll see in a moment, have permitted the link between resource and welfare to attenuate.

The important point for present purposes is this: Resources qua resources are, tautologously and yet sometimes forgotten, always resources *for* something. They *count* as resources, as distinguished from merely insipid, ethically inert substances, only by reference to purposes, hence derivatively preferences, that would-be users have for them. "Wealth" for its part, derived as it is from the Middle English "weal" as in "common weal," is cognate with "wellbeing" itself. So resources or wealth, even to count as such, must be associated in some manner with that which concerns the beneficiaries who engage our distributive concern in the first place. And that is wellbeing. This raises a question: In *what* way, precisely, must resources be tied to wellbeing to count as resources? The full answer emerges only when we turn to proposed distribution formulae and distribution mechanisms below.<sup>43</sup>

Relations between resource and welfare implicate *measurement* matters as well as intelligibility concerns. Resources, in contrast to welfare, raise no *direct* challenge where quantification and interpersonal holdings-comparison alone are concerned. They do raise an *indirect* challenge, however, where the *ethical relevance* of quantities and holdings are concerned. For ethical relevance here, as just observed, is tied critically to welfare-yield. For related

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43 See *infra* Parts V, VI.



reasons, resources also raise a *direct* challenge where *commensurability* is concerned. I sketch these challenges in turn.

The indirect challenge is this: Suppose that a given distributed benefit yields differing welfare measures to differing beneficiaries. Suppose also that welfare is part of what ultimately matters when beneficiaries engage our normative concern. Recall finally that welfare itself is, as observed in Section A, not practicably quantifiable or interpersonally comparable in the holding. If we accept these three plausible premises, then it is not immediately apparent what *ethically cognizable* advantage is offered by resources' quantifiability and interpersonal comparability advantages. Sure, we can measure them more easily than welfare; but it is only by linking their measures to welfare measures that we draw any ethically interesting advantage from that measurability. I'll show how to address this challenge when I turn below to distribution mechanisms.

Resources as distributed benefits also, I noted, raise a *direct* challenge. First, note that resources are disparate. Now suppose also that no such resource is properly subject to its own distribution formula without regard to the other resources. Suppose, in other words (as seems plausible), that we cannot with ethical intelligibility determine some rule for distributing one resource over beneficiaries without also taking account of the distributions of all other resources over beneficiaries. It will then follow that some means of indexing will have to be developed for such terms as "total resources" or "wealth" to bear distributive-ethically relevant content. But now note that *de facto* valuation occurs when comparative weightings are assigned to vector components — that is, to distinct resource types — in fashioning the scalar measure along which "total resources" or "wealth" are to be quantified. Note also that any such valuation that would be ethically satisfactory will again have to link up with welfare, which we've already found to pose measurement challenges. Otherwise we risk fetishism — the senseless valuing of a thing without regard to its actual importance to anyone. It follows, in such case, that indexing — i.e., commensurating — too will be problematic.

How, then, are we to reduce resources to measurability in an ethically intelligible manner? How, in other words, are we satisfactorily to capitalize on what I've cited as their practicability advantages over welfare in view of their measurability? Fortunately, it happens, as I suggested a moment ago, that a well specified distribution mechanism dispatches these problems. It allows both for (a) unobjectionable indexing, and for (b) an ethically intelligible coupling of readily measurable disparate resources with human welfare. I must then once again ask the reader's indulgence until we reach Parts V and VI.

### C. Opportunity and Access

One of the difficulties that Section B just observed in connection with resources as proposed distributed benefits is a counterpart to the objectionable preference problem that Section A observed in connection with some understandings of welfare. This difficulty has in consequence led some to propose a distributed benefit candidate that differs in the articulation, but at bottom amounts to a mere fuller naming, of resources.

Here is how the thinking goes. Because welfare, or “advantage,” is what matters to people, material stuff in and of itself is not ethically salient. That is the “fetishism” concern mentioned in Section B. Furthermore, since material resources are in fact variegated and thus in need of commensuration if they are to be spread under one distribution formula, some common denominator is required. The “common denominator,” in turn, is again welfare, or advantage — the same thing to which resources must somehow be tied if they’re to be *bona fide* resources, as distinguished from inert objects fetishized only by theorists.

Why not, then, simply designate the item whose spread can intelligibly engage our distributive-ethical concern — that is, why not designate the appropriate object of distribution — something like “opportunity for welfare,” or “access to advantage?”<sup>44</sup> We might even continue to call this benefit “resources,” or “wealth,” provided we keep the “opportunity” or “access” understanding of those terms in mind. *Et voila*, we arrive at the influential post-Rawlsian accounts of appropriately distributed benefits now associated with Arneson, Cohen, Dworkin, Roemer and Sen.<sup>45</sup>

For reasons that are plain in light of Section B above, I think that “opportunity for welfare” and “access to advantage” as so described are best understood as alternative christenings of resources or wealth. Their advantage over the

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44 See, e.g., R.J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989) [hereinafter Arneson, *Equality*]; R.J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. (1990) [hereinafter Arneson, *Liberalism*]; G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989). 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.

45 DWORKIN, *supra* note 30; ROEMER, *supra* note 31; COHEN, *supra* note 40; ARNESON, *Equality*, *supra* note 44; ARNESON, *Liberalism*, *supra* note 44; AMARTYA SEN, *Equality of What?*, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307 (Stephen Darwall ed., 1995).

terms “resources” or “wealth” stems from a possibility countenanced in the same Section: that some might grow numb over time to the fact that resources or wealth, in order to *be* resources or wealth as distinguished from ethically inert material, must be resources *for* something. They must be understood by reference to some purpose hence preference, and in *that* sense are “opportunities for welfare” or modes of “access to advantage.”<sup>46</sup>

Resources and wealth thus represent, I shall say, “material opportunity.” They afford opportunity to satisfy wants, to pursue plans, to live well-planned lives, and in that sense to enhance ethically cognizable welfare, wellbeing, and the like. Henceforth I shall accordingly use the terms “resource,” “wealth,” and “material opportunity” more or less interchangeably, with occasional caveats registered where necessary.<sup>47</sup>

## V. PATTERNS OF DISTRIBUTION: DISTRIBUTION FORMULAE

“To distribute,” like other verbs, does more than open variables for subjects and objects. It also is subject to adverbial modification. Distributive claims, as I dubbed them in Part I, in effect mandate conformity to one or another such modification when semantically complete. They say, in effect, “things are to be distributed thus: . . .” Such mandates are in turn subject to feasibility constraints, to which they must *also* conform when *pragmatically* complete. These in turn find expression in further adverbial modifications — claims of the form: “things *can* be distributed *thus*: . . .”

In sum, completed, actionable distributive claims are replies to two adverbially modified forms of question: 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 VI.

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46 Rather as some seem to have grown numb to the fact that wellbeing is not ethically unevaluated pleasure.

47 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.

There seem to be three leading candidate-families on offer where distribution formulae are concerned. 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. I accordingly first discuss each of the distinct families of candidates by reference to its best-known members. Then I conclude both with observations on the inter-formulability of maximizing and equalizing formulae, and with cognate observations on the distributional equivalence of many distributive-ethical views that feature differing “mixes” of variable-valuations.

### A. Maximizing

The best-known maximizing distribution formulae on offer are those I call “naïve” maximizing formulae. The operative ideal that prompts them is disarmingly simple. It is that whatever we distribute should be distributed in such manner as maximizes the quantity of some aggregate taken to be normatively salient in its own right. Usually this means somehow-aggregated welfare or wealth, summed over the beneficiaries who hold or enjoy it.<sup>48</sup> 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:

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

where “Max” means to maximize, “ $\sum$ ” means to sum, “ $i$ ” indexes by beneficiary, and “ $n$ ” designates the number thereof in the society in question.<sup>49</sup>

Maximization in so bald-faced a form has, unsurprisingly, provoked some objections. These include charges of (a) fetishism, (b) problematically unequal treatment of beneficiaries, (c) objectionable construal of beneficiaries as nonresponsible patients, and less often (d) 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. Each of them tends analytically to entail the others, as I shall now demonstrate.

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48 Welfare aggregation and maximization are associated with utilitarian ethics. Wealth maximization is associated with normative economics of law. For more on this issue, see *infra* Part VI.

49 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* notes 10, 14, 17 and accompanying text.

Begin with (a), the fetishism charge. This one is typically directed at naïve would-be wealth-maximizers rather than welfare-maximizers, though this reflects a confusion that can and 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 orange-colored surface-area in the universe. There appears to be no ethically cognizable *reason* for such a pursuit if it does not entail proper treatment of beneficiaries each and all. And if it is indeed individuals who ultimately matter to us where distributive normativity is concerned — as both the dominant agent and patient construals of beneficiaries discussed in Part III suggest — then what constitutes proper treatment of individuals should be explicable without reference to any aggregate. It must be independently specifiable.<sup>50</sup>

So far, so good. But now note that, though it is less often if ever observed, naïve welfare-maximizing is subject to the same charge of fetishism as plagues naïve wealth-maximizing. Welfare might well be — indeed might stipulatively or otherwise trivially be — “what matters” to people. But if it is produced by means that are indifferent to the proper identification and treatment of numerically distinct, politically equal beneficiaries, then it is no less ethically inert than are wealth or orange surface-space. For again, distributive-ethical concern for individuals requires attention to the earned or otherwise deserved wealth or welfare of *each* antecedently equal-rights-bearing beneficiary, one by one. Non-fetishist, individualist normativity takes no cognizance of any antecedently defined aggregate — even a welfare aggregate — in terms of which individuals’ rights are defined and apportioned only a posteriori.<sup>51</sup> To hold otherwise just is to hold that the aggregate’s distribution does not normatively matter, hence that individuals and their political equality do not matter.<sup>52</sup> It is to place an unintelligible interpretation of “the good,” severed from any ground in the individuals *whose* good it *is*, ahead of “the right.” And that is precisely what is fetishist.

Recall now that I also mentioned (b) an unequal treatment complaint that can be leveled at naïve maximization. In view of the immediately foregoing, we

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50 For a reminder of the basis of this supposition, see *supra* note 17 and accompanying text.

51 Indeed, as we’ll see in Part VI, to attempt this is not only ethically mistaken, but analytically impossible. One cannot derive any determinate non-fetishist distributive prescription from a would-be independent maximizing imperative.

52 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*, at ix (1974).

can now see how this complaint might bear a conceptual link to the fetishism charge, hence that the two charges might not be orthogonal. The link is found in the possibility that whatever is naively maximized might be maximized by means that in effect treat persons as being of ethically differing status, even apart from their responsible and hence ethically endogenous choices.<sup>53</sup>

It might turn out, for example, that aggregate welfare or wealth would be maximized simply by euthanizing people who are clinically depressed or otherwise handicapped through no fault of their own.<sup>54</sup> Or maximization might best be effected in some populations by channeling resources or wealth toward people blessed with high endorphin-productivity or otherwise strongly resource-responsive utility functions. These would be people who, like Bentham in the Introduction, derive disproportionate pleasure from what they receive relative to others in the population.<sup>55</sup> The fact that naïve maximization imperatives do not prohibit channeling resources disproportionately in favor of such people in principle — and indeed seem to welcome if not require such measures — one can plausibly argue, demonstrates naïve maximization's unsuitability to serve as or underwrite an ethically defensible distribution formula.

Now for (c), the patient-treatment objection that I mentioned can be leveled at naïve maximization. This one can be viewed as the flipside of the unequal treatment objection. Hence it too, like the latter, is analytically tied to the fetishism objection. The idea here would be that distribution that tracks morally arbitrary characteristics of faultlessly disadvantaged persons<sup>56</sup> does more than treat these people as effectively expendable or legitimately subordinable. It also treats arbitrarily *advantaged* persons<sup>57</sup> as being of meritlessly higher ethical or political status. It does so in complete disregard of that which constitutes distributive beneficiaries as *fellow citizens* — namely, per Section III.A. above, their responsible agency.

How does this harm the advantaged beneficiaries? Well, there is an ethically important sense in which they are treated in what might be called a “metaphysically patronizing” way. The advantage enjoyed is disturbingly contingent, dependent as it is upon traits that the beneficiary is not responsible for. Conferring advantages on beneficiaries in response to such characteristics

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53 In such case, we might say they are treated as being “antecedently” or “exogenously,” hence *ethically essentially* unequal.

54 Richard Posner professed in the early 1980s to be troubled by this possible consequence in the case of utility-maximization, but then puzzlingly dismissed the concern in the case of wealth-maximization. See POSNER, *supra* note 41; *infra* Part VI.

55 An internal relation, then, between unethically unequal treatment and fetishism.

56 Depressives and handicapped persons, say, as just countenanced.

57 “Utility monsters” and talent-Übermenschen, say.

is 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" rather than of the beneficiary's ethically relevant responsibility. This beneficiary is effectively born into a polity that treats her as a patient — per the language of Section III.B. — and, indeed, as an object. For her politically honored advantages are not really her own — they are not the product of her self, of her agency — but instead a conditional gift conferred by society in virtue of an accident. They are conferred simply because the beneficiary is, as we might put it, "productively blonde."<sup>58</sup> The beneficiary in such case is a mere funnel into which the channeling of resources simply happens to produce a higher aggregate. That is profoundly disrespectful of ethical personhood and ultimately in consequence damaging to the self. This would be so equally in the cases of the fortunate and the unfortunate.<sup>59</sup>

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58 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. Is 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* (Boston: James R. Osgood & Co. 1882). Also such films as *ROMAN HOLIDAY* (Paramount Pictures 1953); *THE LAST EMPEROR* (Recorded Picture Company, Hemdale, Yanco Films United, TAO Film, in ass'n with Screenframe and AAA Soprofilms 1987); and *WINGS OF DESIRE* (Road Movies Filmproduktion, Argos Films, Westdeutscher Rundfunk, Wim Wender Stiftung 1987).

59 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. *See, e.g.*, RANDY E. BARNETT & JOHN HAGEL, III, *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* (1977); P.S. Greenspan, *Responsible Psychopaths*, 16 *PHIL. PSYCHOL.* 417 (2003). The link is well drawn in FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (1866).

A final objection to naïve maximization stems from measurement challenges of the kind enumerated in Section IV.A. If welfare is the polity's maximandum, the objection is that welfare does not lend itself to interpersonal comparison in the holding with sufficient precision as to lend the idea of its aggregation and maximization any practicable content. Where wealth rather than welfare is the maximandum in question, the measurement objection seizes on commensurability. There are no markets in many valued or potentially valued goods and services, and in consequence the "wealth" we purport to be maximizing constitutes an ethically incomplete index. Relatedly, one might point to one or another variant of the so-called "Scitovsky paradox." Here one notes that, since two states can be Kaldor-Hicks superior to one another, meaning that the Kaldor-Hicks criterion does not yield a reliable wealth-ordering of possible distributions, the only known welfare economic conception of "wealth" simply does not constitute an aggregate that is sufficiently determinate as to underwrite an intelligible conception of "maximization."<sup>60</sup> I shall say rather more on this subject upon turning to distribution mechanisms in Part VI.

Proponents of naïve maximization have a quiver full of standard rejoinders to the objections just rehearsed. To the fetishism complaint, the welfarist replies that welfare is "what matters" to people, while the wealth-maximizer observes that wealth affords opportunity to satisfy preferences, hence welfare. In both cases, the respondent concludes that maximizing cannot, in consequence, be fetishistic.

Unfortunately, this style of rejoinder is simply a *non sequitur*. For the fetishism complaint is not that welfare and wealth do not matter.<sup>61</sup> It is that their naïve maximization does not matter. The complaint, in other words, is that naïve maximization misunderstands the *ways* in which welfare and wealth matter. As distributed benefits or the raw materials thereof, welfare and wealth of course matter to everyone. Indeed, as we noted in Section III.B., this is tautologically so. The problem is that, when maximized pursuant to a merely additive maximizing formula, they matter only, or at any rate disproportionately in an ethically objectionable manner, to those who happen to be born lucky enough to attract larger distributions by dint of their highly resource-responsive

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

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



utility functions. Naively maximized welfare or wealth might of course matter much to that fortunate few. But it will *not* matter in the same way to “us,” whose collective responsibility is ethically to evaluate a proposed distribution formula’s treatment of each antecedently rights-bearing constituent of that inevitably benefit-distributing polity which we jointly constitute.

Naïve maximizers also have stock rejoinders that amount to *non sequiturs* for the unequal- and patient-treatment complaints. To the unequal treatment charge, the reply is that maximization counts each beneficiary’s utility or wealth-production function “only once” in the social welfare or wealth function. One wealth or welfare function, the claim runs, one “vote,” hence equal treatment. We encountered this “Hail Mary” play above, in the Introduction.<sup>62</sup> It, too, is a *non sequitur*, for reasons also noted in the Introduction. It identifies beneficiaries entirely with their welfare- or wealth-production functions — as distinguished, for example, from their responsible agency. That reductive misidentification constitutes a form of fetishism in respect of beneficiaries that is the counterpart of the fetishism of naïve maximization itself in respect of distribution formulae.

A human agent is no more her wealth- or welfare-function than she is her nose or her forehead. Inasmuch as people are faultlessly and non-creditably born with differing wealth or welfare functions,<sup>63</sup> equal treatment of those functions is unequal treatment of the people whose functions they are — just as to treat people as equals in respect of their noses or foreheads would be to treat them as unequals in respect of their personhood. And it is precisely this to which unequal treatment objectors object.

Naïve maximizers’ rejoinder to the treatment-as-patients objection is reminiscent of, yet also a partial misappropriation of, the claims about beneficiaries made by objectors themselves. Here the reply first notes that beneficiaries are at least partly responsible agents who act to produce much of their own welfare or wealth. It then goes on to reason that, since distributing to maximize welfare or wealth is to distribute in favor of the best, “most efficient” such welfare- or wealth-producers, maximization *coincides* with agent-rewarding.

Replies of this form have things half, but only half, right. The problem is that they place the cart before the horse, and in so doing fetishize — attribute life to — the cart. Here is what I mean: If beneficiaries are owed equal treatment as agents *ex ante*, *prior* to taking the actions for which they are responsible, then the “horse” should be distribution considered *prior to the consequences*

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62 See *supra* note 15 and accompanying text.

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

for any *ex post* aggregate. In other words, one should focus on inputs, not output. For the output — the wealth aggregate — is ultimately just as much the product of agents' responsible actions as it is of the *ex ante* distribution of inputs. Look to the propriety of the *ex ante* distribution of inputs, then, and the appropriate output — the nonfetishist, ethically relevant wealth aggregate — will effectively take care of itself. As an *ex post* matter, it will be maximized “automatically” by our responsible agents. For it will be the product of responsible actions taken with properly distributed inputs — which actions are precisely what the output should track.<sup>64</sup>

As for the measurement-based objections to naïve maximization, proponents of the latter do not seem to have arrived at any canonical rejoinder. This is no accident. For the key to a satisfactory reply again lies in turning away from reference to outputs, and turning to ethically relevant inputs instead. The moment we do that, a strategy for satisfactorily addressing the measurement challenges lies to hand. I defer elaboration, as noted before, to Part VI's treatment of distribution mechanisms. For this is where the answer is found.

## B. Maximining

In recent years, a number of variations on maximizing views have gained growing numbers of adherents. These “prioritarian” views, as they are now called, take seriously some of the shortcomings of naïve maximizing just discussed, and endeavor to correct them. We shall see that they do not quite succeed. Probably the best-known prioritarian distribution formula is also one of the earliest, developed well before the term “prioritarian” had been coined. I refer to the “maximin” formula nowadays associated with — presumably because defended most thoroughly by — John Rawls in operationalizing his renowned “Difference Principle.”<sup>65</sup>

The guiding idea behind Rawls's and many other prioritarians' contributions is something we noted in the previous Section. Many of the differences we find among persons that might seem to recommend disparate treatment of them pursuant to naïve maximizing imperatives are, as Rawls memorably put it, “arbitrary from a moral point of view.”<sup>66</sup> Differences of this sort,

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64 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 whatever 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? For more on this issue, see *infra* Part V.

65 See, of course, RAWLS, *supra* note 42.

66 *Id.* at 72.

Rawls concludes, precisely *because* they are morally arbitrary, should not determine beneficiaries' distributive shares. Instead, if we are serious about identifying and treating one another as moral, juridical, and political equals, these differences must in some way be neutralized where distributive ethics are concerned.

Now, neutralizing morally arbitrary differences altogether, Rawls appears to have recognized, would recommend some form of *egalitarian* distribution formula. Rawls might even have thought that it would recommend what I'll call an *outcome-egalitarian* distribution formula, though Rawls is not altogether clear on the matter.<sup>67</sup> But Rawls himself shied away from any categorical commitment to an egalitarian distribution formula in respect of either inputs *or* outputs. For he took it to be ethically relevant that some *departures* from equality can render even the "worst-off" among unequals "better-off" than they would be under conditions of equality.

The possibility that equality in some possible worlds might be achievable only by "leveling down," in other words, left Rawls amenable to the prospect that something short of full-bore egalitarianism might yield the most ethically satisfactory distribution formula. The position at which Rawls ultimately arrived was that departures from equal distribution — ignore the input/outcome distinction for now — will be morally tolerable insofar as, but only insofar as, they better the lot of "the worst-off."<sup>68</sup> Rawls labeled this guiding maxim "the Difference Principle."

If naïve maximizing raises the tide, and if a rising tide not only lifts all boats but also lifts them so high that even the lowest are raised higher than would have occurred under an egalitarian distribution formula, then maximization will be ethically proper. But again, this will be so only on condition that "the minimum" is maximized too. Moreover, differing distributions can even be rank-ordered in keeping with this so-called "maximin" formula. The aim, then, is expressible thus:

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

where "Max" again means to maximize, "Σ" again means to sum, "i" again indexes by beneficiary, and "n\*" designates the best-off member of the worst-off class, hence the cut between "worst-off class" and all others. Maximin is just the formulaic expression of Rawls's Difference Principle. It is not now the only, but it is the first and best-known, prioritarian distribution formula.

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67 The sense in which it's not clear will emerge presently.

68 There's quite a leap here. But I aim here to exposit, not defend, Rawls's chain of reasoning.

Both the Difference Principle and other prioritarian maxims prove on reflection, however, to be only a bit better than *non sequitur* responses to the specific objections that Rawls and others have leveled at naïve maximization. They turn out in consequence to be coarse-grained remedies, if they are determinate remedies at all. There are several reasons for saying this. First, “the worst-off” class seems to be quite *indeterminate* in Rawls’s formulation. For one thing, it is unclear whether it is the worst-off person, the worst-off 0.1% of persons, the worst-off centile or decile or quintile or whatever that Rawls has in mind. Worse yet, it is unclear even how one is to decide. Rawls offers no principle on the basis of which to decide the question, nor does any particular such principle seem to recommend itself.<sup>69</sup> The lack of a principled basis for deciding this all-important question is troubling, particularly since Rawls offers maximin precisely in order to neutralize morally arbitrary — that is, unprincipled — determinants of distributive shares and thus afford ethically satisfactory guidance to law and policy.

A related, but now more particular difficulty is this. Rawls does not appear clearly to conceive, or even intelligibly to motivate, the idea of a “worst-off class” by reference to any consideration of the *reasons* for anyone’s being worst-off. Rawls draws no distinction, for example, between those who are worse-off by chance and those who are effectively worse-off by choice — as, for example, some might be if their status is the product of irresponsible or deliberately self-destructive behavior. Yet if any ground of distinction among persons that might be of interest to distributive ethics is *not* “morally arbitrary” — and surely there must be *some* that are not if Rawls’s guiding predicate of “moral arbitrariness” is to do any work — one would think it would be that one. Such was the upshot of Section III.A. above, on responsible agency.

As if to register at least an oblique awareness of this cluster of problems, Rawls’s full theory of appropriate distribution employed two more devices apparently meant to bring some attention to responsible agency and equal treatment back into his account. The first device was the familiar “veil of ignorance” for which Rawls appears to be most widely known — somewhat

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69 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 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 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 non-cognizable to ethically cognizable equalizing. For more on this issue, see *infra* Part VI.

ironically, in that the device long antedates Rawls.<sup>70</sup> The prima facie role of the veil for Rawls was justificatory. The idea was that, in their roles as distributors who choose distribution principles under uncertainty with which they must subsequently live as beneficiaries, rational parties “would” select maximin.<sup>71</sup> The distribution formula could in that case be thought of as a sort of “contract” freely entered into by citizens under idealized conditions whose “ideality” sounded in impartiality.

As thus characterized, the veiled choice scenario is of course most apparently prompted by the aim to ensure ethical equality through anonymity and consequent impartiality. Choosers are rendered unable to benefit themselves over others, because the characteristics that distinguish them from others are hidden from their view. That is the ethically interesting form of “ignorance” behind the veil of ignorance.

What Rawls perhaps less explicitly recognized, however, was that the veiled choice’s being the product of a *choice* scenario rendered maximin at least partly a *responsible* choice scenario as well. That is to say, by in effect identifying beneficiaries and distributors as the same people, Rawls ensured beneficiaries were, at least at some level of abstraction, responsible for their own distributive shares. For they were responsible for the chosen distribution formula pursuant to which those shares would be determined.<sup>72</sup> The degree to which this attribute of the veiled choice scenario explicitly motivated Rawls is unclear. But it must have constituted at least part of its attraction. For the linkages between ethical equality and responsible agency noted above in Section III.A. are not hard to see. And the proposition that Rawls himself saw it finds some support in the language Rawls used in motivating the second responsibility-sensitive feature of his account to which I obliquely alluded above. This is Rawls’s conception of the appropriately distributed *benefit*.

The second device by which Rawls at least implicitly — and we’ll see only partly — addressed the responsible agency and ethical equality problems that threaten the Difference Principle, then, was his characterization of the appropriate distributed benefit. Rawls said that what ought to be distributed is what he called an “index of primary goods.” This was, in the idiom I adopted above in Part III, a lumpy and only partly scalable vector of disparate, abstractly conceived resources and opportunities.<sup>73</sup> Among the components

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70 See, e.g., Harsanyi, *supra* note 15.

71 The reason for the scare quotes around “would” will emerge momentarily.

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

73 RAWLS, *supra* note 42, 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 IV;

were various material resources, but also what Rawls called “the social bases of self-respect.” Liberty, too, was included, though in a manner through which it could not be traded off for other primary goods — hence Rawls’s oft-quoted lexicographical “Priority of Liberty” maxim.

Rawls was at least partly cognizant of the resonance with responsible agency and ethical equality that selection of primary goods as appropriate distribuendum afforded. For his explanations made at least occasionally overt reference to the fact that selecting primary goods as distributed benefits holds beneficiaries at least partly accountable for production of their own welfare.<sup>74</sup> Moreover, Rawls expressly noted that to make primary goods the salient distributed benefits is effectively to require that beneficiaries internalize the costs that their life-plan-rooted preferences for primary goods impose upon others.<sup>75</sup> So Rawls appears, in virtue both of his reliance upon veiled choice for purposes of distribution formula, and his reliance upon primary goods as distributed benefit, to have been at least an incipient exponent of what I call “material opportunity egalitarianism” in Section VII.A. below.

The problem for Rawls, I believe, lies in the “incipient” piece of this description. For note, first, that Rawlsian primary goods bear no necessary connection to maximin as distribution formula. The combination, rather than constituting any manner of “natural fit” of the sort that I suggested in Part I is needed, seems to be accidentally paired. Indeed, I shall now claim, they amount to a clumsy and ultimately incoherent combination. For they render Rawls a responsibility-tracer in his choice of distributed benefit, and a moral accident-allower in his selection of distribution formula.<sup>76</sup> The reason is straightforward. It is that those who are “worst-off” in respect even of *primary goods* holding might still be worse off either by chance or by choice, with Rawls drawing no ethical distinction between the two prospects.<sup>77</sup>

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*see also* Hockett & Risse, *supra* note 42.

74 Or in Rawls’s preferred idiom, the formulation and successful pursuit of their own “plans of life.” *See* RAWLS, *supra* note 42, at 80.

75 *Id.* at 359.

76 This is not surprising given Rawls’s ambivalence about responsibility. On the one hand, he defends his selection of primary goods as distributed benefit 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 id.* at 90-93, 182.

77 *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.

Rawls's characterization of maximin as the product of veiled choice might, in theory at least, partly have lessened the volatility of the mixture just noted. At least that might have been true had the choice actually been made, or had there been any compelling reason to suppose that it "really would" have been made. But theorists appear broadly agreed that the choice theory implied by Rawls's explanation of why maximin "would be" chosen behind the veil is "exotic" at best.<sup>78</sup> The choice it imputes to the hypothetical choosers is extensionally equivalent to that which would be made by a chooser who is "infinitely" risk-averse.<sup>79</sup> That makes it seem rather unlikely that the choice even "would" be made, let alone that it is ethically satisfactory to treat beneficiaries as though the choice *has* been made. Whatever trace of responsible agency the veiled choice scenario lends to Rawls's selection of maximin as the appropriate distribution formula is accordingly much attenuated, if not obliterated.

Rawlsian justice theory, then, seems an unstable admixture that arbitrarily conceives beneficiaries simultaneously as agents and patients, and aims to be both responsibility-tracing and moral accident-permitting in its choice of distribution formula. It is in that sense incoherent. The same holds, *a fortiori*, of other prioritarian proposals, all of which simply vary on Rawls in respect of how they define the worst-off, the weight that their distribution formulae afford the worst-off, or both. In consequence, prioritarian maximining and its variations seem to be only marginally more free of ethical arbitrariness than the naïve maximizing they are meant to improve upon or supplant.

### C. Equalizing

An influential alternative to maximizing and maximining over the last several decades has been what I call "equalizing" of one form or another. The reasons for that growing influence, I shall argue, are straightforward in light of the Introduction's observations concerning the link between equalization on the one hand, beneficiary-identification on the other. The egalitarian distribution formulae to which I refer come in several forms. Some can instructively be characterized as "purifications" of original Rawlsian insights. Others cannot. In the next Section, I demonstrate that proposals of the former, what I call "sophisticated" variety can also be viewed as more ethically plausible forms

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

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

of maximization itself — rather as Rawls’s “maximizing” alternative was meant to be. Proposals of the other, what I call “naïve” variety share flaws both with naïve maximizing and with Rawls’s and other prioritarians’ insufficiently purified version of it, as I shall draw out below.

The guiding intuition behind sophisticated renditions of egalitarianism is helpfully articulated thus: Some differences among persons are both partly causative of their differential faring — their differential “outcomes” — and yet “arbitrary from a moral point of view” in the sense Rawls described.<sup>80</sup> But such differences are not the only causes of persons’ differential faring; also playing a role in the latter are those persons’ responsible choices. If this is so, then the most immediately satisfactory distribution formula would seem to be one that first partitions each person’s holdings into portions  $R_i$  traceable to moral arbitrariness, and  $1-R_i$  traceable to responsible agency. That formula then would recommend equalization of the former, while permitting and indeed facilitating agents’ own maximization of the latter.

The morally arbitrary portion of any one person’s holdings,  $R_i$ , would thus be invariantly valued across all persons  $i$ . It would be equalized over beneficiaries. The nonarbitrary portion, call it  $E_i$ , would for its part be permitted — indeed required — to vary across beneficiaries according as they expended varying degrees of responsible effort in productive activities varyingly valued by a *de facto* “market” comprising themselves and others.<sup>81</sup> The correct distribution formula then would be straightforwardly characterized thus:

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

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

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80 RAWLS, *supra* note 42, at 72.

81 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 beneficiaries 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 below.



number of persons  $i$ , and “ $R/n$ ” designates the constant which is each  $i$ ’s pro rata share of the exogenously given residuum,  $R$ .<sup>82</sup>

We can call  $R$  “luck,” “ethically exogenous resources,” “ethically exogenous material opportunity,” “the exogenous endowment,” “the responsibility-independent residuum,” or anything else that connotes the same basic idea. Those who would equalize  $Ri$  across persons might then 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 that I offered above in Section IV.C. for treating “resources,” “opportunity for welfare” and “access to advantage” as all being variants of “material opportunity.”

Most who adhere to one or another rendition of the opportunity-egalitarian view appear to recognize Rawls as a precursor.<sup>83</sup> They view him as having been an incipient opportunity-egalitarian. On this view, he simply did not manage quite fully to purge his distributive ethics of the utilitarian naïve maximization imperative he had set out to replace with a more individualist, contractarian conception. Completing the job, the thought continues, requires that we *systematically* treat (a) beneficiaries as boundedly responsible agents in the manner of Section III.A. above, (b) distributed benefits as *fully* indexed goods and services — that is, as Section IV.C.’s material opportunity — rather than lumpy Rawlsian “primary goods,” and finally (c) the correct distribution formula as that which distributes material opportunity in a manner that *thoroughly* tracks the distinction between chance and choice.

The opportunity-egalitarian view of course has difficulties of its own. For one thing, the divide between chance and choice — “ $Ri$ ” and “ $Ei$ ” above — can be difficult to locate.<sup>84</sup> The challenge afflicts any mode of distribution that names heterogeneous material goods and services as the apposite distributed benefits. One particularly poignant form that the difficulty takes is occasioned by opportunity-egalitarianism’s facing the morally arbitrary determinants of wellbeing head-on. For these determinants include very “personal” attributes such as inborn talents and faultless handicaps. Hence to track the chance/choice divide systematically, opportunity-egalitarians require some means of

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82  $R$  would be the sum of each person  $i$ ’s  $Ri$ . That is,  $R = \sum Ri$ . Summing here of course requires commensuration and interpersonal comparability 1  $n$ .

83 Elizabeth S. Anderson, *What Is the Point of Equality*, 109 ETHICS 287 (1999).

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

commensurating these “person-internal” resources and deficits with “external” such inputs to welfare functions.<sup>85</sup>

Formidable as they might initially appear, however, these challenges are best viewed as minor retractions of the significant theoretic and, as we shall see, practical advantages yielded by the opportunity-egalitarian view. Competing orientations such as naïve maximizing and maximining do not even self-consciously seek these advantages, let alone offer them in somewhat challenged form. Such positions remain in consequence not just practically, but *foundationally* short of distributive-ethical propriety. Failure to appreciate this, I suspect, goes hand in hand with a failure to recognize that there is an ordered set of approximations, “on the ground,” to the opportunity-egalitarian distributive ideal, in a sense not found in the cases of naïve and prioritarian maximizing. I draw this out briefly in Part VI, in connection with distribution mechanisms.

Two final points bear noting in connection with equalization as a proposed distribution formula. The first is that the opportunity-egalitarian principle straightforwardly complements the view of beneficiaries as ethically equal, boundedly responsible agents discussed above in Section III.A. It better “fits” that conception of beneficiaries than do naïve maximizing, prioritarian maximining, or what I shall presently call “naïve equalizing” below.

The second point is that the opportunity-egalitarian ideal also nicely complements the view of appropriate distributed benefits as material inputs to individual welfare that agent beneficiaries themselves are partly — what Section III.A. called “boundedly” — responsible for producing. It better “fits,” in other words, the selection of what Section IV.C. called “material opportunities” as the ethically appropriate understanding of distributed benefits. The same cannot be said for naïve maximizing or prioritarian maximining, for reasons discussed above. Nor can it be said in the case of naïve egalitarian distribution formulae, as I shall now indicate.

What do I mean, then, by “naïve” equalizing? I can best explain by reference to some historic examples. First, then, note that some utilitarians historically have argued on rather simple grounds for simple wealth-equalization. These grounds are simple in the sense that they abstract entirely from any consideration of beneficiaries’ ethical equality or responsibility for production of their own wealth or welfare — in other words, beneficiaries’ agency. One such ground is the naïve egalitarian utilitarians’ conjecture that utility functions are roughly the same from person to person. The other such ground is the commonplace

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85 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.

that the marginal utility of wealth is diminishing in anyone's utility function. These conjectures together, if true, would jointly entail that rough equalization of holdings will maximize aggregate welfare. Maximization of the utility aggregate per the familiar utilitarian desideratum, in other words, would itself require equalizing beneficiaries' distributive shares.

While its outcome-egalitarianism might at least superficially resonate with our views of the ethical equality of persons, however, the resonance is in fact illusory. The reason is that the naïve egalitarian-minded utilitarian view treats beneficiaries as patients just as any other form of utilitarianism does. It treats beneficiaries as ethically inert "welfare factories," into which wealth simply is fed rather like infant formula into the baby animals at a petting zoo. It also, not accidentally, treats beneficiaries as merely contingently equal, while in a deeper sense very much unequal. For beneficiaries are treated as "equals" only in respect of a contingently identical feature — namely, their utility functions, which only *happen* to resemble one another per the egalitarian-minded utilitarian conjecture. Meanwhile, responsibly diligent beneficiaries are expropriated on behalf of, and thereby conscripted for the purposes of, and in that sense subordinated to, the non-diligent. For again, all that is taken to matter in this view is the utility aggregate, not the way in which it is produced; hence those who work to produce can be expropriated for those who do not, all in the name of the utility aggregate. Finally, the naïve wealth equalizing view in effect treats aggregate welfare, not distributed wealth in the "material opportunity" sense, as ethical focal point.<sup>86</sup> For again, its distribution formula is formulated in the name of the utility aggregate. The latter is its normative touchstone. In short, then, naïve equalization of this sort remains a covert rendition of naïve maximization.

Non-utilitarian *welfare*-egalitarians, as I call them, constitute another group of those I am calling "naïve" equalizers who treat beneficiaries in effect as patients and thus ethical, juridical, and political non-equals. They do so, whether cognizant of the fact or not, by taking the following positions, which effectively commit them to the "patient" characterization of beneficiaries. First, they acknowledge that welfare functions can differ significantly across persons. Next, in contemplation of that observation, they advocate differential wealth-inputs across persons, precisely in order to equalize individual welfare-outputs. But this of course means that welfare-egalitarians hold beneficiaries entirely unaccountable for their own welfare; instead of boundedly responsible agents, they are altogether non-responsible patients. And this in turn means

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

that, like the utilitarian and naïve wealth-egalitarians countenanced above, naïve welfare-egalitarians effectively recommend conscription, and in that sense, ethical subordination, of the diligent to subsidize even the willfully non-diligent.

Some advocates of these “naïve” equalizing views, I suspect, would abandon them were they to be made fully cognizant of their implications. Others might continue to advocate one or another such view, perhaps on the basis of one or another eccentric or confused “cosmic” belief about agency. They might, for example, be metaphysical determinists, who believe all persons “really” amount to mere patients — patients of God or of fate or of “nature.”<sup>87</sup> On the basis of such a belief, the theorist might readily go on to conclude that nobody “really” is responsible for anything, including any increment of their welfare, and then draw as an entailment of that view the conclusion that all should enjoy equal welfare.

Against this backdrop, we can discern a sense in which naïve welfare-egalitarianism might be viewed as a degenerate case of the opportunity-egalitarian position. If one somehow were able, for example, both intelligibly to suggest and empirically to establish that nobody “really” is responsible for anything, then welfare-egalitarianism and opportunity-egalitarianism would coincide, extensionally speaking. For one could then simply set  $E_i$  trivially at zero for all values of  $i$  in the formula set out above. This would then give formulaic expression to the idea that nobody is “really” responsible for anything, including for any portion of her own welfare or resource-holdings. There would in such case be no ethically interesting reason to distinguish between opportunity-inputs and welfare-outputs.<sup>88</sup>

Symmetrical remarks would hold for welfare-maximizing utilitarianism as described above in Section V.A. If it were intelligibly possible and empirically plausible to hold every person responsible for everything rather than nothing

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87 I confess 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 whatever 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, seems 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.

88 I mention this prospect, however, merely as a theoretical curiosity. For I do not 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.

— even the entirety, say, of her utility function<sup>89</sup> — then one might set  $R_i$  trivially at zero for all values of  $i$  in the above-stated opportunity-egalitarian formula in recognition of *that* putative “fact.” Persons  $i$  then could be said to be treated as ethical equals in virtue of their each counting for one and there being *no* ethically *exogenous* residuum for which they were *not* responsible, which is precisely that component of agents’ distributive shares that opportunity-egalitarians prescribe that we distribute equally.<sup>90</sup> Again there would be no ethically interesting reason to distinguish between opportunity-input and welfare-output.

Once again, however, the antecedent condition — beneficiaries’ being responsible for everything — looks impossible to maintain either plausibly or, even, intelligibly.<sup>91</sup> It is on all fours with the suggestion that people are responsible for nothing. We seem, in other words, to be stuck with the divide — that between chance and choice — which underwrites the view of agents as “boundedly responsible,” per Section III.A. above, in the first place. Recognition of this hazy boundary seems to be both opportunity-egalitarianism’s theoretic blessing and its occasionally pragmatic curse.<sup>92</sup>

A final point that I think worth drawing out in connection with equalization concerns its relation to a venerable ideal — that of fairness. “Fairness,” I think all who are attentive to English usage would agree, connotes impartiality, even-handedness.<sup>93</sup> Familiar synonyms of the word include “equitable,” “just,” “unbiased,” “treating like cases alike,” and the like.<sup>94</sup> To treat parties fairly is to treat them as equals in respect of the 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.

Suppose, by way of example, that the purpose of the treatment in a particular context is to distribute valuables in accordance with responsible agency and

89 Demanding a Panglossian happy attitude, say, or Schopenhauerian resignation or Nietzschean *amor fati*.

90 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).

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

92 “Largely surmountable,” again, for reasons that emerge *supra* Part III.

93 It bears virtually no recognizable relation, incidentally, to Kaplow and Shavell’s proffered definition in KAPLOW & SHAVELL, *supra* note 2.

94 See, e.g., *Fair*, in BLACK’S LAW DICTIONARY (6th ed. 1990).

nothing else — in particular, no morally arbitrary feature of the beneficiaries. Fair treatment in this context would then seem to be treatment that allocates value to beneficiaries in proportion to their creditability — their responsibility — for value-production.<sup>95</sup> It will also, *a fortiori*, be treatment that *equally* allocates valuables for the production of which *no one* is responsible, since everyone is equally responsible for that residuum. Fair allocations, in other words, 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 I am right about this conjecture, then the class of fair allocations just is the class of opportunity-egalitarian allocations. The opportunity-egalitarian view is the “fair distribution” view.

#### D. Interformulability

This Part’s discussion of distribution formulae thus far suggests a nice formal method by which to illustrate the point with which I introduced this Article. I said in the Introduction that to maximize one thing is to distribute another thing and to equalize yet another thing, with the latter thing amounting in turn to some attribute with which we identify beneficiaries. Section C’s observation just above, that certain equalization formulae can be construed as degenerate cases of maximization formulae and vice versa, affords some preliminary corroboration of the point. Let me now generalize the point formulaically.

The following translation rule captures the idea I am trying to get across. For any aggregative maximizing imperative of the form:

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

in which  $u$ -factors are summed, we can translate the summand,  $u_i$ , into a counterpart equalisand,  $u_i^*$ , and state the same imperative in this fashion:

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

where “ $\forall i$ ” is read, “for all  $i$ ,” and “Eq” means to “Equalize” just as “Max” means to “Maximize.” In other words, rather than summing  $u$  factors and maximizing the sum, we enjoin our functionaries, equivalently, to equalize the summand’s egalitarian counterpart,  $u^*$ . Since there is always a counterpart, we can always work the translation.<sup>96</sup>

95 “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. *See infra* Part VI.

96 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.

Here are two brief examples to help make the point plain. Suppose first that we are garden variety utilitarians. We wish to maximize aggregate utility. That means that we aim to maximize the sum of  $u_i$  measures over individuals  $i$ . The summand in this case is each individual's "utility" measure, as ordinarily construed by utilitarians. This summand's egalitarian counterpart,  $u^*$ , is straightforward. It is what prioritarian utilitarians would call the "weightings" of those individual utility functions employed in determining the utility aggregate. The prioritarian utilitarian assigns more weight, in determining the social aggregate, to the utility functions of those who are worst off or otherwise disadvantaged. The garden variety Benthamite utilitarian, by contrast, assigns equal weight to all individual utility functions. Each individual's utility function receives a weight of one. This weighting is accordingly what the utilitarian social welfare function equalizes. Precisely this point is what prompts some utilitarians to purport to be egalitarian, as we noted earlier.<sup>97</sup>

But what these same utilitarians seem not to have noticed is what I mentioned at the outset. The feature in virtue of which a social welfare function treats us as equals — our equally weighted utility functions — is also the attribute with which that function *identifies* us for policy purposes. The social welfare function "reduces" us, in other words, to our utility functions; our utility functions are all that we are for purposes of social aggregation. This reduction might cohere well with our view of beneficiaries if, say, we construe them — and hence ourselves — as non-responsible welfare factories. But it will not thus cohere if we view beneficiaries — hence ourselves — as boundedly responsible agents in the manner discussed in Section III.A. This takes me to a second example that we can instructively compare to the utilitarian one just countenanced.

Suppose then that we reject utilitarianism in view of the way it construes us in our capacity as beneficiaries. What it instructs us to maximize — "utility" — sounded plausible enough initially, if for no other reason than that the name of this maximandum rang technical and even exalted. But then we find, on analysis, that what it tells us in effect to equalize and identify ourselves with is out of keeping with what we know ourselves to be. It misidentifies that feature of ourselves in virtue of which we take ourselves ethically, politically, and hence legally to matter. How might we give formal expression to a suitably adjusted view of what law and policy ought properly to concern themselves with?

Here is how. We can straightforwardly formulate what we find a more satisfactory legal and policy imperative in the very *same* terms as the utilitarian did. We simply convert this more apt form of identification and equalization

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97 See *supra* note 15.

— that is, the proper understanding of beneficiaries and distributed benefits — into a maximizing formula. We proceed, in other words, from  $u^*$  to  $u$  in this case, reversing the order by which we arrived at utilitarianism's de facto  $u^*$  in analyzing its maximized sum of  $u$ 's.

Let us briefly recapitulate the steps. If we are opportunity-egalitarians, per Section V.C., we shall aim to equalize the distributed benefit described in Section IV.C. — material opportunity — over beneficiaries whom we view as boundedly responsible agents, per Section III.A. The latter, recall, actively transform opportunities into welfare. Now note that in transforming their opportunities into welfare, these agents are, in the aggregate, generating a form of social welfare. Let us call it “equal-opportunity-grounded welfare.”

Is not this form of welfare, then, precisely what we wish to see maximized? Is it not that maximandum which corresponds to what we take to be the appropriate equalisandum? The only differences between this form of welfare and that of which utilitarians speak are that this form, first, proceeds from antecedent conditions of equal opportunity, and relatedly second, is produced in part by responsible agents.<sup>98</sup> But these distinctions make all the ethical difference in the world. For utilitarian welfare, by contrast to equal-opportunity-grounded welfare, is indifferent to the opportunity backdrop and the responsible agency of beneficiaries. Its welfare aggregate is in that sense differently generated, hence is a different species of welfare aggregate altogether. Process is partly constitutive of product here, as one might put it.<sup>99</sup>

This all suggests, I believe, that the *formal* representations of utilitarian and opportunity-egalitarian norms can be rendered schematically identical, hence are themselves in effect structurally identical. They are isomorphic; they share a form — what I am calling the structure of distribution itself. Only the particular valuations given the schematic variables  $u$  and  $u^*$  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 assign to those variables and thus what they equalize and maximize.

Where they differ is, specifically, these two respects: First, in utilitarianism's interpreting  $u^*$  as the weighting assigned to individuals' exogenously given,

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98 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 beneficiaries. “Leave the driving to us,” the beneficiaries might say. For more on this, see *supra* Part III, in connection with distribution mechanisms.

99 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 8.



birth lottery-conferred utility functions; while opportunity-egalitarianism interprets  $u^*$  as the material opportunity afforded those same individuals. And second, in utilitarianism's interpreting that  $u$  whose sum over individuals is to be maximized as "utility," a measure that is indifferent to beneficiaries' agency, bounded responsibility, or opportunity; while opportunity-egalitarianism interprets that  $u$  as "equal-opportunity-grounded" welfare, a measure that is *not* indifferent to those characteristics of agents.

The cardinal point is that both of these distributive ethical views maximize something, and both of them equalize something. In both cases, moreover, we treat as maximandum the right thing if and only if we take as equalisandum the right thing. Not to recognize this is to leave oneself vulnerable to incoherence.

An instructive case in point, in fact, comes immediately to mind. There is much avoidable confusion, I believe, in the theoretical literature concerning a putative distinction between the so-called "consequentialist" nature of maximizing imperatives on the one hand, and the "deontological" nature of fairness — that is, opportunity equalizing — imperatives on the other.<sup>100</sup> One even encounters surprising claims to the effect that norms of the latter sort are inherently "*ex post*" in orientation, while those of the former sort are more "*ex ante*" in orientation.<sup>101</sup>

But the straightforward interformulability of equalizing and maximizing formulae just demonstrated suggests straightaway that this distinction is facile and arbitrary. It is drawn on the basis of an unwarranted fixation on the accidental surface features — as distinguished from the "deep structure" — of distribution formulae. It is no more than an artifact of the symbolism we happen to employ — with consequentialists happening to employ maximization formulae, and opportunity-egalitarians happening to employ equalization formulae. The fact that these formulae are interformulable suggests there is a deeper structure to distribution manifest in that which is invariant when different modes of formulation are employed. This structure is precisely what is not "lost in translation" when we convert maximization formulae into equalization formulae and *vice versa*.

What I have just suggested is further borne out by a few supplementary considerations. First note that "deontology" refers simply to the logic — the form, or structure — of duty, or obligation — *deontos*. "Consequentialism," for its part, refers simply to the conviction that consequences matter. Now note that all imperatives, whether cast in maximization or equalization terms, are laid down as obligations. Recipients of these imperatives are enjoined — are said to be obligated — to "Max" this or "Eq" that. The obligations, in turn, speak

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100 See, e.g., KAPLOW & SHAVELL, *supra* note 2.

101 *Id.*

to consequences. Utilitarianism lays down a duty to seek this consequence: a maximized aggregate that is the sum of equally weighted individual utility measures. Opportunity-egalitarianism lays down a schematically identical duty to seek this substantively alternative consequence: a fair allocation of material opportunity such as results in a maximized aggregate of equal-opportunity-grounded welfare. Both norms are as “consequentialist” as they are deontic, and as deontic as they are “consequentialist”; they simply articulate duties — *deontoi* — to seek different consequences.<sup>102</sup> Were that not so, they would be non-obligatory and inconsequential; they would enjoin nothing and make no difference to anyone’s actions.

As for the putatively “ex post” orientation of “deontological” norms and “ex ante” orientation of “consequentialist” norms, I confess to finding it difficult to know what to make of the claim. I doubt any sense can be made of it. It might bear noting, however, that opportunity-egalitarianism speaks directly to the ex ante spread of opportunity, thereafter allowing the ex post equal-opportunity-grounded welfare aggregate to “take care of itself” via the welfare-productive choices of agent beneficiaries. It does so precisely because it considers agent beneficiaries responsible for producing the aggregate, in “decentralized” fashion, out of the ethically exogenous opportunities antecedently distributed to them. Utilitarianism and latter-day “welfarism,” by contrast, speak directly to the ex post welfare aggregate, without regard for the ex ante spread of opportunity over responsible agents. In that sense, things look to be quite the contrary — indeed the “reverse” — of their characterization by “welfarists,” assuming I have managed to make any sense of the characterization at all.

## VI. MECHANISMS OF DISTRIBUTION: LAW AND INSTITUTIONS

I have already noted a distinction in thinking about “ought” and “can” in connection with distribution. Somewhat surprisingly, normatively oriented legal and policy analysts are largely silent on the subject of feasible distribution mechanisms. This tends to undermine not only their persuasiveness, but in some cases their very intelligibility. This is not simply because “can” limits

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102 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 at least as much muddling mischief as salutary clarification.

“ought.” It is also because failure to think one’s thoughts through to their institutional upshots can conceal theoretic *aporias*.

Intriguingly, all of the best-known accounts of distributive ethics considered above save one seem to fall prey to this danger. Only the opportunity-egalitarian ideal avoids it. I suspect it is no accident that this ideal is also the only one that, as already articulated, requires a specific configuration. More intriguingly still, this configuration seems to constitute that institutional ideal toward which the bulk of legal, policy, and institutional designing done in the name of the public in democratic societies is directed. The mechanism that coheres most closely with the most attractive distributive ethic emerging from the discussion thus far amounts, in other words, to an ideal toward which we seem to have been striving, with varying degrees of self-consciousness, all along. Call it the ideal of an efficient, democratically regulated, endowment-neutral market.

Space constraints limit my capacity to substantiate these claims fully here. But it is possible at least to sketch in broad outline how inattention to questions of mechanism links up with theoretic unintelligibility in the cases of all leading accounts of distributive ethics apart from the opportunity-egalitarian.

Let us begin with utilitarianism. Utilitarianism, or naïve welfare maximization, should in theory be willing to maximize welfare outputs by any means necessary, since welfare-maximization is its sole recognized imperative. The utilitarian planner is accordingly unconstrained by any preexisting right or entitlement, since citizens amount merely to passive utility-factories. Yet because of the earlier noted theoretic perplexities that attend any would-be project of direct welfare measurement, it is indeterminate what actions taken by any such planner actually *could* maximize the utility yield. The picture we’re left with is thus simultaneously dystopian and vacuous: a government stunningly empowered in principle, which for theoretical reasons cannot perform the practical task upon which its power is predicated.

Prioritarian maximising views, including Rawlsian justice theory, fare little better than utilitarianism along this dimension of assessment. Rawls refreshingly acknowledged that his theory spoke only to what he called “the basic structure” of society, but the problem is that operating at this level of abstraction seems to leave the theory with little bite. Rawls seems to anticipate that a just society will feature private property and market exchange; yet he explicitly holds that his conception of a just order is as realizable in socialist societies as in capitalist ones. Because he does not elaborate on this point, however, we are left wondering whether we could recognize a Rawlsian society upon seeing one. As with utilitarianism, then, the problem here is not only that questions of implementation (or “second best”) are underspecified; it is that even “first best” is underdetermined.

Turning now to the other end of the specificity spectrum, one might be tempted to think normative “law and economics” offers a solution to utilitarianism’s and prioritarianism’s quandaries. In contrast to utilitarians and prioritarians, normative economists of law attend with some care to institutional micro-detail, leading to analyses of what might be the simplest unit of institutional structure — the legal rule. Yet this turns out to be their undoing. For while utilitarians and prioritarians miss the trees for the forest, normative economists of law miss the forest for the trees.

The reason appears to be rooted in a fallacy of composition to which the normative economist of law’s penchant for partial rather than general equilibrium analysis evidently blinds him. Even if you know that a particular change in each rule in a series of legal rules is, *ceteris paribus*, wealth-maximizing, it simply does not follow that a combination of such changes will be wealth-maximizing in comparison to some competing set of changes. That determination could be made only if one were to consider full sets of interacting rules rather than individual rules. Choices in nominally distinct legal domains cannot, in other words, be blithely assumed to be linearly independent.

These observations highlight a gulf between the normative pseudo-ideal of wealth-maximization as a macro matter and the normative evaluation of specific distribution mechanisms (the rules) as a micro matter in mainline economic analysis of law. This gulf is not accidental: it is rooted in a foundational incoherence at the core of this school of normative thought. The fundamental problem is that “wealth maximization” is itself normatively indeterminate in macro. One simply cannot prescribe an initial distribution of entitlements on the basis of that distribution’s effect upon “total wealth,” any more than one can make sense of the claim that, say, “cats are better than dogs” absent some implicit answer to the question “better for what?”

The reason is that “wealth” cannot be defined until after an antecedent assignment of legal entitlements has already been made: there is literally no intelligible concept of “wealth” available to normative economics of law that does not presuppose an antecedent distribution, because the “willingness to pay” upon which wealth hinges is itself a function of some such prior distribution. It is, in other words, endogenous, and hence affords no exogenous platform on which to ground a comprehensive normative vision of appropriate distribution.

There is, then, no “wealth” aggregate for the normative economics of law to employ as a prescriptive touchstone in deciding how to distribute legal entitlements. Normative economists of law cannot prescribe a macro-distribution of legal entitlements; they can speak only to isolated micro-changes wrought relative to prior backdrops of entitlements. In the end, then, normative economics of law is as prescriptively sterile as utilitarianism and prioritarianism. Its ineluctable micro-orientation leaves it as incapable of grounding a determinate

distributive ethic as utilitarianism's and prioritarianism's ineluctable macro-orientation leave them.

Again, then, insufficient attention to the deep internal relations among practical distribution mechanisms on the one hand, the "ought" and "can" of distribution discussed above on the other, results in a blind spot that prevents theoretical progress. We fail to notice that certain familiar would-be distributive prescriptions are not merely difficult to implement, but in fact misfire at the stage of prescription itself. We get nowhere until we work to specify completely the valuations of all of the variables opened up by the question of distribution — the variables discussed in Parts II through VI. On then, to that final task.

## **VII. CONVERGENCE AND COMPLETENESS: WHAT WE APPEAR TO BE GROPING FOR**

The previous Part's last observations might seem to warrant some pessimism. In light of the just-catalogued failings of normative distributional theories thus far to prescribe anything determinate with respect to distribution mechanisms, one might conclude that the problem is simply intractable. This would, however, be premature. For as I shall demonstrate in this Part, there does seem to be at least one mechanism that determinately realizes the best vector of values that fill the distributive variables discussed over Parts II through V.

This turns out to be more than a mere happy accident. For the precise ways in which this mechanism vindicates those values highlights yet further the senses in which those values are attractive. That constitutes an attraction additional to the more practical advantages this mechanism offers in giving expression to the values in question. What is more, I shall at least preliminarily indicate, our laws, policies, and institutions appear to be animated, at least inchoately, by a shared societal commitment to realizing something much like this mechanism.

### **A. Material Opportunity Spreading**

Let us begin with a specification, in ideal form, of the mechanism that I have in mind. Assume first, for heuristic purposes, what is known in the literature as a "complete" market. All, and only, desired transactions can be effected.<sup>103</sup>

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<sup>103</sup> Market "completeness" in this sense includes trading in contingent claims, more on which over the course of the next several paragraphs. I 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

Assume further that these transactions are in, first, all goods and services that can practically be made available and that anyone values. These would accordingly be, in the terminology of Part IV above, all things that might count as distributed benefits.<sup>104</sup>

Assume also that our complete market's transactions include trading in, second, what are known in the literature as "Arrow securities."<sup>105</sup> These are contingent claims to compensation upon the occurrence of eventualities that beneficiaries might *disvalue* — what we called "burdens" in Part IV above. The compensation is payable by anyone willing to take the opposite sides of what are functionally equivalent to "bets" on the disvalued contingencies' occurring.<sup>106</sup>

Let us assume next that the market that I am now specifying also is "neutral," in two senses I now explain. It is neutral, first, in the sense that each participant enters this market with an initial endowment of ethically exogenous assets — the "material opportunities" of Section IV.C. — equal in value to that with which everyone else enters it. I call this form of neutrality *entry neutrality*. Assume that our ideal market also is neutral in this, second sense. The law

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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* [*A Generalization of Theories of General Economic Equilibrium and Economic Efficiency to the Case of Risk*], 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* [ECONOMETRICS, INT'L CONF. NAT. CTR. SCI. RES.] 81 (1953); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières par la Répartition la Meilleure des Risques* [*The Role of Securities in the Optimal Allocation of Risk Bearing*], 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* [ECONOMETRICS, INT'L CONF. NAT. CTR. SCI. RES.] 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* (1996).

- 104 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.
- 105 Robert Hockett, *Real Arrow-Securities for All: Just and Efficient Insurance Through Macro-Hedging*, 34 *REV. BANKING & FIN. L.* 609 (2015).
- 106 *Id.*; see also sources cited *supra* note 103 (in particular Hockett); Robert Hockett, *Gaming as Micro-Insurance: How and Why to Regulate, not Eliminate, Online Gambling* (2006) (unpublished manuscript) (on file with the author).

works to prevent any collusively, strategically, or expropriatively opportunistic behavior as might yield the following consequence: 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 *endogenous* — that is, their responsible — transaction histories. I call this *process neutrality*.<sup>107</sup>

I claim that this mechanism straightforwardly instantiates a particular set of valuations of the distributive variables discussed above in Parts II through V. What is more, it enables us straightforwardly to sidestep the measurement noted earlier in connection with sundry proposed objects of distribution. It does so in a manner that no other mechanism instantiating the competing values discussed in Parts II through V can so much as begin to attempt. I now substantiate these two claims.

First, consider those valuations of the distributive variables to which I alluded. The mechanism honors beneficiaries as boundedly responsible agents, as characterized in Section III.A. Beneficiaries transact voluntarily pursuant to their own relative valuations of material goods, ills, and contingencies that they prefer and disprefer. What is more, anything that they hold or enjoy at any given moment is a function of those same valuational and transacting decisions.

The mechanism also treats as distributed benefits whatever goods or services, including risk-bearing services, that our agent-beneficiaries themselves value or disvalue, so long as their coming by these does not violate either of the two forms of neutrality defined a moment ago. These goods and services are, accordingly, just those resources or material opportunities described in Sections IV.B. and IV.C. They are that from which, pursuant to their own market-neutrality-consistent choices, agent-beneficiaries' welfares derive.

Finally, the mechanism also, by dint of the entry neutrality imposed upon it at the outset and the process neutrality retained by it throughout, equalizes just what is ethically exogenous — that which is not traceable in the holding directly to a responsible choice. At the very same time, and by dint of the same forms of neutrality, it permits distributive shares to vary over time in a manner traceable solely to ethically endogenous — that is, responsible — valuational and transactional decisions made by agent beneficiaries. The distribution formula to which the mechanism gives expression, in other words, is the opportunity-egalitarian formula characterized in Section V.C.

Now consider how the mechanism allows us to sidestep measurement challenges. First it sidesteps, in an ethically satisfactory way, the problem

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107 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.

of cardinal welfare measurement. It does so by enabling agent-beneficiaries, through their own voluntary trading activity, to maximize their own welfare in a manner that comports with two conceptually equivalent, normatively required conditions. The first is ethically exogenous endowment equality among market participants, per the opportunity-egalitarian requirement characterized in Part V. The second, by way of corollary, is an equally shared scarcity of the exogenously given resources from which agents “produce” their own welfare.<sup>108</sup> Now here is the proverbial rub: Maximization of this normatively *intelligible* form of welfare<sup>109</sup> is effectively “guaranteed” to occur per our mechanism. This is an immediate consequence of the so-called “first fundamental theorem of welfare economics.”<sup>110</sup>

The mechanism also sidesteps the problem of interpersonal welfare comparison, in much the same way that it sidesteps the problem of cardinal measurement. Provided that all material opportunity components of welfare-production<sup>111</sup> are counted<sup>112</sup> among the exogenous endowments that must be equalized over participants per the entry neutrality requirement, the following will hold true as well: *Whatever* the absolute *or* comparative “quanta” of welfare enjoyed by our beneficiaries, these will be the “highest” that they can be consistent with Part V’s opportunity-egalitarian distribution formula

108 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*, 7 YALE ECON. ESSAYS 45 (1967); Elisha Pazner & David Schmeidler, *A Difficulty in the Concept of Fairness*, 41 REV. ECON. STUD. 441, 441-43 (1974); E.A. Pazner & David Schmeidler, *Egalitarian-Equivalent Allocations: A New Concept of Economic Equity*, 92 Q.J. ECON. 1 (1978); H.R. Varian, *Equity, Envy and Efficiency*, 9 J. ECON. THEORY, 63 (1974); and 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 WILLIAM JAFFÉ’S *ESSAYS ON WALRAS* 17-52, 326-42 (Donald A. Walker ed., 1983).

109 For a reminder of the contrasting, normatively unintelligible form of welfare, see *supra* Introduction and Part IV.

110 See Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, in *PROC. SECOND BERKELEY SYMPOSIUM* 507 (1951).

111 Including physiological determinants.

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



and the accordingly equally shouldered constraints posed by the exogenously given environment.

Finally, the mechanism “automatically” *commensurates* distributed benefits, in the only way that ethically matters. How is that? It is via the implicit comparative valuations of autonomously transacting agent-beneficiaries themselves, in their trading behavior.<sup>113</sup> We need not, in other words, even concern ourselves with how much of some good  $G_2$  “would” or will compensate person  $P_1$  for a deficit of good  $G_1$ . Nor will we have, a fortiori, to attempt to construct any “perfectionist” index of *all* such goods and ills.<sup>114</sup> Instead our beneficiaries themselves will, in effect, autonomously and with equal voice, construct the only index that normatively matters — what amounts to a spontaneously emergent *price* index reflective of equal initial endowments on the part of all who in trading give rise to that index. So long as entry and process neutrality are maintained, this index will effectively constitute the ethically relevant “*social*” valuation of all tradable goods and services. That in turn is a valuation in the construction of which each participant has in effect exercised, by dint of the neutrality conditions themselves, an equal “vote.”<sup>115</sup>

## B. Implementability and “Next Bests”

The idealized opportunity-egalitarian market mechanism just sketched, then, insofar as it can be realized “on the ground,” simultaneously assists in realizing what looks to be the most plausible vector of Part II through Part V distributive values, while meeting or neutralizing each of the principal measurement challenges noted earlier in connection with various proposed objects of distribution. The precise manners in which it does so, moreover, underscore the independent normative-theoretic attractiveness of those values themselves — distributors and beneficiaries as boundedly responsible agents, distributed benefits as material opportunities, and distribution formula as opportunity-egalitarian.

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113 See Hockett & Risse, *supra* note 42.

114 *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, *supra* note 77. The criticism is addressed in Hockett & Risse, *supra* note 42.

115 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.

Two doubts, however, might seem to afflict one's hope that this "ideal" mechanism might be actually realized. I specify, then address, each of the two challenges in turn. Doing so not only will serve to allay doubts, but will also afford opportunity to note several additional attractive features of the mechanism I schematize.

The first doubt has to do with the first form of market neutrality I mentioned — entry neutrality. If, as I stipulate, we are to equalize holdings of the material opportunity endowments with which agent-beneficiaries enter the market, then surely we must commensurate those endowments. For different people in the world we inhabit enter this world with radically different genetic and other non-tradable attributes. But how are we to commensurate these distinct endowments, with a view to compensating those who are under-endowed, *prior* to the operation of the equal-endowment grounded market mechanism itself? For is it not that mechanism itself that I have said affords us an ethically satisfactory method of commensuration? Is there not a pragmatic indeterminacy here just as vitiating as the foundational indeterminacies that I argued in Part VI afflict utilitarianism, Rawlsian prioritarianism, and normative economics of law?

Nope. I shall show why not in three steps. First, I demarcate certain classes of material opportunity endowment that are unambiguously ethically exogenous in the holding; I call them "core endowments." Second, I indicate means by which holdings of these can be readily equalized. Finally, third, I 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 approachable in continuous, upward-sloped fashion.

On, then, to those core endowments. At least four classes of endowment would seem to be uncontroversially ethically exogenous in the holding. First are the genetic determinants and obstacles, so far as we can ascertain them at a 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 are childhood healthcare and education. Children do not earn or deserve greater or lesser access to such assets, particularly when they are still very young. Their degrees of responsibility grow gradually as they move toward adulthood. Third is inherited nonhuman capital — that is, money-valued wealth. Like other forms of inheritance this one is morally arbitrary; it is a product of the birth lottery. Moreover, unlike educational opportunity, it does not tend straightforwardly to be ethically endogenized with time and maturation; there is no particular tendency for children to become more deserving of the plenitude or meagerness of their money inheritances with

age. Finally, the fourth core endowment is opportunity to shed or share unforeseeable risk through trade or collective risk-pooling action — in other words, the existence of insurance markets. This form of opportunity is best seen for present purposes as non-confiscatory compensation for deficits in other resources or material opportunity.<sup>116</sup>

Core endowments of these types are both tractable in principle and manageable in number. Moreover, with the advance of empirical science they grow ever more readily quantifiable, directly distributable, and indeed equitably distributable. They are also in little need of commensuration inter se. This is particularly so of the “beneficial” as distinguished from “burdensome” core endowments — early education, healthcare, and inherited non-human capital. The burdensome endowments are somewhat more difficult, since they disproportionately include genetic, physiological “resources.” But they too are not so unmanageable.

The most difficult of the latter, for example, likely is genetically poor health or handicap. Some deficiencies of this sort can be roughly and preliminarily valued by reference to current prices affixed to their mitigation — prostheses, medicines, and the like. There seems no reason not to begin to address such deficits with compensation equal to the going rates. Other such deficits are of course not as readily mitigated. Here we will do best to estimate the compensation afforded by insurance policies that typically are, or perhaps “would,” be purchased against such contingencies.<sup>117</sup>

Clearly there is rough estimation afoot here, but that is not mere whistling around in the dark. As medical and other forms of empirical knowledge develop, we are gradually enabled to estimate with greater accuracy and reliability. We do as best we are able to repair the ship at sea, as Otto Neurath might have put it.<sup>118</sup> The more repairing we do, in turn, the better the mechanism grows

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116 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 30. I think this position mistaken — in effect, a retreat from the position from which one treats beneficiaries as responsible agents — by dint of its treating co-citizens and their responsible tastes as resources. So I count only infrastructure.

117 *See* Hockett, *supra* note 103, at 217-37; DWORKIN, *supra* note 30, at 307-50. Real, rather than “hypothetical” such insurance is proposed in Hockett, *supra* note 103; 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).

118 The metaphor is taken from OTTO NEURATH, *ANTISPENGLER* (1921) (“We are as sailors who are forced to rebuild their ship on the open sea, without ever being able to start fresh from the bottom up.”).

at improving itself. I shall show this below in connection with “*n*th bests,” thus completing my answer to the doubt concerning neutrality’s attainability. First, I turn to the second doubt concerning the ideal mechanism’s realizability, however. For my subsequent treatment of “*n*th bests” completes my reply to this one as well — two birds with one stone.

The second doubt I raised in connection with the ideal mechanism’s realizability takes aim at what I called completeness rather than the first one takes aim at what I called neutrality. How reasonable, one might ask, is my stipulation, per the completeness requirement, that “all and only desired trading” occur? Is such a thing possible? If so, is it really desirable? Would we not, for example, in order to realize it, have to abandon our market-inalienability norms and “commodify” everything?<sup>119</sup> For, absent that, will the opportunity-egalitarian market mechanism that I have described be capable of discharging the tasks I have assigned to it?

This doubt is more readily allayed even than that raised by neutrality. Take the desirability half first, then the feasibility half. As to the desirability of completeness, then, first consider the core opportunity endowments. These are already subject to unobjectionable market-valuability already. We have already “commodified” what most needs commodifying here. That is what the markets for education, healthcare, health insurance, and so on amount to.

Next consider all else that might be traded. We can easily bracket away from market transacting all things that we might adjudge ought not be commodified — babies, blood, or human organs, for example — and still approximate to distributing unobjectionably commodified goods and services in a manner that permits the mechanism better and better to realize the ideal version I have specified. For again, as I shall presently indicate, there are “second,” “third,” and so forth all the way down to “*n*th bests” from the point of opportunity equality that are ordered equivalently to ordered degrees of neutrality and completeness.<sup>120</sup> The former attribute, in other words, corresponds by degree to degrees of neutrality and completeness. But back to that in a moment.

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119 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).

120 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, *supra* note 119. The blood and human organ allusion is of course to RICHARD TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970).

So much for the desirability half of the doubt concerning “completeness.” The feasibility half is rooted in well-known transaction-cost and information-cost barriers to full market-completion in the technical sense. Here is a fuller articulation: Is it reasonable to suppose that all parcelings of tradable goods, and all possibly desired claims to payment defined in terms of specifiable contingencies, might be rendered tradable? Can we really “complete” markets in the sense you require?<sup>121</sup> There are several ways to handle the doubt as thus technically articulated.

First note that it is a long since established theorem of modern financial theory, as rooted in general equilibrium theory and stochastic calculus, that complete markets can always be simulated through a comparatively small number of hedging strategies.<sup>122</sup> Furthermore, many more contingent claims markets — particularly those whose present supply would be either in the nature of a public good or subject to some other collective action problem in the inception — can be provided in principle than are actually provided.<sup>123</sup> It also bears noting that the number of such claims that can be traded is all the time growing. I exploit those facts elsewhere in making concrete proposals to “jump-start” new forms of insurance market that enable people of humble means to shed risks as readily as large business institutions already manage to do.<sup>124</sup>

Next note that greater entry-neutrality itself yields greater completeness. The reasons are several. For one thing, completeness rides in part upon all desired trading’s being available. But more trades per unit of wealth occur at lower levels along personal wealth curves — that is the upshot of Keynes’s canonical observations concerning the “marginal propensity to consume.”<sup>125</sup> And this means that entry neutrality itself opens market doors to larger numbers of participants who enter at the low end. Hence greater entry neutrality results in more trade.

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121 I thank Henry Hansmann for first pressing me on this score.

122 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* (A.P. Sloan Sch. of Mgmt., MIT, Working Paper No. 881-76, 1976).

123 See Hockett, *supra* note 103; Hockett, *supra* note 106.

124 See Hockett, *supra* note 103; Hockett, *supra* note 106; see also Hockett, *What Kinds of Stock-Ownership Plans Should There Be? Of ESOPs, Other SOPs, and “Ownership Societies,”* 92 CORNELL L. REV. 1 (2007).

125 For more on this, see Robert Hockett, *Bretton Woods 1.0: An Essay in Constructive Retrieval*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2013).

Finally, and most decisively of all, any added degree of completeness at all, just like any added degree of neutrality, renders our mechanism more opportunity-egalitarian. There is no worry, in other words, of the sort Hart long ago noted to afflict moves toward greater completeness where Paretian criteria provide our would-be standards of normative assessment. Specifically, Hart showed that some moves in the direction of greater market completeness can result in Pareto losses.<sup>126</sup> But a Pareto loss, of course, is not an opportunity-egalitarian loss, and it is only losses of the latter sort that should concern us. And it is easily proved that any gain where either completeness or neutrality are concerned constitutes an opportunity-egalitarian gain.<sup>127</sup> As for Pareto losses, these are altogether uninteresting from a normative point of view — for precisely the reasons that naïve wealth- and welfare-maximization, per Part V above, are normatively sterile.

### **C. Institutional Competencies and the Role of Law**

I mentioned above that there are additional, side benefits offered by reflecting with care about how a society might institute that distribution mechanism which gives most direct expression to the most plausible distributive ethic. Among those benefits is the fact that, as it happens, we notice in thinking through the ideal mechanism sketched just above that the laws, policies, and institutions that we find in all the most advanced political and economic systems look as though they are intended to realize, or at any rate approximate, precisely some such mechanism.<sup>128</sup> If I am right about this, then thinking along the lines I have just done in Sections VII.A. and VII.B. offers further advantages as well.

One such advantage is its positioning us better to understand and interpret our own legal tradition, and so to carry it forward in manners that well — or even better — cohere with its own animating ideals. Another, related such benefit is its positioning us to improve the laws, policies, and institutions that we have, with a view to rendering the composite distribution mechanism that we have all the more complete and more neutral, and thus more fully expressive of its own opportunity-egalitarian ideal. Finally, a third such

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126 See Oliver Hart, *On the Optimality of Equilibrium When the Market Structure Is Incomplete*, 11 J. ECON. THEORY 418 (1975).

127 Robert Hockett, *Completeness, Neutrality, and Ethically Cognizable Efficiency: An Ordinal Equivalence Theorem* (2008) (unpublished manuscript) (on file with author).

128 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.

benefit is its positioning us all the better to see what mainline economics of law, influential school of thought that it is, has got right and got wrong, thus better to configure that important and potentially helpful methodology itself in a manner that leaves it less prescriptively mute than has been since its inception.

Let me, then, at least preliminarily elaborate these three suggestions. To begin with the first, interpretive claim, much familiar private-law doctrine seems to be quite transparently opportunity-egalitarian and responsible agency-vindicating in character. With respect to responsible agency, for example, consider the centrality of the concept of “diligence” across property, contract, and tort doctrine. Consider also the doctrines of adverse possession in property, mitigation of damages in contract, and comparative negligence in tort. Even our law’s presumptive favoring of freedom of contract seems rooted in respect for autonomy, which of course is another name for responsible agency.

As for opportunity-equality, consider the treatment of bargaining power and capacity in contract and testamentary law. In remedies law, in turn, concern for “making the plaintiff whole” per the compensatory damages regime looks straightforwardly actuated by considerations of corrective justice, which sounds in a form of equality. It is a matter of equalizing present circumstances to a status quo ante deemed to have been unfairly displaced as a procedural matter. The many doctrines of equity jurisprudence that pervade our law are also of course transparently equalizing of exogenous circumstance and vindicating of responsibility. And that is, of course, just what the term “equity” and the doctrines’ Aristotelian roots would have led one to expect.<sup>129</sup>

When we shift attention from private to public law, it looks once again as though legislators for decades, if not indeed over a century, have been guided implicitly by the aim of constituting something much like the ideal mechanism sketched earlier in this Part. The best reading of most market-regulatory norms in advanced political economies, for example, would seem to be as attempts to afford something like greater neutrality — at least process neutrality, and to some extent entry neutrality as well — and completeness of the sorts described in Section VII.A. Laws prohibiting invidious discrimination on the basis of racial, gender, and other ineluctable or morally arbitrary traits, for example, are obvious cases of process-neutrality protection. Progressive and inheritance taxation, public education, the Land Grant and Homestead Acts, and our many forms of government-provided or —supplemented social insurance — health, retirement, and unemployment in particular — for their

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129 For more on the Aristotelian roots not only of equity jurisprudence, but of Anglo-American private-law doctrine more generally, see JAMES M. GORDLEY, *PHILOSOPHICAL ORIGINS OF PRIVATE LAW* (2006).

parts appear to be aimed at promoting entry neutrality. They work to bring more equalization of ethically exogenous material opportunity endowments — the “*R*” of Section V.C. — over the citizenry. These neutrality-assisting measures, moreover, for reasons noted in Section VII.B. help enhance market completeness as well.

There are other completeness-enhancing measures that advanced political economies have taken in recent decades and, in some cases, even centuries. The history of the law’s treatment of “commodification,” for example, seems by and large to have been to permit, and in many cases even to foster, the trading of more and more goods and services, including contingent claims. Witness, for example, the way our federal government created the secondary debt “securitization” markets beginning in the 1930s and proceeding into the 1970s, for example, in order to lower the cost of credit for home mortgage. Note also the government’s funding of research that has led to the design of publicly important derivative hedging instruments in this connection.

The trend where “commodification” is concerned also has been to “unbundle” more and more previously conjoined items into separately traded items. Conspicuous cases of this form of market-completing include government startup and subsequent regulatory support for active markets in government securities, followed by corporate securities, followed in turn by derivative securities, and now even tradable pollution rights, for example. Conspicuous cases of *mandated* unbundling — which, incidentally, show yet again the linkage between neutrality and completeness — include antitrust action against large telecommunications concerns in the 1980s and software manufacturers in the 1990s, as well as competition law more generally.

The fact that such measures can often be argued to enhance aggregate social welfare, wealth or consumer surplus should neither surprise us nor be taken for a value that our law pursues *instead* of completeness and neutrality. Nor, relatedly, should it be taken for unambiguous evidence that legislatures or common-law judges do, let alone ought, to craft law, doctrine or policy with a view to such goals at the expense of the completeness and neutrality goals. Even less, then, should it be taken for encouragement to conceive “improvements” with a view only to wealth maximizing. For we have seen now that opportunity-indifferent maximizing is normatively empty — it is mere forehead-height, so to speak. *And* we have seen that equal-opportunity-grounded maximizing nevertheless overlaps, in part, with other forms of maximizing, precisely by dint of its sensitivity to responsible welfare-generative agency.<sup>130</sup>

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130 Recall that EDWEs, for example, happen also to be Pareto-efficient, as observed *supra* note 101 and accompanying text.



This latter observation itself explains how “positive” economists of law in the past might have come erroneously to suppose that common-law judges have been subconsciously actuated by Kaldor-Hicksian wealth-maximizing aims. Because of the just-mentioned overlaps, judges who have acted to vindicate equal opportunity and responsible agency naturally could be taken in many cases to be friendly to wealth-generation. For responsible agency *is* generally wealth-generating. It’s just that our law fosters wealth by vindicating the responsible efforts of responsible agents *while also* vindicating the equal opportunity backdrop the opportunity-egalitarian ideals guarantee to responsible agents, in the forms of entry and process neutrality. We could substantially better focus and fine-tune mainline economics of law in a manner that finally rendered it straightforwardly normatively salient, 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 we might describe as an “ethically intelligible economics of law.” Some actual or proposed rules that have been deemed “wealth-maximizing” in what amount to ethically uninteresting ways, for example, will prove to be transparently suboptimal or otherwise problematic when viewed under the aspect of the opportunity-egalitarian ideal. By the same token, responsive amendments to such rules will appear well suited to carrying us closer to full realization of the ideal opportunity-egalitarian mechanism schematized above. Counterpart remarks hold in respect of our efforts to interpret and extend the rules that we have, as well as to conceive, legislate, and implement the best new policies and programs that we can.

Let me close this discussion of distribution mechanisms by emphasizing what I am *not* claiming. I am not suggesting that courts attempt to make general determinations of litigants’ overall material opportunity allotments in deciding cases. Even less am I suggesting that courts should decide winners and losers at trial on the basis of such assessments. Courts are not instruments of non-case-specific compensation or distribution. Nor do I think what I have said thus far to warrant any claim to the effect that legislators as a general rule should always amalgamate all spheres of citizens’ lives in their policy thinking, such as might lead them to prescribe, say, that citizens who fare unjustifiably poorly in one sphere are entitled to be held to different standards in other spheres, all so that they may be “compensated overall.” I doubt that a legislature is fit with any precision to take on the role of opportunity-egalitarian general equilibrium theorist.

In fact, my gut intuition, which I hardly think idiosyncratic,<sup>131</sup> tends to sweep the other way. I think that the integrity and long-term stability of legislative programs and institutions that operate in any of the many different “spheres” of human endeavor that jointly constitute a pluralist society often actually *proscribe* our determining individuals’ outcomes in one sphere by reference to their outcomes in other spheres.<sup>132</sup> I accordingly think that realizing full opportunity-equality among responsible citizen-agents will generally require that we work severally — but also simultaneously — toward opportunity-equality on a “sphere by sphere” basis. I say “severally” for the sake of institutional integrity sphere by sphere. But I also say “simultaneously,” because the opportunity-egalitarian ideal is general in its sweep, precisely because there are so many distinct kinds of material opportunity which are all of them nonetheless opportunities.

The full opportunity-egalitarian ideal is accordingly best realized in each sphere when well realized in all spheres.<sup>133</sup> My guess is that broad understanding of this basic truth on the part of legislators will itself serve to encourage much in the way of the needed simultaneity. For against such a “values” backdrop, all legislation might reasonably be expected to reflect our most fundamental political and economic value — that of equal material opportunity enjoyed by ethically equal responsible agent citizens.

But the present Article, alas, is of course not the place to commit to much more than these very general, provisional observations. Much more consideration is required to arrive at a suitably full set of “principles of morals and legislation.” My claim at this juncture is accordingly rather more modest. It is simply that, where rules or programs or policies are crafted or drafted, the crafting and drafting should be done with equal regard for citizens conceived as boundedly responsible agents. That claim would seem to entail one more claim: namely that judges, legislatures, and administrative agencies should, while bearing in mind the institutional distinctions between their distinct roles, also remain mindful of what all of these roles — as public roles — have in common. That shared role would seem to be this: First, to *equalize* such benefits and burdens as both (a) functionaries are themselves institutionally

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131 Indeed, I take the intuition to be broadly Toquevillean, and perhaps in that sense particularly “American.”

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

133 For reasons discussed in Part VI above, in connection with the non-independence of domains.

authorized to bestow or impose, and (b) are *ethically exogenous* in the holding by those citizens in regard to whom the particular functionaries are acting. And second, simultaneously to dispense in proportion to differential *responsibility* such ethically *endogenous* benefits and burdens as the functionaries are institutionally authorized to bestow or impose. And one way of rewording this articulation of the shared role, in light of the foregoing discussion, is to say that legal doctrine and legislative policy ought generally be elaborated with a view to broadening the reach, and improving the operation, of the composite ideal distribution mechanism that I have schematized and elaborated upon in this Part.

These observations also bear some possible implications for a thus far inconclusive discussion on institutional roles that has been taking place in the legal-economic literature over the past decade or so. One strand of this discussion argues that courts are better suited to maximizing aggregate wealth in the incremental crafting of legal doctrine, while distributional concerns are for their part more efficiently handled through tax policy.<sup>134</sup> I must defer thorough discussion of such questions to subsequent work, but two brief comments seem warranted in light of the foregoing discussion.

First, in light of what has emerged over the previous pages — Part V in particular — the particular understanding of “efficiency” at work in these debates simply will not bear any normative import if decoupled from the responsible agency, equal material opportunity ideal. For the aggregate in question in such case will be morally arbitrary — like forehead height.

Second, assigning distributional tasks on the one hand, and naïve maximizing tasks on the other, to separate institutional spheres raises at least two significant moral risks. 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 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. For agents tend only occasionally to think in “big picture” terms, while most of the time hankering for “proximity”

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134 For recent discussion of this long-contested claim, see, for example, Chris W. Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000); and 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. LEGAL 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.

between responsible act and just consequence. If one needs proof of this observation, she need only read some of the experimental economics literature on “framing effects,” or consider the strange co-presence of attachment to equal opportunity on the one hand, resentment of “death taxes” and the like on the other, among many middleclass Americans.

These observations appear to suggest that a practical corollary might be implied by the “granular” character of that mechanism I have been arguing bests instantiates the responsible agency, equal opportunity ideal. Call it a principle of consequence-proximity, or perhaps subsidiarity: Rewards to responsible agency should, in general, follow as “proximately” to particular exercises of such agency as possible. For only in that case do we minimize the need for “all things considered” reflection on the part of citizens who wonder about the justice of what they receive or relinquish by dint of public action each week. I think it no accident that the want of precisely this form of proximity turned out to be one of the flaws we observed earlier to vitiate veiled-choice distribution scenarios like Vickrey’s, Harsanyi’s, and Rawls’s. By the very same token, it is no accident that its tying transaction-by-transaction distributive changes as closely as possible to the voluntary transactions that immediately produce them was part of what recommended the more micro-detailed distribution mechanism that has been this Part’s preoccupation.

## CONCLUSION

We have surveyed a rather broad terrain here. But as must now be apparent, there is much ground to cross over and clear. And clearly much more must be done. Indeed, if I am right in what I have been arguing in this Article, there is much more to do than we have hitherto realized. For it seems we’ve been on the wrong track for a while, where the normative theory of law’s links to economic activity are concerned. For decades, we have been fixated on end-states that are not only unmeasurable, but in fact normatively uninteresting even as aims. And all the while we should have directed our gaze toward more ethically salient opportunity “inputs,” whose right distribution allows rightful “outputs” to take care of themselves.

If collective action through law affects allocations of benefits and burdens to our fellow citizens, then we cannot *help* but think through the *ethics* of distribution in aiming to “do the right thing.” It is incumbent upon us, in other words, to “take distribution seriously.” And if we find, on analysis, that distributive ethics call for significantly improved spreads of material opportunity, it is just as incumbent that we think through how this can be done. Distributive ethics and feasible distribution mechanisms, in short, hang together, as Parts VI and VII sought to make plain.

But now consider the breathtaking sweep of the research agenda that these observations open for legal theory. What are the principal determinants of veritable, equal-opportunity-grounded wellbeing — the real material opportunities of Part IV? What means can we develop for more accurately charting the boundary between ethically exogenous and ethically endogenous such opportunities — between chance and choice as were traced over Parts III through V? How might we design better means of spreading the former, so that the latter — the sole ethically intelligible maximand — might “automatically” be maximized as described over Parts V through VII? What institutions, of the sorts broached in Parts VI and VII, will be better at discharging which functions in this project? And how much functional specialization of the sort that renders institutions less transparently part of just wholes, in the language of Section V.D. and Part VI, can endure? All of these questions and others press with new urgency, the moment we see that they cannot be dodged if we wish to be ethically coherent.

For far too long now — nearly two centuries, in fact — Benthamite misdirection, Paretian complacency, and the latter’s more recent bedfellow, Kaldor-Hicksian wealth fetishism, have functioned as balls and chains, handicapping our hopes to make legal-theoretic inquiry something that might recognizably better our institutions and lives. They have conferred vetoes upon beneficiaries of morally arbitrary distributions — distributions of genetically endowed utility functions, productivity functions, and wealth — for what we now see to have been literally no normatively cognizable reason whatever. Now that we see these constraints are not only unnecessary, but in fact incoherent and indeed incompatible with normative prescription itself, we see as well that it’s high time to jettison them.<sup>135</sup>

Consider how breathtakingly freeing this will be. It will free us and our fellows as persons and as citizens — whose lives and life prospects, as well as whose ethical roles relative to one another — will be vastly improved. It will free us as lawyers, legislators, and scholars as well — whose lifework will grow vastly more practically useful, theoretically sound, and indeed genuinely edifying. Consider finally what this will mean for law, politics, and economics. All three will be once again reconciled to their origins, in ethics. All three will be, once again, what once they were seen clearly by all to be — moral sciences.<sup>136</sup> They will be *healthy* again. They will have come home.

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135 See Hockett, *supra* note 1; Hockett, *supra* note 2.

136 Ethics, politics 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.

