Decentralized Responses to Good Fortune and Bad Luck

Richard A. Epstein[*]

Most forms of egalitarian theory impose on government (and through it other people) to redress the inequalities of fortune that result from bad luck. This Article takes issue with the various forms of this large claim, and argues that decentralized forms of assistance are likely in the long run to do better by the very standards by which egalitarians justify their own program. The alleviation of poverty depends in the first instance on increases in wealth that can only come through private innovation and technological advances. These have in fact produced major improvements in overall well-being, with disproportionate advances for the poor. But if one starts with Dworkin's unsustainable distinction between option and brute luck, or Nussbaum and Sen's capability theory, then no egalitarian theory can deliver on the promise to level differences in wealth without seriously compromising overall levels of social welfare. By expanding the scope of government regulation, these proposals open the door to selfish political forces whose political clout ensures that ill-conceived programs, such as the Americans with Disabilities Act, frustrate the very goals they hope to achieve. State intervention to redistribute resources should be understood as a last resort for dealing with problems of ill fortune.

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"The harder you work, the luckier you get."
Gerald R. Ford

INTRODUCTION

The topic of luck holds a long and storied place in political theory. One reason for its prominence in legal and philosophical discourse is that it presents one key question — what is the proper distribution of social resources, both tangible and intangible, in a just society? — that separates writers in the libertarian tradition from those in the egalitarian tradition. Libertarians tend to think that luck has a relatively small place in organizing social institutions, while egalitarians of all stripes treat it as one of the central issues for any adequate theory of social justice. To be sure, small government types like myself understand full well that the inequality of fortune is in and of itself not a good thing. Nothing in the libertarian persuasion rejects the proposition that diminishing marginal returns to wealth favors, ceteris paribus, greater parity of income and advantage. Rather, the libertarian reticence on the question of luck stems from its skepticism that any centralized or collective program of government intervention can do much to alleviate the problem of inequality once it has occurred, without devastating losses in both liberty and productivity, and through them, human happiness.[1] Quite simply, the powerful forces of individual self-interest, while not universal, will blunt or co-opt most of the governmental initiatives intended to redress these differences.

Egalitarians, in contrast, often differ among themselves on the proper ground of state intervention to respond to inequalities generally, and specifically to those that result from bad luck or fortune. In this volume, David Enoch concludes that "we are not entitled to what we get from the social as well as the natural lotteries (which are, of course, not under our control and so a matter of luck)" and that, therefore, "differences that are due to these lotteries should be compensated for by the state."[2] This claim

1 For the most influential statement of this position, see Friedrich A. Hayek, *The Uses of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

2 *See* David Enoch, *Luck Between Morality, Law, and Justice*, 9 THEORETICAL INQUIRIES L. 23, 54-55 (2008). Nor does this formulation ask the question of which state agencies should respond to the problem. I have sought to respond to these claims in advance in Richard A. Epstein, *Luck*, 6 SOC. PHIL. & POL'Y 17 (1988).

vastly increases the scope of government obligation and leaves unclear which individuals must contribute how much to this vast state project to which they may be personally opposed.

Daniel Markovits, in his defense of luck egalitarianism, places strong limitations on state action. Thus he thinks that a state acts improperly when it "asserts the authority to sustain distributions that advantage some citizens and disadvantage others in morally arbitrary ways . . . purports to obligate both the advantaged and the disadvantaged to support such distributions — implicitly treats the advantaged as more worthy than the disadvantaged, even though there are no morally respectable grounds for making this judgment."[3] He then concludes that the disadvantaged in such a regime count as politically "subordinate," and that it is appropriate for a state to take into account differences attributable to brute luck if not from conscious choice.

I shall address the issue of brute versus option luck later on, and here stop only to make the general observation that this nonsubordination principle is so broad that it is hard to know in the abstract whether to agree or disagree with it. Thus, anyone in the broad libertarian tradition thinks that it is foolish and unwise to introduce a set of subsidies that tax one group of individuals for the benefit for another. If that is all that Markovits means by his general proposition, then it is perfectly consistent with the view of equal rights of liberty and property for all, coupled with a general prohibition against all transfer payments. But if his notion of "political solidarity" envisions, as I fear it does, a large state in which all persons "cooperate" with each other, then it rests on the disingenuous premise that countless people can be coaxed or coerced into developing close affective relationships with total strangers. Such naiveté calls for an unnecessary expansion of government power in areas in which it is likely to perform poorly. The rate of return from public action is likely to be far higher when government reserves its energies for keeping individuals apart (by an effective prohibition against the use of force), so as allow those who so choose to come together on voluntary terms for whatever business, social, religious or charitable purposes they see fit. More concretely, in my view, the state does not "authorize" (even "to sustain") any distribution of wealth when it allows private parties to enter into whatever employment contracts they choose. The private parties do their own authorization. Yet if Markovits treats the state backing of these contracts as "authorizing" these "morally arbitrary" distributions, then his brand of egalitarianism supports endless disruption

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3 Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 285 (2008).

of labor and capital markets that eliminates the prospects for division of labor and gains from trade — prospects which allow for the high rates of production that characterize market economies.

Markovits's speculation highlights one frustration for outsiders to the egalitarian tradition, which is the difficulty of knowing the extent to which its general strictures invite or require extensive regulation of market institutions. This point is recognized by Elizabeth Anderson when she bemoans as bizarre the writings of some egalitarian theorists who think it is appropriate to ask energetic workers to subsidize shiftless people who care not to work at all, or for ordinary citizens to subsidize the expensive tastes, hobbies or exotic religious practices of those who cannot afford to indulge in these activities on the strength of their own resources, or for subsidies to be available for those who suffer from defects such as a gloomy personality.[4] These odd forms of cross subsidy do not commend themselves to most ordinary people, and Anderson is surely right to distance responsible efforts to develop coherent egalitarian proposals from ones that are all too easily dismissed as crank.

Nonetheless, Anderson's egalitarian concerns are troubling as well, for they rest on a misapprehension of the resilience of markets. Thus, in this issue she takes the position that "individuals in advanced capitalist societies . . . are increasingly exposed to market risks."[5] But her conclusion errs in at least two ways. First, it suffers from historical amnesia, given that the boom or bust cycles in bygone times, of which the Great Depression is only the most conspicuous, far exceed today's market fluctuations. Those changes, moreover, are properly laid at the doorstep of two major government mistakes: high tariff walls and wild swings of inflation and deflation.[6] Second, her account, like those of others, does not take into account the market mechanisms

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4 *See* Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999) (citing Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101 (1991)). For additional analyses of these problems, see Richard Arneson, *Equality and Equality of Opportunity for Welfare*, *in* LOUIS POJMAN & ROBERT WESTMORELAND, EQUALITY: SELECTED READINGS 2 (1997); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989).

5 Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239, 240 (2008).

6 On deflation, see J. Bradford DeLong, Slouching Towards Utopia?: The Economic History of the Twentieth Century — XIV. The Great Crash and the Great Slump (Feb. 1997), http://econ161.berkeley.edu/TCEH/Slouch_Crash14.html; on the Smoot-Hawley Tariff of 1930, see, for example, United States Department of State, Smoot-Hawley Tariff, 1930, http://www.state.gov/r/pa/ho/time/id/17606.htm (last visited May 1, 2007).

that do cope with just these risks, including the vast improvement in insurance, securitization, and portfolio diversification, all of which are freely available to individuals in all income brackets, even those with low levels of market sophistication.

Nor is it true that certain forms of risk fall more heavily on ordinary people. Anderson is wrong, for example, to lament the decline of defined-benefit pension plans in favor of defined-contribution plans, where in the former the risk of market fluctuations remains largely with the firm and in the latter with the individual holder of the retirement account. These defined-contribution plans need not increase market risk for pension holders, who still have the option to include debt instruments in their diversified portfolios. Indeed, defined-contribution plans also reduce risk for employees by allowing them to shift jobs without losing any fraction of their accumulated savings. Before any grand philosophical generalizations can be made about the shortcomings of markets, closer attention should be paid to how they work to minimize risk, just as more attention should be paid to how contemporary government policies, dealing with such matters as money supply, greatly minimized fluctuations in inflation and deflation in the past thirty years.

In my view, the misunderstanding of these market and institutional arrangements on the part of some critics helps put the problem of luck in perspective, even if it does not eliminate concerns regarding the effects luck has on the fortune of various individuals. The sheer proliferation of egalitarian responses to luck is, however, instructive for another reason that is not so easily disregarded. If we treat bad luck or inequality of fortune as a valid reason that justifies some special resource claim against other individuals in society, then deep intramural disagreement will follow as night follows the day. The threshold conditions for government action are so ubiquitous that it is unlikely that any two egalitarians will see eye to eye on who should pay, who should receive, and how much. Their only point of agreement lies in rejecting the libertarian norm that bad luck in and of itself generates neither entitlements nor obligations that the coercive power of the state should enforce.

The broad libertarian position, however, need not be blind to the question of assistance to those in need. Rather, in ways that should not be dismissed as naively cavalier, it leaves help for the unfortunate to the decentralized decisions of various individuals and groups who respond to these problems as they see fit, each in his or her own distinctive fashion. Some people will do nothing at all, but even that is not troublesome for two reasons. First, to the extent that they engage in productive labors, they benefit their trading partners as they increase the stock of social wealth. Second, the effectiveness of charitable activities, unlike the prevention of violence, does

not depend on universal participation. The only question is whether a society can achieve a critical mass of support, and that task should become easier as the overall wealth of society increases and the fraction of poor people decreases.

Suitably qualified, I think that this outlook remains the best starting point for analysis, such that we should deviate from it, if at all, only on a very strong showing that this system has broken down. To make that showing, moreover, requires us take into account not only the intended distributive implications of these programs, on which egalitarians focus, but also their impacts on production and innovation, which egalitarians tend to downplay or ignore. In general, I think that egalitarians tend to fail on both counts. First, they gravitate toward standards of social well-being that tend to minimize the differences across people, rather than maximizing the sums of their happiness. Second, they choose means that cannot achieve their intended goals.

One source of their mistakes is that they pay too much attention to the intractable questions of relative preferences, whereby improvement in the welfare of one individual is taken somehow to reduce the welfare of other persons with whom they compare themselves. Such relative preferences, if left unchecked, can lead to violently antisocial behaviors. "At the extreme we have the Russian peasant whose neighbour has a cow. When God asks how he can help, the peasant replies, 'Kill the cow.'"[7] No one will take matters that far, one hopes, for fear of what would happen if those destructive sentiments were applied across the board. But why even support more limited forms of leveling down that advance Pareto pessimality — I am entitled to make you worse off so long as I make myself worse off as well — in the fruitless quest for greater equality? Thus, even in less extreme cases, concentrating relative status is a dead loser because it leads to a proliferation of supposedly negative externalities whenever the welfare of any person has improved or declined. Let one person get richer, and all others can lament their change in relative status. Yet at the same time, others can still rejoice in their success. This broad definition of externalities (both positive and negative) makes it impossible to make any intelligent statement about the welfare consequences of any change in relative status. The only way to make any theoretical problem tractable is to adopt a conclusive presumption that ignores all these soft externalities, both positive and negative, in dealing with any social problem, for improvements in wealth and health are real and don't cancel themselves out.[8]

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7 RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE 44-45 (2006).

8 For my earlier defense of this position, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 97-99 (1992)

Second, egalitarians stumble badly on the questions of implementation. Their schemes require constant forms of government intervention, which would dull incentives for production even if applied faultlessly, and would be far more mischievous when subject to the harsh winds of partisan politics. If we could just get rid of subsidies, for example, that distort resource allocation — of which farm subsidies are an obvious illustration — we can vastly improve the overall situation without adopting a different set of subsidies that will be co-opted by yet other interest groups.[9] Limiting the scope of discretion in political affairs has enormous payoffs that no egalitarian (or any other form of) political tinkering can hope to match.

In order to defend this position, I shall first offer some account of the libertarian or classical liberal response to these problems, while attending to the small (relative to egalitarians) but critical differences between these two positions. In developing this argument, I shall to some degree revisit the positions that I have taken in an earlier article that I wrote on the topic of luck.[10] In my view, the use of decentralized and private means to combat the risks of ill fortune will outperform state agencies over a very broad range of social conditions. Once I have developed the classical liberal approach to this problem, I will look at two main efforts to construct an egalitarian response to the problem of bad fortune. The first is Dworkin's famous but ultimately unsustainable distinction between brute and option luck, alluded to earlier. The second is the capabilities approach which in its various forms has been championed by Amartya Sen and Martha Nussbaum, among others. Last, I will look at two types of programs that attempt to deal with major forms of bad luck. The first of these involves the treatment of disability, and the second involves various efforts to soften the blows of adverse events by using the tax system as a source of wealth redistribution.

[hereinafter EPSTEIN, FORBIDDEN GROUNDS]; Richard A. Epstein, *Externalities Everywhere? Morals and the Police Power*, 21 HARV. J.L. & PUB. POL'Y 61 (1997).

9 For a popular account of how farm subsidies of about $25 billion per year (and climbing) distort the relative prices in domestic markets and wreak havoc in other countries, see Michael Pollan, *You Are What You Grow: Will This Year's Farm Bill Make Us Fatter and Sicker?*, N.Y. TIMES, Apr. 22, 2007, § 6 (Magazine), at 15. In domestic markets, fruits and vegetables are slighted at the expense of processed foods. In world markets, poor farmers in third world countries have to compete with subsidized American exports.

10 Epstein, *supra* note 2.

I. LUCK IN A LIBERTARIAN WORLD

On most occasions, when speaking about political theory, I am careful to call myself a classical liberal and not a libertarian.[11] That distinction is important in a number of contexts, which I shall mention briefly here, and it helps us understand the various responses to bad luck. As is well understood, the libertarian position generally holds that the sole obligations that people owe to strangers are negative in form: to avoid the use (including the threat) of force against other persons, to avoid fraud (including strategic concealment) and to keep promises. Otherwise, all individuals are entitled to the exclusive use of their natural talents, and to keep all the external resources that they acquire either by first possession (the occupation of land or the capture of animals or the taking of material things) or by voluntary transfer (direct or through intermediates) from persons who have valid title.

The basic objectives of the system are to give a clear delineation of original rights so that all individuals know where they stand in relation to each other. This rights definition has to be enforced by positive law because there are too many individuals for everyone to agree on some common solution by actual agreements. Using this basic rights definition allows for individual utilization of human and natural resources, and for their voluntary exchange, including various sorts of ongoing pooling or cooperative arrangements. The logic is that each such agreement that takes place will improve the lot of the parties to it, and will in general create greater opportunities for those who are outside the network of voluntary exchanges. It is understood that voluntary transactions need not take the form of bargains, but may also include various types of gift or charitable transfers, even if they leave the transferor worse off in material terms than before. Within the system, the key objective of state power is to police the overall social regime in order to minimize the number of rights violations that take place at the crucial junctures of individual autonomy, private property and voluntary exchange. Inequality of fortune will surely emerge from the repeated and consistent application of these rules, as some individuals, through skill or good luck, will achieve higher levels of satisfaction than others.[12] But inequality of fortune is in and

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11 *See, e.g.*, RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN APPROACH TO CLASSICAL LIBERALISM (2003).

12 Coppage v. Kansas, 236 U.S. 1, 17 (1915): "it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." The decision upheld under the United States

of itself not a matter of collective concern, except as it might be a spur for some individuals or groups to take decentralized voluntary actions to control it.

Any faithful conformity to this position should, owing to the huge generation of wealth that it spawns, reduce the need for transfer payments to individuals who are unlucky. And the ever greater stock of available wealth should make it possible for some modest fraction of the successful individuals to help the relatively few individuals who otherwise fall between the cracks (remember, there is no way to transfer happiness or utility as such). That need would be limited in practice because the instances of pure, or brute, bad luck (being hit by the proverbial meteor) are usually the easiest losses to insure against, precisely because the risks of adverse selection and moral hazard, which constantly prey on voluntary insurance schemes, are largely absent here. But beyond such categorical losses as death and blindness, these risks bedevil insurance markets that attempt to respond to the more common conditions associated, even imperfectly, with obesity, drunkenness, smoking and general laziness, all of which have an adverse effect on human health and longevity.

Private efforts to alleviate bad luck may falter when adverse events hit huge communities at one time, as with tsunamis and hurricanes, or, worse still, as with various kinds of widespread terrorist attacks. That real risk of common mode failure leads to limitations on insurance coverage to prevent the entire industry from going under. The proper design of these coverage limitations is a matter of intense dispute, because exclusion is not the only strategy to deal with these risks. Reinsurance through the global market is surely a second approach, which helps take the strain off individuals who find themselves in harm's way. Truthfully, however, most of the voluntary rescue efforts are usually organized after the event, based on knowledge of local conditions that dictate what sort of resources should be mobilized and how. But again, it is important to not forget that the weaknesses that private organizations face in dealing with huge catastrophes also plague governments, whose institutions can be, and have been, overwhelmed, as was the case with Hurricane Katrina.

Yet whether or not we bracket these extreme cases, the increase in wealth and the availability of robust insurance markets are in tandem likely to do far better than a wide range of government transfer programs. These programs

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Constitution the right of employers to fire or refuse to hire employees unless they agreed not to join a union during the period of their employment. In my view, the case was rightly decided, but it has been emphatically overruled.

first reduce the overall level of wealth, only to create thereafter incentives for people to ease up, often in unobservable ways, trusting that someone else is available to pick up the slack. Using private donors to determine recipient eligibility helps curtail that risk, for these parties working on the ground will in general have information to discriminate, when appropriate, between people who slack off and those who have been hit by genuine misfortune.

On many key elements, the classical liberal position does not differ from the libertarian view. Classical liberals certainly respect the initial distribution of property rights in persons and things that are the hallmark of the libertarian position. They also favor protection against aggression and the use of voluntary transactions wherever possible. One major difference between the classical liberal and the libertarian is that the former is comfortable with taxation (preferably flat taxes based on either income or consumption) and with using the eminent domain power to acquire key parcels of land that might otherwise blockade the formation of transportation and communication networks. Put more generally, classical liberals believe that it is proper to use state coercion against individuals for their own benefit, not out of a sense of paternalism but rather to overcome the coordination and public goods problems that arise in supplying both police protection and needed physical infrastructure, broadly construed.

Closer to the topic at hand, classical liberals take a somewhat more receptive attitude toward the amelioration of bad fortune by others. The hard-line libertarian draws no distinction among various kinds of preferences. Human actions are either allowed or forbidden. You can give or withhold assistance to others in need just as you can choose between a Schwinn or a Raleigh bicycle. So long as you respect the perimeter of rights that surrounds other individuals, you can do what you please with your own. There is no intermediate category of actions subject to moral obligation outside the domain of positive law. That includes charitable obligations. The classical liberal takes a more complex view of social obligations that the state should leave to individual choice. In some cases it fully respects the naked expression of choice, as in the selection of consumer goods. But in general, it insists that persons with great fortune share in some way their good fortune with others, and endorses social sanctions from disapproval to ostracism to make good on these so-called "imperfect obligations."[13] I believe that this in fact offers a better description of social life, both normatively and positively,

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13 *See, e.g.*, Joseph Story, Natural Law (unsigned article in 9 ENCYCLOPEDIA AMERICANA 150 (1836)), *reprinted in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 318 (1971).

than the pure libertarian version, because it well accounts for the outpouring of these activities to supplement, or even displace, collective action on these critical matters.

This insistence on these imperfect obligations, moreover, should not be dismissed as an idle cop-out whose major function is to allow stingy people to escape paying for the health of the less fortunate members in the community. It is a powerful tradition, even if it does not always work on a community-wide basis that egalitarians prefer, but through churches, clubs and friendly societies that in turn achieve these goals through some messy (but effective) amalgam of reciprocity and generosity. The upshot is that the classical liberal should endorse (at a normative level) and expect (at a descriptive level) a higher level of assistance through voluntary means than does the libertarian. The next question is how this system operates.

The method of private support networks, of which charities are only one, deviates sharply from the various egalitarian models. In the first place, the classical liberal never insists on any norm of universal application. Triage is just fine. Equal respect for all persons may be a nice mantra, but it is not part of the driving force toward benevolence. It is compassion or sympathy for particular individuals in a condition of need, or for those with whom there is some independent empathetic bond. Accordingly, under the usual norm of freedom of association, ordinary people can decide to deal with other individuals in charitable ways for good reasons, bad reasons, or no reason at all. As a general matter, the key exception to this general at-will principle lies with monopoly providers of certain kinds of services, such as common carriers and various network industries (railroads, power distribution systems, communications). In those contexts, the sole supplier has a correlative obligation to take all comers on reasonable and nondiscriminatory terms.[14] The working out of a general theory of regulation for network industries is the work of a lifetime, but it is largely orthogonal to the issues raised here. There are no real network effects in charitable operations, which can aid as few or as many as they like, with others entitled to enter to fill the gaps that remain.

It is that level of freedom in the object of charities, well-recognized in private law, that makes traditional forms of private assistance work.[15]

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14 For the early statement, see Allnut v. Inglis, (1810) 104 Eng. Rep. 206 (K.B.). For an early discussion of the subject, see H.W. Chaplin, *Limitations upon the Right of Withdrawal from Public Employment*, 16 HARV. L. REV. 555 (1903). For my views, see RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 279-87 (1998).

15 *See, e.g.*, McDonald v. Massachusetts, 120 Mass. 432 (Mass. 1876).

In dealing with their own operations, many groups give explicit preferences to religious, ethnic or geographical ties. After all, "charity begins at home" because we take care of those "nearest and dearest to us" first. This point is no deep, dark secret. Many charitable organizations so identify themselves in order to attract their natural class of donors: the United Jewish Appeal, Catholic Charities, the United Negro Fund. The exact giving pattern of these organizations tends to vary, but they may exclude outsiders in some circumstances or send them to the back of the queue in others. The clear impulse behind this (dare one say) laissez-fair attitude is that the first order of business is to maximize the willingness of people to intervene benevolently, which will not happen if the state meddles in their affairs. Saving lives is the key objective of the enterprise. The distribution of the benefit is very much a second order effect.

Nor should one disparage this result as inequitable, for two market forces will tend to soften any exclusionary or discriminatory effects in charitable giving. First, these insider preferences could be softened (and perhaps eliminated) by conscious decision of those who supply the assistance in question. Religious hospitals might decide to use religion-blind triage standard in the emergency room, even if they reserve the best hospital beds to members of their groups. Of equal importance, other groups with other preferences help fill the void for some underprotected groups, and for two reasons. First, most people who engage in charitable activities will tend to extend their help where it is needed, which covers the underserved groups. There are no charitable drives to help the rich. Just a brief look at the website of various religious organizations exposes their focus.[16] One powerful charitable message is that "we are all God's children." Second, other individuals with different religious orientations, for example, could imitate for their own groups the strategies adopted by others, with their own insider preferences. There will of course be holes in this market, but there will be fewer than one might expect. And of course, it is always necessary to avoid the Nirvana fallacy, which contends that conscious government assistance will

16 For the Jewish United Fund, see Jewish United Fund, http://www.juf.org/get_involved/inside_home.asp (last visited May 1, 2007). Its purposes include "social welfare, health care and Jewish education programs for disadvantaged people in Israel," and it "supports similar programs for needy Jews in more than 60 other countries." The religious and charitable messages are intertwined. Catholic Charities USA has the same mix. Catholic Charities USA, Mission Integration and Catholic Identity, http: //www.catholiccharitiesusa.org/mission/index.cfm?cfid=2316278&cftoken=35550402 (last visited May 1, 2007).

overcome all these petty biases and unjustifiable omissions, without creating other problems in their place. The experience with Hurricane Katrina revealed that many charitable organizations kept out of the disaster areas because they did not have permits, leaving slow, ineffective, bureaucratic, petty and jealous government agencies to conduct a scandalously inept rescue effort that led to much unneeded suffering.

Egalitarians, however, typically invoke their clear preference for state action and ignore the endemic public choice problems in providing for charitable assistance of all sorts on a nondiscriminatory basis. Unfortunately, we pay a very high price by seeking universality in combating the results of bad fortune. The effort to make sure that no one falls outside the safety net often leads to dismantling or weakening what safety nets are already in place. The insistence, for example, in the United States that all emergency rooms take all patients who are at risk or in active labor has resulted in a contraction of available emergency services.[17] The equality constraint in my view should yield in general to an ex ante expected utility test. So long as people make their fundamental choices behind the veil of ignorance,[18] they will not give exclusive weight to the worst states with no attention to the rest. Even if risk averse, they will seek to maximize their welfare over all expected states of the world and not just one: why would anyone choose to reject a distribution that leaves all persons better off in the ex ante position than some rival distribution? Pareto optimality is an intelligible standard; Pareto pessimality (I can make you worse off so long as I am worse off) is not. There is nothing about the veil of ignorance approach that requires us to fall into the Rawlsian trap of trying to organize social institutions under a maximin strategy that focuses exclusively, or even heavily, on the position of the worst-off individuals. People certainly do not adopt this strategy in organizing their own lives. Often, to get good outcomes in surgical procedures, they will increase the risk of death, thinking that the positive outcomes provide compensation for the negative ones. The social analogies seem clear. We should never make any judgment about social distributions that look only at one slice of the whole — bottom or top. From behind a veil of ignorance, a positive expected utility does more for more people. The egalitarian might think that a world with everyone at 10 is better than one with 99 percent of the population at 100 and one percent at 1. But few if any people would choose the first distribution.

The social lesson is clear: we should try to foster institutions that will

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17 Erik J. Olsen, *No Room at the Inn: A Snapshot of an American Emergency Room*, 46 STAN. L. REV. 449 (1994).

18 JOHN RAWLS, A THEORY OF JUSTICE 12 (1971)

save as many people as possible, and whose work cannot typically be done with government programs that suffer from massive types of social drag. Triage may not be an egalitarian approach, but if it is good enough for the military it is good enough everywhere else and for one reason: it saves lives. It is quite impossible to ask any private charitable effort to save everyone, or seek to save everyone equally. The older view of imperfect social obligation allows all groups to pick their targets of benevolence, thereby taking advantage of the fundamental heterogeneity in tastes among potential donors. Some foundations, for example, are dedicated to global health; others to the improvement of schools in their own neighborhoods. Leave them unfettered, and the one group will fill in the gaps left by another. There is no need to subject all these organizations to the directions of any central command.

II. EGALITARIAN ACCOUNTS OF LUCK AND GOOD FORTUNE

A. Dworkin on Equality

The previous arguments should make it clear that I have little or no faith in the ability of large government action to respond to the problems of bad luck and unequal fortune. In addition, I think that most of the egalitarian theories fall of their own weight in the effort to specify the conditions under which the state can seek to provide that relief on a systematic basis. The first of these theories, which enjoys much currency today, is associated with Ronald Dworkin, who many years ago thought that a system of egalitarian justice had to insulate people from some, but not all forms of bad luck or fortune.[19]

The first part of his theory examines the conditions that make for equality among persons. In dealing with this issue, Dworkin does not precisely discuss the common law first possession rule, but he does explicitly contrast it with its closest (but not exact) philosophical equivalent, the Lockean labor theory of property acquisition.[20] That common law system works very hard

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19 Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

20 *Id.* at 309. The key difference is that the common law (and the Roman Law as well, *see* G. INST. 1.66 (F. de ZuLueta trans., 1945)) postulates that all property is *unowned* in the state of nature, so that no individual has any property interest that is compromised when someone else reduces that unowned object to possession. For Locke, property in the initial distribution was owned by mankind *in common*, which moves the world closer to the egalitarian pole, and creates greater difficulties

to make sure that each plot of land has a determinate owner, but does nothing whatsoever to ensure that all plots of land acquired by various individuals are of equal value or in any way, shape or form satisfy what Dworkin ingeniously calls the "envy principle." No person, when the dust settles on the observed allocation, prefers the holdings of someone else to the holdings that he enjoys. Or, in Dworkin's own words, "No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle."[21] The use of the term "immigrant" in this quotation is not mere happenstance. It is included because Dworkin's analysis presupposes that "a number of shipwreck survivors are washed up on a deserted island which has abundant resources and no native population,"[22] without pausing to note the unlikelihood that these two conditions will be joined to together. In his view, any free-for-all governed by a first possession rule will produce an unjust distribution. What is needed instead, conceptually, is an auction whereby each person is given a number of chits (or clamshells) that become the currency for bidding. The plot sizes and prices are adjusted such that the market clears (which is not all that easy to do). Each person bids exactly his number of shells for the plot of land that he acquires. Under this condition, everyone is exactly happy with his holdings, and initial parity takes place. The use of this market mechanism is not meant to exclude future trades between members of the immigrant population. Rather, like the first possession rule to which it is implicitly compared, it sets the stage for further bargains, which will in general be binding because of the validity of the initial allocation.

This scenario presents us with Dworkin's view of a zero-transaction cost world, which is why the results come out as neatly as they do. Even within that framework its (sensible) concern with material resources means that the auction cannot deal with the types of resentments that some people might hold precisely because other people have gotten what they want, no matter what it is. ("I will not accept any arrangement in which Jones is happy with

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when any individual combines his labor (which Locke thought was his alone) with external things. "But I shall endeavour to show how men might have come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17 (Thomas Peardon ed., Prentice Hall 1952) (1690). For my account of some of the problems with Locke's formulation, see Richard A. Epstein, *On the Optimal Mix of Common and Private Property*, 11 SOC. PHIL. & POL. 17 (1994).

21 Dworkin, *supra* note 19, at 285.

22 *Id.*

his lot." "I must live next to Jones but cannot live next to Smith.") In any positive transaction cost world, moreover, the story may not be so mellow, because of the practical difficulties of constructing any auction that meets these exacting conditions, as Dworkin recognizes.[23] First, the conditions that work for the auction are never satisfied in historical contexts. There are few islands that are wholly isolated — the fertile ones tend to get settled — and few situations in which all potential claimants to the property arrive at just the same time, as part of some prior community that creates a common language and some mutual trust. There is in fact no background community, as in his example, that mutes the individualistic character of the first possession rule, which does happen when members of groups take possession of land in the name of their tribe, clan or family.

Historically, therefore, the tilt toward the common law rules results from the imperfections on running auctions in situations where latecomers threaten the stability of a prior order: auctions are no better, and perhaps worse, than a first possession rule in dealing with the claims of late arrivals. In any real world hubbub, there is no guarantee that one could find a leader, let alone one who would act as a perfect fiduciary-turned-auctioneer to all the members of the community. Nor is there in practice any way in which this auction could be organized in time to forestall the immediate risks of starvation and violence.

There is a larger lesson that needs to be remembered. Markets, like other social institutions, are hard to organize, and their success depends on a favorable social infrastructure. The comparative advantage of the first possession rule is that it performs better under real world conditions than any imaginary auction. Those people who come first are able to entrench themselves, so that the system will show some sign of stability precisely because it takes a far greater force to dislodge it. In addition, the first possession rule establishes a focal point that helps resolve disputes when more than two parties have their eye on certain natural resources. He who gets there first can exclude all the subsequent takers. All of them will know this rule well enough so that its signaling power is effective. Latecomers may come in, of course, but only with the consent of those who are there, who may — individually, but not collectively — well exact an admission price in cash, kind or future services.[24] There is no guarantee that this system will

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23 *Id.* at 291.

24 Herein lies one of the major difficulties of communitarianism, which when applied to land use decisions amounts to a collective refusal to deal with outsiders, which is far more devastating than rules that allow individual owners alone, but not in combination, to decide whom to let in and whom to exclude. For some sense

prove stable in the long term. The history of violence and sieges proves just how fragile any form of social organization is. But it surely has a better shot at getting started than the auction method once Dworkin's hothouse assumptions are relaxed. Quite simply, the universal adoption of the first possession rule in the face of constant (after the fact, of course) criticism from philosophers shows that durability in nature may be more important than equality.

Therefore, there are powerful reasons to allow luck to play a substantial role in setting the original allocation of external resources. But no matter what system is used to set the initial allocation of material resources, one point remains certain: distribution will not remain constant over time. In the first possession world, human capital matters at least as much, or more, than physical capital. Individuals with larger than average holdings could lose ground through a series of unfortunate transactions, or they could parlay their initial holdings into greater advantage. We allow these transactions generally because we think, rightly, that they will on average improve the lot of everyone who participates in them. It is not as though any redistribution takes place in a zero sum universe. Indeed, with good fortune, the lot of the worst off in some future period could be better than the lot of any individual under the original distribution. The same result, of course, holds in the subsequent rounds of voluntary transactions even when goods are allocated fairly by some ideal auction. The old insight that voluntary transactions can lead to inequalities of fortune is a brute fact of nature that no egalitarian theory can ignore, as the earlier footnoted quotation from *Coppage v. Kansas* should remind us.[25] The question is what to do about deviations from the moral norm that are in large measure justified by the need to increase the overall size of the pie.

Dworkin is well aware of these problems, and makes two points to explain why equality is an initial constraint on the system rather than a permanent state of affairs. His first point is that it would be incorrect to take a snapshot view of future wealth, while ignoring any differential consumption rates in the interim. To do so is to give one party higher lifetime benefits than others. It also creates a strong incentive to immediate consumption in order to improve one's position relative to strangers (and Dworkin does not like, or at least stress, incentive arguments). Hence, the only possible measure would look at the discounted present value of consumption and wealth from

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of the huge dislocations that arise when inclusionary zoning systems are used to counterweight exclusionary ones, see ROBERT C. ELLICKSON & VICKI BEEN, LAND USE CONTROLS: CASES AND MATERIALS 760-88 (3d ed. 2005) (summarizing the Mount Laurel saga in New Jersey).

25 *See supra* note 12.

the initial distribution to the present, which raises formidable valuation questions that any theory would do best to avoid.

His second effort to overcome these consequences requires him to make a controversial judgment on the ownership of labor. He could move into the Rawlsian universe in which the initial allocation of talents is deemed a matter of luck, and thus should be subject to some government revision. But, rightly in my view, he tends to avoid that tack, and thus follows part way down the Lockean trail by treating labor and talents as owned by the individual that naturally possesses them. Why else, one might ask, should anyone place stock in the welfare of individuals if we did not think that they had the capacities of growth and choice that befit rational and autonomous agents? Nonetheless, the clear implication of this concession is to a greater toleration of inequality in later periods, given the differential abilities and talents. Note that the classical liberal theory — which is not troubled by any constraint of equality in the initial position — rides through these differences without regret or complications, for it does not have to explain why the equality of natural resources matters so much when every other element of the theory moves in the opposite direction.[26]

The overall analysis becomes still more difficult because there are some subsequent distinctions that Dworkin's theory wishes to take into account, the most critical of which is between brute and option luck.[27] Stated in its simplest form, brute luck includes those actions that took place by virtue of the force of nature, so that no actions of the affected individual could have altered the probability of their occurrence. The most familiar example of brute luck is being hit by a meteor, or perhaps being caught by a tsunami. And no doubt, there are many situations for which this description is apt. On the other side of the line lies option luck, which is what people experience when they make an informed gamble which could either win or lose. Dworkin's position speaks of a universal duty to take steps to ameliorate the adverse consequences of brute luck, and thus considers it appropriate to require (some) redistribution of social wealth in favor of those individuals cast into this select group. But at the same time, he holds that individuals who make their own beds have to sleep in them, so that folks who take gambles and lose should bear the consequences of their own decisions, no matter how far they have fallen. Accordingly, those whose conditions come by misfortune or birth defects have a greater claim on

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26 See Dworkin, *supra* note 19, at 309-12, for Dworkin's inconclusive struggle with this point.

27 *Id.* at 293.

the resources of others than individuals who engage in risky activities that do not pan out.

In several senses this distinction is a nonstarter. In general, there is no way to separate anyone's natural endowments from the choices that he or she makes: people with greater natural — or undeserved — endowments are likely to make better choices, both in life decisions and in financial markets. Hence the separation that Dworkin presupposes will apply in the case of persons with identical capabilities and opportunities, which of course could never hold in the face of natural variation across all populations on all relevant traits.

His arguments, like many of his critics and followers, also have an air of unreality for yet another reason. In many cases, the party who makes a wrong choice dies, at which point the most ardent egalitarian can do nothing to improve his welfare. In other, more financial settings, skilled traders never bet everything on a single role of the dice but work actively to diversify portfolios and hedge risks, precisely because they are risk averse in at least some degree. Yet oddly enough, unlike the dead person, it is hard to wipe out the failed trader. Even if financial capital is down to zero, human capital is not, and so long as the bankruptcy laws provide the "fresh start" through discharge, these people will never be wholly down on their luck.

I do not wish, however, to stress any of these objections here. Even if these are put to one side, there is something deeply odd, even harsh, about these examples because they cut against the usual way in which charitable aid is dispensed to the unfortunate. Dworkin uses a model that is peculiarly dichotomous in three senses. First, he writes as though obligations to assist or compensate are either legal or nonexistent. There is no hint anywhere in his article about that middle category of imperfect obligations of beneficence that forms a critical part of classical liberal theory.[28] Second, he assumes that all luck, apart from borderline cases, falls into one of these two categories, when in fact many important scenarios of option luck to do not involve traders who have made skilled market decisions, but individuals in imminent peril of death or serious bodily injury who have acted carelessly or recklessly in managing their own affairs. In lots of situations, the antecedent negligence of a given party may put him in harm's way, such as the individual who did not heed the storm signals when out to sea, who is then swept up by the tsunami. If the mixed cases predominate in practice, as I expect they will, then the distinction is not administrable, whatever its conceptual attractions.

Last, the position that denies compensation for wrong voluntary choices

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28 *See* Epstein, *supra* note 2.

is harsher than any encountered in practice. Thus, assume that members of a group all start in the same initial positions and one chooses not to insure against a risk that others insure against. They are compensated in large measure for their losses, but the one outlier is not. It may well be that the fortunate owe absolutely nothing to the outlier as a matter of law, but as a matter of social practice I think that very few charitable organizations, or individuals, would treat even a manifest want of prudence as a reason to exclude that unfortunate person from those eligible for assistance. Dworkin might respond that they are free to do so, since his theory only holds that there is no political obligation to aid these persons. It hardly places a prohibition against that assistance. Yet this argument proves too much, for if there is no political obligation to aid those from one form of misfortune, the same holds as well with respect to all forms of misfortune. Help privately if you will, but do not treat any sort of misfortune as the source of a strong political obligation.

Stated otherwise, brute luck, option luck, and any permutation of both, should be treated as generating only imperfect obligations.[29] Ex ante incentives for people to insure can be preserved by altering the level of assistance provided them, so that the uninsured person does not fare as well as someone who had the foresight or resources to take precautions. It is a much more difficult question to decide whether in the ex post world individuals who suffered their misfortune from brute luck or from option luck should receive the same benefit. Again, there might be some slight preference to the person who suffered from pure misfortune, if only because there is less of any perceived moral hazard problem than that which arises with the party that fails to insure. But again this difference is surely likely to be expressed as a matter of degree, and not as distinction in kind.

The hard point about ordinary intuitions on charity is to figure out how to blend the ex post concerns with need with the ex ante concerns with harm prevention in deciding on levels of assistance. The common approach is to think first of the ex post situation, which is the visible need, after which it must be asked whether to ratchet care up or down to take into account behaviors of the needy person in the ex ante world. On this matter, as noted above, ordinary negligence in the provision of one's own care does not normally tip the balance against giving aid, if

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29 For an attack on Dworkin's view on option luck within the egalitarian framework, see Anderson, *supra* note 4, at 295-97; Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 ETHICS 548 (2001). For its relentless defense, see ERIC RAKOWSKI, EQUAL JUSTICE 75-80 (1991).

it would otherwise be supplied. Thus it is commonly accepted that no individual is legally obligated to rescue a stranger, even when the risks to the rescuer are small and the potential gains to the rescued are large.[30] One reason for this rule is that most people will act without legal compulsion in cases of easy rescue. But in this "no duty" world, few would-be rescuers would think it relevant that the victim was lost at sea because of an avoidable navigation error, or suffered injuries during a hurricane because he remained at home too long after receiving a warning to evacuate. The usual response is to overlook these forms of admitted negligence and to rescue just as if the loss in question stemmed from brute luck. A similar result applies in cases of private necessity, where the operative line is that owners, who have no duty to rescue, must nonetheless stand aside when people in distress take steps to use the owner's property to save themselves or others.[31] I am aware of no legal authority anywhere, in which negligent or reckless individuals forfeit any rights to protect themselves from natural necessity. The risk of failure is so great that ample sanctions (in the form of injury or death) remain on potential victims even if the usual rules of private necessity remain in place. From the ex ante perspective, the negligent sailor may not be able to clamber onto the dock, so that the privileges in time of necessity will not loom large in his earlier calculations, and will thus have little or no effect on any victim incentives to take care.

The same result holds, for example, under the traditional tort law doctrine of last clear chance, which allows a party guilty of contributory negligence to recover when struck by someone who has acted with blind indifference to an evident risk. In the ex ante world, there are few occasions in which the negligent plaintiff is harmed through the willful neglect of others. Most cases of injury involve more prosaic harms, so that strong incentives to take care are preserved even if in some circumstances recovery is allowed. Likewise, within the framework of workers' compensation statutes, injured parties may recover routinely in the teeth of their negligent behavior. Only willful neglect or reckless disregard of evident risks bars their recovery. Here the argument takes on a slightly different form, namely, that the compensation formula is set sufficiently low that even full compensation awards under the plan leave the injured party worse off than before, so that ex ante incentives are preserved. Indeed, there are very few cases in which (bad) option luck

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30 *See, e.g.*, Buch v. Armory Mfg., 44 A. 809 (N.H. 1897).

31 *See* Ploof v. Putnam, 71 A. 188 (Vt. 1908) (privileging the entry); Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910) (requiring compensation when entry is made under conditions of necessity).

denies recovery. Thus with medical emergencies, the current United States law requires hospitals to take in all patients who are in dire stress, wholly without regard to how they got into their condition. But prior to the adoption of the law, most charitable institutions had to be pushed very hard (as in cases of chronic self-destructive abuse) to exclude individuals from the receipt of care. In all cases, the ex post state matters more than Dworkin's account allows. The operative assumption is to help first (if you are going to help at all) and to ask questions about sources and origins later. The classical liberal tradition on this point has a much better correspondence with current behaviors than the more austere egalitarian theory which starts, ironically, from the same narrow vision of self-interest that led Hobbes astray in such very different directions. And for those egalitarians who think that the state should fulfill all the obligations that the classical liberal might leave to private choice, the result is clear: impose on the state duties of assistance in those cases where voluntary rescue is often undertaken. The question of state provision of this form of care raises difficult questions that we do not have to worry about here. But we should be chary of following Dworkin's view that lets supposed option losses lay where they fall. And at the same token, we should not think, given the intermediate positions that are available, that the inequality of natural resources dooms us to an unjust society.

B. Capability Theory

1. The Basic Approach

A second major strand of modern egalitarian theory, closely associated with Amartya Sen and Martha Nussbaum, involves the view that all individuals are entitled to satisfy minimum needs that permit them to exercise their capabilities in ways that allow them to flourish.[32] One practical implication of this provision is to take our attention away from aggregate measures such as gross domestic product that make little effort to understand or measure the full set of nonmonetizable benefits and burdens of individuals. The capabilities approach is also intended to give some adequate reflection of the differential needs that people have to flourish based on their stage of development and their particular position — pregnant or not, sick or not, disabled or not — and the like. And in similar fashion, the capability theory takes much more seriously

32 *See, e.g.*, AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT (1982); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000).

than, say, Dworkin, the claims that individuals have claims to increased levels of resources based on disabilities, whether attributable to natural or social misfortune.

At one level, the approach is surely unexceptionable. It would be a mistake of gargantuan proportions to assume for any given individual that financial net worth is an adequate measure of personal happiness. The recent work by Kevin Murphy and Robert Topel, for example, repeatedly stresses that individuals attach very high valuations to conditions of good health, which, roughly speaking, matter as much to most people as their financial well-being,[33] and the happiness literature generally reaches the same conclusion. The point should in some sense be obvious because of the large amounts of money that people with deadly illnesses or constant pain spend on medical care and other forms of relief, drawing from their own money, even when not supplemented by public funds.

Their central observation, however, does not embarrass the classical liberal theory. It simply gives some explanation as to the pattern of activities and expenditures that most people (sensibly enough) make in their lives. To be sure, it is hard to factor these features into any measure of overall national wealth, because it is true that most individuals place enormous value on their full web of interpersonal relationships, which cannot be easily reduced to dollars and cents.[34] Indeed, one reason why the relationship between wealth and happiness is so often confounded in modern societies is that people (like this author and countless other academics) quite consciously sacrifice extensive amounts of income in order to gain a life-style and do work that they enjoy. High income is thus often understood as compensation for a crummy life style, so that we should expect a highly imperfect correlation between happiness and wealth.[35] The advantage of living in a wealthier society

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33 Kevin Murphy & Robert Topel, *Diminishing Returns? The Costs and Benefits of Improving Health*, 46 PERSP. BIOLOGY & MED. S108 (2003) (estimating that an additional year of life is worth on average $350,000 to a fifty-year old man, and $180,000 to a fifty-year old woman).

34 For an exhaustive discussion of the topic, see LAYARD, *supra* note 7, at 63. Layard lists in order of importance these seven factors as determinants of happiness: family relationships, financial situation, work, community and friends, health, followed by personal freedom and personal values. The low ranking of health is suspect. It may well be low for people in various states of good health who take it more or less for granted, but as people get sicker and more crippled, it assumes an ever larger role of life, especially for persons in constant pain.

35 For discussion, see M. Todd Henderson & James Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption*, 93 GEO. L.J. 1835 (2005).

is that choosing happiness can be made with far less sacrifice of material well-being than it could be made in societies in which lower levels of income and material support require people to live lives of comparative drudgery. Perhaps that is why the clergy and the physical therapists report high levels of satisfaction, as part of helping professions, while lawyers and doctors (who often help, for whatever it is worth) report less satisfaction.[36] It seems as though individuals (albeit in different proportions) do trade off happiness against wealth, notwithstanding the blandishments of a consuming culture. Who wants to be miserable eight hours a day working at something one doesn't enjoy? Or earn money when there is no time to spend it?

In light of these complex relationships, it is not surprising to find a weak global correlation between individual wealth and individual happiness.[37] But, by the same token, there are certain features of our public behavior that these studies cannot explain. Thus it is rare that any group makes an effort to give up new luxuries, even when they breed inequality. The effort is never to ban flat-screen television. It is to get one like your neighbors, especially after the price goes down. In addition, the tenacity of labor negotiations suggests a real belief that more is better, notwithstanding the common "reference group" phenomenon which leads workers to compare themselves to their immediate coworkers, and not the rich and famous.[38]The claims of solidarity demand both wage parity and wage increases, for otherwise how do we explain the everyday dynamics of collective bargaining arrangements?

Nor do the happiness studies pick up all relevant variables when they concentrate on reported feelings of individuals in different settings. For example, these snapshots do not capture the lives lost at early ages because of disease or malnutrition; indeed, they pay scant attention to the elimination of infectious diseases and the marked increase in life-expectancy, which stood at 47.3 years of age in 1900 and rose to around 77.0 years of age in 2000 — an increase of about 30 years in a century.[39] If individual happiness

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36 Tom Smith, National Opinion Research Center at University of Chicago, Job Satisfaction in the United States, http://www-news.uchicago.edu/releases/07/pdf/070417.jobs.pdf (last visited July 16, 2007).

37 LAYARD, *supra* note 7, at 3, 32.

38 *Id.* at 44. For a detailed discussion of these reference group issues, see TRUMAN BEWLEY, WHY WAGES DON'T FALL DURING A RECESSION 310 (1999).

39 NATIONAL CENTER FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2006, tbl.27, http://www.cdc.gov/nchs/data/hus/hus06.pdf#027 (last visited July 16, 2007). It is worth noting that the racial disparities have dramatically decreased during this time. The white/black difference was about 14.6 years (47.6 to 33.0) in 1900, but shrunk to about 5.7 years (77.6 to 71.9) in 2000. That difference declined by another 0.5 years between 2000 and 2004.

per unit of time were constant over that period, then the added years should count for total happiness, especially since there seems to be little decline in reported happiness with age.[40]

In some sense, the results of these happiness studies are encouraging for social cohesion, for they help explain why there is relatively little income envy across social classes. It is not as though the secretaries who work for Wall Street investment bankers are systematically resentful of their lot in life, relative to those who work in universities, where the wage differentials are surely smaller. Put in another way, if income differentials are said to matter little, as the critics of neoclassical economics contend, then why bother with the inefficiencies of progressive taxation and direct regulation? And if they do matter, they matter as well to the people on top, so that it becomes hard to say that the law of diminishing marginal utility of wealth carries over to the more nebulous area of social status.

In the end, gross domestic product is an imperfect surrogate for overall well being, and the empirical evidence tends to corroborate this weak correlation.[41]To be sure, in individual cases we can expect to see massive gyrations between people's financial and personal well-being, but over large aggregations of persons the ratios will be pretty constant. It is not likely that we shall find some mysterious inversion whereby societies whose members have sufficiently greater resources will systematically have unhappier people. And even if this were the case, those poorer societies with great happiness (or, better, their individual members) could just continue along their historic path. Either way, there is nothing about the expanded definitions of satisfaction, or the empirical findings on happiness, that requires ditching older understandings about political relationships of the classical libertarian theory, just because people do not — and they should not — operate under some narrow definition of profit maximization.

The hard question for capabilities theory is whether it can make good on its overall political aspiration, which is to push hard for redistribution for those whose needs are greater than others, usually (but not always) through no fault of their own. Strip away the rhetoric and it has two components. First, and noncontroversially, is its libertarian side. All vulnerable people — children, women, old people — are entitled to protection against the use and threat of force. That of course does not distinguish them from more fortunate individuals, except for the fact

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40 *See* LAYARD, *supra* note 7, at 62.

41 *See id.* at 32.

that a uniform public commitment to protect these interests is likely to be of greater value to individuals who are less able to take self-help measures to defend their persons or property. Likewise, all people, including the vulnerable, are to have liberty of motion and travel, or as common lawyers like to put it, to be free of imprisonment or restraint or the threat thereof. Once again, public protection of these interests is likely to generate greater benefits to the least self-sufficient. Next, all people are entitled to have freedom of association, to affiliate and to join with those whom they please, without the interference of others, in activities that involve work, play and intimate relations. And of course, all persons are entitled, subject to age and competence limitations, to the usual rights to vote and to participate in public life with their fellow citizens.

Why are these rights uncontroversial? Well, in the simplest sense there is no coherent political theory that seeks to deny them to any individual. So we can rely on brute consensus even if it is not reasoned. But of course, it *is* a reasoned consensus when we ask which of these conditions we would choose to relax. Not the condition of equal rights before the law, for then we would have to decide in a society of millions of individuals which persons are entitled to preference over millions of others, and to measure the degree of the embedded preferences they should receive, and to do that over and over again with each change in the life of the polity through death, birth, immigration or emigration. The costs of running that ambitious program are positive and large. The sum of rights that these preferences generate is, however, only constant in that any receipt of rights of domination or preference are necessarily offset by the duties of subordination or disadvantage. But the value of the rights does change, in all likelihood negatively, for there is no reason to think that these systems of social stratification even meet the Kaldor-Hicks standard of efficiency whereby the gains to the winner (from making, say, another person his slave) exceed, or at least equal, the losses to those whose freedom is lost. In making this judgment, of course, there is reason to restrict the gains and losses to strictly pecuniary ones. The capabilities theory is clear on this point, obviously, but so too are all varieties of the libertarian theory that respect the subjective value that all individuals attach to their emotional, psychological and associational states.

The same can be said about the substantive content of some of these prescriptions. The standard libertarian theories, to be sure, often adopt a hard natural law or deontological stance to condemn force and fraud as wrong, because, well, they are wrong. More theorists (and certainly this theorist) were uneasy about this foundational logic, and found powerful

utilitarian justifications for these rules.[42] But there is some real question as to whether explicit utilitarian arguments work well as a guide to human conduct. Social life will operate more smoothly when most people, including philosophers, economists, and lawyers, develop strong learned, inbred, or habitual responses in order to yield a relatively high level of conformity with these basic commitments on a day-to-day basis, even in the absence of a direct system of enforcement. Freud had a real point when he noted that the process of socialization involves the internalization of these norms, such that the people who followed them did so even in the absence of immediate threat of legal sanction. And again, although many people will take what they can so long as they think that they will not get caught, there are probably more whose self-discipline would make it impossible to take what is not theirs. Remember, common observation suggests that most people return the extra change that is handed to them by the harried supermarket check-out clerk.[43]

There is, then, no reason to think that there is a deep gulf between the level of aspirations for social welfare of the libertarian (or at least the classical liberal, who is more explicit about recognizing the utilitarian foundations of the basic rules of the game) and the capabilities based egalitarian. So wherein lie the differences?

One of them has to do with the question of whether individuals should be regarded as free, equal and independent in a state of nature, to use Locke's felicitous expression. Capability theorists see intense needs to give care to infants owing to their natural state of helplessness. But they are surely not alone. No libertarian, and certainly not John Locke, takes the position that all individuals should be required to fend for themselves from birth.[44] Parents are the natural guardians, and by inclination and legal obligation they spend lots of their time and precious resources in caring for the young, often without sensing any conflict of interest between their own welfare and that of their children, although such conflicts do exist.[45] But what happens when the parents die, or cede responsibility for their children? One commonly used alternative is for other family members to take over, so that disaster is avoided,

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42 *See, e.g.*, Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989).

43 *See* Tom Smith, National Opinion Research Center at University of Chicago, Altruism in Contemporary America: A Report from the National Altruism Study, http://www.news.uchicago.edu/releases/03/altruism.pdf (last visited July 16, 2007) (finding that Americans, on average, perform more than 100 selfless acts per year).

44 *See* LOCKE, *supra* note 20, at 30-45 (dealing with these obligations falling on mothers and fathers alike).

45 *See* Robert L. Trivers, *Parent-Offspring Conflict*, 14 AM. ZOOLOGIST 249 (1974).

even if the children are often not cared for as well as they would have been if their own parents had been up to the job. In addition, the church (or the state) surely can intervene to provide orphanages or foster care when the family has been unable to provide assistance, although sometimes the level of care is likely to be less than one might hope, as is surely the case in the present hodge-podge that passes for a foster care system in the United States.

2. Positive Rights or Public Health

So the real difference between capability theory and classical liberal theory lies in the willingness to create positive rights, in part to counteract ill fortune and bad luck. Thus, Nussbaum's list of capabilities stresses, for example, that the right to live covers not only the duty to refrain from interference, but also the positive right of "being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced to be not worth living." But where is it within the power of human societies to ward off accident and diseases with fatal consequences? What form of social policy stops automobile fatalities or murder? What policies, or expenditure of resources, could have kept Christopher Reeve from dying a horrific quadriplegic death after his tragic riding accident? Similar tragedies will occur no matter what social policy is in place. All that can be asked is to improve the odds; once death occurs, there is nothing that can be done to right the imbalance in the individual case.

So the real social goal is to improve the odds, not to avert all cases of individual misfortune. At this point, it is worth stressing that *the* great social advance of the twentieth century in developed nations has been the extension of life expectancy and the period of good health for all individuals, regardless of sex, race or social class.[46] But none of that gain has to do with the aspirations of egalitarian politics. The gain comes from public health measures which, when funded by property owners, necessarily provide benefits to the least fortunate segments of population. It comes from advances in technology that reduce the amount of hard bodily labor needed to survive, and that move people systematically out of dangerous occupations like mining and farming, while making those tasks safer for the smaller fraction of the population that continues to practice them. It comes from discovering simple and cheap ways to provide the right vitamins to deal with debilitating and deadly diseases such as Pellagra, Beriberi and Scurvy. It comes from the antibiotic revolution of

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46 For one such discussion, see Robert W. Fogel, *Nutrition and the Decline in Mortality Since 1700: Some Preliminary Findings, in* LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH 439 (Stanley L. Engerman & Robert E. Gallman eds., 1986).

the 1930s and 1940s that led to effective control of the full range of infectious diseases that used to snuff out the lives of the young and the weak. It comes from the ability to control diabetes, and on and on.

Nor is there any evidence that poor people as a group have benefited less because of these improvements than rich people. Indeed, even though differences in wealth still matter today as they always will, there is no doubt that the gaps between rich and poor are far narrower on the personal, emotional and psychological dimensions stressed by capability theory than they are in wealth. The simplest question is this: right now, do we think that the gaps in general health, happiness and well-being are greater than the gaps in income between rich and poor? I have little doubt that this gradient is far less steep than any differential for wealth. After all, the simplest of measures indicates that the difference in life-expectancy from top to bottom for both males and females is roughly 10 percent, which is a tiny fraction of the roughly 1000-fold differences in wealth that applies to these parts of the distribution.[47] The overall compound measure of total satisfaction probably lies somewhere in between. My guess is that a tenfold satisfaction differential is probably high, but who can say for sure, given that so many of life's benefits are not easily monetizable.

Here is another set of numbers worth pondering. Around the year 1900, infant mortality rates per 1,000 births varied from about 247 to 94, with a consistent down gradient in mortality across social classes: the children of poorer people died sooner. By the year 2000, that same social gradient persisted across all classes, only now it ran from 8.1 to 3.7 per 1,000 births. There are two ways to look at these numbers. One is to claim that there is only modest improvement because the mortality ratio — the percentage of deaths in the poorest cohort divided by the percentage of deaths in the richest cohort — has moved only a little bit, from about 2.6 to 2.2.[48] The other is to note that children raised in the worst circumstances today have less than ten percent the mortality risk of the most privileged children one hundred years earlier (8.1 versus 94, per 1,000 births). The mortality gains to the poorest have been far greater than the drop in mortality risk for the best off.

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47 One estimate for 1998 puts the total wealth in the top 4 percent of the U.S population at 21.4% and that of the bottom 40 percent of the population at 0.2%, which works out to a per-person differential of about 1,000-fold. *See* The Rational Radical, Wealth Distribution in U.S. (Sept. 4, 2001), http://www.therationalradical.com/dsep/wealth-distribution.htm (last visited July 16, 2007).

48 For the data, see Michael Marmot, *Understanding Social Inequalities in Health*, 46 PERSP. BIOLOGY & MED. S9 (2003). Note that the title of the article stresses the inequalities, not the incredible rate of overall progress in that 100 year period.

The poorest cohort dropped by about 240 infant deaths per thousand born, as compared to a drop of only 90 deaths among the richest infants. These changes occurred over long periods of time during which there was the inescapable ebb and flow of egalitarian politics. The message should be clear — there is only one consistent driver of health and welfare for all. It is increased prosperity and technological advance. The rest is detail. Too much emphasis on ex post egalitarian politics and positive rights is likely to slow down both wealth creation and technological advance — hardly a good bargain even — make that especially — for the worst-off in society.

III. Self-Reliance, Disability and Institutional Arrangements

I also take strong exception to yet another feature of the egalitarian story — its unwillingness to assign either credit or blame to how people with disabilities respond to their conditions. Over the years, I have met many courageous disabled people who have never asked for a single favor or benefit from any group, let alone the state, on account of their conditions. Rather, they fought like the dickens to stay out of wheelchairs and to be as self-sufficient as possible. Hats off to them. Yet at the same time, some measure of blame for poor health and wealth outcomes should fall on the individuals, and their parents, who have failed to make any (let alone similar) efforts at self-improvement and self-preservation. Most modern public health issues have nothing to do with communicable diseases. The current killers are drug abuse, obesity, diabetes, heart disease, high blood pressure, tobacco and alcohol, all of which are best controlled by individual decisions that don't depend on state intervention to control or cure. Yet I am hard pressed to think of a single reference in the egalitarian literature that points to these issues (let alone to children born out of wedlock) as pressure points for social improvement. Rather, the literature seems to suffer from an undercurrent of making excuses for bad conduct, which only aggravates the basic problem. Of course, no one should treat all these harms as though they were self-inflicted. But we should expect some serious examination of the tough trade-off between extra assistance after the fact and the increased risk of poor behaviors before the fact. That trade-off does not disappear simply because we have moved from private charity to less efficient, but more massive forms of government intervention. And the institutional designers who pass by that issue in silence are sure to fall prey to potential program recipients who (like everyone else) learn to game the system. Quite simply, anyone who is oblivious to the corrosive effect of self-interest on public

programs and institutions is likely to do little if anything to forestall the worst.

In making this institutional plea, it is critical to remember that the sole choice is *not* between doing nothing to help individuals who have suffered from misfortune and running the current set of programs. Rather, we have to ask whether the various forms of voluntary assistance and accommodation should be supplemented, and if so to what extent, by forms of state intervention — and if so, by what forms. On these twin issues of implementation, it is a mistake to assume that all public programs have the same prospects of success. By and large, those which reduce the level of public discretion (such as programs like the earned income tax credit) tend to work relatively well.[49] Nonetheless, the dangers are always present, especially in programs that provide various sorts of in-kind benefits.

I shall mention only one facet of that effort here. The current system relies on a strong antidiscrimination norm with respect to both facilities and employment, thanks in part to the Americans With Disabilities Act (ADA). The key feature of this antidiscrimination effort is that it relies on off-budget measures to secure compliance with the chosen set of social objectives. Employers have to hire and promote workers, and with minor qualifications, they do so regardless of the costs of accommodation. Yet the cost of hiring someone who is disabled is so high that the percentage of disabled people now in the labor force is lower than it was in 1990, when the ADA was adopted.[50]

Facilities in all new residences and workplaces have to meet certain exacting standards, chiefly for wheelchairs, but also for individuals with other impairments such as blindness and deafness. The requirements are not enforced in litigation but through the permit process, which can be exacting, and the cost of compliance today runs typically about twenty percent of a total construction package for new facilities (at least for various public accommodations — the cost is less for private homes and apartments), with still heavier costs in line if retrofitting noncompliant premises becomes an important issue. The exact cost of these proposals is hard to calculate,

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49 "The United States federal *Earned Income Tax Credit* (EITC) is a refundable tax credit that reduces or eliminates the taxes that low-income working people pay (such as payroll taxes) and also frequently operates as a wage subsidy for low-income workers." *Earned Income Tax Credit*, *in* WIKIPEDIA, http://en.wikipedia.org/wiki/Earned_income_tax_credit (last visited May 1, 2007).

50 *See* Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693 (2000) (noting that the ADA reduced employment among disabled men by 7.2 percent, with no increase in wages).

because it is only with difficulty that one can tease out expenditures that are solely, or even largely, for statutory compliance.

In my view, this entire approach gets it wrong for reasons that have as much to do with the structure of sound democratic government as with the strong protection of property rights under the classical liberal model.[51] The off-budget nature of the program makes it impossible to compare (under any metric that even egalitarians might adopt) the costs and benefits of the program. That issue is not some small economistic concern. This is one of the key vices of modern rent control programs (which redistribute wealth away from the poor).[52] It goes to the heart of how many social resources should be spent on what activities, and how they should be spent. A better system, by far, is one that relies on political deliberation to determine the extent of the level of desired support, which is then coupled with an explicit cash appropriation, either large or small, to institutions that submit winning bids to meet government specifications for certain programs for the disabled.

No one can be sure exactly how this system would play out because no one has tried it. But I am confident on two points. First, once the size of the subsidy is made explicit, it will be reduced. Second, once it is reduced, we can be confident that no champion of access for the disabled would spread it around in small dabs to a huge number of institutions; universal access would be the first casualty of any explicit public accounting. Faced with a cost constraint, the confident prediction is that those in charge of implementing such subsidies would think long and hard about how many institutions to make accessible to different forms of disability and what requirements to impose. That process need not be done on a once and for all basis, and the political branches of government could increase (or decrease) the expenditures as new data emerges. The use of this program would cut back on the heavy cross-subsidies and the massive waste in expenditures, while bringing attention to an issue that is critical to every discussion about luck, redistribution and the regime of positive rights.

Matters of technique really count. The greatest criticism of most egalitarian politics is that they are inattentive to just about all questions of institutional design as they relate to forces of individual and group self-interest. The stronger protection of property rights would surely dull these appetites, by forcing state compensation for the public loss of the rights to exclude others

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51 For a more detailed account of this approach, see EPSTEIN, FORBIDDEN GROUNDS, *supra* note 8, at 482-88.

52 See, for the observation, Pennell v. City of San Jose, 485 U.S. 1, 20-21 (1988) (Scalia, J., concurring in part and dissenting in part).

from property and thus to set the terms on which they are admitted. I do not wish to wade into any of these constitutional swamps at the eleventh hour. But it is important to end with this observation about the sources of material progress and social equity. Over and over again, the standard egalitarian position tends to treat the various schemes of regulation now in place with respect to labor, health care, housing, land use and other areas as background conditions that fall outside their scope of inquiry.

That is a huge mistake. Redistribution via cross-subsidy carries with it heavy costs for contested benefits. To repeat, these costs do not count as a trump that necessarily blocks these proposals. But there is a real methodological issue that should not be overlooked in setting social priorities. The first means to achieve greater access and material satisfaction lies in the removal of barriers to entry into various businesses. The gains from these actions are typically enormous, because we find an increase in overall social product that is brought about by a shrinkage in the size of government and a reduction of the taxes needed to support the state. Only after these gains are exhausted does it make sense to address the schemes that are directed explicitly toward redistribution on any grounds. The greatest mistake of the entire egalitarian enterprise is that it looks at just distributions first and production of wealth last. This order needs to be reversed, and it needs to happen now.