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Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment

Robert C. Hockett

Cornell University Law School, robert-hockett@postoffice.law.cornell.edu

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Monograph Prospectus

Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment

Robert Hockett

Despite over a century's disputation and attendant opportunity for clarification, the field of inquiry now loosely labeled "welfare economics" (WE) remains surprisingly prone to foundational confusions. The same holds of work done by many practitioners of WE's influential offshoot, normative "law and economics" (LE).

A conspicuous contemporary case of confusion turns up in recent discussion concerning "fairness versus welfare." The very naming of this putative dispute signals a crude category error. "Welfare" denotes a proposed object of distribution. "Fairness" describes an appropriate pattern of distribution. Welfare itself is distributed fairly or unfairly. "Fairness versus welfare" is analytically on all fours with locutions of the form "warmth versus clothing" or "35 mph versus tennis balls." Framing disputes in this way leads us nowhere. It only miscarries our thinking.

A more venerable source of perplexity is found in the hallowed Pareto criterion (PC) and its conceptual kin. One proffered advantage of the PC is its purportedly enabling "us" to sidestep contested questions of interpersonal comparison, aggregation and distribution. But what manner of collective agent – what "we" – might plausibly be expected to take interest in unavoidably resource-distributive prescriptions, without view to the propriety with which these treat each member of the collectivity effectively addressed by the prescriptions, is left unidentified. And as soon as we plausibly fill-in the gap, the PC and kin prove prescriptively sterile. We get nowhere until we confront distributions – and de facto distributors – head-on.

This Monograph seeks to lay out with some care both when, and how, such confronting should be done. It specifies both the conditions, and the appropriately structured mode of analysis, under which distributive-ethical assessment is called for and apt to bear fruit. The means to success lie in carefully mapping the constitutive structure – the full valence grammar – of distribution-implicative claims.

Effectively normative claims concerning distributions wrought by legal rules, programs or policies, if they would be so much as cognitively complete let alone ethically assessable, must assign values to all variables opened by the case grammar of "to distribute" and cognate infinitives – "to allocate," "to apportion," "to mete out," etc. They must, that is, determinately and inter-compatibly indicate to whom claims are in effect being addressed, what is effectively being distributed, pursuant to what pattern the latter is being distributed, by what means and to whom. To be normatively defensible, in turn, such claims must not only carefully specify, but also must ethically justify, the jointly compatible values they proffer for filling those variables.

The normative payoff of the mode of analysis proposed here is a compelling distributive ethic, a means of rendering past and present foundational disputes both tractable and conclusively resolvable, and in the end a new research agenda for what the Monograph labels an "ethically intelligible law and economics."

Minding the Gaps: Fairness, Welfare, and the Constitutive Structure of Distributive Assessment

ROBERT HOCKETT*

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* Assistant Professor of Law, Cornell University. Warm thanks to [Greg Alexander, Dick Arneson, Brian Bix, Guido Calabresi, Alexander Cappellen, Jerry Cohen, Dan Farber, Marc Fleurbaey, David Grewal, Aristides Hatzis, George Hay, Dan Kahan, Doug Kysar, Emily Sherwin, Peter Spiegler, Sanjay Reddy, John Roemer, Alexander Somek, Bertil Tungodden,...]

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INTRODUCTION

Despite over a century’s disputation and attendant opportunity for clarification, the field of inquiry now loosely labeled “welfare economics” (WE) remains surprisingly prone to foundational confusions.¹ The same holds of work done by many practitioners of WE’s influential offshoot, normative “law and economics” (LE).²

A conspicuous contemporary case of confusion turns up in recent discussion concerning “fairness versus welfare.” The very naming of this putative dispute signals a crude category error. “Welfare” denotes a proposed object of distribution.³ “Fairness” describes an appropriate pattern of distribution.⁴ Welfare itself, that’s to say, is distributed fairly or unfairly. “Fairness versus welfare” is thus analytically on all fours with locutions of the form “warmth versus clothing,” or “35 mph versus tennis balls.” Framing disputes in this way leads us nowhere. It only miscarries our thinking.⁵

¹ My claim here is general, not universal. I discuss particular examples *infra*, Part III.

² As with the previous note, so here.

³ Or a byproduct of some such object’s – a distribuendum’s – distribution. *Infra* Parts II.C and II.D.

⁴ That is, a distribution formula. *Infra* Part II.D.

⁵ There is a restricted set of conditions under which such statements might serve as elliptical for more fully specified phrases bearing sense. Those currently employing the phrase “fairness versus welfare”

A more venerable – and somewhat more subtle – source of perplexity is found in the hallowed Pareto criterion (PC) and its conceptual kin. One proffered advantage of the PC is its purportedly enabling “us” to sidestep contested questions of interpersonal comparison, aggregation and distribution. But what manner of collective agent – what “we” – might plausibly be expected to take interest in unavoidably resource-distributive prescriptions, without view to the propriety with which these treat each member of the collectivity effectively *addressed* by the prescriptions, is left unidentified. And as soon as we plausibly fill-in the gap, the PC and kin prove prescriptively sterile.⁶ We get nowhere until we confront distributions – and de facto distributors – head-on.⁷

I therefore propose in this monograph to lay out with some care both when, and how, such confronting should be done. I specify what I take to be the conditions, and the appropriately structured mode of analysis, under which distributive-ethical assessment is called for and apt to bear fruit. To succeed in discharging this task, I believe, is to afford means of bringing systematic clarity to WE and LE discussion bearing normatively assessable distributive significance. The means to success, I believe, lie in carefully mapping the constitutive structure – the full “grammar,” so to speak – of distribution-implicative claims, be the latter overt or covert in their distributive import.

Effectively normative claims that either speak directly, or lay themselves open, to questions concerning the propriety of distributions wrought by legal rules, programs or policies, if they would be so much as cognitively complete let alone ethically assessable,

do not fulfill these conditions. Infra note 14 and Parts II.D, III.B. On the “miscarrying” of thinking, see infra Part II.

⁶ I discuss the very narrow class of circumstances in which Paretian prescription is, rather than sterile, simply trivial, infra Parts II.D, III.

⁷ This claim is in sympathy with that made by Judge Calabresi in Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L. J. 1211 (1991). While Calabresi’s point appears to be primarily pragmatic, however, my intention here is to speak more foundationally. In that sense this might, I hope, complement Calabresi’s. See in particular infra, Parts II.E and III.

must assign compatible values⁸ to all variables opened by the valence grammar⁹ of “to distribute” and cognate infinitives – “to allocate,” “to apportion,” “to mete out,” etc.¹⁰ They must, that is to say, determinately single out to whom the claims are effectively being addressed (de facto distributors), what is putatively being or thought ought be distributed (distribuenda), pursuant to what pattern the latter is being or thought ought be distributed (distribution formulae), by what means it is being or thought ought be distributed (distribution mechanisms), and to whom it is being or thought ought be distributed (distribuees). To be normatively defensible, in turn, such claims must not only carefully specify, but also must ethically justify, the values they proffer for filling those variables.

The argument, then, proceeds as follows: Part I preliminarily characterizes the conditions under which distributive assessment is apt. These are the circumstances under which who holds what can sensibly be, and thus is ethically required to be, evaluated as globally right, wrong, better or worse.¹¹ Though these conditions are foundational and ought to be evident, their brief enumeration serves both to ground, and to facilitate fuller assimilation of, the discussion that follows. They also appear to have gone oft-forgotten in much of the theoretical literature.¹²

⁸ “Compatible” in a sense that will grow plain through Part II. We’ll see there as well that they need be not only compatible, but also “of the right analytical type.” One does not distribute a distribution formula, nor can an object of distribution – a distribuendum – itself serve as a distribution formula. “Fairness versus welfare” violates precisely that structural stricture.

⁹ Valence grammar also goes by the name “case” grammar. More, again, *infra*, Part II.

¹⁰ It is customary in the economics literature to reserve “allocate” for the spread of inputs among producers, “distribute” for the spread of resultant goods among consumers. For present purposes such distinctions will be without difference, particularly given the way in which I shall construe goods-recipients and the goods they receive – as boundedly responsible agents who transform resource allocations into welfare outputs. Hence I shall use such terms interchangeably save when specifically indicating otherwise.

¹¹ Absent the conditions, that is, distributive-ethical assessment will be unimplicated, so that proffered such assessments will be “out of place,” senseless. Given the conditions, on the other hand, distributions will be subject to critique whether foreseen or intended as distributions or not.

¹² *Infra*, Part III.

Part II elaborates the valence grammar of “to distribute” (as well as cognate infinitives) and its significance. The gaps opened up by that grammar, it turns out, are all analytically interconnected: Selection of particular values to fill one or more variables partly constrains the ranges of plausible values with which one can sensibly fill others.¹³ What is more, a single distributive upshot – one invariant pattern of entailed allocation – appears both to follow upon and indeed to constrain differing plausible fillings of a particular variable, provided that plausible compensating variations are made in the fillings of other variables: Appropriate allocations turn out to be rather like isoquants.¹⁴

The discussion over Parts I and II also gradually converges upon what appears to be the *correct* macro-social allocation isoquant. It is, in short, the distributive-ethical theory jointly entailed by our core value commitments on the one hand, the grammar-grounded metatheory here elaborated on the other hand. I suggest a few implications that this appears to entail for the future agendas of WE and, especially, LE.

Part III briefly “applies” the metatheory and theory developed over the course of Parts I and II in taking stock of two familiar foundational controversies occasioned by some of the canonical WE and LE literature: First it revisits the “wealth as a value” dispute of the 1980s, showing that all sides were, metatheoretically speaking, less than optimally inarticulate, while one side in consequence was, theoretically speaking,

¹³ Expositorily speaking, one consequence of this interdependence is that the argument of Part II is cumulative in nature: Part II’s subsections, because analytically interdependent, might not be fully appreciated until the full Part is read-through. I must accordingly beg the reader’s indulgence, both for that fact and for my frequent resort to cross-reference between subsections. It might not be beautiful, but it will be symphonic, so to speak.

¹⁴ One consequence is that it is theoretically possible for a locution of the form “[distribution formula] versus [distribuendum]” to bear sense, if employed elliptically for some more fully elaborated locution. “Fairness versus Unweighted-Welfare,” for example, might be employed as short for “Fairly Distributed Welfare versus Aggregate Welfare as Summed Over Unweighted Individual Welfare Functions,” and in such case will avoid simple category-error. For “Unweighted-Welfare” is itself shorthand for unfairly distributed welfare. See *infra* Parts II.D.5 and II.D.6. Current users of the locution “Fairness versus Welfare,” alas, do not do so elliptically. The phrase ends up meaning quite literally nothing at all. See *infra* Part III.B.

egregiously wrong. Then it takes the measure of present day “fairness versus welfare” discussion, showing that this features metatheoretic confusion, and indeed incoherence, such as can leave one quite nearly nostalgic for the comparative infelicities plaguing the 1980s debate.

I conclude by briefly indicating some other disputes that the theory and metatheory here offered should now render more tractable.

I. DISTRIBUTIVE CIRCUMSTANCES

Most things we find in the world are distributed, allocated, meted or spread out, etc. Not all such spreads lend themselves to intelligible normative critique. The chairs and the table on one’s porch are laid out in a certain arrangement, say: They’re “distributed” over the floor in a particular, geometrically specifiable way. And they could be redistributed over that surface in many alternative ways. But absent some purpose or value the effectuation or realization of which significantly rides upon such arrangements, no particular distribution within the domain class of possible arrangements will be sensibly subject to any form of assessment bearing behavioral import: There will be nothing to say whose upshot is that the arrangement “ought” to be changed.

It also happens that many distributions of things *do* implicate values and purposes. These accordingly fall subject to one or another mode of normatively intelligible assessment: Insofar as you are sensitive to considerations of geomancy, the distribution of your furniture itself will be apt to evaluation. Some arrangements will aesthetically dominate others, so that you will incline toward redistributing your furniture until it accords with the “best” possible arrangement.¹⁵ Counterpart remarks hold in

¹⁵ Or with one that belongs to the best-ranking class of mutually indifferent arrangements.

respect of any other value under the aspect of which the furniture arrangement might be sensibly evaluated – ease of reading in the late afternoon light, for example.

Normatively evaluable *legal* arrangements and public policies – the stuff of WE and LE – of course have the effect of distributing not simply tables and chairs over porch-floors, but perceived goods and ills over persons. Legal rules and rulings, statutory enactments, government programs and policies of sundry sorts all tend to produce “winners” and “losers”¹⁶ – recipients of benefits and burdens at the “receiving end.” Patterns of such policy-wrought wins and losses amount, relative to each status quo ante they displace, to *redistributions* of perceived goods and ills.¹⁷ And such redistributions, like each status quo ante that any of them supplants, are subject to normative assessment at least as readily as are furniture arrangements. Indeed they are more urgently so subject. For they implicate the ethical propriety with which persons are treated. And the comparative ethical valences of varying distributive arrangements are more compellingly salient than the aesthetical ones: More than merely recommending actions as do the latter, the former such valences *require* them.¹⁸

So much is more or less obvious. What seems to be less obvious to some is that even when allocations wrought by legal rules and policies are neither foreseen nor intended, they are nonetheless ethically assessable: They are subject to “ought” claims whose upshots are that the arrangements are right, wrong, better or worse, and are to be

¹⁶ Or at the very least *differential* winners or losers.

¹⁷ Or at the very least redistributions of *relative* advantage and disadvantage.

¹⁸ There is of course overlap, though it's short of extensional equivalence, between ethical and aesthetic assessment. Dastardly people or deeds are quite often found “ugly,” “warped,” “grotesque,” etc. (The term “tort” itself is derived from the same Old French root as is “torture,” a term that connotes twisting.) And just actions and persons and patterns are often found “beautiful,” “balanced,” “harmonious,” etc. Fair allocations, moreover, like beautiful arrangements, often appear to share some manner of *symmetry* in common. (The word “fair” itself derives from an Old English root that refers to the beauty borne by an attractive face.) But I'll not further limn these connections in this paper.

left in place or improved accordingly. In this light it is worth taking summary stock of the full – though it’s small – set of circumstances under which distributive consequences can be said to be ethically better or worse. We can call these the prerequisites to aptness to distributive-ethical assessment.¹⁹ I’ll specify these as minimally and rudimentarily as possible. For, first, that will amount to being as charitable as possible in the matter of admitting claims as intelligible.²⁰ And second, fuller detail will build upon the present foundations as we turn to distributive-ethical assessment’s full logical form in Part 3.

I take it that the minimal conditions to distributive-ethical assessment’s aptness are these: First, there must of course be things that can be variably distributed.²¹ Second, there must be beings to whom (or which – more on which prospect presently) these things can be distributed. Third, those to whom things can be distributed must hold preferences or interests in respect of their receiving or not receiving the distributed items: The items must be regarded or properly regardable as beneficial or burdensome by, hence productive of welfare or illfare among, their prospective recipients.²²

Fourth, the recipients of items who hold preferences or interests in respect of them must hold ethical *claims to our regard*. They must be entitled to our consideration of their preferences or interests as we distribute. They must hold, in short, what I shall call

¹⁹ Or, the circumstances under which distributive-ethical assessment is implicated, is called-for. The set of conditions is jointly sufficient both to implicate such assessment and to render it apt. The set’s elements are jointly necessary as well, though it will be clear that they are not independent of one another in the way that one typically expects of the axioms that determine a formal system. The non-independence of the conditions as I state them is rooted in expository/heuristic considerations that I trust will be evident: Each in effect “builds upon,” hence is not unrelated to, its nonetheless analytically distinct predecessor.

I adapt the term “aptness” in the present context from Frank Jackson’s “truth-aptness” – the propositional attribute of being capable of bearing a truth value. See FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS (2000).

²⁰ One wishes to rule out as “nonsense” as few claims as possible.

²¹ Note that welfare does not appear to be directly distributable. It seems rather to be something produced by beings possessed of welfare functions who transform material inputs into welfare outputs. More on that infra Parts II.B, II.C, II.D, II.E, III.B.

²² More on preferences and interests, benefits and burdens, welfare and illfare, as well as on distributed items – *distribuenda* – and those who receive them – *distribuees* – infra, Parts II, III.

“distributive-ethical claims,” hence be “distributive-ethical claimants.” We for our part must reciprocally be under obligation so to consider claimants’ preferences or interests. It is this entitlement and its correlative obligation that render our assessment of distributions to the preference- or interest-holders *ethical* in nature.

Finally fifth, all items the distribution of which would be subject to ethical assessment must be “scarce,” meaning there must be potential for interests or preferences to diverge or conflict: Distributions to some subclass of the full class of claimants must materially entail the nonsatisfaction of another subclass of claimants’ preferences.²³

The first condition, though necessary, is of course trivial in the sense that it holds of any circumstance in which any form of distributive assessment, ethical or otherwise, is apt. The second condition is trivial of distributive-ethical assessment but presumably not of distributive assessment more generally: It does not seem to hold, for example, of distributive-aesthetic assessment.²⁴ The third condition is trivial of distributive-ethical assessment but definitely not of distributive assessment more generally: It does not hold, for example, of distributive-aesthetic assessment.²⁵

The fifth condition – I’ll return to the fourth presently – is trivial in the sense that it holds of all forms of distributive assessment, but not trivial of the class of all things that might be distributed: There are plenty of items that thus far are sufficiently plentiful as not to require zero-sum choices in their distributing even when very much needed or

²³ The significance of this obvious point in particular seems sometimes, surprisingly, to have gone overlooked. See *infra* Part III.

²⁴ Unless we idiosyncratically regard physical locations as “beings to whom or which things – e.g., furniture – can be distributed.” That seems not to have been uncommon in centuries past, and there evidently are places in the world where something like the phenomenon is still encountered.

²⁵ Unless, again, we are animists who believe physical locations to hold preferences. In such case aesthetics would extensionally merge into ethics in more or less plenary fashion. Locations would be viewed in effect as being inhabited by spirits who desire things.

desired.²⁶ Distributive assessment is apt only in respect of situations involving distributed things not of this type.

The fourth condition is that in which specification of distributive-ethical assessment-aptness's prerequisites begins seriously to "cut" – to impart potentially controversial information. The reason is that it contestably rules out some distributive scenarios as being so much as susceptible to ethical assessment. For typically the class of ethical claimants whom we regard as entitled to our regard is a proper subclass of the full class of literal claimants: There are beings, that is, who (or which) apparently want things, or want to be free of things, whom (or which) not everyone agrees to bear rights to have those wants ethically considered.²⁷ We'll consider this somewhat more fully below.

II. DISTRIBUTIVE STRUCTURE

Distributive assessment is intelligible only by reference to distribution itself. And distribution, for its part, like the infinitives that denote it is internally complex: It bears a structure, a logical form. Its form tracks the form of the infinitives that name it. The "case," or "valence" grammar of infinitives cognate with "to distribute" manifests the constitutive structure that effectuated distribution must take, hence that determinate distributive assessment or prescription must take.²⁸

²⁶ In most places, breathable air is an obvious example. Thus far, at any rate.

²⁷ Bovines, fish and fowl, for example, presumably do not wish to be killed and eaten, or at any rate seek to avoid such harm as is predicate to their being killed and eaten. That seems the best reading of their fight and flight. More on such matters infra, Parts II.A, II.B.

²⁸ Case, or valence grammars divide sentences into predicate functions – typically verbs – and their argument places – most filled by nouns and noun phrases, but in some cases fillable by adverbs – predicates of predicates (hence second-order predicates). The number and kinds of arguments that a predicate can take constitute its "valency." See generally Charles J. Fillmore, *Toward a Modern Theory of Case*, in MODERN STUDIES IN ENGLISH 361-361-75 (David A. Reibel & Sanford A. Schaner eds., 1969); Charles J. Fillmore, *The Case for Case*, in UNIVERSALS IN LINGUISTIC THEORY 1-88 (Emmon Bach &

If we speak of distribution, either directly or indirectly, in a manner that is out of conformity with “to distribute”’s case grammar, we shall speak either nothing or nonsense. Our thoughts and our statements will be either semantically empty or syntactically miswired: They will either lead nowhere, actionwise (the clutch won’t engage, they will not determinately describe or prescribe); or they will amount not to thoughts, but at best to mere proto-thoughts, at worst to mere cognitive cramps.²⁹

Call a claim concerning the rightness or wrongness, betterness or worseness of some distribution a “distributive claim.” For such a claim to be complete hence determinate – thus to prescribe anything determinately – it must fill all the gaps opened by the case grammar of “to distribute.” It must assign values to the variables that this and all cognate infinitives effectively carry with them unfilled.

The variables are, in effect, the pronouns and proadverbs that figure into the following questions: Who is being addressed by the distributive claim? What does the claim take for being distributed, or suppose ought to be distributed? To whom does it take that for being distributed, or suppose that it ought be distributed? What pattern does

Robert Harms eds., 1968); STUDIES IN LINGUISTIC SEMANTICS (C. Fillmore & D.J. Langendoen eds., 1971). The analysis of predicates as argument-taking functions appears to have originated with Frege. See Gottlob Frege, *Begriffsschrift, eine der arithmetischen nachgebildete Formelsprache des reinen Denkens*, in FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC 5-82 (Jan van Heijenoort ed., 1967); GOTTLOB FREGE, FUNKTION UND BEGRIFF (1891).

²⁹ A case of syntactic faulty-wiring would be a string of words such as “Ate carnival Canaveral.” The words all connote and denote, but their arrangement in this case does not seem to assert or command or request anything. A case of semantic emptiness would be a string such as “The king of America in 2003 ordered an invasion.” The words and their arrangement all connote – the string succeeds in appearing to assert something – hence are syntactically well-ordered, but the first four words, by dint of historic accident (there did not happen to be an American king), do not denote anything, which deprives the string of semantic valence (truth-value). A case of combined syntactic faulty-wiring and semantic emptiness might be a string of the form, “Socrates was identical.” The string seems to predicate something, identity, of an actual historic personage, Socrates, and thus initially reads as if it were a sentence which might bear a truth-value. But identity is a pairwise (or n -wise with $n > 1$) relation, not a monadic predicate, and the string here features only one relatee – Socrates. It’s thus semantically empty – devoid of a truth value – for essential syntactical rather than contingently accidental reasons.

the claim take properly to characterize such distributions to such recipients? And how – by what physical means – does the claim take the distribution to be effectuable?³⁰

I call the values with which syntactically orderly and semantically complete claims fill the variables: distributors, distribuenda, distribuees, distribution formulae, and distribution mechanisms. The middle three variables must be filled for a distributive-ethical claim to be semantically complete – i.e., for the claim to bear determinate cognitive content in respect of whether a particular spread of goods or ills is or would be right, wrong, better or worse than some other possible such spread. The first and last variables must be filled for the claim to be what might be called “pragmatically” complete – i.e., for the claim successfully to prescribe some course of action that might actually be taken.³¹

Counterpoised sides of de facto distributive disputations, I believe, with apparently varying degrees of cognizance of the fact, when they really disagree at all are disagreeing over how one or more of the just-enumerated variables should be filled.³² This is most effectively shown by briefly elaborating and discussing the leading variable-valuing candidates that historically have been proposed. Many, though possibly not all,

³⁰ In effect I supplement pure semantics-based case grammar here with argument-places additionally derived from linguistic pragmatics. For a claim actually to be made rather than simply entertained propositionally, it must be addressed to someone, and must take into account means by which addressees can effectively respond to it. In making this observation I am in effect melding classical valence grammar with what Paul Grice would have called “conversational implicature.” See, e.g., H. P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS, 3: SPEECH ACTS, (P. Cole & J. Morgan eds., 1975); H. P. Grice, *Further Notes on Logic and Conversation*, in SYNTAX AND SEMANTICS, 9: PRAGMATICS, (P. Cole ed., 1978); H. P. Grice, *Presupposition and Conversational Implicature*, in RADICAL PRAGMATICS 183-98 (P. Cole ed., 1981). All three are reprinted in H. P. GRICE, *STUDIES IN THE WAYS OF WORDS* (1989).

³¹ Semantic completeness is necessary, but does not suffice, to confer pragmatic completeness.

³² Sometimes, I’ll indicate, disputants appear not actually to be disagreeing even when they suppose that they are. One source of ersatz disagreement is the indeterminacy of claims owing to incomplete variable-filling. Another is failure to recognize correct distribution’s isoquant-like character – the fact that differing valuations of some variables, through effectively compensating variations in other variable-valuations, can produce invariant distributive outcomes. See *infra* Part II.D.6.

of these might look familiar. Yet I don't think that any have been discussed under the individual rubrics employed here, let alone all together under all of the rubrics here employed, in structured relation one to another at once. And it is precisely the lack of that systematically structured and plenary treatment, I believe, which is now tending to stand in the way of further progress.³³

A. Distributors

Determinate distributive-ethical claims, like “to distribute” and cognate infinitives themselves, take some singular or collective subject: There must be distributors – those who distribute. Who we understand the distributors to be will quite naturally play a role in determining our particular distributive-ethical norms – our “ought” claims in respect of distribution. The converse, of course, also holds: Particular duties and those who are held subject to such duties must categorically “fit” one another.³⁴ Who, then, are the beings whom we take to owe each of us the benefit of acting in conformity with our distributive-ethical “oughts”?

There seems little overt disagreement over who the effective distributors are in most modern distributive-ethical disputation. “We” – the sovereign we, all who effectively are addressed by potential disputants – are in effect taken to be the distributors. We are “the people” – the citizenry or humanity at large, all who bear rights

³³ Understanding the variables' and their plausible fillings' inter-relations, I think, greatly facilitates understanding of the subjects themselves, as well as of the nature of distributive ethics more generally.

³⁴ One does not take non-parents to owe parental duties, one does not take non-fiduciaries to owe fiduciary duties, etc. Furthermore, one does not suppose all persons equally fit to take on such duties. Children, for example, do not typically become fiduciaries – nor, we hope, do they generally become parents. To characterize a duty, then, not surprisingly is in part to characterize the sort of agent who might sensibly fall subject to that duty.

to take part in deciding distributive-ethical principles.³⁵ Or we are “the policy community” – judges, legislators, advocates, academics and others assumed to be thinking and acting on behalf of that broader constituency. The latter constituency, in turn, includes ourselves as representative members: In either case, then, we in effect are distributing over ourselves. One consequence is that the class of distributors, particularly in modern polities, typically converges with that of distributees.

Were we gods or, somewhat more humbly, legally sanctioned elites looking over a polity in which formal political-decisional rights were allotted unequally, there might be some wedge between “us” and the distributees: We’d be considering what “we” should distribute to “them,” pursuant to what pattern(s) and means.³⁶ Much this disparity between would-be distributors and would-be distributees characterizes discourse among animal rights advocates, for example.³⁷ But the “we” and the “they” of most mainstream distributive-ethical discourse are one and the same: We are speaking of how we should apportion goods and ills among ourselves. How, then, should we characterize *ourselves* when considering what is to be distributed, pursuant to what patterns and means?

B. Distributees

³⁵ Insofar as we are committed to the proposition that there are universal human rights, “we” are humanity at large. Insofar as we commit to the more restricted proposition that rights inhere only within political communities, “we” are the citizenry. I incline to the former commitment, and argue on its behalf elsewhere. No claims advanced in the present paper, however, hinge upon the choice.

³⁶ Some theorists appear willing to view scholars and “analysts” as radically distinct from the citizenry at large, better able to limn the “real nature” of normativity while the general public proceeds about its business in the hold of mere popular myth. Some such picture as this appears to have prompted the surprising – and as it turns out ironic – ruminations offered in KAPLOW & SHAVELL, *infra* note 261 at 382-402.

³⁷ See, of course, PETER SINGER, *ANIMAL LIBERATION* (1976). A not entirely dissimilar disparity as between distributors and distributees is of course encountered in debate over the ethics of abortion, though in this case a critical feature of the dispute is precisely whether the distributees are to be considered members of the distributor class. That’s of course why this dispute is more contentious than that over “animal rights.”

Determinate distributive-ethical claims, like “to distribute” and cognate infinitives themselves, take not only subjects, but indirect objects as well: There must be distributees – those to whom things are distributed. And just as there is “fit” between our distributive-ethical norms and how we view distributors, so is there fit between those norms and how we view distributees. How, then, do or should we understand these recipients of distributed goods and ills?

The fact that “they” are in fact “we” here, I think, offers a critical clue: Our being the distributors, and our being accordingly capable of being responsible for distribution, says something important about us as distributees. Curiously, however, not everyone seems to have caught the hint. For many distributive-ethical advocates, via positions they take as to how we should characterize distribuenda and distribution formulae, effectively commit themselves to a view of distributees that conflicts with the view that their being distributors appears to entail. First, then, that latter view. And then the other.

1. Responsible Agents

The gradually emergent consensus view of distributees among those concerned with the ethics of distribution appears to be one that is in harmony with their role as distributors. It is the view according to which distributees are best considered to be what I’ll call “boundedly responsible human agents.” Such agents largely, though of course not completely, determine their own well-being. It is accordingly appropriate to hold them responsible in large measure for doing so – on grounds of respect, of equality, and even of what I’ll call “ethically cognizable efficiency,” we’ll see.

But such agents also are constrained, to not fully determinable degree, in effecting their welfare by the environments into which they are born. Their inherited capacities,

incapacities, advantages and disadvantages – themselves features of their environments – permit distributees wide, but nonetheless limited, latitude in altering or exiting their environments.

This construal of distributees seems to be that which is most consonant not only with our role as distributors, but also with our experience of action – the deeds that both we and all those with whom we empathize or identify regularly perform: We experience ourselves and others as both freely choosing and constrained to but vaguely determinable degree in the choosing. That experience in turn is reflected in our capacities to experience guilt, shame, ambition for and frustration with self, resentment of and gratitude to others, and cognate “reactive attitudes” which would seem to be possible only under conditions of relative freedom.³⁸ The same complex of experiences of action – in this case, the “boundedness” portion – underwrites our capacities to feel and extend mercy, forgiveness, and charity toward self and toward others.

The construal of distributees as boundedly responsible agents carries a cluster of analytically interconnected consequences for distributive-ethical assessment:

First, to the degree that we view distributees as freely choosing, we find it appropriate to hold them responsible in part for what they choose. This is not merely a matter of punitive attitude, nor even of incentives-sensitive productive efficiency, though of course such considerations also can sensibly underwrite the view. It is, more immediately compellingly, a matter of dignity, of respect. It is part of what it is to *view* persons as agents – as practical forgers of fate – rather than as patients or addicts – mere

³⁸ See, classically, P.F. Strawson, *Freedom & Resentment*, in *FREE WILL* 59 (Gary Watson ed., 1982); Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 *PHIL. & PUB. AFF.* 299 (1992).

passive objects of fate akin to children who “do not know any better” or “cannot do differently.”³⁹

An oft-ignored corollary of this respect is that all agents must be viewed as *equally* dignified and *equally* deserving of most *forms* of respect – including material respect – at least “prior to” or “apart from” the operation of their responsible choices.⁴⁰ If “all are created equal,” then all are equally deserving of respect’s material expression – access to the materials upon which successful lives are built – at least before their *own* creating enters into the evaluative picture.

Second, to the degree that we hold agent-distribuees *responsible* for fate-forging and life-building, we are likely to view appropriate distribuenda, distribution formulae and distribution mechanisms as those which give latitude to the *operation* of responsible agency. Appropriate distribuenda will accordingly be seen as those that amount to inputs to individual welfare functions whose outputs are partly the responsibility of distribuees themselves.

Appropriate distribution formulae, in turn, will speak to the ex ante distribution of such responsibility-exogenous inputs. Persons’ welfare-functional inputs, that is, will be what concern us most directly in the matter of distribution mechanisms’ outputs. Our formulae will not be directly concerned with ex post, responsibility-endogenous individual welfare-outcomes as such, but rather as byproducts mediated and endogenized

³⁹ It is tempting to suppose that some such commitment is what ultimately underwrites the Kantian idea of a “right to punishment.” See, e.g., P.S. Greenspan, *Responsible Psychopaths*, at <http://www.philosophy.umd.edu/Faculty/PGreenspan/Res/rp.html>; Randy E. Barnett & John Hagel III, *Assessing the Criminal: Restitution, Retribution and the Legal Process*, at http://www.randybarnett.com/assessing_the_criminal_.html.

⁴⁰ The reason for the scare-quotes will become evident as we proceed. In essence, it is that “prior” and “apart from” must be generalized over *multiple* temporal and spatial locations, because we perform *many* deeds over the courses of our lives for which we are varyingly responsible, and multiple interventions of fortune, which also occur over time, interweave with those deeds.

by individual responsible agency. Preferred distribution mechanisms in turn will be such as give most effective expression to those ideals. We'll see this borne out below.

2. Patients & Addicts

The residuum left by incomplete agency might be called “patienthood.” To the degree that one *really* “cannot help himself,” he is a patient – an object of fate or of others, acted upon rather than acting.⁴¹ Or he is an addict – one who “cannot resist.”

To the degree that our agency is bounded, we are all of us patients. But we are not apt to admit this. Indeed we are apt to feel disgust or contempt, rooted perhaps in the perceived threat posed by exemplars with whom we are able subconsciously though unwillingly to identify, for those who seem too quickly ready to admit limitation. Owing to that fact and to the indeterminacy of the boundary in the large number of borderline cases that each of us individually encounters each day, we probably tend in consequence for the most part to let the boundary line “take care of itself.” We do so by each simply trying as hard as s/he can.

Probably for reasons rooted in facts such as these – including cognate concerns with incentives their consequences⁴² – few if any practitioners of distributive-ethical assessment wittingly construe distributees as patients. Rather, instead some effectively, and one assumes non-cognizantly, *commit* themselves to that construal. They do so in

⁴¹ I intend “patient” as used here, like “agent” before, in its grammatical sense – specifically, as the recipient of rather than initiator of an action. See, e.g., JOHN LYONS, AN INTRODUCTION TO THEORETICAL LINGUISTICS 340, 350 (1967); BERNARD COMRIE, LANGUAGE UNIVERSALS AND LINGUISTIC TYPOLOGY: SYNTAX AND MORPHOLOGY 42-43, 58-61 (2d ed. 1989). Also RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 303 (“addicts”); Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2295f. (2003).

⁴² Those incentives and their consequences are traced *infra*. In brief, letting agents too readily “off the hook” results in the unjustifiable conscription of those who act responsibly by those who do not. It also – and we’ll see at Parts II.D and II.D.6 that this comes down to the same thing – results in ethically cognizable inefficiency.

taking particular positions in respect of appropriate distribuenda, distribution formulae, and distribution mechanisms:

Because welfare is more saliently an output than an input, for example, it is difficult, absent a Byzantine distribution formula, to be unalloyedly welfarist without in effect treating distributees as not being responsible for outcomes – hence as patients.⁴³ Similarly, because resources or wealth are best viewed as welfare inputs – inputs to distributees’ welfare functions – advocates of egalitarian resource or wealth distribution even posterior to, or apart from, the working of distributees’ responsible choices likewise in effect treat distributees as patients.⁴⁴

Finally, insofar as any distribution mechanism might fully instantiate some distribution principle such as that just mentioned, it too treats distributees as mere patients.⁴⁵ And insofar as it *fails* to be egalitarian prior to or apart from the operation of distributees’ responsible choices, it violates ethical equality and respect too. It does so by effectively treating some distributees as deserving of less than others even when all that is being considered is pre-choice, action-antecedent claims to material opportunity upon which action and choice are to operate. More on all of this presently. As I said at the outset, our valuations of distribution’s grammar-opened variables indeed interrelate.

C. Distribuenda

Determinate distributive claims, like “to distribute” and cognate infinitives themselves, not only take subjects and indirect objects, hence implicating distributors and

⁴³ See *infra* Parts II.C, II.D.

⁴⁴ Again see *infra*, Parts II.C, II.D.

⁴⁵ This prospect of course suggests that distribution mechanisms might be composite in nature: Market allocations followed by taxation and redistribution would constitute a familiar case in point. The suggestion is borne out *infra*, Part II.E.

distribuees; they take direct objects as well: There must be distribuenda – distributed things.

On the surface there has been more dispute in the theoretical literature over appropriate distribuenda than over who the distributors and distribuees are. This is somewhat surprising. But I think that it follows directly upon something noted before – widespread failure to think-through the deep analytical linkages among all of distribution’s constitutive case-variables. Alternative proposed distribuenda are in effect ethical touchstones or flags under which other disputes – disputes over distribuees and distribution formulae in particular – are pursued. We’ll see this as we proceed. I’ll begin, however, with a few measure-theoretic preliminaries. For these too play a critical role in debate over distribuenda – as well as over the other distributive variables.

1. Measurement Matters

Adequate discussion of proposed distribuenda, distribution formulae, and distribution mechanisms below requires some reference to matters of measurement. It will accordingly be helpful briefly to catalogue a few relevant measurement types and challenges before turning to those variables.

Both theoretic and practical measurement challenges confront (a) the conception and formulation of distribuenda and distribution formulae, respectively, and (b) the determinate specifiability and instantiability of distribution mechanisms. They also, accordingly, confront all distributive-ethical assessment. The challenges fall into roughly three types.⁴⁶ There are multiple conceivable, but as it happens fewer practicable,

⁴⁶ The typology is partly a matter of convenience. Formally speaking the second and third types can be amalgamated. See *infra*, Part II.C.1.d. It nonetheless proves heuristically and pragmatically convenient to distinguish between them.

solutions to each. These latter in turn ride upon what is to be distributed, to whom it's to be distributed, and how, we shall see. I'll call the measurement problems those of "simple quantification," "commensuration," and "interpersonal comparison."

a. Simple Quantification

Differing conceivable distribuenda vary in their susceptibilities to "absolute" cardinal, scale-relative cardinal, or mere ordinal quantification of differing magnitudes. Magnitudes are said to be "absolutely" quantifiable when differences as between them can be put into correspondence with differing values along the integer, rational, or real number orderings.⁴⁷ It makes sense in such cases to ask, in an "absolute" – i.e., "pure" number-system rather than other scale-relative – sense, "how much" or "how many."⁴⁸ Unless they are reducible to endorphins and C-fibers, or perhaps Bentham's "utils," subjective welfare and illfare do not seem to be "absolutely" quantifiable in this sense. Other possible distribuenda, e.g. resources or wealth, do seem to be.⁴⁹

Magnitudes are said to be "scale-relatively cardinally" quantifiable (and hence unit-comparable) when differing "amounts" of them can without objection be stipulatively correlated to some other, more tractable physical magnitude which can itself then be put into correspondence with the integer, rational or real number orderings. A familiar example would be mercury confined to a capillary tube over which it varyingly

⁴⁷ For most workaday measurement tasks the rationals are fine-grained enough. For many such tasks even the integers suffice.

⁴⁸ One might, one supposes, maintain that the number systems themselves – reals, rationals, integers, even ordinals – are themselves scales. Some no doubt would argue that this would be incorrect for reasons stemming from the same considerations as dictate our not saying the Standard Meter Rod in Paris is one meter long. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1951). Others would argue that the latter statement would be perfectly licit. See, e.g., SAUL KRIPKE, *NAMING AND NECESSITY* (1972). I do not wish here to be taken for committing to a position in that dispute. Suffice it to say that by "scale-relative" I shall simply mean "relative to some scale that is not one of the number systems."

⁴⁹ That's not in itself to recommend wealth over welfare. See *infra* Part II.C.

extends in accord with varying external temperatures. In such cases such questions as “how hot?” and “how much hotter?” become answerable with some precision, though all the time relative to a scale that is not itself one of the number systems.⁵⁰ Welfare is not thought to admit of scale-relative cardinal quantification any more than of “absolute” cardinal quantifiability, though Edgeworth appears to have believed that one day some “hedonometer” might afford means.⁵¹ Other proposed distribuenda need not be scale-relatively quantified, because “absolutely” quantifiable.

Magnitudes are said to be “ordinally quantifiable” (or simply “orderable”) when they can at least be rank-ordered relative one to another, such that one magnitude can sensibly be said to be “more” (or “better,” or “higher,” or “preferred to,” etc.) than, “less” than, or “equal” to the other. It is generally understood that no information as to “by how much” is imparted through such orderings, and so there is no question of unit-comparability. It is of course possible to conceive “second order” and indeed “*n*th order” orderings among apparent *differentials* between differing ordered pairs; and *n*’s growth in some such cases might lead the given ordinal to come increasingly to resemble a cardinal, unit-comparable scale.⁵² But such conceivabilities typically outrun our perceptual

⁵⁰ State *S*₁’s being “two degrees hotter than,” or “twice as hot as,” state *S*₂ on the Fahrenheit scale does not immediately translate into the same numerical differences on the Celsius scale, though the mathematical relation obtaining between scales will afford precise means of calculating the correct translation.

⁵¹ And though von Neumann & Morgenstern seem to have suggested something similar, perhaps taking up a suggestion of Ramsey’s. See F. Y. EDGEWORTH, *MATHEMATICAL PSYCHICS* 81 (1881) (the “hedonometer”); J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 17 (1944) (“Even if utilities look very unnumerical today, the history of the experience in the theory of heat may repeat itself, and nobody can tell with what ramifications and variations.”); F. P. Ramsey, *Truth and Probability*, in F. P. RAMSEY, *PHILOSOPHICAL PAPERS* (D. H. Mellor ed., 1990). Also LEONARD SAVAGE, *THE FOUNDATIONS OF STATISTICS* (1956).

⁵² Say that *S*₁ exceeds *S*₂ in some ordering, and that *S*₂ exceeds *S*₃, and that *S*₁ exceeds *S*₂ by “more than,” though there is no stipulated scale such as can render determinate sense to the notion “how much” more than, *S*₂ exceeds *S*₃. Call the differential between *S*₁ and *S*₂ “*D*_{1/2},” that between *S*₂ and *S*₃ “*D*_{2/3}.” Then there is a second-order ordering as between *D*_{1/2} and *D*_{2/3}, pursuant to which the former exceeds the latter. Etc.

capacities very quickly in respect of such magnitudes as are not already straightforwardly quantifiable in an absolute or scale-relative cardinal manner. And welfare at any rate is thought generally to admit of crude “first order” orderings at best. Other proposed distribuenda, for their parts, again needn’t be consigned to mere ordinal quantification at all.

b. Commensurability

Commensurability is called for when vector quantities of disparate items need be expressible as scalar quantities of some singular amalgamandum, or “stuff.” The scale with whose units the differing scalar quantities of “stuff” can be put into correspondence is called a “metric” or “index.” In the construction of such an index, disparate items of course must be “weighted”: It must be stipulated how many units of each vector component will “weigh in” at one unit of scalar measure. Differing components’ index weights then yield to expressibility in relation to one another, against the scalar backdrop, as value-ratios other than unity.⁵³

One might view such ratios, at least in some contexts, effectively as “price ratios” or “rates of exchange.” They are rates at which items are in effect “traded off against,” or indeed even literally traded for, one another. When so, they are rates of the items’ actual averaged relative valuations as determined by the aggregation of values that actual traders or “weight”-assigners, who ever and how ever many they be, place upon them. That will prove useful when we turn to distribution mechanisms below. For commensuration, when required, raises a critical ethical question for distributive assessment: If and when commensuration is necessary, who should be viewed as bearing the right to determine the

⁵³ Unity would amount to a degenerate case. In such case our vectors would trivially reduce to scalars. Simple addition of all units of all items would yield a single unit-expressible sum of all “stuff.”

vector components' weightings, and how should the latter be determined? The question, we'll see, interacts with our questions concerning distribuees, distribuenda, distribution formulae and distribution mechanisms.

Commensurability challenges would not threaten distributive assessment were welfare both our chosen distribuendum and directly distributable through some workable mechanism: As roughly construed by most of its advocates, welfare amounts to an undifferentiated, singulary substance which, insofar as it's measurable at all, is effectively already scalar-measurable.⁵⁴ Where commensurability difficulties do threaten to raise practical problems, then, is in the distribution of variegated items that differentially *underwrite* welfare, such as I'll discuss at 3.3.

c. Interpersonal Comparability

So-called "interpersonal comparison"⁵⁵ takes either of three forms. The practicability of each rides again on the nature of the distribuendum itself. Comparisons might be (absolutely) "full," (scale-relatively) "unit," or (degenerately) "non."

Holdings are fully comparable across persons when what's held is absolutely (hence cardinally and non-scale-relatively) quantifiable. Holdings are (scale-relatively) unit-comparable when that which is held is (scale-relatively) unit-quantifiable. In both such cases the distribuendum is either "objective" – generally physical – in nature or is effectively correlated with something physical.

Holdings are interpersonally *non*-comparable only when not manifestly physical or physically-correlated. The converse arguably does not hold: There might be limited

⁵⁴ That is the case whether it be ordinally (as is most often the case), scale-relatively cardinally (as with Edgeworth's "hedonometer," presumably, and as would be for Ramsey and for von Neumann & Morgenstern, one supposes), or absolutely (as for Bentham's "utils") quantifiable.

⁵⁵ More precisely, comparative quantification of differing persons' holdings of given distribuenda.

comparability, at least of a first and perhaps of some n th order ordinal nature, even where there is no measurable physical correlate to the item in question. But as noted above in connection with simple quantifiability, conceivability here quickly outruns practicability. More on the upshot when we turn to distribuenda, below.

Proposed distribuenda that are physical or physically correlated, then, for obvious reasons pose no interpersonal comparability challenges. It is as straightforward comparatively to quantify differing persons' holdings of wampum or dollars as to quantify any one person's such holdings.⁵⁶ This does not in itself decisively recommend our selecting such items as ethically salient distribuenda, however, in light of fetishism objections to material distribuenda that I assay below, Part 3.3.

d. Formal Appendix: Group-Theoretic Representation

We can summarize the differences both among and within measurement types formally. The formalization both nicely captures and precisely manifests the distinctions:⁵⁷ First let the expression $u_i(x)$ represent the generic "attainment level" of person i in state x . "Attainment" may be understood "objectively" – e.g., in terms of dollars or resource-allotments received, years of life-expectancy attained, etc. Or it may be understood "subjectively" – e.g., as hedonic "pleasure" experienced, welfare, or whatever. The expression thus designates an uninterpreted utility function, mapping values taken by x and i jointly onto various singulary numeric values.⁵⁸

⁵⁶ Dollar-denominated "wealth," of course, is a scale. More on the distributive-ethical significance of that fact *infra*, Parts II.D, II.E.

⁵⁷ See generally Claude d'Aspremont, *Axioms for Social Welfare Orderings*, in SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER 19-76 (Leonid Hurwicz et al. eds., 1985); A.K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); A.K. Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 ECONOMETRICA 1539 (1970). A particularly lucid and comprehensive treatment is JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 16f. (1996).

⁵⁸ That the values be singulary is of course entailed by the function's being, indeed, a *function*.

Now suppose a transformation function $\Phi(\chi)$ that maps values taken by $u_i(x)$ onto yet other singulary numerical values, and stipulate that it do so without loss of any information deemed to be ethically salient. Hence, whenever $u_i(x)$ takes some value δ , say, $\Phi(u_i(x))$ takes some value $\Phi(\delta)$, or ε . Now $\Phi(\chi)$ will of course specify a calculable relation between values of δ and ε , the transformation rule Φ converting values of the former to values of the latter.

This is all that we require to characterize the sundry forms of measurability discussed above as informational relations obtaining between $u_i(x)$ and $\Phi(\chi)$: We simply define the measurability forms in terms of restrictions imposed on the transformation rule.

If attainment is absolutely quantifiable and interpersonally fully comparable, the only transformation rule that will not leak information in the mapping from $u_i(x)$ values to $\Phi(\chi)$ values is the (of course highly restrictive) identity function: $\Phi(u_i(x)) = u_i(x)$.

If attainment is only cardinally, not absolutely quantifiable, and is interpersonally unit-comparable – so that I might say that the difference between my attainment levels today and yesterday is greater than that between my or your attainment levels yesterday and the day before, but I cannot say “how satisfied” you or I are, in a non-scale-relative way, on any given day – then a somewhat more permissive transformation rule will work: Any rule of the form $\Phi(\chi) = \alpha\chi + \beta_i$, $\alpha > 0$ will do. The rule preserves cardinal information by dint of α 's being positive and invariant over i 's – our transformations are increasingly affine – but because it permits the intercept β_i to vary with individuals i , it does not in any way restrict “absolute” levels of satisfaction, hence is uninformative on that count, providing nothing by way of absolute measure.

If attainment is cardinally quantifiable but interpersonally non-comparable, the transformation rule will be even less restricted – i.e., preserving of even less satisfaction information: Any rule of the form $\Phi(\chi) = \alpha_i\chi + \beta_i$, $\alpha_i > 0$ will do. The formula $\Phi(\chi)$ remains increasingly affine, but α_i as well as β_i can be assigned different values for different persons i , meaning that neither information as to “absolute satisfaction levels” nor interpersonally comparable information as to changes in satisfaction units $u_i(x)$ between states x is available to be preserved through transformations Φ .

Finally, if attainment is only ordinally “quantifiable” and interpersonally non-comparable, our transformation rule need not even be affine; it need only be increasing. Hence rules of the form $\Phi(\chi) = \alpha_i\chi$, $\alpha_i > 0$ will suffice. Now the only information preserved in transforming utility functions is that any state x_1 that renders person i more satisfied than state x_0 will be mapped onto some higher number by dint of both $u_i(x)$ and $\Phi(\chi)$ than will state x_0 . If we tighten up our last transformation rule a bit, not allowing α to vary over persons, so that $\Phi(\chi) = \alpha\chi$, $\alpha > 0$, we shall have treated attainment as only ordinally “quantifiable” – the intercept β remains unspecified – but interpersonally fully comparable; any increasing transformation is permitted but the same one must be applied across individuals.

It is of course difficult to intuit any experienceable meaning in such so-called “ordinal utility” information, which is of the form “I am more satisfied today than you were yesterday.” But the fact that it can be mathematically modeled highlights the fact that various forms of intra- and interpersonal measurability are at least analytically distinct.

Observations analogous to those just rehearsed hold with respect to inter-item commensurability. Indeed, if we let i in the equations specified above vary over goods and let x vary over quantities of goods, then analogues, in terms of “value yielded” by goods, to all information-types just surveyed will be readily derived and formally characterized. It is thus clear that my having distinguished between “commensurability” and “interpersonal comparability” above is dictated not by conceptual structure, so much as by ethical salience.

We’re now equipped to discuss proposed distribuenda with some modicum of rigor:

2. Welfare/Well-Being

A particularly venerable family of proffered distribuenda have gone by the names “utility,” “welfare,” “well-being,” “happiness,” “satisfaction” and cognate expressions. The prompting consideration runs thus: Faring well is what matters to people, indeed is trivially so since “utility” and the like are *defined* simply as that which is in effect “produced” upon people’s finding their preferences (or, on some readings, interests – “enlightened,” “rational,” “ideally informed,” or otherwise) satisfied. Well-faring, or “welfare” in consequence is that whose spread ought to inform distributive-ethical assessment.

Attending to welfare as thus counseled seems unobjectionable enough – again, trivially so – so far as it goes. One might then wonder why anyone would propose anything *other* than welfare as distribuendum. I think what’s objected to generally is not welfare as distributive-ethical touchstone, but (a) “welfare” as *construed*, by some of its

more eccentric or irresponsible advocates,⁵⁹ or (b) welfare as *literal, direct* distribuendum. Here's what I mean:

Construal-based objections take various forms, most prompted by unduly narrow or bizarrely overbroad stipulations by advocates as to what counts as well-faring. Some early utilitarians, Bentham and Edgeworth probably best known among them, sometimes (not always) notoriously suggested that all that should count as well- or ill-faring was hedonic experience. It's even been suggested, sometimes inadvertently, that both are reducible to endorphins and C-fiber counts, respectively, rather as "water" has come to be specified with definitive precision as H₂O. Such claims prompt predictable objections and equally predictable responsive refinements. Best known among the latter are probably those of such thinkers as the later Mill, Sidgwick, and more latterly Griffin. These have sought to take seriously the prospect that a well-faring human life might be something other than an extended orgasm or itch-scratching.⁶⁰

Latterday exponents of earlier Benthamite crudity do not banish all welfare that isn't hedonic in nature. They push to the other extreme, counting as ethically cognizable "welfare" the satisfaction of any preference what ever.⁶¹ And so they've occasioned

⁵⁹ Who, perhaps in owing to their eccentricities themselves, seem alas always to be the best known of welfare's advocates.

⁶⁰ See, e.g., J. GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE* (1986). Griffin's refinements have turned out to be so extensive that he has ultimately found himself compelled to abandon consequentialist ethics altogether. See J. Griffin, *The Human Good and the Ambitions of Consequentialism*, 9 SOC. PHIL. & POL'Y 18 (1992).

⁶¹ See, e.g., KAPLOW & SHAVELL, *infra* note 261 at 421-22 ("The idea of an analyst substituting his or her own conception of what individuals should value for the actual views of the individuals themselves conflicts with individuals' basic autonomy and freedom."). The short answer is that imprisonment likewise "conflicts" with basic autonomy and freedom – that of convicted criminals. Few people disapprove of autonomy and freedom, just as few disapprove of welfare or well-being. But the question has always been how we are to demarcate individuals' spheres of autonomy satisfactorily, and that question of satisfactory demarcation is of course the question of fair allocation. See *infra* Part III.B. The "we don't want to judge" disclaimer, moreover, accordingly avails nothing. Determining fair allocation is judging, period. Use of the ethically loaded *terms* "welfare" or "well-being" rather than ethically colorless terms like "preference-satisfaction," moreover, immediately registers precisely such judgment. This all of

predictable objections and refinements reminiscent of Griffin's. These take account of the fact that a preference itself can be ethically problematic, either in itself – because, say, expressly or even recursively anti-ethical – or as the product of, hence as endogenous to, antecedent distributive circumstances that are ethically problematic.⁶²

It is effectively to lie and corrupt, for example, to say of the thief that “he fares well,” or that “his well-being improves,” when he steals more goods undetected.⁶³ Better and much less misleading in such case to say that “he [wrongfully] got what he wanted,” or “is [unjustifiably] more satisfied.” It would seem to be likewise misleading, in most cases, to say of the slave who has come to accept what she's told of her putative race-rooted “inferiority,” that she's “better off,” or that “her well-being is up,” relative to the circumstance in which she rejects the race-rooted characterization and demands respect.⁶⁴ Better and much less misleading in such case to say “she's resigned to her [unjust] circumstances.”

“Welfare” and cognate expressions, these objections to anti-ethical satisfaction as *distribuendum* effectively recognize, are ineluctably value-suffused. It is in consequence not only idiomatically irresponsible, but is ethically condemnable, to use them in circumstances like these as a shorthand for mere preference-satisfaction.⁶⁵ Such use

it is so fundamental that it is remarkable that one should have to supply the reminder. See next several paragraphs.

⁶² On recursive preferences, see *infra* Part III.B. On preferences that are endogenous to unfair antecedent distributive circumstances, see, e.g., G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906 (1989); A. K. Sen, *Equality of What?*, in *EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES* (Stephen Darwall ed., 1995).

⁶³ Or that Nazis are “better off” when they murder more “non-Aryans,” etc.

⁶⁴ Even if the respect's not forthcoming. But see ARTHUR SCHOPENHAUER, *DIE WELT ALS WILLE UND VORSTELLUNG* (1844) (recommending, in Vol. I, Bk. 4, Vedantic resignation).

⁶⁵ To say of the unapologetic Nazi who has boasted death chamber “productivity,” “He is more satisfied,” does not jar as does “His well-being has improved.” The reason, of course, is that “satisfaction” carries less ethical content and connotation than does “well-being.” And of course, once the Nazi's putatively ethical claim – his demand that we consider his preference – is transparently seen as a mere demand rather than an ethical claim, we are more immediately prepared to ask, “why should we hear this

inevitably is legitimative of injustice. Indeed it obscures the very nature of distributive-ethical assessment itself. For distributive claims directed toward “us,” the composite polity that distributes, eo ipso are ethical claims: They are claims sounding in rights to collective concern. And “we” cannot *hear* putatively ethical claims to have *anti*-ethical preferences satisfied, any more than we can draw round squares, or than a court can hear tort “claims” of nose-thumbing.

But the problems with construing “welfare” or “well-being” in an ethically unfiltered manner, it happens, extend further than corruption alone. It turns out that one cannot determinately prescribe at all without filtering. To specify a distribution formula or social welfare functional at all, that is to say, is perforce to delimit what’s cognizable as welfare. I’ll elaborate quite fully on this below at Parts II.D and 4.2.

Non-construal-based objections to welfare as distribuendum are rooted in the fact that, as noted above in 3.2, it is not a directly measurable or distributable substance. The physical distribution problem is the most immediately apparent: Whether understood as endorphins, preference-satisfactions, idealized or fully-informed or ethically-laundered preference-satisfactions, etc., welfare just isn’t a thing that’s directly doled out. It is, rather, at best “produced” by *distribuees*, *from physical things* that are doled out. That opens two lines of concern flagged by theorists who do not count themselves unalloyed welfarists:

First, in order practically to be welfarist, one must operationally also be “something elseist” – wealthist, resourcist, etc.⁶⁶ Second, since (a) welfare emerges from what distribuees *do* with what ever is literally, more directly distributed, and since (b) the

claim, why should we count it cognizable in the forum of distributive-ethical assessment?” Ethical claims, to the effect that we are duty-bound, and mere demands are of entirely different types. See supra Part I.

⁶⁶ More on wealth, resources, etc. infra next subsection.

latter materials are in most cases scarce, (c) distribution both might and indeed must take account of distributees' *capacities* and *responsibilities* for producing their *own* welfare *out* of what they are allotted. The fuller significance of these opened lines will emerge in short order.

The measurability concerns occasioned by welfare as proposed distribuendum were indicated earlier: On most present-day construals, it does not lend itself to practicable quantifiability or interpersonal comparability in the holding any more than it does to direct distributability. Commensurability is the one measurement task for which welfare does not present difficulties. But please hold that thought, till we cover the next proposed distribuendum.

We'll presently see that in the just mentioned respects "subjective" welfare is, measurability-wise, the inverse image of more "objective," physical distribuenda. And indeed it appears that the two things – welfare and the physical items from which distributees derive it – must be brought together in some way for distribuendum-measurement problems to be addressed ethically-intelligibly at all. This too, along with its practical import, will emerge as we proceed.

3. Resources/Wealth

The principal competitors to welfare as distribuendum candidate historically have been material resources or wealth of one sort or another. And resources' characterization or construal, like welfare's, has ranged from simple and abstract to complex and concretely particular. The simplest and most abstract characterization is simply as *wealth* – some index-tied medium of exchange or scalar "stuff" that recipients can transform into

welfare through purchase of more variegated goods and services.⁶⁷ More complex and concretely particularized characterizations include Rawlsian “primary goods,” among others.⁶⁸

As indicated at the end of the previous subsection, the advantages and disadvantages of resources as prospective distribuenda can be viewed as the inverse image of the disadvantages and advantages of welfare. As for advantages: First, resources are directly distributable. Relatedly second, they are readily measurable, at least in respect of simple quantification and interpersonal comparability in the holding. And finally third, they provide space for the working of distributees’ at least partial responsibilities⁶⁹ for effecting their own well-being: What satisfactions distributees enjoy will ride partly upon what they do with their resource allotments. That seems to many both ethically right and, incentives-wise, efficient. More on that when we turn to distributees, distribution formulae and distribution mechanisms below.

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

⁶⁷ Including risk-bearing services, the fuller significance of which emerges below at Part II.E.2. This rough characterization of wealth, incidentally, is cognate with but not identical to that offered by Posner in the 1980s, as discussed below at Part III.A. A suitable synonym for my use would be “purchasing power.”

⁶⁸ See, e.g., J. RAWLS, A THEORY OF JUSTICE 54-55, 78-81, 358-65 (rev’d ed., 1999). I prescind from such complexities here, as (a) they’re not germane to present purposes, and (b) bracketing them causes no harm. Fuller discussion of primary goods can be found in Robert Hockett & Mathias Risse, *Primary Goods Revisited* (under revision for ECON. & PHIL.), available at my SSRN site.

⁶⁹ Even if bounded responsibility – more on which supra, Part II.B and infra, Part II.D.

like. They cannot be so any more than, say, Nazi preference-satisfaction is cognizable as “well-being.”

We should bear this in mind: Resources are, trivially and yet oft-forgottenly, in every case resources *for* something. They *count* as resources, as distinguished from uninteresting, ethically inert substances, only by reference to purposes, hence preferences, that users have for them. “Wealth” for its part, derived as it is from the Middle English “weal” as in “common weal,” is cognate with “well-being” itself. So resources or wealth, even to count as such, have to be tied in some manner to that which concerns the distributees who engage our distributive-ethical concern – well-being. The question thus opened is: In *what* way, precisely? The full answer emerges only once we’ve arrived at proposed distribution formulae and distribution mechanisms, below.⁷⁰

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

The indirect challenge is this: If (a) a given distribuendum yields differing welfare measures to differing distributees, (b) welfare is ultimately what matters, and (c) welfare itself is, as observed earlier, not practicably quantifiable or interpersonally comparable in the holding, then (d) it is not immediately apparent what ethically

⁷⁰ Infra Parts II.D and II.E.

cognizable advantage is offered by resources' quantifiability and interpersonal comparability advantages.

The direct challenge is this: If (a) resources are disparate, and (b) each is not properly subject to its own distribution formula, then (c) some means of indexing must be developed for such terms as "total resources" or "wealth" to bear content. And given both (d) the de facto valuation that occurs when assigning comparative weightings to vector components in fashioning the scalar along which "total resources" or "wealth" are to be quantified, and (e) the fact that ethically satisfactory such valuation must again involve measurement-challenging welfare, (f) indexing too will be problematic.

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

4. Opportunity/Access

One perceived difficulty attending resources as proposed *distribuenda* – a counterpart, I think, to the objectionable preference problem attending certain construals of welfare – has occasioned a *distribuendum* candidate that differs in the articulation but at bottom amounts, I believe, to a mere fuller naming of resources.⁷¹ The idea is this:

⁷¹ The difficulty was flagged just above: It's the danger of fetishism. The sense in which it is counterpart to objectionable preferences in "welfare"-construal is this: The danger that afflicts welfare is that *all* preferences – even admittedly antiethical ones – might illicitly be counted, in their satisfaction, as ethical "welfare." The danger that afflicts resources is that *no* preferences what ever will be considered when labeling ethically inert, unwanted substances "resources." "Resource," like "welfare," is an ineluctably value-laden term. It might be worth noting that "resource" is subject to ethically objectionable over-inclusive construal as well, just as we observed "welfare" to be subject to ethically objectionable under-inclusive construal: Just as it is ethically grotesque to suggest that welfare is only hedonic, it is ethically grotesque to suggest all things the possession of which might afford pleasure might be counted as

Because welfare, or “advantage,” is what matters to people, material stuff in itself is not ethically salient. Moreover, since material resources are variegated and accordingly in need of commensuration if to be spread under one distribution formula, some common denominator is required: And that’s again welfare, or advantage. Accordingly, the item whose spread can intelligibly engage our distributive-ethical concern or assessment, even if material in nature, must be understood as “opportunity for welfare,” or “access to advantage.”⁷²

For reasons that will be plain in light of II.C.3 just above, I think that “opportunity for welfare” and “access to advantage” as so described are best understood simply as alternative christenings of resources or wealth. Their advantage over the *terms* “resources” or “wealth,” if such they carry, stems from the possibility that some folk appear to have grown numb over time to the fact emphasized above – that resources or wealth, to *be* resources or wealth as distinguished from unvalued hence ethically inert matter, just are opportunities for welfare, modes of access to advantage.⁷³ They represent, one might say, “material opportunity” – opportunity to satisfy wants, to effectuate plans, to build lives, hence potentially to enhance welfare, well-being, etc. Henceforth I’ll accordingly use the terms “resource,” “wealth,” and “material

“resources.” Slaveholders and pre-20th Century husbands seem often to have viewed human beings that way, for example.

⁷² See, e.g., R. J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); R. J. Arneson, *Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare*, 19 PHIL. & PUB. AFF. (1990); Cohen, *Currency*, supra not 43. An analogue in the case of welfare would be someone’s suggesting we use “ethically compatible preferences” instead. Just as “welfare,” I think, already connotes such conditions (in contrast to “satisfaction” or “utility”), the word “resources,” I’ve argued, already connotes the conditions I record here.

⁷³ Rather as some seem to have grown numb to the fact that well-being is not ethically unevaluated pleasure.

opportunity” by and large interchangeably, with occasional caveats registered where necessary.⁷⁴

D. Distribution Formulae

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

In posing the first question, we are asking for specification of what I call a “distribution formula.” In posing the second question, we ask for specification of what I call a class of “distribution mechanisms.” I treat of the first here, the second in Part II.E.

Historically there have been three leading candidate-families proffered by practitioners of distributive-ethical assessment for distribution formulae. I call their advocates “maximizers,” “maximiners,” and “egalitarians” of one stripe or another. Each family is best known through one or two of its historically most influential members. Each also has featured one or more members argued for by appeal to hypothetical veiled choice scenarios. I’ll accordingly first discuss each of the distinct families of candidates

⁷⁴ Such caveats as I’ll register concern the distinction that one must draw, in some cases, between what I’ll call “ethically exogenous” and “ethically endogenous” resources, wealth and opportunity. Briefly, ethically exogenous holdings are such as one is not responsible for, while ethically endogenous holdings are such as one is responsible for. The discussion of distribution formula below, at Part II.5, elaborates the ethical significance of the distinction. The relevance of the distinction at present is simply that the terms “material opportunity” and, a bit less, “resource” probably connote ethical exogeneity quite immediately to most, while “wealth” probably does not, meaning that I’ll more often have to make plain that I have, say, “ethically exogenous wealth” in mind than that I have “ethically exogenous material opportunity” in mind.

by reference to its best known members, then discuss veiled choice scenarios as employed in respect of all three, then conclude with observations on the inter-formulability of maximizing and equalizing formulae.

1. Naïve Maximization

The best known maximizing distribution formulae are what I call “naïve” such formulae.⁷⁵ The operative ideal behind such formulae is disarmingly simple: It is that what ever is distributed should be distributed in such manner as maximizes the quantity of some aggregate taken to be normatively salient. Typically, that means somehow aggregated wealth or welfare, simply summed over the distributees who hold or enjoy it.⁷⁶

If distribution D_1 yields aggregate wealth or welfare W_1 , D_2 yields W_2 , and W_2 exceeds W_1 , then D_1 ethically dominates D_2 on this view. For our goal is, quite simply:

Max $\sum_{i=1}^n W_i$, where “ i ” indexes by distributee and “ n ” designates the number thereof in the society in question.⁷⁷

⁷⁵ Strictly speaking, maximization of course can no more be a literal, or “direct” distribution formula than welfare can be a literal, or “direct” distribuendum. It serves, rather, like welfare, as a manner of touchstone. The idea is to distribute in such manner as will maximize some aggregate, rather as in the case of welfare as distribuendum one is to distribute something in such manner as produces welfare in or for some distributee(s). For this reason it turns out, unsurprisingly, that maximizing formulae can be reformulated in non-maximizing form. See *infra* Part II.D.5.

⁷⁶ Welfare aggregation and maximization are associated with utilitarian ethics. Wealth maximization is associated with certain Kaldor-Hicksian legal scholars. More *infra*, Parts II.E, III.A.

⁷⁷ I am of course presenting here a particularly simple formulation of a maximization formula. Things typically grow rather more complicated than this. Relatedly, I refer to “naïve maximization” in this context by dint each i ’s “level”’s being equally weighted – “counting for the same” – in the naïve social welfare functional, notwithstanding the possibility that that which is equally weighted – the utility function – might be something for which the distributee i is not fully responsible, hence something that’s in part morally arbitrary. We could just as easily call naïve welfare-maximization something like, say, “utility-function-egalitarianism.” For it is always possible to depart from the aforementioned equal weighting condition, say on the aforementioned grounds that one is not entirely responsible for one’s utility function and thus that that function amounts in part to a morally arbitrary feature of the person. Such departures will in effect incorporate different distributive judgments than does naïve maximization. (Something other than each distributee’s utility function alone will be summed in the functional.) And any such formulae will of course “maximize” something, it just will not be welfare that’s undifferentiated as between ethically exogenous and ethically endogenous (responsible) welfare. Indeed, once the social welfare functional – including its aggregation formula – is determined, any prescription what ever can be described as

Maximization in so unalloyed a form has, unsurprisingly, provoked charges of (a) fetishism, (b) objectionably unequal treatment of distributees, (c) objectionable treatment of distributees as nonresponsible patients, or less often (d) some combination of these. It is insufficiently widely recognized, I believe, that the combined objection would be analytically more satisfactory. For the separate objections are readily demonstrated to be quite closely interrelated objections; one tends conceptually to entail another:

The fetishism charge is more typically aimed at naïve would-be wealth-maximizers than welfare-maximizers, though this fact reflects a confusion, I'll show. The idea is that maximizing wealth for its own sake, shorn of the proper ethical regard for wealth-makers and wealth-takers, is ethically indistinguishable from maximizing, say, the quantum of blue-colored area over some surface. There seems no ethically cognizable *reason* for such pursuit if it does not somehow entail proper treatment of distributees person by person.⁷⁸ And what constitutes the latter treatment would seem to have to be understood antecedently under criteria quite independent of the substance – or space – maximization itself. For ethics is by its nature concerned most immediately with the treatment of individual persons rather than of nonpersons, such as aggregates are. The prospective ethical salience of any aggregate must in consequence be explained by reference to that aggregate's relation to the persons – in fact ourselves – who are the subjects of our ethical regard. No group of persons who are distributor/distributees – no

“maximizing.” And just as clearly, any such maximization formula can be recast as an egalitarian formula. The distinction between the maximization and equalization forms, that is to say, is entirely arbitrary. When formulae nonarbitrarily differ it is always according to what feature of distributees – of *i*'s – is to be treated as ethically relevant hence worthy of equal treatment, thus “equalized” in an equalization formula or “unweighted” and summed in a maximization formula. One way of viewing the quest for the correct distribution formula, then, whether they be cast as maximization or as equalization formulae, is as the quest for non-morally-arbitrary – i.e., nonfetishist – features in virtue of which to view distributees as equals. See *infra* Part II.D.5.

⁷⁸ More on this matter in connection with the “wealth as a value” debate of the early 1980s, *infra* Part III.A.

“we” – will sensibly bother, under the aspect of normative ethics, with an aggregate not understood in those more fundamental, personal terms.

Though it is rather less often observed, naïve welfare-maximizing is subject to precisely the same charge of fetishism as is naïve wealth-maximizing. Welfare might indeed be – indeed might stipulatively hence trivially be – “what matters” to people. But if produced by means that are indifferent to the proper treatment of numerically distinct and ethically equal distributees, it is no less ethically inert than is wealth or blue surface-space. For again, ethics requires attention to the deserved or earned welfare or wealth of *each* antecedently equal-rights-bearing person one by one, not to an antecedently defined aggregate – even a welfare aggregate – in terms of which rights are but subsequently defined and apportioned. To hold otherwise, of course, is to hold that the aggregate’s distribution does not normatively matter.⁷⁹ It is thus to eschew distributive-ethical assessment altogether. And that is what’s fetishist.

The unequal treatment charge leveled at naïve maximization is, in view of what just has been said, readily seen to be deeply connected to the fetishism charge: It stems from the possibility, in principle, that what ever is maximized might be maximized by means that effectively treat persons as being of ethically differing status even before or apart from their ethically endogenous choices.⁸⁰ It can in theory turn out, for example, that aggregate welfare or wealth would be maximized simply by euthanising faultless

⁷⁹ Some such intuition is of course what underlies Robert Nozick’s “utility monster” objection to utilitarianism. It is not accidental that he begins the treatise with an observation to the effect that “individuals have rights.” See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

⁸⁰ In such case we might say they are treated as being “antecedently” or “exogenously,” hence *ethically essentially* unequal.

depressives or severely handicapped persons.⁸¹ Or it might be that maximization would be effected by channeling resources or wealth toward persons blessed with high endorphin counts or otherwise highly resource-responsive welfare functions, who accordingly derive disproportionate pleasure from that which they receive.⁸² The fact that naïve maximization imperatives do not prohibit such measures in principle (and indeed seem to welcome them), it is argued, demonstrates maximization's unsuitability to the task of articulating an ethically defensible distribution formula.⁸³

The patient-treatment objection to naïve maximization is the flipside of the unequal treatment objection, hence is, like the latter, also connected to the fetishism objection:⁸⁴ It is, in effect, that just as distribution effected on the basis of morally arbitrary features of faultlessly disadvantaged persons – depressives and handicapped persons, say, as just countenanced – treats the latter as effectively expendable and non-rights-bearing, so does it treat morally arbitrarily *advantaged* persons – “utility monsters” and talent-Übermenschen, say – as being of meritlessly higher ethical status quite apart from that which constitutes them as human persons – their responsible human agency.⁸⁵

There's a deep sense in which that is as it were “metaphysically” patronizing, disturbingly contingent, and in consequence alienating and demoralizing: One's birth into a right to larger distributive shares than those enjoyed by others is the product of a dubious “blessing.” It is effectively her birth into a polity that treats her as a patient and,

⁸¹ Richard Posner professed in the early 1980s to be troubled by this possible consequence in the case of welfare-maximization, but then puzzlingly dismissed the concern in the case of wealth-maximization. See *infra* Part III.A.

⁸² See again Nozick, *supra* note 75. A deep relation, then, between unethically unequal treatment and fetishism.

⁸³ It is of course no answer to say that this does not typically happen in practice. Ethics concerns not happy accidents but principles. More on this *infra* Part III.

⁸⁴ Hence of the fetishism objection as well. Again the offenses, we see, are all interrelated.

⁸⁵ See again *supra* notes 75 and 78.

indeed, as an object. For she is treated as one whose politically honored advantages are not really her own, not the product of her agency, but instead a gift conferred by society in virtue of an accident – conferred simply because she is, so to speak, “productively blonde.”⁸⁶ In such a polity she is but contingently favored, by mere accident of birth, as a mere funnel into which the channeling of resources simply happens to produce a higher aggregate. That, it is argued, is deeply disrespectful and ultimately harmful of the self, even if in some respects likewise materially benefiting, of the fortunate as well as of the unfortunate.⁸⁷

A final objection to naïve maximization is rooted in measurement challenges of the kind surveyed above in Part 3.2. Where welfare is held out as maximandum, the objection is that welfare is not sufficiently amenable to interpersonal comparison in the holding as to render its aggregation sufficiently effectuable as to lend “maximization” any workable content. Where wealth is the proposed maximandum, the measurement-rooted objection finds its ground ultimately in commensurability: One objects that the absence of markets in many valued or potentially valued goods and services – including

⁸⁶ Imagine a society in which blondes were quite rare such that, in consequence, birth with blonde hair was viewed as a sign from the gods that the blonde was to be treated as an avatar, maintained in a temple and endowed with sacramental gifts. Even were the blondes in such society permitted to come and go as they pleased, there is an obvious sense in which they would experience themselves to be freakish, radically separated from others. The sense in which this is damaging to the putative beneficiary will be familiar to those who have read of the psychological harm experienced by members of royal families in those few modern democratic polities that maintain them. It is also of course a staple of fiction concerning the longings of celebrities, royalty, avatars and even angels to lead ordinary lives. See, e.g., MARK TWAIN, *THE PRINCE AND THE PAUPER* (1882). Also such films as *Roman Holiday*, *The Last Emperor*, *Wings of Desire*.

⁸⁷ Because the favorable treatment is contingent on morally arbitrary – unearned – features, and is accordingly withdrawable immediately upon the loss, however accidental it might be, of such features. Some such intuition as this seems to underwrite the expressions of alienation, loneliness, anxiety and even humiliation sometimes heard from people found physically attractive by large numbers of others. And arguments analogous to the charge sometimes are heard from opponents of affirmative action programs who have qualified or would qualify as beneficiaries of such programs. There’s a link here to the notion of a “right to punishment” as well, per supra, note 60. The link’s perhaps best drawn in FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (1866).

risk-bearing services – renders the “wealth” that is maximized an ethically incomplete index. Or, relatedly, one points to one or another variant of the so-called “Scitovsky paradox” and concludes that, since two states can be Kaldor-Hicks superior to one another and the Kaldor-Hicks criterion accordingly does not yield an ordering, “wealth” is not sufficiently determinate an aggregate as to be amenable to intelligible maximization at all.⁸⁸

Naïve maximizers have offered well-worn rejoinders to these objections. To the fetishism charge, the rejoinder is either that welfare is what matters to people (in the case of welfare-maximizers) or that wealth affords opportunity to satisfy preferences hence welfare (in the case of wealth-maximizers). In both cases, it is “concluded,” maximizing cannot, in consequence, be fetishistic.

This rejoinder is of course a non sequitur. The fetishism charge is not that welfare and wealth do not matter.⁸⁹ It is that their naïve maximization does not matter. It is that naïve maximization misunderstands the *ways* in which welfare and wealth matter. As themselves, these of course matter by definition to everyone. But as maximized in aggregatum pursuant to a simple additive maximizing distribution formula, they at best matter only, or objectionably disproportionately, to those lucky enough to attract distributions in owing to such of their inherited – not earned – advantages as happen to be welfare- or wealth-productive *for them*. Welfare or wealth will *not* in such case matter to “us,” whose collective role is that of assessing a distribution formula’s ethically

⁸⁸ See Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941); also Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980). The determinacy objection also is grounded in distribution. See *infra* Parts II.E, III.A.

⁸⁹ The rhetorically rich but perhaps somewhat overstated title of a well-known article by Dworkin might be partly responsible for this misunderstanding. See *infra* Part III.A. The misunderstanding itself figures in D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEG. STUD. 263 (1986).

appropriate treatment of each rights-bearing constituent member among us of the distributing polity that we jointly constitute.

Viewing welfare or wealth under the aspect of simple summation – as if a collection of persons were a person – or under the aspect of how they matter merely to some lucky patient-recipients rather than to us – each equal member of the full polity of individual rights-bearing agent distributors and assessors – is precisely what is fetishist about naïve maximization when proffered as an end in itself. For it is to abandon the ethically required accounting of where welfare or wealth go and who actually has earned it, hence simply to treat either it as an ethically inert substance akin to blue surface space, or “society” as one person – the sole person – with ethical status. Both misdirect ethical regard toward nonpersons – which is what’s fetishist. The second in particular also happens, of course, to amount to “social organicism” or “collectivism” with a vengeance.

To the unequal- and patient-treatment charges, naïve maximizers also have offered rejoinders that amount to non sequiturs. In the case of the unequal treatment charge, the rejoinder is that maximization counts each person’s utility or wealth-production function for one in the social welfare functional – the aggregating and maximizing calculus. One individual function, the claim runs, one “vote;” hence equal treatment.

This one’s a non sequitur because it mistakes distributees for their welfare- or wealth-production functions. That’s a form of misplaced fetishism in respect of distributees quite counterpart to naïve maximization itself’s fetishism in respect of distribution formulae. One is no more one’s wealth- or welfare-function than one is one’s nose. Insofar as differing persons are both faultlessly and non-creditably born with

differing such functions – as would seem to be the case, say, most dramatically in respect of congenital depressives and handicapped persons – equal treatment of those functions is, eo ipso, unequal treatment of those born with them. And it is precisely that to which those leveling the unequal treatment objection object. One might just as well erect maximization of aggregate forehead-height as a societal goal and distribute goods accordingly, then reply, in response to ethical objections, “but we have counted each forehead once.” It isn’t an answer.

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

This rejoinder is half right, half non sequitur, and so we shall find it half-echoed in what turns out to be the most plausible characterization of the correct distribution formula further below: The problem is that it places the cart before the horse, so to speak, and in so doing fetishizes – attributes life, as it were, to – the cart. If distributees bear rights to equal treatment ex ante, immediately prior to commencing with action, then the “horse” should be correct distribution considered prior to the consequences for any particular aggregate. Then the appropriate aggregate – the nonfetishist, ethically cognizable aggregate – will effectively take care of itself: It will be maximized quite “automatically” ex post as output of the correct ex ante distribution of inputs.⁹⁰

⁹⁰ More on this infra Parts II.D.3, II.D.5, II.E, in connection with what I’ll call “ethically cognizable” welfare, maximization and efficiency.

If we are really to treat distributees as responsible agents not patients, which it would seem we *must* do since “they” here are in fact “we” – we who are acting as agents even in posing the question – then we are obliged, if we would be coherent, to look only to inputs: We must look to that which agents responsibly employ in producing their own welfare or wealth outcomes. And in looking to how to distribute those inputs, once again, we ask what distribution treats distributees as ethical equals – as ethically identical, boundedly responsible human agents. That requires we take exogenously given “internal” or “personal” – physiologic – resources and deficits into account just as we take “external” or “impersonal – nonphysiologic – such givens into account. For all of these are the product of chance not of choice.

The *ethically* equal distribution, then, will be that which works realistically to compensate boundedly responsible agents for shortcomings in their welfare- or wealth- functions rooted or located not in their responsible agency but in their boundedness – viz., their handicaps. This is where our ethical attention belongs in the matter of adequately characterizing the appropriate distribuendum and distribution formula – at least, again, if we’re taking agency seriously.⁹¹ It should not be directed to outputs save indirectly, as outputs of the appropriately characterized, equal-agency-honoring inputs. To do otherwise is precisely what’s fetishist.⁹² More on this just below at Part II.D.3.

Maximizers do not appear to have arrived at a canonical rejoinder to the measurement-rooted objections to maximization. I think that’s no accident. The key to

⁹¹ There are of course moral hazard considerations, rooted in the aforementioned difficulty of drawing the “boundary” of “boundedly responsible agency,” that must be considered once discussion turns toward means of collectively acting pursuant to the ideal distribution formula. More on those *infra*, II.E.

⁹² Cognate observations apply in respect of those maximizers who observe that maximizing will tend to coincide with equalizing in view of the diminishing marginal utility of wealth or what ever else is distributed. Quite apart from the claim’s ignoring of agency and its reliance upon the happy accident of concavity, it leaves open the question: If you’re serious about equality, why bother with naïve maximizing at all? Let the horse pull the cart. See *infra* Part II.D.5.

an answer, I believe, again lies in turning away from distributive welfare-output-assessment altogether, in favor of distributive resource-input-assessment. Once we do that, ready answers to all measurement challenges are immediately forthcoming. I'll defer elaboration to Part II.E, on distribution mechanisms.

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

2. Prioritarian Maximining

Maximining, most often associated with John Rawls, is like several other prescriptions oft-associated with Rawls prompted by – though as we'll see not fully responsive to – some of the shortcomings of naïve maximizing. The prime-moving idea is that many of the differences among persons that would tend effectively to recommend disparate treatment in pursuit of a naïve maximizing imperative are, as Rawls put it, “arbitrary from a moral point of view.”⁹³ Such differences, it is thought, precisely because they are morally arbitrary, cannot ethically be permitted to be distribution-determinative. They must in some way be neutralized.

Neutralizing such differences altogether, Rawls appears to have thought, would result in our pursuit of an egalitarian distribution formula of one sort or another – indeed

⁹³ See RAWLS, *supra* note 41 at 72.

probably an outcome-egalitarian one, it would seem, thought this isn't clear.⁹⁴ But Rawls shied away from full-bore egalitarian distribution of any sort, apparently on the theory that some departures from equality would render even the "worst-off" among unequals "better-off" than they would be were all equal. In consequence, Rawls seems to have concluded, departures from equal distribution are morally tolerable if, but only to the degree that, they tend to better the lot of "the worst-off."⁹⁵

Rawls labeled this Grundnorm "the difference principle." If naïve maximizing is tide-raising, we might say, and if a rising tide not only lifts all boats but lifts them so high that the lowest are raised higher than they would have been under an egalitarian distribution formula, then maximization will be distributive-ethically permissible. But it will be so only on condition that – and indeed differing egalitarian distributions will be socially preference-orderable precisely according as – "the minimum" be maximized too: $\text{Max} \sum_{i \in n^*} W_i$, where "i" again indexes by distributee and "n*" designates the best-off member of the worst-off class, hence the cut between "worst-off class" and all others. Maximin is accordingly the formulaic upshot of Rawls's difference principle.

Both the difference principle and maximin appear, on reflection, to be only semi-sequitur responses to Rawls's specific concerns about "pure" maximization. They turn out in consequence to be rather crude, coarse-grained remedies, if indeed determinate remedies at all:

For one thing, of course, "the worst-off" class is quite *indeterminate*: Not only is it unclear whether it be the worst off person, the worst off .1% of persons, the worst off centile or decile or quintile or what ever: It is unclear even how we are to decide. No

⁹⁴ The sense in which it's not clear will emerge presently.

⁹⁵ I recognize that there is a rather lengthy leap here. But I am endeavoring to exposit or reconstruct, not to defend, Rawls's chain of reasoning.

principles are on offer, nor does any particular rationale seem to offer itself.⁹⁶ That's a bit troubling given that maximin's meant to neutralize morally arbitrary determinants of distributive shares and thus afford ethically satisfactory guidance to law-makers.

A closely related difficulty with Rawlsian maximin is that the idea of the "worst-off class" does not even seem to be clearly conceived or intelligibly motivated, *let alone* defined, by Rawls with any articulated view to the *reasons* for anyone's being worst off: Rawls draws no distinction, for example, between those who are holdings-wise worst-off by chance and those who are effectively worst-off by choice. Yet if any distinction of interest to distributive-ethical assessment is *not* "morally arbitrary" – and surely there must be *some* that are not if the predicate's to do any work – one would think it would be that one.

Why, then, does Rawls not *consider* the question at all in characterizing the moral arbitrariness-prompted (a) maximin formula and (b) class of "worst off" distributees who are its beneficiaries? No answer's forthcoming. And that is both strange and quite troubling: For insofar as there is divergence between those who are responsibly worst-off on the one hand, accidentally worst-off on the other, maximin looks no less morally arbitrary in principle than is naïve maximizing. *Both* maximize morally arbitrarily; they differ only in maximizing different maximanda. That means in turn that maximin

⁹⁶ That's to say that Rawls's failure to offer a basis on which to make the cut does not seem to be accidental. There seems no principled basis at all. And that, I believe, is rooted in the difference principle's failure directly to address its own motivating concern – the concern with morally arbitrary distinctions among persons that result in their differential faring. The only means by which to address that concern, in turn, turn out not only to supply a satisfactory theoretical baseline, but also to render the difference principle itself quite superfluous. Rawls on this understanding emerges as an unstable resting point en route from naïve to ethically cognizable maximizing – or what is the same thing, as we'll see *infra*, from ethically noncognizable to ethically cognizable equalizing. More *infra*, Part II.D.3, II.D.5.

little or no more treats distributees as moral equals and responsible agents than does maximization.⁹⁷

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

The veiled choice scenario is of course most immediately prompted by the wish to impose ethical equality via anonymity and consequent impartiality: Choosers are prevented from choosing to benefit themselves "rather than" others because features that distinguish them from others are hidden from view. What was less explicitly recognized, however, was that the fact that veiled choice is the product of a *choice* scenario arguably renders maximin a *responsible choice as well*, to the consequences of which choosing agents might then accordingly be appropriately held.⁹⁸ The degree to which this feature

⁹⁷ I perhaps slightly overstate the case – at least insofar as (a) the morally arbitrarily disadvantaged are disproportionately represented among the Rawlsian "worst off" class however defined, and (b) there really are significant numbers of "utility monsters," talent Übermenschen or wealthy-born among us. In such case the Rawlsian distribution would presumably undo more arbitrary damage than would naïve welfare- or (especially) wealth-maximization. But in this case of course all boils down to a contingent, empirical question. And note in that case the apparent plausibility of the suggestion, often associated with Lerner, that by far most of us possess similar utility functions and that these are concave in wealth such that wealth-equalization would maximize aggregate welfare. If that is true, a utilitarian distribution might actually assist more of the morally arbitrarily deprived than would the Rawlsian.

⁹⁸ More corroboration here, I am tempted to say, of the deep interconnectedness of ethical equality and responsible agency noted at various points in the foregoing subsections. There has, incidentally, historically been lively debate over just how much ignorance there should be behind the veil. Rawls at times spoke as if he believed distributees should be held accountable for their lifeplans – indeed that is partly what prompts his selection of primary goods as *distribuenda*, as noted in the next paragraph. But if

of the scenario overtly prompted Rawls is unclear. But it is difficult not to suppose that it would have constituted part of its attraction, consciously or otherwise. That is so particularly in view both of the linkages between ethical equality and responsible agency noted above, and of some of the language Rawls's used in motivating the second device to which I've alluded – his selection of *distribuendum*:

The second device by which Rawls in effect partly addressed the responsible agency and ethical equality problems afflicting his difference principle was, as just suggested, his characterization of the appropriate *distribuendum*. Rawls prescribed distribution of what he called “an index of primary goods” – in effect, a lumpy and only incompletely scalable vector of disparate, broadly conceived resources.⁹⁹ Rawls was at least partly cognizant of the agency/equity value that this prescription offered. For, first, his explanations made at least some overt reference to the fact that the selection of primary goods as *distribuenda* effectively held distributees partly responsible for the production of their own welfare – or in his wording, the formulation and successful pursuit of their own “plans of life.”¹⁰⁰ And relatedly second, Rawls made note of the fact that treating primary goods as *distribuenda* in effect required distributees to internalize the costs that their lifeplan-rooted preferences (for primary goods) imposed upon others.¹⁰¹

So Rawls seems, in his particular – and, as we'll see, internally volatile – brand of

that is the case, then lifeplans are ethically endogenous, not “morally arbitrary,” and so it is puzzling why choosers behind the veil would not know at least those features of themselves. Other employers of veiled choice justification strategies – essentially some utilitarians and Kaldor-Hicksian wealth-maximizers, as discussed *infra*, Part II.5.4, avoid such difficulties in essence by not concerning themselves with the ethical endogenization of anything at all apart from the choice of distribution formula (behind the veil) itself – a “thin” sphere of operation for responsibility, to say the least. For reasons set out below at II.D.4, however, I don't think that we need concern ourselves with whose veil is most attractive.

⁹⁹ Rawls, *THEORY*, *supra* note 41 at 54-55, 78-81, 348, 358-65. In light of the incomplete scalability, of course, the index is but incompletely an index. See *supra* Part II.C.1. Also Hockett & Risse, *supra* note 57.

¹⁰⁰ Rawls, *THEORY*, *supra* note 41 at 80.

¹⁰¹ *Id.* at 359.

veiledly-chosen, primary-goods-distributive maximin, at the least to have been an incipient resourcist and equal responsible agency exponent.

The problem for Rawls lies in the “incipient” part of that just-offered characterization, which amounts in effect to a carrying-forward of the earlier noted “semi-sequitur” characterization. Here’s what I mean: Note, first, that primary goods as distribuenda bear no necessary connection to maximin as distribution formula. Indeed, they appear to be none but a clumsy and indeed ultimately incoherence-producing graft-on, rendering Rawls a responsibility-tracer in respect of his distribuendum selection, a moral accident-allower in his selection of distribution formula.¹⁰² Why? Because the “worst off” in respect even of *primary goods* holding *still* might be so either by chance or by choice.¹⁰³

The treatment of maximin as a product of veiled choice might, perhaps, at least partly have rectified the unstable mixture just noted, had it been a choice actually made, or had there been compelling reason to suppose that it “really would” have been made.¹⁰⁴ But it is widely observed that the choice theory by which Rawls arrived at maximin as distribution formula was “exotic” to say the least,¹⁰⁵ and that the choice he imputes is in fact extensionally equivalent, preference-schedule-wise, to such as would be made only

¹⁰² This is not altogether surprising once one notes Rawls’s unresolved ambivalence concerning responsibility. On the one hand, he defends his selection of primary goods as distribuendum by reference to the importance of responsibility. On the other hand, at other points he argues deterministically that people are not responsible unless able to choose freely, and that they are not able to choose freely because, he says, they do not choose their faculties for choosing. See RAWLS, *THEORY*, supra note 43 at 90-93, 182.

¹⁰³ See, e.g., Richard Arneson, *Primary Goods Reconsidered*, 24 *NOÛS* 429 (1990). Note that if leisure be counted a primary good, we wouldn’t even be able to say that those poor in other primary goods through voluntary nonworking were poorly off at all. See infra note 101.

¹⁰⁴ Though I’ll offer skepticism about veiled choice scenarios below at II.D.4.

¹⁰⁵ See John E. Roemer, *Egalitarianism Against the Veil of Ignorance*, 99 *J. PHIL.* 167, 168 (2002).

by such as are “infinitely” risk-averse.¹⁰⁶ There accordingly seems little if any reason to suppose that the choice even “would” be made, let alone that it has been made. And so it affords little if any viable element of responsible agency to Rawls’s characterization of the appropriate distribution formula.

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

3. Equalizing: Naïve and Sophisticated Varieties

Several, though we’ll see far from all, proposed egalitarian distribution formulae can be viewed as “purifications” of original Rawlsian insights. These same, we shall see in the next subsection, also are characterizable – like Rawls’s was meant to be – as more ethically sophisticated forms of maximization. The guiding intuition underwriting these proposals can be articulated thus: If some differences among persons are both partly causative of their differential faring and yet “arbitrary from a moral point of view,” then the most immediately satisfactory distribution formula is that which simply partitions each person’s holdings into portions R_i traceable to moral arbitrariness and $1 - R_i$ traceable to responsible agency, then equalizes the former while facilitating agents’ own maximization of the latter.

¹⁰⁶ See, e.g., Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls’s Theory of Justice*, 70 J. PHIL. 245, 254 (1973); L. Hurwicz, *Optimality Criteria for Decision Making Under Ignorance*, 370 STATISTICS 1 (1951); GEOFFREY A. JEHLE & PHILIP J. REMY, *ADVANCED MICROECONOMIC THEORY* 260 (2d ed. 2001).

The morally arbitrary portion of any one person's holdings, R_i , would be invariantly valued across all persons i . The nonarbitrary portion, call it E_i , would for its part be permitted – indeed required – to vary across persons according as they expended varying degrees of responsible effort in “productive” activities varyingly valued by themselves and others.¹⁰⁷ The correct distribution formula accordingly would be most straightforwardly characterized thus: $\forall i: H_i = E_i + R_i = E_i + R/n$, where “ H_i ” designates each person i 's holdings, “ E_i ” and “ R_i ” designate what they were said just above to designate, n is the number of persons i and “ R/n ” designates the constant which is each i 's pro rata share of the full exogenously given residuum R .¹⁰⁸

R can be called “luck,” “exogenously given resources,” “ethically exogenous opportunity,” “the exogenous endowment,” “the residuum,” and so on. Those who would equalize R_i across persons can accordingly be labeled “luck-egalitarians,” “resource-egalitarians,” “responsibility-tracing egalitarians,” “opportunity-egalitarians,” and so on. I'll call them the latter, for reasons counterpart to those offered above at 3.4.3 for treating “resources,” “opportunity for welfare” and “access to advantage” all as variants of “material opportunity.”

Most adherents to the opportunity-egalitarian view tend to regard Rawls as having been an incipient such egalitarian. On this view, Rawls simply had not managed to purge

¹⁰⁷ Leisure in such case would of course not count as part of one's “holdings.” But it could be so counted – hence the scare-quotes around “productive,” and the “themselves and” placed before “others” in the characterization. Were we to count leisure as part of one's holdings, we then would say that E_i 's composition, rather than E_i itself, varies across persons i . (A consequence, of course, would be that maximization of the full vector of goods one enjoys “takes care of itself,” as a straightforward consequence of responsible choices made by distributees as to the disposition of their resource endowments – R_i . Implications of “varying degrees of responsible effort in activities varyingly valued by themselves and others” are traced and treated below. The basic idea is that any surplus that you end up with over your mandatorily equalized ethically exogenous endowment is properly a matter of what others give to you in exchange for what you give to them.

¹⁰⁸ R would be the sum of each person i 's R_i . That is, $R = \sum_{i=1}^n R_i$. Summing here of course requires commensuration and interpersonal comparability.

his views fully of the naïve aggregative utilitarian maximization imperative that he had sought to displace with an individualist distributive-ethical ideal. The full purge, it accordingly seems in effect to be thought, is that which *consistently* treats distributees as boundedly responsible agents, distribuenda as *fully* indexed goods and services rather than lumpy Rawlsian “primary goods,” and the correct distribution formula as that which distributes goods and services in a manner that is *systematically* responsive to the cut between chance and choice.

Opportunity-egalitarians are of course not without challenges. The aforementioned cut, for example, between chance and choice – “*R_i*” and “*E_i*” above – is in practice of course notoriously difficult to draw, and for a plurality of reasons.¹⁰⁹ There also are problems of commensuration such as plague any distributive mode that takes heterogeneous material goods and services as distribuenda. Finally and quite relatedly, by dint (a) of its confronting all morally arbitrary determinants of wellbeing head-on, and (b) of personal traits such as innate talents’ and handicaps’ being *among* such determinants, (c) the position in order to be thoroughgoing requires some means of commensurating “personal” or “internal” – physiologic – resources and deficits along with “impersonal” or “external” – non-physiologic – such inputs to welfare functions.¹¹⁰ That isn’t easy.

These challenges, however, amount simply to partial discounts that must be applied to, or obstacles to full enjoyment of, the advantages that the opportunity-egalitarian position affords. For competing positions – naïve maximizing and

¹⁰⁹ See generally Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 74-75 (2005); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means*, 79 SO. CAL. L. REV. 45 (2005).

¹¹⁰ This is of course a challenge, not a fault. The fault lies, on this view, with views that do not even so much as notice that such “resources” are among those that clearly are morally arbitrary.

maximizing – refrain from so much as even attempting to *reap* those advantages. They remain in consequence not only practically, but indeed foundationally short of the ideal.

Failure by critics to see this, I think, stems from one remaining piece of the naïve aggregationist worldview that some opportunity-egalitarians seem at times inadvertently or unreflectively to have retained: This is the idea that the most familiar traditional early 20th Century formulations of welfare-economic efficiency are distributive-ethically cognizable. Once it is seen that they are not, it is readily seen that that the challenges just mentioned are nothing but limitations on the degree to which the opportunity-egalitarian ideal can be fully realized as a matter of practice, not on the fact that it strictly dominates, and indeed fully consummates the ambitions of, naïve maximizing and maximizing as a matter of theory. It also, relatedly, is readily seen in such case that any movement forward along either of two market-attribute dimensions that I discuss below at Part II.E yields unambiguously forward movement in the direction of fuller realization of the opportunity-egalitarian ideal, hence again in the direction of advance over naïve maximizing and maximizing.¹¹¹ More on this, again, below at Part II.E on distribution mechanisms.

Two final points should be made in connection with equalization as proposed distribution formula: First, as perhaps has been noticed, the opportunity-egalitarian principle straightforwardly coheres with the view of distributees as ethically equal, boundedly responsible agents. It likewise coheres with the view of appropriate distribuenda as material inputs to individual welfare that distributees themselves are in significant measure responsible for producing – i.e., as material opportunity. The same

¹¹¹ The latter ideal along with the two mentioned market-dimensions, that is to say, are ordinally equivalent. More on this in connection with distribution mechanisms *infra*, Part II.E.2.

cannot be said, clearly, for many other historically proposed – indeed “naïve” – egalitarian distribution formulae:

Some utilitarians, for example, historically have argued for wealth-equalization apart from any consideration of distributees’ ethical equality or responsibility for wealth- or welfare-production. They have so advocated simply on grounds that the conjecturally similar utility functions of, and in particular the diminishing marginal utility of wealth among, most persons would entail that rough equalization of holdings would maximize aggregate welfare. That view of course treats distributees effectively as patients – as ethically inert, “automatically” operating welfare manufactories into which wealth is fed rather like worms into chicks’ beaks. It also of course treats them as ethically unequal: They are treated as “equals” only in respect of a contingently identical feature (again, their utility functions); and the responsibly diligent among them, at least so long as they continue to act diligently, are expropriated on behalf of and conscripted for the purposes of the intentionally non-diligent. Finally, the view of course treats aggregate welfare, not wealth, as distributive focal point.¹¹² In short, then, it remains, as per Part II.D.1 above, a version of naïve maximization, just a contingently (by dint of a posited accidental feature of utility functions) income-equalizing one.

Non-utilitarian welfare-egalitarians are another group of equalizers who historically construed distributees effectively as patients and ethical non-equals. Advocates of such welfare-output-equality, in (a) acknowledging differing welfare functions across persons, and (b) advocating differential wealth-inputs in contemplation of that fact so as to equalize individual welfare-outputs, (c) effectively held distributees

¹¹² It is also, of course and in consequence, another case of cart’s being placed before horse. If wealth-equalizing is sought only by dint of its putative aggregate welfare-maximizing, it is sought in pursuit of a fetish.

unaccountable for their own welfare even in part, and in so doing (d) like utilitarian wealth-egalitarians conscripted the diligent to subsidize the non-diligent. But most such advocates also, it happens, at least were laudably upfront about why: They were determinists, pursuant to which view all persons are in effect patients – patients of God or of fate or of “nature” – through and through.¹¹³

There is of course a sense in which the last position just mentioned can be reconciled with – or, better, said to amount to a degenerate case of – the opportunity-egalitarian position: Were it somehow possible, for example, both intelligibly to maintain and empirically to establish that nobody “really” is responsible for anything, then welfare-egalitarianism would extensionally coincide with opportunity-egalitarianism: One would simply set E_i trivially at zero for all values of i in the formula set out above in this subsection in recognition of no one’s “actually” being responsible for anything, including for any portion of her holdings. There would be no ethical point in distinguishing between opportunity-input and welfare-output. I don’t see how the mentioned antecedent conditions, however, could ever be practically satisfied.

Counterpart remarks would presumably hold of welfare-maximizing utilitarianism: Were it plausible to hold persons responsible for everything rather than nothing – even the entireties of their utility functions¹¹⁴ – then we might set R_i trivially at zero for all values of i in the above-stated opportunity-egalitarian formula in recognition of that “fact.” Persons i would be treated as equals by dint of their each counting for one

¹¹³ I can’t claim fully to understand this position, of course. By its own criteria it would seem to be prompted in the saying by metaphysical necessity rather than by the proponent’s seeing of the truth. And we who hear the claim likewise will do what ever we do pursuant to the same occult metaphysical causes rather than to offered reasons. But I must leave this curious matter to one side with a shrug.

¹¹⁴ Demanding a Panglossian happy attitude, say, or Schopenhauerian resignation or Nietzschean *amor fati*.

and there *being* no ethically *exogenous* residuum, for which they were *not* responsible, to be spread objectionably *unequally*. Again there would be no more point in distinguishing between opportunity-input and welfare-output. Once again, however, the antecedent condition here – distributees’ being responsible for everything – looks impossible plausibly to maintain.¹¹⁵ We seem to be stuck with the cut – between chance and choice – the explicit recognizing of which is opportunity-egalitarianism’s theoretic blessing and (partly surmountable, we’ll see at II.E) pragmatic curse.

The final point to make in connection with equalization has to do with its relation to fairness. “Fairness,” on all semantically informed understandings of the word, connotes impartiality or even-handedness:¹¹⁶ Commonly proffered synonyms of “fair” include “equitable,” “just,” “impartial,” “unbiased,” “even-handed,” “treating like cases alike” and the like.¹¹⁷ To treat parties fairly is to treat them as equals for purposes of the treatment. It is, that is to say, to eliminate or neutralize inequities that are exogenous to the purposes of the treatment, and to retain or vindicate inequities that are endogenous to the purposes of the treatment – precisely in proportion to their endogeneity.

If the purpose of the treatment in a particular context, then, is to distribute in accordance with responsible human agency and nothing else – i.e., no morally arbitrary feature of the distributees – then fair treatment will be that which allocates value to distributees in proportion to the latter’s creditability for value-production.¹¹⁸ It will also, then, a fortiori be treatment that *equally* allocates value for the production of which *no*

¹¹⁵ Neither Schopenhauer nor Nietzsche managed sustainedly to pull it off, for example. And Pangloss of course was the fictitious butt of a widely appreciated joke.

¹¹⁶ It bears virtually no recognizable relation, incidentally, to Kaplow & Shavell’s proffered definition, more on which below at Part III.B.

¹¹⁷ See, e.g., *Black’s Law Dictionary* 595 (6th ed. 1990).

¹¹⁸ “In proportion to . . . creditability for value-production” of course requires, if it is not to be devoid of content, commensuration of disparate items produced and services rendered, then cardinal valuation of agents’ inputs along the resultant index. We’ll get to that infra, Part II.E.

one is responsible, since everyone is in effect equally responsible for that residuum. (Zero equals zero.) Fair allocations in short will be those which equalize holdings of such stuff as no one is responsible for, and both allow and indeed require holdings for which persons are in fact responsible to vary in proportion to their responsibility. If that is so, then the class of fair allocations would seem to be precisely the class of opportunity-egalitarian allocations.

4. Note on Veiled Choice Scenarios as Justification Strategies

Members of all three principal families of distribution formula candidate have been advocated by some on the basis of counterfactual choice scenarios involving identity uncertainty. Harsanyi, for example, once argued that average, then later that aggregate, utility-maximization would be selected as distributive touchstone from behind the veil.¹¹⁹ Richard Posner once argued for wealth-maximization along similar lines.¹²⁰ Rawls, we have noted, argued that primary goods maximin would be chosen. And Dworkin has in effect argued that physiological resource deficiencies should be compensated pursuant to “talent insurance” purchases hypothetically made in a contingent claims market purged of such asymmetrical information-apportionment as would generate market-destructive adverse selection or moral hazard.¹²¹

The attraction of veiled choice strategies is not difficult to grasp: As noted before in connection with Rawls, the veil itself – an imposed informational symmetry – is

¹¹⁹ See John Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434 (1953); John Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955). Harsanyi (along with many others) misinterpreted the significance of his proofs, which turn out to be nothing more than representation theorems concerning the cardinalizability of ordinal measures. See generally ROEMER, THEORIES, *supra* note 41 at 141-50.

¹²⁰ More on Posner’s argument *infra*, Part III.A.

¹²¹ See Ronald Dworkin, *What is Equality? Part I: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

intended to screen out what's thought to be morally arbitrary knowledge of self, hence prevent ethico-objectionably unequal treatment in the selection of distribution formulae. The *choice* made from behind the veil, for its part, can be thought ethically to endogenize the resultant formula precisely by dint of it apparently rendering the resultant formula responsibly – even if distantly or attenuatedly – chosen by agent-distribuees.¹²²

Such *problems* as might inhere in hypothetical veiled choice scenarios, then, arise in the main – though we'll see not exclusively – from their “*hypothetical*” status. And that there *are* problems so rooted ought probably to be clear if for no other reason than that such contrary distribution formulae as those just discussed all have been claimed to be derivable from them.

The problematicity of arguments from hypothetical veiled choice have not, I believe, received adequate systematic attention in the literature. Because I have treated them elsewhere,¹²³ however, and because in the next subsection I show means of by and large sidestepping them through a distribution mechanism that both affords and simulates much more actual choice than has hitherto been afforded, I shall be summary:

The first and most obvious difficulty facing veiled choice scenarios stems from the question of how one is actually to determine what actual agents “would” do or choose. There seem many bases upon which one might, armchair fashion, attribute multiple contrary choices. And consensus on the matter of a satisfactory theory of choice – rational or otherwise, and relatedly even as to whether such theories ought be conceived as descriptive or prescriptive – has been unsurprisingly elusive.

¹²² More on what I take for the significance of that attenuation just below.

¹²³ See Robert Hockett, *Responsibility, Preference Under Identity Uncertainty, and Counterfactual Choice* (under revision for J. PHIL., 2006).

A second and related difficulty is rooted in the question: If we are not actually *ascertaining*, but in effect stipulating, what rational agents would do – in effect thereby defining “rational agency” – what is the ethical status of the stipulation, and how is it to be justified? Should people not be thought ethically free to be “irrational” by such lights? And if we believe that they should be though free in this way, is it not incoherent to hold them responsible for choices that we think that they “would” have made on grounds of such species of rationality? The stakes are of course high, involving as they do the justification of holdings or the prescription of redistributions, so a particularly convincing justification would seem to be required.

A third and again related difficulty stems from the role that would have to be played by *risk-taste* in any veiled choice scenario. Because choice under uncertainty inherently imports risk-taste into choice-making via the shape and gradient of each chooser’s preference schedule, and since risk-taste in turn is thought not to be subject to rational critique – it’s simply a taste – it is difficult to see how a stipulative definition of rational choice could ever *not* be inherently contestable. And all the while the alternative – likely actual choice – is both empirically investigable and yet left uninvestigated.

A fourth, yet again related difficulty faced by hypothetical veiled choice scenarios has to do with the truth-valuation of counterfactual claims. Many if not most philosophical logicians believe counterfactuals to be of *indeterminate* truth value – neither true nor false.¹²⁴ If that’s appropriate, then again it is particularly troubling, in view of the stakes, to hinge prescriptive distribution formulae upon them. They’re at least as contestable as are rational choice stipulations.

¹²⁴ See Robert Hockett, *Primary Goods, Interpersonal Comparisons & Nonstandard Logics* (under revision for ECON. & PHIL, 2006).

A fifth difficulty facing hypothetical choice stems from the question whether hypothetical choice-imputations, even *if* possessed of determinate truth value and determined with reasonable confidence, constitute adequate grounds for attributing *actual responsibility*. The choices, after all, have not actually been made. And we do not tend in other settings to reward or punish people for what we (even reasonably) suspect that they “would” do under circumstances that do not actually obtain.¹²⁵

Finally sixth, even were there not the previous five cognate difficulties, there seems something troubling, or at any rate needlessly suboptimal, about letting all distribution lifelong ride entirely upon one macro-choice made as it were before life commences, leaving no further space for later, more micro-like choices to affect distribution. This seems particularly so if the principles thought likely or properly to *animate* the macro-choice – principles that give expression to ethical equality and boundedly responsible agency – are themselves more directly, more proximately, more fine-grainedly implicated and ultimately therefore more fully vindicable at the “micro level,” on a transaction-by-transaction basis.

Call this a “principle of proximity,” “regret-avoidance” or, perhaps, “formula-choice subsidiarity”: If distribution is to ride upon ethical equality and bounded responsibility, it is tempting to stipulate that the latter should be permitted to operate as immediately responsively to the transaction at hand as is practicable and not subversive of the principle of equal boundedly responsible agency itself. Even if choice behind the veil is choice as to something as basic as Rawlsian “basic structure,” then, let the basic

¹²⁵ Objections to “entrapment” in the criminal law context seem to be rooted in some such intuition as this. Indeed, possibly there are quite many people who might now be imprisoned were we to try persons on the basis of criminal actions that we believe with reasonable confidence that they “would” take if presented with opportune circumstances. And there are others whom we might award prizes on such grounds.

structure *itself* (or rebuttably presume that choosers would let that structure) afford ongoing micro-linkage between diachronically extended distribution-affecting action on the one hand, dynamic and ever-fluxum resultant distribution on the other.¹²⁶ That, surely, is at least where the presumption should lie.

I see no easy way to address such objections to veiled choice scenarios as these. The best we can do, I suspect, is (a) to afford as much scope for ongoing actual choice as possible, which scope we shall find at Part II.E to be far broader in potential than in realization thus far, so as to sidestep the problems; and (b) in so far as resort to hypothetical choice must be had in order to afford space to responsibility, to ground imputations as closely as possible in actual discreet choice, by extrapolating from far more empirical evidence and simulated choice than theorists thus far have bothered to look for. I'll sketch how this might be done at Part II.E below, on distribution mechanisms. Not incidentally, that sketch will show not only how hypothetical choice might be systematically supplanted by more actual choice: I also will show how, in consequence, the opportunity-egalitarian distribution formula that supplants naïve maximizing and maximining themselves can be gradually operationalized.

5. Note on the Interformulability of Maximizing and Equalizing Formulae

It will prove salutary, particularly in connection with the discussion below at Parts II.E and 4, to draw out a bit more an ideographical fact implicit in our treatment of distribution formulae in the foregoing subsections: It is that any distribution formula that

¹²⁶ There seems a deep link between violation of this principle on the one hand, naïve maximizing's and maximining's decoupling from ethical equality and responsibility as discussed above on the other. It is not accidental that the veiled choice scenario that is least decoupled from thorough-going ethical equality and responsibility is Dworkin's, *supra* note 115, which involves hypothetical insurance purchases in contemplation of specific risks.

is formulated as a maximization norm can be reformulated as an equalization norm, and vice versa. This was perhaps most obvious in connection with classical utilitarianism – naïve welfare-maximization – as elaborated above. For the injunction to “maximize utilities summed over persons” is readily re-renderable as “count each person’s unweighted utility function equally – i.e., precisely once – in deriving the sum that’s to be maximized.” Indeed it’s precisely that fact that has misleadingly underwritten the ultimately spurious claim made by some utilitarians to be egalitarians.

It is the rejoinder to that just-mentioned spurious claim, of course, that indicates the means by which to convert egalitarian distribution formulae into maximization formulae: Simply redefine the summand that’s summed into the maximized aggregate. For the objection to utilitarians’ claim to be ethical egalitarians, recall, is that the summand which they treat equally by not weighting – viz., distributees’ at least partly genetically determined utility functions – is at least partly morally arbitrary, a gift of chance, hence at least partly fetishist. Kaldor-Hicksian wealth-maximizers, we saw, lay themselves open to similar objections on ground of the moral arbitrariness of the innate talent and birth-into-wealth components of personal wealth- functions.

Those observations point to the obvious method by which to derive a more ethically satisfactory – i.e., non-naïve, non-fetishist – maximization formula: First, define the nonfetishist summand – the characteristic with which it is *not* ethically objectionable to identify a distributee in the way that it is to identify her with her utility function, her nose or her forehead: Delimit, that is, the characteristic in virtue of which it is *not* ethically-unequally-treating to treat the distributee, in summing, unweightedly “for one.” *Then* by all means *do* count each person for one – *ethically* for one – as

represented by that ethically satisfactory summand, and “maximize” the now ethically cognizable sum.

What is that summand? Well, in view of the observations made in the preceding subsections, the ethically satisfactory, boundedly-responsible-agency-respecting summand would seem to be what we’ve called “ethically cognizable,” i.e., “non-morally-arbitrary,” welfare. It is the welfare that agents – including ourselves, who are acting as agents even in deliberating over the appropriate distribution formula – play a critical role in producing, *out of* the exogenous *opportunities* they – we – are given. That welfare-output is maximized, as might be preliminarily gleaned from the foregoing and as is more painstakingly shown below at Part II.E, precisely by equalizing exogenous welfare-inputs – material opportunity – over distributees.

Formulaically, then, we would convert the opportunity-egalitarian formula supplied at II.D.3 into a maximization formula of the form supplied at II.D.1 simply by more carefully specifying what the subscript “*i*” in the latter formula indexes by. Rather than indexing by distributee – or, what is the same thing, by each distributee’s undifferentiated (as between morally arbitrary and non-morally-arbitrary) welfare – “*i*” would index by each distributee’s ethically cognizable welfare. In effect, “*i*” in the newly interpreted II.D.1 maximization formula would designate what “*Ei*” in the II.D.3 opportunity-equalization formula was said to designate. We might indeed even simply combine formulae, yielding: $\text{Max} \sum_{1n} W_{Ei} \ \& \ \forall i: \text{Eq } Ri.$ ¹²⁷ But strictly speaking this would be redundant, since by virtue of the definitions of “ethically cognizable welfare,” “*Ei*” and “*Ri*,” each conjunct entails the other. That is: $\text{Max} \sum_{1n} W_{Ei} \equiv \forall i: \text{Eq } Ri.$ Ethically

¹²⁷ Here read “Eq” to mandate equalizing as “Max” mandates maximizing.

cognizable welfare just is that which is maximized when ethically exogenous material opportunity is equalized over individual welfare-producers – boundedly responsible agents.¹²⁸ That raises an important ideographical-cum-operational point, having to do with the optimal mode by which to formulate distribution formulae:

Because the left-hand side of each formulae just above “takes care of itself” just so long as the right hand side is satisfied, there is, operationally speaking, seldom any reason – apart, perhaps, from theoretic perspicuity – to bother with the former side – the maximization component of these formulae – at all. If, for example, we are simply instructing an administrator charged with implementing distribution policy as to what she is to do, it suffices to instruct her simply to follow the rule stated in the right-hand side of the formulae – the equalization side. Then the left-hand side, which no administrator can *directly* satisfy in any event but rather can satisfy only indirectly, through satisfaction of the right-hand side, will quite “automatically” be satisfied. Ethically cognizable maximization, that is to say, will occur simply as a matter of course so long as ethically exogenous material opportunity endowments are equalized. And this of course is so even though – indeed *because* – the equalization rendition and the maximization rendition of the distribution formula set out above are extensionally equivalent, mandating precisely the same distributive consequences.

This latter point dovetails into yet another point, this one now more theoretical than operational: There is much avoidable confusion in the theoretical literature over a supposed opposition between the “consequentialist” nature of maximizing mandates on the one hand, the “deontological” nature of “fairness” – i.e., equalizing – mandates on the

¹²⁸ This presumably is apparent already, but will become yet more so in the next several paragraphs, and when we turn to elaboration of the optimal opportunity-egalitarian distribution mechanism below at Part II.E.2.

other.¹²⁹ That this is in fact a confusion can be readily shown, and its source now readily diagnosed, by reference to the aforementioned extensional equivalence of always-interformulable maximizing and equalizing formulae on the one hand, the operational or “pragmatic” difference found nevertheless between them on the other:

First note that the “ethically cognizable maximization” or, equivalently, exogenous-opportunity-equalization to which I’ve referred in the foregoing paragraphs differs from *naïve* forms of maximizing, maximining and indeed equalizing *only* in respect of the *shape of the distribution formula* – or equivalently, the shape of the maximizing social welfare functional – that it prescribes.¹³⁰ It does not, of itself, entail anything different than do those other formulae from a “how to” point of view. *All* prescribed distribution formulae or social welfare functionals – i.e., maximization formulae – as an operational matter must in effect prescribe allocations of resources, wealth, or what I am calling “material opportunity,” as inputs, with a view to resultant welfare-outputs.¹³¹ The latter, that is, are the only literal, or “direct” distribuenda. For of course welfare, as noted above at 3.2 and 3.3, cannot be directly or “literally” distributed at all.¹³² It can only result from distribution of something more material in nature. The latter – what *can* be literally or “directly” distributed – for its part, typically *will* be

¹²⁹ A particularly egregious case is discussed *infra*, Part III.B.

¹³⁰ Of course it differs in respect of the considerations that have gone into the determination of that shape as well, but that should go without saying. Any difference of shape is presumably the result of differing considerations – differing judgments of value – even if in some cases, such as utilitarianism and Kaldor-Hicksian “wealth-maximization,” for example, the “consideration” involved is better described as inconsideration or insufficient attention.

¹³¹ It would thus be no more than a case of confusion to suggest that opportunity-equalizers were “unconcerned with welfare,” or were “nonconsequentialist,” in any intelligible way that welfare-maximizers are not. More on this *infra*, Part III.B.

¹³² Nor, as we noted above at Part II.C, does it seem directly measurable. But that is a different matter from that which I’m presently considering, though it too, like the present matter, will prove pertinent when we turn to mechanisms at Part II.E below.

distributed only insofar as it is wanted, hence is welfare-producing, hence is cognizable as a veritable “resource.”

Where distribution formulae or social welfare functionals actually differ, then, apart from the ethical considerations or inconsideration that prompt or underwrite their shapes, is only in respect of the *patterns* pursuant to which they prescribe distribution of the resource inputs that they do, and, in consequence, in respect of resultant patterns of distributed welfare output.¹³³ And by parity, all such formulae or functionals, because indeed they do in fact mandate patterns whether foreseen and intended or not – if there’s distribution, there’s a pattern of distribution, just as where there are objects there are contours of objects – to prescribe distributive action pursuant to a formula or functional is eo ipso to commit oneself to a pattern. It is to commit oneself to the proposition that that pattern is the *right* one.

Lest it be wondered why I bother to emphasize this point, as noted above we shall see at Part 4.2 in particular that some authors appear erroneously to have thought that egalitarian formulae are “non-consequentialist.” What is more and relatedly, some of the same authors appear in effect to suppose, while not recognizing the fact or the incoherence to which it commits them, that it is possible analytically to distinguish between prescribing satisfaction of a social welfare functional on the one hand, and prescribing conformity to a distribution principle – a pattern according to which benefits and/or burdens are meted out – on the other.

¹³³ This point requires emphasis because, as we’ll see at Part III.B in particular, some authors appear erroneously to have thought, perhaps owing to egalitarian distribution formulae’s having been formulated more along II.D.3 lines addressed directly to inputs rather than along II.D.1 lines, which address inputs less directly via reference to outputs, that egalitarian formulae are “non-consequentialist.”

This is of course an altogether hapless misunderstanding, as is clear once we see, as just emphasized, both: First, that equalization and maximization formulae are interformulable. And second, that the only real difference – apart, per our operationally oriented observations above, from perspicuity to the administrator charged with their execution – between the more familiar nominally equalizing and nominally maximizing formulae historically on offer is one of recommended pattern – and hence, of course quite trivially, of the particular value commitments that determine and thus are implicated by the patterns as well.

All distribution formulae and, what is the same thing, social welfare functionals recommend particular patterns of inputs – hence of inputting action – in contemplation of distributive output consequences. And hence all are both “consequentialist” in their mandating distributive outputs, and “deontological” in their prescribing – consciously or otherwise – that we or our agents do so pursuant to patterns. For the latter, of course, must be justified: *Reasons* must be given for why we are to conform to *these* patterns in producing distributive consequences. And those reasons accordingly will have to appeal to something anterior to the consequences themselves, something that tells us *which* consequences to *produce*.

6. Distributive Ethics as Isoquants

There is a sense in which the observations just made as to the interformulability of distribution formulae might be generalized: We can generalize the intersubstitutability of extensionally equivalent output-maximization and input-equalization formulae just described to *multiple* possible vectors of “inputs” to our invariant-output, multivariate “distributive-input-function” – our distributive ethic. For it happens that we can readily

fill our grammar-opened variables with differing sets of valuations and still yield distribution maxims that, though differently articulated, are nonetheless extensionally equivalent – just like interformulable equalization and maximization formulae. That fact shows both (a) how deeply interconnected *all* of what I have been calling the distributive grammar-opened variables are, and (b) how it might be that we most of us share a single distributive ethic “deep down” even while sometimes appearing to disagree owing to differences of articulation.

I think the most straightforward way to make the point will be to limit ourselves to variable interplay between two of the variables already discussed – say *distribuenda* and distribution formulae, the last two we have treated – while holding others – in particular, the *distribuee* variable which we’ve also discussed – constant.¹³⁴ We’ll assume, then, a hypothetical distribution scenario and our likely shared intuition as to what distribution would be proper. Then we’ll observe how readily we can formulate a mandate prescribing that correct distribution in varying ways. Each such “way” involves a different characterization of the *distribuendum*, accompanied in turn by a “compensatingly varying” characterization of the distribution formula. The combined terms in each case yield the same distributive output.

Suppose, then, two *distribuees*. Vital Hamilton’s born vigorous and robust. Sickly Jefferson’s born weak and infirm. Our world is such that Hamilton will fare well if but left on his own.¹³⁵ In the same world Jefferson will fare poorly unless aided along. That’s the case even though both men intend to – and let us say do – labor hard. They

¹³⁴ Concentrating on the interplay between these two variables in particular will prove helpful below at Part III.B, when we turn to the fairness “versus” welfare “dispute.”

¹³⁵ “Our world” here accordingly includes a particular valuation of the distribution mechanism variable to be discussed more fully *infra*, Part II.E – the rough-hewn, composite mechanism by which distribution is effected in most modern political-economies.

labor to the best of their abilities, in fact. Now we, the polity of which Jefferson and Hamilton are members, have some decisions to make. Among those decisions is who should receive what, according to what principles and what resultant distribution formula that gives precise expression to those principles.¹³⁶ In deciding such matters, what should we do about Jefferson and Hamilton?

Say that we respect our citizenry – including ourselves – as life-planning agents who formulate systems of interconnecting aims, and pursue these in constructing successful and meaningful lives. We respect them, that is, pursuant to the now-dominant view of distributees discussed above at Part 3.4, a view to which our American polity in particular appears to have committed itself from its earliest days: We view our fellows as “pursuing happiness,” as they define it and as they see fit. And we are committed to honoring and vindicating that humanity-defining feature of them, hence to honoring and vindicating the sphere of autonomy and access to resources which realization of that feature entails.

We also recognize, however, that the aforementioned happiness-pursuits can often require employment of the same, scarce, resources: Spheres of autonomy can collide. We accordingly require means of determining the appropriate *boundaries* of “spheres” – means of demarcating between “internality” and “externality” in an ethically satisfactory way. What means are at hand? Well, we also have committed ourselves from the very birth of our political community to the proposition that “all citizens are created equal.” We didn’t mean that physically, of course: We’re not deluded; and besides, just look at Jefferson and Hamilton. What did we mean, then? We meant *ethically* equal: Our

¹³⁶ I could say “and mechanisms,” but do not because discussion of mechanisms is sufficiently complex as to require deferment to fuller, rather more elaborate discussion in the subsequent subsection.

fellows are equally deserving, equally entitled, equally rights-endowed. At least they are so prior to acting, prior to acting in ways for which they are at least partly responsible – acting in such ways, that is, as give rise to differential desert.

These commitments of course amount to constraints upon how we value the variables that all jointly constitute our distributive norms. Indeed as we saw above at Part II.D.3, abandoning our commitment to the responsible agency construal of distributees as just elaborated would amount to setting E_i in the opportunity-egalitarian distribution formula trivially at 0, such that opportunity-egalitarianism would collapse into welfare-egalitarianism. But we're not abandoning such commitments here, recall; we are holding them constant, in order to fix attention on the interplay between but two variables at a time. In that light, then, how might the considerations just run-through now contour the way that we address our question – the question as to what Hamilton and Jefferson ought to receive (distribuenda), and pursuant to what pattern (distribution formula), as they plan and live their lives?¹³⁷

It seems pretty clear that the considerations I've mentioned recommend we distribute to Hamilton and Jefferson in an opportunity-egalitarian manner. But now note how easy it is to prescribe this through *varying* characterizations of the distribuendum on the one hand, *compensatingly* varying formulations of the distribution formula on the other:¹³⁸

One way to formulate the distributive prescription would be to say, “let dollars be distributed to each according to his marginal product, but redistribute dollars from

¹³⁷ I don't mean to suggest that we plan all at once, then live out our plans. Planning and living, of course, interact over time.

¹³⁸ That means that the “the opportunity-egalitarian manner,” like other manners as it happens, amounts to an isoquant whose vector components inter-vary.

Hamilton to Jefferson in half of the amount necessary to remedy the latter's infirmity."¹³⁹
But another way roughly to formulate essentially the same prescription would be to say,
"distribute so as to equalize Hamilton's and Jefferson's exogenously given physical
capabilities."¹⁴⁰

The first formulation names money as noncomplex distribuendum, and a more complex, two-part rule requiring two calculations as operational-step-specifying distribution formula: first distribute per marginal product, then redistribute to compensate handicap.¹⁴¹ The formula's opportunity-egalitarian credentials are left latent in the words "half" – equal shouldering by two distributees – and "remedy" – remedying opportunity's contrary, infirmity. The second formulation renders its opportunity-egalitarian character more patent by recharacterizing the distribuendum – as internally complex "capability," a form of material opportunity which, like the distribution formula in the previous formulation, will require two calculations to determine – and then, via a noncomplex distribution formula, straightforwardly mandating "equalization" of that. Both formulations, of course, via their differently placed complexities – the first in the distribution formula, the second in the distribuendum – implicate measurement requirements (in particular, commensuration requirements) of the sort discussed above at

¹³⁹ I assume for simplicity's sake that the handicap is fully remediable. Hamilton pays half of the cost, of course, because that is the compensation that renders the handicap equally borne. I also assume, of course, in saying "let dollars be distributed ... according to ... marginal product," that we have either means of doing this, or reason to be confident that our economy itself "automatically" does this. More on that matter again *infra*, as we turn to distribution mechanisms at Part II.E.

¹⁴⁰ I make the same assumption here as recorded in the previous footnote. The term "capability" here is commonly associated with Sen. See, e.g., Sen, *supra* note 43.

¹⁴¹ Of course the "steps" needn't be temporally separated. The point is merely that there are two calculations to be made.

3.2. But they do so in the same way, so we needn't fret over them for present purposes.¹⁴²

Now slightly alter the story: Jefferson and Hamilton are as previously described, but Jefferson has exacerbated his infirmity by contracting syphilis while in Paris. He has managed to do the latter by engaging in behavior he knew would expose him to the risk. We for our part are still just as opportunity-egalitarian as I have described. That means we recognize that Jefferson still is entitled to assistance in respect of that portion of the dollar-consequences of his infirmity traceable to his genetic endowment. But the same commitment also means we recognize that Jefferson is not entitled to our assistance – the mandated assistance of all of us, the polity – in respect of the portion traceable to his syphilis. For to mandate his compensation for that would be to treat his fellow citizens as ethically *less* than his equals, by conscripting them into the project of subsidizing his voluntarily undertaken risk.¹⁴³

How to describe the distribution we'll favor in this circumstance? At least two means quite immediately present themselves.¹⁴⁴ We can do so, for example, either by slightly varying the first formulation proposed above, or by simply repeating the second such formulation. We say, that is, either: "Let dollars be distributed to each according to his marginal product, but redistribute dollars from Hamilton to Jefferson in half of the amount necessary to remedy such of the latter's infirmity as is not accounted for by his syphilis." Or, as before: "Distribute so as to equalize Hamilton's and Jefferson's exogenously given physical capabilities," perhaps emphasizing the "exogenously given"

¹⁴² We return to them, however, below at Part II.E.

¹⁴³ It should go without saying that this is not say that Jefferson's plight cannot or should not elicit voluntarily provided charitable assistance. I speak here only to what is distributive-ethically required of all of us at a minimum.

¹⁴⁴ There are of course others – many others.

qualifier in this case. The first formulation again specifies dollars as simple distribuendum, but now mandates their spread pursuant to a slightly more complex formula requiring the performance of three calculations rather than two as before. The second formulation again specifies simple equalization of a more internally complex, non-dollar distribuendum as before, which in this case will, like the distribution formula in the alternative formulation, require performance of three calculations. But again both mandates mandate the same distribution.

The message is plain even if curiously oft-overlooked: Just as equalization formulae and maximization formulae are interformulable simply through variable definings of summands and equalisands, so is a given distributive prescription varyingly formulable simply by variable formulations respectively designating distribuenda and distribution formula. And those variations in turn, as we saw, were themselves constrained by the way we construe our distributees – a construal I held constant – viz., as boundedly responsible agents.¹⁴⁵ Had the “boundedness” qualifier been dropped, we’d have held Hamilton and Jefferson equally responsible for all aspects of their own faring, and our wording in designating ditribuenda and distribution formula alike would have changed accordingly. Had the “responsible agency” portion of the distributee characterization been dropped, there’d have been parallel changes.

All of this tends to corroborate something that has been suggested throughout the presentation to now: Namely, that we cannot know *what* actually to make of a particular distributive prescription until *all* of its distributive valence-grammar-opened variables have been specified. It also entails a corollary: Namely, that there is inevitably some degree of arbitrariness in the specification of *any* one feature of a distributive

¹⁴⁵ Jefferson, of course, is here bounded relative to Hamilton by his sickly birth.

prescription, until *others* of its features are specified. They must all of them be ethically assessed, then, by reference to one another. And full sets of them – full output vectors – must in turn be assessed by reference to their distributive consequences and the full set of values by reference to which we adjudge such consequences. I think that failure to bear this in mind accounts both for the erroneous perception by ethical theorists sometimes that they differ from one another in respect of distributive ethics simply by dint of their differing as to how a particular variable-filling value should be construed, and for confusions in WE and LE of the sort I’ll consider below at Part 4.

E. Distribution Mechanisms

I noted at the outset of Part II.D that “to distribute” is subject to two forms of adverbial modification – by “ought” adverbs, which implicate distribution formulae, and by “ought”-limiting “can” adverbs, which implicate feasible distribution mechanisms. I now turn to the latter.

One can of course imagine multiple means by which to effect distributions. These can in turn be specified at varying “levels” of abstraction and generality, running from concretely detailed description of actually instantiated institutions, to formally abstract and variably instantiable axiomatic mechanism theory. Yet most normative theorists whose prescriptions either forthrightly amount to or simply implicate distributive assessment have been by and large quiet about the subject. That’s somewhat regrettable. For not only does “can” limit “ought,” as is commonly recognized: On a perhaps happier or “more positive” note, *some* “can”s render *some* “ought”s particularly – indeed affirmatively – attractive.

I think that's the case here. One distribution mechanism appears to fit certain more or less independently plausible fillings of our distributor, distribuendum, distribuee and distribution formula variables quite gracefully and, what is more, uniquely. That renders those fillings more attractive on feasibility grounds, of course. But it seems to do more than that: The process of actually schematizing and justifying this mechanism appears further to illuminate even those fillings' independent attractiveness. So, I believe, we shall see.

I'll begin, then, by first briefly characterizing the rough-hewn, composite mechanism-type that looks to be taken for granted as background condition in most cases of distributive advocacy and assessment. That mechanism amounts to a vaguely specified *mélange* of decentralized market allocation, partly centralized private law rights-vindication by courts, and more fully centralized ad hoc legislative intervention. Following brief discussion of the prescriptive gaps lying between this composite and most of the distributive theories that appear to assume it, I then seek to specify, in a bit more detail, the one mechanism that seems truly to cohere with *particular* closeness to a particular vector of distribution-variable-filling values.

The mechanism I'll schematize is readily seen to be a refinement of the less fully specified mechanism implicitly advocated in the past by theorists writing before full articulation of the opportunity-egalitarian ideal discussed above. I'll argue that this is no accident. For opportunity-egalitarianism itself seems a refinement of the earlier views. It thus stands to reason that its institutional expression amounts in its specification to a refinement of the earlier assumed composite.

The opportunity-egalitarian resonance and embodiment, moreover, I suspect is why we in the industrial democracies have arranged our distribution regimes in a way that seems implicitly meant to approximate the mechanism I'll specify: Once again, as in the foregoing subsections, it rather looks as though all of us, fully consciously and articulately or otherwise, are opportunity-egalitarians "deep down."

1. Mechanisms, Laws, Governments

First, then, the rough-hewn composite to which I've referred: Most who speak normatively in respect of effectively distributive questions appear to take the following for granted: First, that most of the material things that matter to people are distributed by sundry forms of private bequest and exchange. Second, that the latter are predicated upon antecedently defined private law rights sounding in civil obligation – property, contract and tort – which are vindicable in courts. And third, that these rights in turn are subject to occasional piecemeal or in some cases wholesale amendment or alteration by centralized legislative action. But things seldom are more fine-grained than this.

What ever the causes of that lack of detail,¹⁴⁶ the consequences of mechanism-nonspecification are often quite vitiating, as I'll indicate presently. And not simply implementation-wise vitiating, but indeed fully thought- and theory-vitiating as well. For distributive-theory-building just is, in its actuating ambition, institution-designing. Without imagining in some degree of detail what the "outward expression" of theory would look like – how the right world would operate – our theorizing itself is stopped-up, so to speak. Critical particulars go unspecified, intelligibility-despoiling gaps are left open, and prescriptions accordingly are left indeterminate – not just pragmatically so, but

¹⁴⁶ I hazard some speculative explanations in Hockett, *supra* note 12.

indeed cognitively so. It isn't just a matter of the engine's running warmly and the clutch's not being engaged; it's more like attempting to think without language: Thought itself is left lumpy, ill-formed, inchoate. The full content's not there.¹⁴⁷

We find this, I think, in quite nearly all of the leading distributive-ethical theories currently on offer. What's missing in these theories is brought to light most starkly precisely when we ask what it would be to instantiate them. We can see this quite readily by briefly considering the best known such theories.

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

Consider first aggregative utilitarianism – naïve welfare maximization – perhaps the most venerable post-18th century political-ethical tradition: Collecting the information assembled in the previous several subsections, we know that a utilitarian polity will wish to sum its patient-distribuees' welfare outputs and maximize the resultant sum. It will, moreover, aim to do so “by any means necessary.” For the utility aggregate is the sole normative touchstone guiding utilitarian policy, both as a matter of personal and of political morality.¹⁴⁸

But then in light of (a) the earlier noted difficulties that afflict direct welfare-measurement, it is (b) generally quite indeterminate what means *would* suffice or be necessary. This in turn is the case *while* nonetheless (c) a high degree of centralized government action will be viewed as ethically warranted in principle, indeed even required. For it will be thought both (i) necessary for the regular collection of utility data

¹⁴⁷ Cognate concerns animate Joseph Carens's and Robert Goodin's interesting work on institutional design. See, e.g., JOSEPH CARENS, *EQUALITY, EFFICIENCY AND THE MARKET* (1990); ROBERT GOODIN, *THE THEORY OF INSTITUTIONAL DESIGN* (1998).

¹⁴⁸ There are of course various subspecies of “constrained” utilitarianism. But the constraints in such cases are simply ad hoc and arbitrary unless rooted in a theory of antecedently held rights which itself receives simpler, fuller and more direct expression in opportunity-egalitarianism, as discussed above.

and the regular redistribution of holdings in order to maintain a maximal height on the utility index; and (ii) unconstrained by any antecedently defined rights held by ethically equal agent-citizens.¹⁴⁹

What is one to make of so disjointed and indeed incoherent a picture? A government highly – indeed intrusively – empowered in principle, that for theory-grounded reasons nonetheless literally never could actually perform the function upon which that surprising degree of power is predicated: All dressed up with no place to go.

In view of such difficulties as these, which are not merely implementary but foundational, utilitarianism looks to be a nonstarter as complete and determinate distributive-ethical prescriptions go. Its uninstitutability does not direct us to a “second best.” Rather, the *reasons* for its uninstitutability reveal a sense in which it is not itself even a merely accidentally unimplementable “first best” – or even so much as a specified “good”: It is prescriptively sterile or stillborn au fond, while its advocates’ leaving the mechanism variable unvalued has served to conceal the fact.¹⁵⁰

b. More Tastefully Dressed, Yet Still No Destination: Rawlsian Justice

Observations reminiscent of those made in connection with utilitarianism, I think, hold of Rawlsian justice theory as well. Rawls for his part was refreshingly candid about it: He admitted that his concern was solely with what he called “the basic structure” of a just society. The problem, I fear, is that the structure he appears to have had in mind is *so*

¹⁴⁹ And this is of course not even the mention the problems likely to be occasioned by redistribution’s effects to effort-expense hence goods and services production hence ultimately the size of the utility aggregate itself. In view of utility’s functioning as a fetishized maximandum, incidentally, the likely need of centralized government action should not be surprising. In effect, the utility aggregate here amounts to a contemporary analogue to the pyramids of Egypt and the ziggurats of Mesopotamia and Mesoamerica. Societies organized around such monistic and inhuman pursuits have historically quite typically been both theocratic and autocratic.

¹⁵⁰ And of course that is not even to mention the unsatisfactoriness of the values that it does supply for some of the variables, as discussed in the previous portions of Part II.

basic that it's left quite unclear what Rawlsian principles have to say about matters as "basic" as the society's constitutional order itself, let alone subsequent legislation and private law doctrine.

Rawls left such matters as these for what he called "later stages" of polity-constituting, with which his work was said not to be immediately concerned. There seems to have been a rough expectation that there would be property rights and market exchange.¹⁵¹ But Rawls averred that his principles would be realizable in market- and non-market socialist societies as well.¹⁵² It is accordingly undetermined how Rawls's principles are so much as even to begin to be operationalized. That raises a worry, of course, that the principles as articulated impart no determinate prescriptive information – a worry that already arose earlier in connection with the indeterminacy of "the worst off" in Rawls's specification of what he took for the correct distribution formula.

So again we find the lack of attention paid questions of mechanism not simply leaving implementary and "second best" questions unanswered, but allowing even the matter of "first bests" to remain undetectedly underspecified. One is left wondering whether there's any "here" here. The theory so underdetermines its own implementation that we don't know quite what to make of the theory itself. What is it telling us if it is equally realizable in any number of polities with radically divergent arrangements of property and other entitlements?

Rawls's implicit "structural" metaphor of tree and branches, or skeleton and organs is ultimately unsuited, I think, to distributive-ethical theory – which is a theory, after all, governing day-to-day material relations among compatriots. If for no other

¹⁵¹ See RAWLS, THEORY, supra note 43 at 52.

¹⁵² Id. at 55.

reason than that those relations are effectively altered by countless transactions conducted each hour, we want something more like fractal geometry than plate tectonics.¹⁵³ Absent some view of what counts as instantiation, we don't really know what is being prescribed.

**c. Locally Determinate but Globally Indeterminate Prescription:
“Normative Law & Economics”**

Apart from the mechanism I schematize in the following subsection, the only serious mechanism-grappling that seems to be found in the normative distribution-implicative literature is that done by LE, and a very few WE, practitioners. WE practitioners of course have familiarly concerned themselves with the aggregate or quasi-aggregate welfare or wealth effects likely to be wrought by various market, regulatory and tax arrangements.¹⁵⁴ I'll have more to say about them – in particular, about the consequences and ethical intelligibility of their attenuated Paretian version of aggregation in evaluating alternative mechanism-options – below at II.E.2.

Economists of law, for their parts, often if not indeed generally Kaldor-Hicksian wealth-maximizers in orientation, typically attend carefully to micro-institutional detail. Indeed their bailiwick is precisely the wealth-aggregate effects likely to be wrought by alternative choices available at what probably is the simplest unit of institutional structure there is – the rule.¹⁵⁵ Yet by what might at first seem a quite curious irony, this is precisely their undoing from a distributive mechanism point of view.¹⁵⁶ It turns out

¹⁵³ See supra Part II.D.4, on what I called the principle of “proximity.”

¹⁵⁴ More on “quasi-aggregation” infra, Part II.E.2.

¹⁵⁵ One might credit the transaction as simplest institutional unit, but I think that this would come down to crediting rules. Because transactions are rule-structured – rules functioning in effect as their patterning “software” – and because institutions in turn are best viewed as the patterns that contour practices such as transactions, pattern-prescribing rules seem more appropriately regarded as the simplest institution-constitutive units.

¹⁵⁶ The previous subsection on maximizing distribution formulae of course highlighted additional downfalls from the point of view of the formula variable.

actually to be less ironic than at first it appears, however. For it ultimately stems from a gap between macro-objective and micro-detail akin to that noted in Rawls.¹⁵⁷

The foundational mechanism problem for mainstream LE takes root in a fallacy of composition: From the fact that each of n rules $R_{a/1} \dots R_{a/n}$ tends, in the confines of its particular domain $1, 2, \dots$ or n and in comparison to its envisaged competitors a, b, \dots and m in that domain to be wealth-maximizing, it does not follow that the full vector of rules $R_{a/1} \dots R_{a/n}$ will be wealth-maximizing as compared, say, to some other vector $R_{b/1} \dots R_{b/n}$ which might be envisaged only against a fuller institutional backdrop that is neither in view nor considered when all that is being asked is which of $R_{a/1}, R_{b/1}, \dots R_{m/1}$ is wealth-maximizing in domain 1 considered in isolation. Relatedly, choices in the domains $1 \dots n$ are of course unlikely to be linearly independent, as any student of general equilibrium theory – or indeed of “the seamless web” that is “the law” – will recognize.¹⁵⁸ It will accordingly again be illicit to conclude from $R_{a/1}$ ’s dominating $R_{b/1}$ in domain 1 that the full vector $R_{a/1} \dots R_{a/n}$ dominates $R_{b/1} \dots R_{b/n}$, let alone any other available vectors $R_{m/n}$.

There is, then, a foundational gap in mainline LE between normative ideal – wealth-maximization – in macro, and mechanism-evaluative practice – rule-evaluation – in micro. And that gap, quite critically, is inherently unbridgeable, not merely accidentally unbridged. For LE’s guiding ideal itself – “wealth-maximization” – as recognized now for at least 25 years, is, via “wealth” itself, ineluctably law-prescriptively indeterminate in macro: “Wealth” as the name of a putative mechanism-maximizable

¹⁵⁷ Rawls ignored micro for macro, at macro’s expense. LE attends too uncritically to macro, we’ll see, at micro’s expense.

¹⁵⁸ Indeed LE, like much of the Marshallian/Pigouvian (as distinguished from Walrasian) WE from which it descends, appears largely confined to but partial equilibrium modes of thinking.

maximandum, that is, cannot be so much as defined until *after* an antecedent assignment of legal entitlements has already been carried out. For the macro-distribution of entitlements is itself determinative of the wealth aggregate, via the definition of “wealth” and the operation of “wealth effects” themselves.¹⁵⁹ And so it cannot prescribe anything in respect of that initial macro-allocation of legal entitlements.¹⁶⁰ Yet some such allocation-prescription would seem to *have* to be made for any plenary distribution mechanism to be prescribed, hence for LE to succeed in coherently prescribing anything at all of real interest to “us” – to the polity at large.

Yet again, then, insufficient attention paid the unseverable coupling of distribution mechanism to others of distribution’s grammar-opened variables results in obscuring of distributive prescriptions’ being not merely difficult to implement, but indeed not even determinately prescriptive *of* anything. We get nowhere – we don’t even point anywhere – until we work to fill all of the distributive infinitives’ argument places.

2. The One Satisfactory Mechanism

The previous subsection might appear to counsel or underwrite pessimism. That would be premature. For there is one mechanism that does appear determinately to instantiate a specific vector of canonically proffered valuations of the distributive case-variables. Moreover, this mechanism instantiates what have been coming to appear, in light of the discussion thus far, already to be the most plausible such valuations. Further still, this fact itself does not seem to be mere happy accident: The “how”s of this

¹⁵⁹ More on this *infra*, Part III.A.

¹⁶⁰ Posner, to his credit, recognized this early on, see *infra* Part III.A, yet then went blithely forward to point out that the problem did not afflict what I am here calling the “micro” choice problem of choosing between possible rules within a single, more limited domain. But that is precisely what I am claiming here to be the problem for normative LE from a mechanism-prescriptive point of view: It does not succeed in so much as prescribing at all (let alone prescribing with ethical intelligibility), save for those who wish to do no more than tinker.

mechanism's instantiation of the recommended case-variable-valuations seem to show more about the independent attractiveness of those valuations themselves, in addition to the attractiveness of the mechanism that realizes them.

a. One Fully Specifiable Mechanism

Here, first in idealized form, is the mechanism that I have in mind: To begin with, assume for heuristic purposes a “complete” market – a forum in which all and only desired, voluntary trading occurs.¹⁶¹ Assume that this trading is in, first, all goods and services that can practically be made available and that anyone values – hence, that are politically cognizable as ethically interesting distribuenda.¹⁶² Assume that the trading is in, second, “Arrow securities” – contingent claims to compensation upon the occurrence of any eventuality that anyone *dis*values, payable by anyone willing to take the opposite sides of these de facto “bets,” on the disvalued contingencies.

Assume next and further that the market I describe here is “neutral.” It is neutral in the sense, first, that each participant enters it with an initial endowment of ethically exogenous desired assets equal in value to that with which everyone else enters it: Call

¹⁶¹ Market “completeness” in this sense of course includes trading in contingent claims, more on which over the course of the next several paragraphs. I’ll also argue that completeness in this sense is a function, in part, of neutrality itself, a fact which appears to go largely ignored. The classic sources on the role of contingent claims in completing markets are JOHN R. HICKS, *VALUE AND CAPITAL* (1940); Maurice Allais, *Généralisation des Théories de L’Equilibre Economique Général et du Rendement Social au Cas du Risque* 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* 81(1953); Kenneth J. Arrow, *Le Rôle de Valeurs Boursières par la Répartition la Meilleure des Risques*, 11 *ECONOMETRIE, COLLOQUES INTERNATIONAUX DU CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE* 41 (1953); and GERARD DEBREU, *THEORY OF VALUE* (1954). Completeness is, unsurprisingly, more precisely characterized by formal means. Its presence bears many ramifications, only some of which can be treated here. For fuller treatment, see Robert Hockett, *Just Insurance Through Global Macro-Hedging*, 25 *U. PA. J. INT’L. ECON. L.* 107 (2004). For state of the art plenary treatment, see MICHAEL MAGILL & MARTINE QUINZIL, *THEORY OF INCOMPLETE MARKETS I* (1996).

¹⁶² Assume also, for obvious reasons, that valued “goods” and “services” do *not* include among them the nonconsensual expropriation of others’ entitlements, which would violate the neutrality conditions I next describe. (We’ll also see, of course, explain over the course of this sketch how to apportion and determine entitlements, hence what counts as expropriation.)

this “entry neutrality.” Assume that the market also is neutral in the sense, second, that regulatory norms effectively prevent such collusively, strategically or expropriatively opportunistic behaviors as would effectively result in some participants’ coming to possess greater or lesser holdings, or price-affecting effective demand powers, than would be traceable to such ethically exogenous initial endowments and participants’ ethically endogenous transaction histories alone: Call this “process neutrality.”¹⁶³

This mechanism, I believe, strait-forwardly instantiates in broad outline a particular vector of valuations of the other case-grammar-opened variables discussed above at 3.1 and 3.3 through II.D.6. It also, simultaneously, fully disposes of the three critical measurement concerns discussed above at 3.2 in a manner that no other mechanism on offer so much as even begins to attempt:

First those valuations: Note to begin with that the mechanism honors distributees as boundedly responsible agents. Distribuees transact voluntarily pursuant to their own autonomous relative valuations of material goods and contingencies that they prefer and disprefer; and what they hold or enjoy at any pint is decisively a product in part of those autonomous valuational and transacting decisions.

Note next that the mechanism treats as distribuenda what ever (non-neutrality-violative¹⁶⁴) goods or services – including risk-bearing services – those agents themselves value or disvalue. These goods and services are the resources or material opportunities from which, in conjunction with their choices, distributees’ welfares derive.

¹⁶³ Please set aside, just for the moment, first the questions of means by which endowments would be measured and endowment-equalization effected, and second the “problem of future generations.” We’ll get to that.

¹⁶⁴ Please see supra note 156.

Note finally that the mechanism, via the neutrality imposed upon it at the outset and retained throughout, equalizes what is ethically exogenous – that which is not traceable in the holding directly to a responsible choice – *while* allowing holdings over time nonetheless to vary with ethically endogenous responsible transactional and other decisions:¹⁶⁵ The distribution formula to which the mechanism gives expression, that is, is opportunity-egalitarian.

Now the measurement challenges: Note first that the mechanism sidesteps, in an ethically satisfactory way, the problem of cardinal welfare measurement. It does so by allowing agent-distribuees, via their voluntary trading activity, presumptively – by dint of the “first fundamental theorem of welfare economics”¹⁶⁶ – to “maximize” utility in a manner consistent with (a) ethically exogenous endowment equality among market participants, and (b) consequently equally shared scarcity of the exogenously given resources from which agents “produce” their own welfare.¹⁶⁷

¹⁶⁵ It should be borne in mind, per observations made supra Part II.D.3, that those latter include labor-expending decisions. It should also be borne in mind, again per the discussion at II.D.3, that the temporal language here – “*tn*,” “after,” etc. – is partly heuristic in nature. “Before” means “ethically exogenously,” “after” means “ethically endogenously, because consequent on responsible choice,” etc. There are, as noted earlier, as it were multiple “*t0*”s in each trader’s life. See supra notes 86, 101, 131, and associated text.

¹⁶⁶ See, classically, Kenneth J. Arrow, *An Extension of the Basic Theorems of Classical Welfare Economics*, PROC. SECOND BERKELEY SYMP 507 (1951).

¹⁶⁷ In essence, we are describing an economy characterized by a so-called “equal division Walrasian equilibrium,” or “EDWE.” The technical literature on the theory of EDWEs and fair allocation more generally is vast, though curiously, it seems, ignored by most economically oriented legal academics. Here is a canonical sampling: See, e.g., T.E. Daniel, *A Revised Concept of Distributional Equity*, 11 J. ECON. THEORY 94 (1975); Duncan Foley, *Resource Allocation and the Public Sector*, YALE ECON. ESSAYS 7, at 45-98 (1967); E.A. Pazner & David Schmeidler, *Egalitarian-Equivalent Allocations: A New Concept of Economic Equity*, 92 Q.J. ECON. 1 (1978); Elisha Pazner & David Schmeidler, *A Difficulty in the Concept of Fairness*, 41 REV. OF ECON. STUD. 441, 441-43 (1974); H.R. Varian, *Equity, Envy and Efficiency*, 9 J. ECON. THEORY, 63, 63-91 (1974); H.R. Varian, *Two Problems in the Theory of Fairness*, 5 J. PUB. ECON. 249 (1976). Good surveys of the literature include WILLIAM J. BAUMOL, *SUPERFAIRNESS: APPLICATIONS AND THEORY* (1986); W. Thomson & Hal Varian, *Theories of Justice Based on Symmetry*, in SOCIAL GOALS AND SOCIAL ORGANIZATION, supra note 140. A useful recent synthesis of results is HERVÉ MOULIN, *FAIR DIVISION AND COLLECTIVE WELFARE* (2003). The work from which these studies take their departure is of course LEON WALRAS, *ELEMENTS OF PURE ECONOMICS* (William Jaffé trans., 1954) (1844).

Similarly, the mechanism unobjectionably sidesteps the problem of interpersonal welfare comparison. For, so long as the material opportunity components – i.e., the ethically exogenous components – of “welfare-manufacture” itself (including physiological determinants) are themselves counted (in the form of drugs, prostheses, or contingent claims to those and other forms of compensation) among the exogenous endowments that must be equalized over participants, then again, what *ever* the absolute or comparative quanta of welfare enjoyed by distributees, we shall know that these are the “highest” that they can be consistent with the opportunity-egalitarian distribution formula and the consequently equally shouldered constraints posed by the exogenously given environment.

Finally, the mechanism “automatically,” as it were, *commensurates* distribuenda in the only way that ethically matters – via the autonomous implicit comparative valuations of voluntarily transacting distributees.¹⁶⁸ We need not, that is to say, worry ourselves over how much of some good G_2 “would” or will compensate person P_1 for a deficit of good G_1 , let alone seek to construct a “perfectionist” index of all goods and ills.¹⁶⁹ Our distributee-participants themselves will, in effect, autonomously and with equal voice construct the only ethically *salient* index – a spontaneously emergent *price*

Walras appears to have anticipated, indeed even inchoately to have intended, precisely such developments as these. See WILLAM JAFFÉ’S ESSAYS ON WALRAS 17-52, 326-42 (Donald A. Walker ed., 1983).

¹⁶⁸ See Robert Hockett & Mathias Risse, *Primary Goods Revisited* (under revision and disaggregation for ECON. & PHIL., 2006, available at Hockett’s and Risse’s Cornell and Kennedy School websites, respectively).

¹⁶⁹ *Id.* The claim that the need to index disparate resources commits one to perfectionism – i.e., the position that some goods simply are inherently more worthy of collective pursuit than others – figures into a prominent criticism of Rawlsian primary goods leveled by Richard Arneson. See Richard Arneson, *Primary Goods Reconsidered*, 24 *NOÛS* 429 (1990). The criticism is addressed in Hockett & Risse, *id.*

index. This latter amounts to an aggregated comparative “social” valuation of goods and ills in the construction of which each participant has exercised an equal “vote.”¹⁷⁰

b. Instantiability-Challenges & Ordered “Nth Bests”

The opportunity-egalitarian market mechanism, then, in so far as it can be realized, simultaneously assists in realizing what looks to be the most plausible vector of distributive gap-filling valuations, and either meets or neutralizes each of the principal measurement challenges.

Three obstacles, however, might appear to stand in the way of its realization. Dispatching them will be necessary, if we’re (a) to work toward that realization, or (b) even to make use of the mechanism as an evaluative metric against which simply to effectively distributive prescriptions. But the process of addressing the challenges yields more than that: In dealing with them we also (a) see how the mechanism amounts to a refinement of the mechanisms unsatisfactorily designed and prescribed in effect by mainstream WE and LE, (b) see that the mechanism is variably instantiable in a manner that’s ordinally equivalent to a scale of 1st through *n*th bests, (c) are enabled to envisage means by which more fully to *realize* the mechanism, and (d) see how much, though as yet arguably not enough, of our familiar private law seems to be prompted by implicit *recognition* of these facts.¹⁷¹

The first challenge arises in connection with market-neutrality, in particular with entry neutrality: If we’re to equalize holdings of the material opportunity endowments

¹⁷⁰ Again, provided that there exist market completeness and neutrality in the senses explicated above. Trading here is voting, and voting rights are equally spread in the sense that ethically matters – conferring equal bargaining power involving the right kind of equality, viz., equality of all and only ethically exogenous endowments.

¹⁷¹ Hence we’ll see reason to displace even “positive” LE with a more convincing picture.

with which participants enter the market, we must presumably commensurate them. But how are we to do that *prior* to the operation of the equal-endowment grounded market mechanism, when it is that mechanism itself that affords ethically satisfactory commensuration? Is there not a pragmatic indeterminacy here ultimately just as vitiating as the foundational indeterminacies said above to afflict utilitarianism, Rawlsian justice theory and normative LE?

The answer is no. To show why not we proceed in three steps: First we demarcate certain classes of material opportunity endowment that are unambiguously ethically exogenous in the holding; call these “core endowments.” Second we indicate means by which holdings of those are readily equalized. Finally third we show that any forward movement in these directions is unambiguous movement toward the ethically optimal distribution. The upshot is that the ideal mechanism is straightforwardly approached in continuous upward-sloped fashion.

First, core endowments: At least four classes of endowment are uncontroversially ethically exogenous in the holding: First, the genetic determinants and obstacles, so far as we are able to determine them at any given time, of and to successful life-planning, wealth-making and welfare-pursuit: Many handicaps are obvious and incontestably unearned; some talents are likewise.¹⁷² With the advance of empirical science we grow ever more able to sort out, at least probabilistically, what’s predisposed and what’s not.

¹⁷² Those simply born with handicaps would accordingly have claims to compensation. Those simply born with certain inordinate talents would effectively owe, at least were they to profit by those talents. The latter claim is of course more contestable, partly because innate talents often are less easily shown to be simply innate than are handicaps, and partly because when clearly innate they will by dint of their unamenability to being shed be transformed into handicaps – balls and chains, so to speak – if their possessors are forced to work and profit in order to “compensate” others not born with such talents; their leisure will have been transformed into a very expensive resource that they are made to purchase. It is for such reasons as these that the profiting by, not the possession alone, of such “resources” as unambiguously innate talents would be what would be taxed.

Second, childhood healthcare and education: Children do not earn or deserve greater or lesser access to such assets, particularly when very young. Their degrees of responsibility gradually grow as they move toward adulthood. Third, inherited nonhuman capital, i.e. money-valued wealth: Again, like other forms of inheritance this one is morally arbitrary. Moreover, it doesn't grow less so with time and maturation. Finally fourth, opportunity to shed or share unforeseeable risk through trade or collective risk-pooling action. This is best seen as non- or pre-confiscatory compensation for deficits in other resources or material opportunity.¹⁷³

Now note that these core endowment classes are not only limited in number, but also are more or less – and with the advance of empirical science, increasingly – straightforwardly quantified, directly allocable, and allocable equitably. They are also in little if any need of commensuration inter se. If we distinguish between “beneficial” and “burdensome” endowments, we see that this is particularly so of the beneficial ones – early education, healthcare, and inherited non-human capital. The burdensome endowments, by contrast, are a bit more difficult, since they disproportionately include “physiologic resources,” but still far from impossible.¹⁷⁴

The hardest of the latter is genetically poor health or handicap. Some such deficiencies can themselves be valued by reference to current prices affixed to their mitigation – prostheses, medicines, etc. There seems no harm in beginning to address such deficits with compensation equal to the going rates. Other such deficits are not so

¹⁷³ Some are inclined to include the presence of counter-traders in the opportunity set here. See, e.g., COLIN M. MACCLEOD, *LIBERALISM, JUSTICE, AND MARKETS: A CRITIQUE OF LIBERAL EQUALITY* (1998); Markovits, *supra* note 81. I'm inclined to think that a mistake – in effect a retreat from the position from which one treats distributees as responsible agents – by dint of its treating co-citizens and their responsible tastes as resources. So I count only infrastructure.

¹⁷⁴ I've left physiological out of “beneficial” endowments for present purposes.

readily mitigated. There the best that we can do is estimate the compensation afforded by insurance policies that typically are, or, perhaps, “would” be purchased against such contingencies if available.¹⁷⁵

Clearly there’s more guesswork here, but it needn’t be anything near an arbitrary whistling in the dark. With the growth of empirical knowledge, moreover, we grow better at estimating with greater reliability. We do what we can to repair the ship at sea, if one might yet again borrow Neurath’s old simile. And the more such repairing we do, the better able the mechanism grows to improve itself. I’ll show this below in connection with “*n*th bests,” thus completing the challenge to neutrality’s attainability, after preliminarily addressing the second *prima facie* challenge to the mechanism’s instantiability. For the treatment of “*n*th bests” completes the addressing of that one as well.

The second challenge to mechanism-instantiability is rooted in “completeness” as the first was in “neutrality.” It runs thus: Is it reasonable to require that “all and only desired trading” occur? Is that possible, and should we even wish it? Wouldn’t we have to abandon our market-inalienability norms and “commodify” everything?¹⁷⁶ And if we don’t do that, can the opportunity-egalitarian market mechanism that I have described do what I’ve charged to it?

¹⁷⁵ See Hockett, *Whose Ownership*, *supra* note 101 at 217-37; DWORKIN, *supra* note 115 at 307-50. Real, rather than “hypothetical” such insurance is proposed in Hockett, *Global Macro-Hedging*, *supra* note 151; and in Alexander Tabarrok, *Trumping the Genetic Tarot Card*, 9 *CONTINGENCIES* 20 (1997). See also J.H. Cochrane, *Time-Consistent Health Insurance*, 103 *J. POL. ECON.* 445 (1995).

¹⁷⁶ The classic contemporary objection to “commodification” is of course Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987). See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). Also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1997). Contemporary protests of commodification revive concerns raised repeatedly in the past. Two classic Victorian-era objections are THOMAS CARLYLE, *PAST AND PRESENT* (Robert Thorne ed., 1890); and JOHN RUSKIN, *UNTO THIS LAST AND OTHER WRITINGS* 155-228 (Clive Wilmer ed., 1985).

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

Next consider what else might be traded – in the earlier idiom, "all that enters into responsible agents' welfare-pursuit." It is easy enough simply to bracket out of market transactions such things as "we" might believe ought not be commodified – babies, blood or organs, for example – and still approximate to distributing goods and services as "best" as we thereby permit ourselves to do. For again, as we'll see, there are "second" clear down to "*n*th bests" that are ordered equivalently to ordered degrees of neutrality and completeness.¹⁷⁷

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

¹⁷⁷ The baby allusion is of course to Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), one of the bugbears that prompted Radin, *id.* The blood and human organ allusion is of course to Titmuss. See, classically, RICHARD TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970). There will of course be disagreement as to some of the afore-envisaged bracketings. It will appear to some to be an affront to liberty, for example, to prohibit autonomous agents' trading in what ever they wish to trade (apart, of course, from in other agents). At least that will be so when the trading really is consensual, is uninfected by objectionable inequities in comparative bargaining power, and does not itself impinge upon any third party's equal responsible agency. Such bracketing might especially seem liberty-offensive if advocated against a more equitably spread opportunity backdrop, before which such implicit *exploitation* fears as I suspect ultimately motivate much of the market inalienability discourse are less likely to be operative. But the real point here is that we need not worry over these disputes at the margins of commodifiability. The mechanism does its work well through trade of those many *more* goods and services that all *agree* should be tradable.

The first way is to note that it is by now a well established theorem of general equilibrium- and stochastic calculus-rooted financial theory that complete markets can be simulated through a comparatively small number of hedging strategies.¹⁷⁸ Moreover, many more contingent claims markets are providable than currently provided, and the number of such claims that can be made tradable is only likely to grow in the immediate future. I exploit those facts elsewhere.¹⁷⁹ So we can do a lot more completing than thus far we've done.

The second and third ways of addressing the completeness challenge are more immediately satisfying. Note for one thing that more entry-neutrality will itself tend toward more completeness: Since (a) the latter rides in part on all desired trading's being available, and since (b) more trades per unit of wealth occur at lower levels along personal wealth curves, and finally since (c) entry neutrality ensures larger numbers of market participants who enter at the low end, (d) greater entry neutrality results in more trade.

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

¹⁷⁸ See Robert C. Merton, *Lifetime Portfolio Selection Under Uncertainty: The Continuous-Time Case*, 51 REV. ECON. & STAT. 247 (1969); Robert C. Merton, *Optimum Consumption and Portfolio Rules in a Continuous-Time Model*, 3 J. ECON. THEORY 373 (1971); Robert C. Merton, *Continuous-Time Portfolio Theory and the Pricing of Contingent Claims*, Working Paper No. 881-76, A.P. Sloan School of Management, MIT (1976).

¹⁷⁹ See Hockett, *Global Macro-Hedging*, *supra* note 151.

The third challenge, just presaged, is this: If you cannot achieve full completeness and neutrality of the sort that characterizes the ideal mechanism sketched above, might you not in seeking merely more completeness and neutrality than you presently have, ironically, end up farther from your ideal goal? For has not Hart, for example, proved at least that the move from less to more complete markets (short of fully complete) can incur Pareto-losses?¹⁸⁰

I'll reply here intuitively, as I've provided more technical treatment and formal proof elsewhere.¹⁸¹ The intuitive reply is that the claim that an ordered set of n th bests is not ordinally equivalent to the set of more complete, more neutral markets turns crucially upon an ethically uninteresting conception of efficiency. Indeed it turns on a conception of efficiency that we've already shown, in effect, noncognizable above at II.D.1.

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

Pareto-efficient distributions of goods or ills to persons are best understood, intuitively, as distributions the quasi-aggregated welfare deriving from which cannot be raised without lowering the individual welfare of at least one person.¹⁸² That is the sense

¹⁸⁰ See Oliver D. Hart, *On the Optimality of Equilibrium When the Market Structure is Incomplete*, 11 J. ECON. THEORY 418 (1975).

¹⁸¹ See Robert Hockett, *Conditional-Existence Proof of Well-Ordered Set of 'Nth Best' Equal Division Walrasian Equilibria* (2006) (working paper, posted at my Cornell website).

¹⁸² By "quasi-aggregated" I mean that "aggregate" which is one person's varying welfare when all other persons' welfares are held constant. Of course the Pareto principle is intended to afford technical means of sidestepping interpersonal utility comparison and with it, therefore – so the standard argument runs – aggregation. But leaving aside for present purposes the standard argument's running aggregation and comparison together, the Pareto criterion trades for its ethical salience upon an intuition which

in which it amounts to a form of “efficiency,” the one sense in which it can warrant the use of that word: We’ve maximized scalar-aggregated welfare output for this given class of permitted distributive input vectors – the input vectors that do not “take” from anyone (any vector component) in the status quo ante. Pareto efficiency is welfare-maximization as constrained by the effectively distributor-conferred “veto” wielded by any distributee (any input vector component) who stands to suffer a welfare loss in the event of some departure from some antecedent distributive input vector.

Kaldor-Hicks efficiency is yet closer to the workaday understanding of “efficiency,” because unapologetically aggregative rather than quasi-aggregative: Distributions are efficient in the Kaldor-Hicks sense if there is no departure from them that would render some parties’ aggregated gains greater than other parties’ aggregated losses.¹⁸³ The guiding intuition, then, again – and now more forthrightly – is that the scalar welfare output of a given wealth-distributive input vector is, given the individual welfare functions (input vector components) that we have to work with, the “highest” it can be.¹⁸⁴

But now note an entailment of the straightforward arguments elaborated above at Part II.D.1: Efficiency on either of these understandings, the Paretian or Kaldor-Hicksian, is entirely devoid of ethical relevance hence normatively inert, *unless*

implicitly imports aggregation. There is no reason for “society” to be interested in a Pareto-efficient social choice rule dictating increases in the utilities of some so long as no one else’s utilities are diminished thereby, unless “society” itself is seen as thereby benefiting in some sense. That sense, if such there be, is the only sense in which the principle can be ethically interesting, and it is of course an aggregative (a quasi-aggregative) sense – as indeed the terms “society” and “social choice” should indicate right from the start. On the analytic distinction between interpersonal comparison and aggregation, see supra Part II.C.1. For more on the conditions under which Paretianism can be sensibly viewed as socially attractive, see infra Part III.A.

¹⁸³ The aggregation – and assumed interpersonal comparability imported thereby – enter via the “compensation principle.” Note the shared root – “com,” i.e., “with” – shared by both “comparison” and “compensation.”

¹⁸⁴ One “produces” welfare, in the Pareto and the Kaldor-Hicks senses, by distribution operations. Those are the variable inputs, so to speak, while persons’ utility functions are the fixed inputs.

understood by ineluctable reference to exogenous material opportunity endowment equality – i.e., fairness.¹⁸⁵ There are as it were “negative” and “positive” sides of the argument fleshing this out:

From the “negative” side, as we saw above at II.D.1, the mere maximization of an aggregate shorn of attention paid the boundedly responsible agency and ethical equality of those through whom the aggregate is produced is, quite literally, fetishist. Kaldor-Hicksian wealth and Paretian welfare, then, must be understood by unexpurgable reference to principles of equal material opportunity to *engage* in wealth- or welfare- production before they can be ethically intelligible as wealth or welfare at all. They *are* “wealth” or “welfare,” as distinguished from something like high aggregate forehead height or vast blue-colored surface space, only in so far as such is the case.¹⁸⁶

Now from the “positive” side, recall that the opportunity-egalitarian distribution formula laid out at II.D.3 above requires not only that ethically exogenous holdings of that from which ethically endogenous wealth and welfare are derived – material opportunity, as represented by “ R_i ” – be equalized: It also requires that ethically *endogenous* such holdings – “ E_i ” – be permitted to *vary* with the responsible choices and effort that *produce* them. But this means that welfare and wealth *will* be maximized, in the only ethically intelligible sense of those words, both “automatically” and precisely *in proportion* as the inputs to individual welfare and wealth functions are distributed in accordance with the opportunity-egalitarian distribution formula.

¹⁸⁵ See *supra* Part II.D.3.

¹⁸⁶ The usual rationalization offered, when something like this is pointed out, is that it’s more efficient – occasioning of less deadweight loss – to handle distribution through tax policy. I’ll speak to that *infra*, Parts II.E.3, III.A.

The crux of the (“positive” side of the) claim here, then, is that agent-distribuees face all incentive necessary to producing and indeed maximizing such of their satisfactions as are of legitimate interest to the polity – to “us” – under the opportunity-egalitarian distribution formula. For again, that formula requires that distribuees not be despoiled of that which they produce by their own efforts from exogenously given and fairly spread resources. So “aggregate” welfare and wealth are “maximized” in the only sense in which such aggregation and maximization normatively matter. Ethically intelligible efficiency just is what results from a distribution of individual wealth-inputs that accords with the opportunity-egalitarian distribution formula. Now it happens that ethically intelligibly efficient allocations also are Pareto efficient ones – the former set is a proper subset of the latter.¹⁸⁷ But the complement of the former within the latter is, from a normative point of view, entirely devoid of interest. It is aggregate forehead height, so to speak; there is no reason what ever to take collective political interest in it, and indeed there is every reason to ignore it.

Once we grasp this, we see that the third challenge facing the above-schematized opportunity-egalitarian market mechanism is entirely dispelled. Proofs that sets of markets rank-ordered in terms of degrees of completeness falling short of full completeness might not be ordinally equivalent to sets of markets rank-ordered in terms of their welfare-optimality trade on a *conception* of welfare-optimality that is normatively inert. The only welfare that matters – indeed, that can be viewed as well-faring by responsible agents capable of faring well rather than fetishized substance- or space-growing – is that produced by equally exogenously endowed agents who consume or trade that with which they are endowed and/or that which they receive through trading

¹⁸⁷ See sources cited supra, note 161.

when so endowed. Incentives-wise, such allocations are as cognizable-welfare- and wealth-maximizing as, quite literally, it is so much as possible to conceive and to wish.¹⁸⁸

These observations do more than complete the reply to skeptical concerns about the instantiability of the opportunity-egalitarian market mechanism I have schematically described. They also indicate the sense in which this mechanism amounts to an ethical refinement and consummation of a mechanism toward which *WE* might be said long to have groped: For one way of viewing the mechanism I've sketched is as a particular instance of an equal division Walrasian market. It is obvious (a) that equilibria in such markets – so-called “EDWEs” – fall within the class of Pareto-efficient equilibria by dint of their being Walrasian, and (b) that they are “fair” in a resource-egalitarian sense.¹⁸⁹ It's also well established (a) that EDWEs are “fair” in a variety of welfarist, “envy-freeness” senses, (b) that under various circumstances all such fair allocations are EDWEs, and (c) that fair allocations which are EDWEs and thus efficient always exist, even in dynamic economies with production, under certain plausible assumptions and understandings of “envy-freeness.”¹⁹⁰

Moreover, one corollary to what I've just argued is that the *non*-Pareto efficient equilibria, so long as they're fair in the appropriate sense, cannot intelligibly occasion “our” ethical *concern*. For the Pareto criterion itself, like all naïve maximizing and quasi-maximizing pseudo-norms, is distributive-ethically superfluous; it is quite literally

¹⁸⁸ One cannot wish what one cannot conceive. One cannot wish, for example, “that Harriet draw the round square.” None of this, incidentally, is to say that the mentioned trading itself is incapable of bearing third-party effects such that over time ethically exogenous resources come to be centralized unjustifiably in overendowed hands. But that is in part why market-neutrality above is defined not only in initial endowment terms, but in ongoing regulatory terms as well.

¹⁸⁹ See, again, sources cited supra note 161.

¹⁹⁰ Id. In the interest of brevity I have compressed here into one sentence results that occur in a number of the papers cited in note 161.

nothing to us.¹⁹¹ It is no more than another instance of cart's being placed before horse, in the idiom of II.D.1 above. The horse – distributive-ethical allocation – *always* pulls the only cart that's got anything in it that “we” wish to pull – *ethically intelligible* efficiency.

That ethically intelligibly efficient allocations also happen in the presence of certain conditions to qualify as Pareto-efficient is of little more than historico-sociological interest: It possibly helps to explain, at any rate in part, why even ethically conscientious people sometimes have thought – as it happens mistakenly – that they were Paretians, even while possibly feeling uneasy about it.¹⁹² Next we shall see that something similar holds of LE: We shall see how it could be thought that legal doctrine was, positively speaking, subconsciously Kaldor-Hicksian in motive.

c. Law's Proper Role

It is worth taking notice of how the law in advanced political-economies appears meant in large part to foster and buttress some such mechanism as that I've just sketched and defended.¹⁹³ That will amount to a sketch of a refinement and completion of LE quite counterpart to the way in which II.D.6.2.2.3 just now described a refinement and completion of WE. In effect, it's the map of a new normative and positive research agenda. It will also, not incidentally, suggest means of further improving the mechanism we have already in place.

¹⁹¹ I explain its appeal notwithstanding that fact *infra*, Part III.A. The short answer is that insofar as it appeals to us, this is due to an inchoate assumption that “things balance out over time.” We subconsciously assume, that is, a diachronically extended Paretianism or Kaldor-Hicksianism pursuant to which she who does not gain in today's transaction will gain in tomorrow's.

¹⁹² The other explanation is that alluded to in the previous footnote.

¹⁹³ We might say, then, that early LE was positively incorrect in a manner precisely analogous to that in which it was normatively incorrect.

The best interpretation of most market-regulatory norms (and indeed many other laws) in advanced political-economies, I think, is as attempts to afford something like greater neutrality and completeness of the sorts I've assayed just above. Laws prohibiting invidious discrimination on the basis of racial, gender, and other ineluctable or morally arbitrary traits, for example, look to be straightforward cases of process-neutrality-promotion. Public education and sundry forms of government-facilitated social insurance for their parts are readily viewed as attempts at promoting entry-neutrality. They work to equalize ethically exogenous material opportunity endowments – the “*R_i*” of Part II.D.3. Such neutrality-boosting measures, moreover, for reasons noted earlier tend to enhance market completeness as well.¹⁹⁴

There are other completeness-enhancing measures that advanced political economies have steadily taken over the past two or three centuries. The trend in respect of “commodification,” for example, seems by and large to have been to permit, and indeed in many cases even to foster, the trading of more and more goods and services, including contingent claims. It's also been to “unbundle” more and more once-conjoined items into separately traded items. Conspicuous cases of such market-fostering include government regulatory and start-up support for securities, derivatives and more recently pollution rights trading, for example. Conspicuous cases of mandated unbundling – which incidentally show again the linkage between neutrality and completeness – include antitrust action against large telecommunications concerns in the 1980s and against software manufacturers in the 1990s.

¹⁹⁴ There are arguments out there, of course, to the effect that these changes are “efficient.” That is not, in light of the foregoing, surprising: We've seen that there is much overlap between uninteresting and interesting efficiency. But there's also divergence, and in any event to place the horse before the cart is to attend to opportunity inputs alone, which we've seen results in ethically interesting efficiency's quite taking care of itself.

The fact that such measures as those mentioned can often be argued to enhance aggregated social welfare, wealth or consumer surplus should not surprise us. Nor should it be taken for unambiguous indication that legislatures or common law judges do, let alone ought, to craft law, doctrine or policy with a view to such goals. All the less should it be taken for encouragement to conceive “improvements” we think likely all the more fully to effect aims of that sort. For we’ve just seen both (a) that equal-opportunity-indifferent aggregate-maximizing is ethically irrelevant, and (b) that equal-opportunity-*consistent* maximizing is nonetheless in many cases coextensive with other forms of maximizing.¹⁹⁵ (That fact itself explains how “positive” LE exponents of the past were able to suppose that common law judges might be subconsciously actuated by wealth-maximizing aims.¹⁹⁶) It is better, then, to interpret our legal arrangements as actuated by the aim of taking us closer to the equal agency, equal opportunity ideal, and framing our own efforts at improvement as similarly actuated.

If I am correct in what I suggest here, then a substantial new research agenda in what might be called “ethically intelligible LE” is opened. Some rules found to be likely wealth-maximizing in ethically uninteresting, fetishist ways, for example, might well prove to be suboptimal on ethical grounds. And amendments to such rules might in many cases be found likely to move us further along in the direction of realizing the ethically optimal mechanism schematized just above. Of course this isn’t the place to map out a fulsome such research agenda. But an illustrative example or two might prove helpfully suggestive of what we might envisage:

¹⁹⁵ Recall that EDWEs typically are Pareto-efficient, for example, as noted just above.

¹⁹⁶ More on that history *infra*, Part III.A.

Consider, then, by way of but one example, the venerable case of “property” versus “liability” rules.¹⁹⁷ Much ink has been spilt by practitioners of LE on behalf of the supposed normative superiority of the latter over the former in various contexts. But suppose that the grounds for that professed superiority – the ethically uninteresting grounds of fair-distribution-indifferent wealth-maximization – were forthrightly seen, as ought now to be clear that they ought, to be otiose from a normative point of view. Suppose moreover that the autonomy aspect of responsible agency – each agent’s ability untrammelledly to control the disposition of assets to which she was ethically entitled pursuant to the opportunity-egalitarian distribution formula, and not to part with it at a price not of her naming – was seen to be more fully vindicated by property rather than liability rules.¹⁹⁸ Would it not be found natural, in that circumstance, for ethically-salient LE itself, in its normative aspect, to explore the prospects for developing property-like or –simulating rules in such contexts?

Begin with the case of contract, for example, in which transacting is voluntary and only the subsequent history of the transaction might possibly turn out to be involuntary in some respect. Suppose that all of the generally required predicates of fairness (i.e., equal opportunity) – competence on the part of both parties, rough transparency and rough parity of bargaining power – attend the initial agreement. In such case there seems no reason not to view the parties’ joint – i.e., bargained – valuation of the transaction and the cost of breach as the ethically salient one, hence as the appropriate

¹⁹⁷ See, of course, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁹⁸ That seems a plausible suggestion, does it not? To have found the opportunity-egalitarian distribution is to have found the proper, or “natural” – the ethically determinate – line of demarcation between internality and externality, between any one person’s ethically permitted and indeed protected sphere of autonomy and rights on the one hand, that person’s outward-looking responsibility and duties on the other.

answer to the counterfactual “would have charged” question. For the charge has in fact *been* agreed, *ex ante*. Boundedly responsible agency and equal material opportunity among citizens are not implicated, let alone offended, by what ever valuation the parties jointly place upon the terms of their autonomous transaction – again, provided that the aforementioned predicates obtain. There seems no reason, then, not to afford responsible autonomy maximal vindication through propertization of the contractual entitlement. Arguably specific performance, therefore, and certainly stipulated damages, should be enforceable. That is the appropriate legal expression given the opportunity-egalitarian polity’s constitutive value of responsible agency in the context of contracting.

The case of tort is somewhat more difficult, but not very much as a matter of theory. The added difficulty is simply an empirical/informational one bearing upon administrability, not a principled one bearing upon conceivability or appropriate guiding ideals. The question is, how do we know, or determine, what the wronged party in a tort suit “would” have charged or paid in order to relinquish or insure her entitlement to immunity from harm? And, given the difficulty of satisfactorily answering that question – a difficulty of which the tort victim herself is aware – might there not be a danger that the victim will exaggerate *ex post* what she claims would have been her *ex ante* reservation price or guaranteed insurance payout?¹⁹⁹

In view of such difficulties, there is a practical problem afflicting the administration of any “propertized” system of tort remedies, at least if the latter be taken

¹⁹⁹ An analogous difficulty, of course, arises in the eminent domain and benefit-tax contexts of contemporary American property law – viz., the “holdout” problem presented by owners’ capacity to overstate what their condemned property “really” is worth to them, and the “free-rider” problem presented by their capacity to understate what their shares in some tax-financed appurtenant public good, e.g. a school, a park, a sewer system or police force, are worth to them. *See* Calabresi & Melamed, *supra* note 190 at 883.

to mean a system wherein victims literally stipulate their own damages. So while in principle the tort system is on the same footing as the contract system and thus ideally would be propertized in respect of remedies (again especially, e.g., for such torts as conversion and nuisance), in practice the implementation of the principle requires limitation.²⁰⁰ The appropriate response of the opportunity-egalitarian polity, then, would seem to be to select the most plausible proxy for actual reservation price or insurance policy. The question becomes, what is it most *likely* that the victim actually would have charged, or would have insured for?

Addressing this question might involve the gathering of statistical data from which average – hence most likely – amounts are derived, which latter then can be suitably adjusted in view of special features of the victim that we should think reasonably would have led to a reservation price or insured value greater than or lower than that average – e.g., a particular sentimental attachment to the house in which one was born or the heirloom handed down to her, or a particular physical or psychological weakness or vulnerability suffered by the victim. To some degree, the law of tort appears already to do this, as, e.g., in such doctrines as that “the tortfeasor takes the victim as he finds him,” colorfully operationalized in the so-called “thin skull rule”.²⁰¹

It might be objected that “propertization” as here counseled gives rise to a tension between values embedded in the construal of distributees as boundedly responsible agents. The objection would run thus: The opportunity-egalitarian polity values not merely agency, but *responsible* agency, as noted at 3.4 above. And *responsible* agency, as we

²⁰⁰ Again, analogous contexts arise, now in contract, where transaction costs are thought to render actual contracting infeasible.

²⁰¹ See, e.g., *Poole v. Copland*, 348 N.C. 260 (1998).

saw, entails *equal* agency, at least in the sense that it requires that responsible agency's material correlate – access and exposure respectively to ethically exogenous resource and risk – be equitably spread, as suggested at II.D.3 above. But we also noted, at 3.2 and II.E.2 above, that the only way to render intelligible the notion of “equal spread” of *heterogeneous* goods and ills that are not *separately* equalized (ad seriatim, good by good and ill by ill) over agents is by indexing through the operation of complete and neutral markets, which amount to democratic determinations of the relative worths of heterogeneous goods and ills, by citizens endowed with equal “votes” in those markets.

These observations might then seem – erroneously, we'll see – to suggest that the appropriate remedy for violation of a legal right is the (complete and neutral) *market* – i.e., the social, or “true” – valuation of that right, not the right-holder's possibly idiosyncratic or deliberately exaggerated valuation. And that, in turn, would seem to suggest vindication of the right by *liability* rules of a particular kind, rather than by property rules: Victims would be limited to court-determined recoveries, and courts in turn would be limited to market-determined amounts. All remedies, in effect, would be like “takings” remedies, requiring “just” compensation defined as (complete and neutral) market value compensation.

Notwithstanding the initial “bite” of this objection, the preferred opportunity-egalitarian path, it is difficult not to conclude, is to favor practicable propertization – at least in respect of some contract rights, and, in a sense to be explained, in respect of some tort immunities as well. The reason is rooted in the crucial distinction, implicit in Parts II.C.4 and II.D.3 on material opportunity and opportunity-egalitarian distribution, respectively, between ethically exogenous and ethically endogenous holdings. That

distinction in the present context is isomorphic to the *ex ante* / *ex post* divide vis a vis the operation of complete and neutral markets. If (or to the degree that) holdings of ethically exogenous resource have been equalized over citizens prior to their entering complete and neutral markets, and if (or to the degree that) their holdings after entry into those markets are traceable to those equalized initial holdings and their trading activity in those markets, then (or to that degree) their holdings are consistent with the requirement of equal, boundedly responsible agency. They hold what they ought to hold, by definition, and the social valuation – i.e. the market value – of those holdings is in such case of no further ethical interest to us.

The *social* valuation of agents' assets, that is to say, is ethically interesting only *prior* to their entry into the market, when we are seeking to determine what everyone ought to start out with – hence how much they are to be compensated when victimized by hard luck, by the workings of blind fate. *After* we have done that, *post*-market-entry holdings have been ethically endogenized. People have what they deserve, and are viewed as being ethically entitled to it. There is no further public salience to what it is that what they have is “worth,” at least not so long as it is held, any more than there is any public salience to their individual welfare- or wealth-outputs.²⁰²

Given that posture, the question then becomes, how should legally vindicated ethical entitlements be valued and compensated if and when they are subsequently violated or taken (rather than denied at the outset, *ex ante*), not by hard luck – by blind fate – but by voluntary entitlement-violative behavior on the part of a transgressor. The first part of the question seems readily answered: Since legitimate transfers of title take place by voluntary exchange at prices mutually agreed by transferors and transferees paid

²⁰² Recall Parts II.D.3, II.D.5, and II.E.2 on this – *ethically cognizable* “efficiency.”

by the latter, the legitimizing – correcting – of an involuntary “exchange” likewise should involve exaction of a price from the transferee. In effect the taker has performed one part of an involuntary transaction, and she owes back her part of the “bargain.”²⁰³ Her part of the bargain, in turn, is what the wronged party “would” have charged – at a minimum, her reservation price prior to transacting – in exchange for what was taken.

I should emphasize that this is but the answer to an anticipated theoretic objection, hence is couched in theoretic terms. It is simply to say that there is no tension, in advocating property-like vindication of private law rights in contract or tort, between the ideals of (a) complete and neutral market-valuation of goods and ills for purposes of determining opportunity-egalitarian endowments on the one hand, and (b) wronged-party-valuation of what she is wrongfully stripped of on the other, for valuation in the first case is carried out to determine appropriate ethically exogenous (“initial”) endowments, while in the second case it is carried out to determine what subsequently endogenized holdings actually are worth to the autonomously valuing agent who now rightfully holds and is entitled to them.

All of that said, the matter of how best to approximate this ideal in view of the information difficulties and perverse “hold-out” incentives acknowledged several paragraphs up remains an open question – a question for ethically relevant LE. It is presumably helpful in addressing the question in an ethically intelligible manner, nonetheless, to be clear as to the ideal that we ought to be seeking to approximate. That

²⁰³ Where she has taken more than she can pay, even out of what she has taken, the overage in effect becomes a case of hard luck – ethically exogenous – so society is the appropriate compensator. The overage is as it were an “act of God”.

of course implicates a more general point with which we might best conclude this subsection:

d. Note on Institutional Competencies

None of the foregoing, I should emphasize, is intended to suggest that courts should attempt to make general determinations of litigants' overall material opportunity allotments in deciding cases, and then allow such determinations to enter-in to the making of decisions as to who ought to prevail in litigated cases – as if courts were engines of non-case-specific compensation or distribution more generally. Nor do I intend here to recommend that legislators, policy-makers or political ethicists *more broadly* amalgamate spheres of human activity in their thinking in such wise as might lead them ultimately to prescribe that citizens who fare unjustifiably poorly in one sphere of activity be held to different standards in other spheres of activity, that they might be “compensated overall.”

My gut intuition, indeed, is that the integrity and longterm stability of institutions that operate in the many different “spheres” of activity that all jointly constitute a complex polity and pluralist society requires we *not* generally determine individuals' outcomes in one sphere by reference to their outcomes in other spheres.²⁰⁴ And thus my intuition also is that full opportunity-equality among all citizens requires our working serially toward opportunity-equality sphere by sphere. But this is not the place either to

²⁰⁴ Others who seem to think so include, e.g., JON ELSTER, *LOCAL JUSTICE* (1993); ALISTAIR MCINTYRE, *AFTER VIRTUE* (1979); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (1999); MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); AND H. PEYTON YOUNG, *EQUITY IN THEORY AND PRACTICE* (1996). I don't wish to endorse their particular claims, and both Miller and Walzer in particular I think are rather more pluralist than can ultimately be sustained.

commit to or argue for that provisional judgment. Much more is required, to think-through the question effectively, than can be done here.

My claim here is accordingly more modest. It is simply that, where rules or programs or policies are crafted or drafted – such as in appellate courts incrementally developing legal doctrine with a view to future applications, or as in legislatures prescribing in yet more forward-looking and wholesale fashion – the crafting and drafting ought to be done with equal regard for all citizens conceived as boundedly responsible agents, and that doing that in turn requires that our judges and legislatures view their role as that of in effect (a) equalizing such benefits and burdens as both (i) they are institutionally authorized to be effectively bestowing and (ii) are ethically exogenous in the holding by the citizens in regard to whom they are acting, while (b) apportioning in proportion to differential responsibility such (i) ethically endogenous benefits and burdens as they are (ii) institutionally authorized to be effectively bestowing. And one entailment of this latter claim, in turn and in light of the foregoing subsections, is that legal doctrine and legislative programs generally ought to be elaborated with a view to broadening the reach of and buttressing that distribution mechanism schematized through II.E.2 above.

These observations appear likely to bear implications for the thus far broad-brush and inconclusive discussion on institutional roles taking place in the WE and LE literatures. An identifiable strand of this discussion, for example, has it that courts are better suited to maximizing aggregated wealth in the incremental crafting of legal doctrine, while distributional concerns are more efficiently (more deadweight-loss-

avoidingly) handled through tax policy.²⁰⁵ I'll defer discussion of such matters to the next two Parts, save to note here:

First, that in light of the foregoing discussion in Parts II.E.2 and II.D.1, the “efficiency” appealed to in such arguments will, again, not be of interest to “us” if decoupled from distributive propriety. And second, that in light of the observations on institutional integrity and stability several paragraphs up (proper distribution in each sphere, not across spheres), on Rawls at II.D.2 (the incoherence of his mix of distribution formula and distribuendum), and on distribution formula / transactional proximity at II.D.4 (greater ethical satisfactoriness and longterm stability the closer we find responsible choices and resultant distribution), there would seem to be considerable threats both to ethical rectitude and to longterm institutional stability posed by assigning decoupled distributional concern and naïve maximizing concern to separate institutional spheres. Such observations, recall, and their prescribed antidote – tying principle-conforming distributions as closely as possible to the agent-taken actions that immediately produce them – were indeed part of what recommended the distribution mechanism that has been this Part’s principal preoccupation.

III. APPLICATIONS: “DECONSTRUCTING” FOUNDATIONAL DISPUTES IN THE LIGHT OF DISTRIBUTIVE STRUCTURE

Our results in the foregoing sections enable us quite easily, I think, to take hold of familiar foundational controversies in WE and LE, and to resolve them quite easily as

²⁰⁵ For recent discussion of this long-contested claim, see, e.g., Chris W. Sanchirico, *Taxes versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEG. STUD. 797 (2000); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEG. STUD. 821(2000). This is of course a minimal sampling, and fuller consideration would, again of course, require discussion of the sizeable WE literature concerning optimal taxation, particularly the contributions to that literature of Hammond, Mirrlees, and Vickrey. Regrettably I must of course pass all of this over in relative silence here.

well. I'll begin here with the first great foundational debate in normative LE. In the next Part I'll handle the most recent.

A. A Value, or Just Value? “Wealth” and Its “Maximization”

The 1980s saw protracted controversy over the foundations of LE that has continued sporadically since. The question, roughly stated, was whether the “wealth” in which LE took interest might be “a value,” and if so, what its relation might be to other values.

The position taken at one end of the “yes”/“no” divide – that wealth is not even *a* value *among* values – would, if correct, have deprived LE of any normative interest whatever. The position taken at the other end of the divide – that wealth is not only a value, but is *the* principal value with which courts in particular and perhaps policy more generally should concern itself with advancing – ironically tended toward the same result. It did so by rendering wealth, as the position construed it, unintelligible even as a, let alone the, value of interest to law.

An apparently intermediate position took wealth for a value that society indeed should take interest in “maximizing,” but whose maximization was in all cases to be considered subordinate to the lexicographically prior value of fairness. Fairness, that is, on the intermediate view operated as a “veto” or “side constraint” upon otherwise worthwhile wealth-maximization.

1. A False Start: Early Posner

The second position just mentioned – the “yes” vote – was of course most conspicuously associated with Richard Posner, and lay at the basis of much normative LE

of the day.²⁰⁶ Posner's original aim seems to have been to supplant one legal-theoretically influential teleological ethic – utilitarianism – with another that avoided both the latter's ethical pitfalls and those of what Posner viewed as its principal competitor – something he called “Kantianism.”

Posner rehearsed several of the more familiar problems of utilitarianism (hereinafter “U”): There were the uncertain domain of its beneficiaries (distribuees), the total versus aggregate utility problem,²⁰⁷ and the interpersonal comparability problem (as per Part II.C.1 above). He also took due note of what might in view of Part II.D.1 be called the contingency problem – U's rendering even such seemingly fundamental rights as those to labor autonomy, or against unprovoked homicide, merely contingent upon their vindication's happening to maximize the utility aggregate. And Posner added a concern, cognate with observations made above at II.E, that U might seem to warrant virtually unlimited government intervention into otherwise private ordering.

Against the potential “monstrousness” of U opened by such prospects as these mentioned, Posner contrasted what he labeled “Kantian” “squeamishness” and “fanaticism.” Taken to its logical endpoint, Posner apparently thought, “Kantianism” (hereinafter “K”) would prohibit my killing one innocent in order to save one hundred innocents, even if the first innocent would be among the one hundred.²⁰⁸ To avoid such prudishness, Posner claimed, “most Kantians . . . carv[e] exceptions to the categorical

²⁰⁶ See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103 (1979); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). Both articles are reprinted in revised form in RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983). Pin-cites herein are to pages in the latter.

²⁰⁷ See supra note 92.

²⁰⁸ That story, of course, originates with Bernard Williams, no Kantian. See Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

duties they impose.”²⁰⁹ But the exceptions, he then objected, are ad hoc and accordingly subject to slippery slope problems – “there is no logical stopping point.”²¹⁰

Since neither U nor K were satisfactory to Posner’s thinking, there was, curiously, “interest in trying to combine [them] in some fashion.”²¹¹ That was curious in part because one does not ordinarily expect conjoined ills to add up to goods. But it was particularly curious, in Posner’s particular case, because Posner had argued that one of K’s defects was precisely “its resemblance to [U itself].”²¹² And finally it was curious because no meta-ethical considerations what ever were adduced that might have afforded guidance as to in *what* way, if any, U and K should be combined. Be those puzzles what they may, Posner proceeded to read-off the sundry respects in which he took what he called “wealth-maximization” (hereinafter “WM”) to avoid the weaknesses of U and K, hence (?) to constitute a compelling social aim.²¹³

First, of course, Posner defined a few terms. Social wealth, he reported, comprised total “market value in the sense of price times quantity of all goods and services,” and also “the total consumer and producer surplus generated by those goods and services.”²¹⁴ “The most important thing” about the concept of *value* upon which this definition of “wealth” turned, Posner reported, was that it was “based on what people are willing to pay for something rather than on the happiness they would derive from having it.”²¹⁵ Those matters laid out, Posner suggested that commonlaw judges both should, and

²⁰⁹ POSNER, *supra* note 199 at 58.

²¹⁰ *Id.*

²¹¹ *Id.* at 65.

²¹² *Id.* at 63.

²¹³ I insert the parenthetical question mark because there is of course a leap here. A proposed aim’s avoiding the failings of another proposed aim is not ordinarily thought to constitute so much as an affirmative, let alone a sufficient, recommendation of the proposal.

²¹⁴ POSNER, *supra* note 199 at 60.

²¹⁵ *Id.*

in fact commonly – if “subconsciously” – did, craft private law rules as to maximize aggregate wealth so defined.

Now while value, hence wealth, of course correlated in part with satisfaction hence some form of welfare on Posner’s understanding as just described – since people presumably would not be willing to pay for what did not afford them some satisfaction – they also of course rode upon rather *more* than just satisfaction or welfare. For *willingness* to pay for a good is a function not only of the anticipated satisfaction-yield of that good, but also of (a) the comparative prices of all individually desired goods and services, and (b) the broader distribution of purchasing power itself (ultimately a legal entitlement) over the community as well. The questions thus were left open both (a) what normative import wealth and its maximization have could insofar as they *diverged* from welfare and its (or wealth’s) proper distribution, per concerns noted above at 3.3.1 and II.D.1; and (b) given the functional dependence of aggregative wealth’s determination upon the “wealth effects” of wealth’s distribution itself, how wealth-maximization could be of any use in determining an appropriate initial distribution of entitlements, per concerns noted above at II.E.2?

Notwithstanding such foundational problems afflicting erection of Posnerian WM as a proposed social aim, Posner proceeded buoyantly to elaborate how the pursuit would avoid the problems of U and K he’d run-through. Thus, the “boundary” problem concerning whose utilities should count would be solved through determination, not of elusive comparative capacities to experience utility, but by “the intersection of marginal product and marginal cost of keeping” the utility-experiencers.²¹⁶ WM also avoided U’s measurement problems, Posner suggested, since we have reasonably satisfactory means

²¹⁶ Id. at 79. Posner considered sheep.

already to hand by which to measure wealth.²¹⁷ Further, because wealth is maximized through voluntary exchange, wealth-maximization would tend to favor a broad sphere of autonomy among citizens, along with a concomitant limiting of government.²¹⁸

WM also would avoid much of the moral monstrousness of U, said Posner, because those who derive utility through the suffering of others would have to purchase the right to inflict that suffering from them.²¹⁹ Indeed, to generalize that point, even very self-centered people would be able to promote their interests in general only by benefiting others, through exchange. Relatedly, many “conventional virtues – keeping promises, telling the truth, and the like – [could] also be derived from [WM]. Adherence to those virtues facilitate[d] transactions and so promote[d] trade and hence wealth by reducing the costs of policing markets.”²²⁰

There were, of course, multiple cracks in this happy edifice from the conceptual and ethical points of view – the latter ironically being, recall, that from which Posner was seeking to *promote* WM. The grounding error was simply that noted above – that the view offered no attempt what ever to explain *what particular* mix of U’s and K’s *advantages*, if any, an adequate ethic should capture, or why. Proceeding from that foundational void were multiple individual confusions.

One was, as flagged just above, what normative interest wealth should have insofar as it was severed from welfare – a concern of the sort noted above at 3.3. If the answer to that one was that, say, “WM, not wealth itself, is what solves the problems of U,” then another problem was simply that, just as grotesquely as Posner noted of U, WM

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ Id. at 70.

²²⁰ Id. at 67.

rendered rights as basic as that against involuntary servitude contingent upon the fact that people tend thus far to be more productive when not enslaved.²²¹ That's troubling, of course, as noted above at II.D.1 in connection with all forms of naïve maximization.

Another problem, deeply connected to those just rehearsed, was WM's complete indifference to the morally arbitrary distributions of ethically exogenous endowment that WM was committed to leaving untouched – again clearly vitiating in view of II.D.1's observations above. “If [one] happens to be born feeble-minded and his net social product is negative,” Posner admitted, “he would have no right to the means of support even though there was nothing blameworthy in his inability to support himself.”²²² That consequence Posner strangely described, not as repugnant and ethically disqualifying, but merely as “grat[ing] on modern sensibilities” – as though on a par with bear-baiting and petticoats. More strangely still, he professed nonetheless to “see no escape from [the conclusion] consistent with any of the major ethical systems.”²²³

But there is of course a perfectly obvious “escape” recommended by the perfectly familiar value of equal opportunity as elaborated above through Part 3, pursuant to which faultless handicaps are to be compensated. Posner obscurely professed to find that ideal “inconsistent with the Kantian notions of individuality from which the view [that genetic endowments are morally accidental] purports to derive.”²²⁴ He darkly hinted, that is, that there is some manner of internal inconsistency in the view that faultless handicaps deserve help: “To treat the inventor and the idiot equally concerning their moral claim over valuable resources,” he quipped in an unfortunate echo both (a) of his apparently

²²¹ Id. at 70.

²²² Id. at 76.

²²³ Id.

²²⁴ Id.

much admired Holmes (“three generations of imbeciles are enough”) and (b) of an oft-quoted Rawlsian locution, “does not take seriously the differences between persons.”²²⁵

But this observation simply failed to take seriously the difference between contraries. The problem that Rawls had singled-out with “the distinction between persons” remark was U’s failure to treat persons as discrete individuals – as numerically distinct – not as characteristically differing: The problem was naïve aggregation itself, which was problematic precisely because it allowed morally arbitrary distinctions between persons – in this case, individuals’ exogenously given utility functions – to determine the distribution of resources employed by persons in producing their utilities. (Utility functions as foreheads or noses, per II.D.1 above.) WM, of course, suffered precisely the same problem, as indeed noted at II.D.1, simply replacing utility-productivity with wealth-productivity. And so, by effectively treating as morally decisive the accidental differences between persons in advocating naïve maximization of an ethically inert aggregate, WM failed to take seriously the ethically relevant – indeed properly decisive – numerical distinction between equal-rights-bearing agent-distribuees.

2. A Helpful & Entertaining Corrective, But a Bit Overstated: Dworkin

Conceptual sloppiness and ethical repugnance of this sort were surely what lay behind the sometimes perhaps overstated – or over-subtly stated – but nonetheless

²²⁵ Id. Rawls’s observation on U’s failure to take seriously the distinction between persons appears at RAWLS, supra note 43 at 79. Holmes’s “imbeciles” remark, along with further references to “idiots,” “degenerates” and so on, can be found in *Buck v. Bell*, 274 U.S. 200 (1927) (upholding eugenicist Virginia law providing for forced sterilization of persons with IQs falling below minimum threshold) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.”)

decisive demolition of Posnerian would-be normative WM conducted by Dworkin.²²⁶

Dworkin's stated concern was with whether "the claim that social wealth is a component of value . . . is a defensible idea."²²⁷ Dworkin's ultimate verdict was that "it is plain it is not."²²⁸

Dworkin's argument rode, to what might at first have seemed a surprisingly unique degree, upon a single hypothetical story: In the story one person possesses a book desired by another. The first person's reservation price, or measure of willingness to accept (WTA), is \$2. The second person's willingness to pay (WTP) is \$3. Dworkin observed that a benevolent tyrant actuated by normative WM would see reason simply to strip the first person of the book and deliver it to the second, without any compensation at all paid the first. For the transfer, of course, would increase social wealth as defined by Posner, and moreover would economize on the haggling costs that the parties would incur in a market transaction. Dworkin then asked whether there is any respect at all in

²²⁶ Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191 (1980); Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980). Both are reprinted in substantially unaltered form in RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985). Subsequent pincites herein are to pages in the latter.

It should be emphasized that Posner himself has long since abandoned WM as a serious normative principle, partly indeed – I think to his great credit – in response to Dworkin's critique. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 374f. (1990); RICHARD A. POSNER, *OVERCOMING LAW* 387f. (1995); and especially the well-rendered discussion in RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 95f. (2001). On the other hand, it is not yet quite clear just how fully he's thrown-off WM, in that much "cost benefit analysis" ("CBA") advocacy bears a strong aggregative WM taint, and Posner seems an advocate. See, e.g., last mentioned cite. Because CBA's still developing, however, and is not yet determinately committed as a whole to naïve maximization stripped of distributive concern, neither it nor Posner should yet be accused of backsliding, and it is moreover to be hoped that the mode of approaching distributive matters advocated in this paper might ensure CBA's more healthy development. More on this *infra*, Conclusion. It should also be noted that Posner endorses Kaplow and Shavell's work, discussed *infra*, next subsection, which work in turn expressly repudiates WM. There's also some irony, however, in the endorsement, in that this work itself is a mess, as we'll soon see, and in that were one to endorse both Kaplow and Shavell (who do not commit on the matter of how social welfare functionals should aggregate individual welfare functions notwithstanding their recognition that one must so commit before one can prescribe, see *infra* next subsection) on the one hand, an affine social welfare functional such as most welfarists thus far propose on the other, one would lapse straight back into the utilitarianism that Posner recognized to be "monstrous" in the early 1980s and has reaffirmed to be "barbarous" more recently. See last cited Posner work, *supra*.

²²⁷ DWORKIN, *id.* at 242.

²²⁸ *Id.*

which the post-transfer society, reached after the tyrant had taken and given, would be better than the pre-transfer society. His answer, to which he averred that he thought most would agree, was that it would “not [be] better in any respect.”²²⁹

It seems safe to say that Dworkin was right at least in the sense that most if not all would say the forced transfer described in his story is ethically wrong. What is perhaps less clear is the basis on which they would say so. For there are, at least superficially, multiple bases on which to object: It might be the involuntary nature of the transfer, for example. Or it might be the uncompensated nature of the taking. Or it might be the suspicion that the original owner, since he'd take less than the “new” owner would have paid, is (undeservedly) poorer, hence not only taken from but *unjustly* taken from (simply in order to render an undeservedly richer person undeservingly richer still by a yet greater margin). Or finally it might be, relatedly though not immediately obviously so, the recognition that, in light of willingness-to-pay's dependence in part upon antecedent wealth, the new owner might derive much less utility from the transfer than the original owner derives prior to it.

Because any of these reasons might individually underwrite one's revulsion to the transfer described in Dworkin's story, and because at least some of them might be thought consistent with finding the post-transfer situation better at least in some ultimately “outweighed” respect, the revulsion alone cannot be immediately taken, it seems, for evidence of our not finding the post-transfer situation better “in *any* respect.” And so Dworkin might appear to have overstated his conclusion. At least it might seem so unless and until we can show all of the just proffered facially distinct grounds for

²²⁹ Id.

objecting to the hypothetical transfer to be deeply connected – in effect one reason, which itself entails the post-transfer world’s not being better in any respect.

I think that the facially distinct reasons for objecting to the transfer in Dworkin’s story *can* indeed be reduced to one, and that this reason itself entails the post-transfer world’s not being better in any respect. We simply have not been equipped, thus far, to articulate clearly and comprehensively how this can be so, until we have viewed the matter from the valence-grammatical point of view elaborated through Part 3. The post-transfer situation in Dworkin’s story fails to be better in any respect, I think, simply because it is a situation the only *prima facie* improvement represented by which is its larger naïvely summed aggregate. And a larger such aggregate, we have seen at Part II.D.1 and elsewhere above, considered apart from the ethical propriety of its distribution and the means by which it is obtained, is as an ethical matter entirely without interest.

The latter fact is obscured, at least in some confused eyes – such as Posner’s, apparently, in the early 1980s²³⁰ – most immediately by failure to track what above we have called the “distributor” variable and its adequate filling – the “we” who are addressed by *de facto* distributive prescription. As soon as we attend to it, we are reminded that “we” refers to all of us, since ethical prescriptions by their very nature claim universality.²³¹ And then upon recognizing that there is no reason for “us” to take interest in an aggregate whose maximization does not treat us all as of equal ethical standing, we see that there is nothing prescriptive for “us” to *hear* in the recommendation

²³⁰ He’s long since recanted. See *supra* note 219.

²³¹ This has been a commonplace since Hare at the latest. See R.M. HARE, *THE LANGUAGE OF MORALS* (1952). Explicitness on the matter also is canonically found in Kant’s categorical imperative, pursuant to which one is to act on such principles as one can conceive “legislating in the form of universal law.” See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* [1785], in IMMANUEL KANT, *PRACTICAL PHILOSOPHY* 37 (Mary J. Gregor et al. eds., 1996).

of a transfer such as that in Dworkin's story – a prospect to which, as Dworkin well shows, WM commits itself.

General failure to view the matter in conformity with valence grammar is manifest, incidentally, not only in failure till now to articulate both comprehensively and clearly just why and how the Dworkinian transfer story results in no improvement in any respect. It also is manifest to some extent in how the questions of value and betterness typically are framed: When Dworkin asks whether the post-transfer situation is “better,” simpliciter, in any respect than its temporal antecedent, there is, strictly speaking, a gap in the question. Situations, objects, and so on are “better,” typically, not only *in* one or another *respect* – i.e., relative to some value- or purpose-determined metric – but also *to* one or more valuing, purpose-holding *agents*.

Dworkin's post-transfer situation might indeed be (unjustly and thus ultimately incorrectly, per II.D.1 above) judged “better” by the *beneficiary* of the forced giving. And so that person might, superficially and in effect weak-jokingly, answer Dworkin's question in the affirmative: He might say, “yes, it is better in respect of its enhancing my wealth-holdings, with which in turn I can satisfy more of my wants and fulfill more of my plans, hence indeed boost my welfare.” And it is presumably some such prospect as that which underwrites the early Posner's and, more recently, Hanoch Sheinman's inclination to answer Dworkin's question in the affirmative as well.²³²

But of course these are actually non-answers at bottom. Or perhaps more precisely, they are answers to a different question. For Dworkin's real question is not whether the post-transfer situation is *preferable* to the ethically unreflective *thief*, or

²³² Hanoch Sheinman, *Are Tradeoffs Between Justice and Welfare Possible? Calabresi and Dworkin on the Normative Foundations of Law and Economics*, 64 MD. L. REV. 250 (2005). More on Sheinman's recent contribution *infra*.

whether the latter “values” – i.e., desires – wealth. It is, rather, whether “we,” as a polity of ethical equals, jointly take ethical interest in the growing of a naïvely summed aggregate unmoored in (hence grown in offense to) our ethical equality. And both the fact that this is Dworkin’s actual question, and the obvious reply to it – “No” – are kept much more clearly in view when the case grammar of distribution is kept clearly in view. Obscurity about this, by parity, is the product of grammar-blind thinking.

My proposed way of framing the controversy shows not only why Posner’s (and Sheinman’s) attempts to rebut Dworkin’s polemic fall as flat as they do, but also both why and how the various facially distinct grounds for objecting to the transfer in Dworkin’s story briefly enumerated above ultimately reduce to one: Those who object to the transfer by dint of its being an uncompensated taking, for example, implicitly assume that the prior owner of the book was a rightful owner, and then object to the transfer-in-name-of-the-aggregate’s indifference to distribution – in this case, to the person from whom the book is taken. Similarly, of course, in the case of those who object out of suspicion that we have taken from the worse-off to the better-off in the story. And ultimately similarly in the case of those who worry that the transfer need not actually bring increased utility, since those with that worry are then concerned with the *fetishism* of WM, a concern which commits them, for reasons discussed at II.D above, to reject *any* form of naïve maximization, U included. Finally, for reasons adduced at the end of Part II.E on distribution mechanisms, the same opportunity-egalitarian commitments as underwrite the other grounds for objection underwrite objection to involuntary

redistribution for any reason other than that of bona fide exogenous opportunity-equalizing, which seems to be subtly assumed not to be happening in Dworkin's story.²³³

3. A Quasi-Posnerian Reformulation, But What Does It Mean?: Sheinman

As for the more detailed putative rejoinders to Dworkin found in the literature, again, failure to attend to the case grammar of distribution leads critics to miss the actual force of Dworkin's argument, I believe, hence to offer what amount to non sequiturs as answers. Posner says in his then-contemporary rejoinder, for example, that were Dworkin simply to have changed the numbers in his story, so that the original owner still maintained a reservation price of \$2 but the "new" owner now was willing to pay \$3,000, we would likely answer Dworkin's question in the affirmative. That's simply facetious. The quantities are entirely irrelevant – because, again, naïvely maximized *aggregates* are irrelevant. There is no more reason for "us" to favor the "new" owner's seeing his wealth illegitimately increased by \$2,998 at the original owner's illegitimate expense than there is to favor his wealth's illegitimate increase by \$1 at the original owner's illegitimate expense.²³⁴

Similar observations hold in respect of Sheinman's more recent, and rather more painstaking, attempt to engage Dworkin.²³⁵ Sheinman considers three variations on Dworkin's original story. In the first, the two parties actually engage in voluntary exchange: The second person *purchases* the book from the first, for two dollars, hence

²³³ Had the first person in the story been very wealthy, all by dint of inheritance, for example, and the second person been very poor, all by dint of a handicap, no one would find it troubling. But in that case Dworkin wouldn't have bothered with reservation prices or willingnesses to pay. Thus since he did, and since he apportioned these as he did, we tend instead to assume in reading the story some quite contrary initial distributive picture.

²³⁴ A cognate error afflicts an argument leveled by Kaplow and Shavell against Howard Chang. See Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L.J. 237 (2000). More on that *infra*, Part III.B.

²³⁵ Sheinman, *supra* note 225.

retaining the whole of the one dollar surplus that is the WTP/WTA spread. Sheinman's reported intuition is that the post-transfer situation is "on balance better." That's not a surprising intuition, of course: Something very much like it underwrites the program and principal results of WE from Edgeworth through Pareto to Arrow and beyond. And probably most people share Sheinman's intuition, at least preliminarily. But it's worth asking why:

Why? I think it's this: Because at first pass in Sheinman's story both parties involved, who per the story exhaust the universe of distributees, presumptively *prefer* it.²³⁶ After all, they trade voluntarily. So "everyone's happy," we figure, what's not to like? Indeed, distributive-assessment and thus the ethical objection it might underwrite aren't even implicated absent potential conflict between agents over something that's scarce. Since everyone's happy here, no conflict, so no assessment or, therefore, objection. But let's probe a bit longer:

There are at least three further questions worth asking about the shared intuition that's countenanced here. The first and easiest one is whether it's improved welfare or increased "wealth" that accounts for the intuition: For recall that Dworkin's target was Posnerian wealth-maximization, not welfare as distribuendum or welfare-maximization as a distributive ethic. Sheinman forthrightly recognizes, correctly I think, that it's improved welfare that accounts for our approving the transfer. For reasons stated two paragraphs up, this isn't surprising. But now we might wonder, was Posner then right after all, save that he should have promoted welfare- rather than wealth-maximizing? Or was he, say, *partly* right, in that we must in some sense "balance" our interests in

²³⁶ Where all parties to a distributive change prefer the change, it sometimes is said that a "weak" Pareto improvement has been effected. More on "strong" and "weak" Pareto *infra*, Part III.B. Note that in such case the prerequisites to distributive-ethical assessment's aptness, per *supra* Part I, might not be met.

distributive fairness on the one hand, aggregate welfare or wealth on the other, hence implicating the familiar apparatus of indifference curves? I think clearly not, for reasons that emerge as we turn to the two remaining questions I alluded to just above:

The second two questions that I think worth asking in connection with Sheinman's intuition in reaction to his story are more interesting than the first. And in light of Part 3 we can see that they're intimately connected. The first question is whether the welfare improvement we discern in Sheinman's story has anything to do with our perceiving a welfare aggregate's having been raised. The second is whether that aspect of the story which renders the post-transfer situation an improvement has anything to do with a value that really can come into conflict with, hence sometimes conceivably have to be "traded-off" against, a correct distribution. I think the answer to both questions is no, for reasons discussed throughout Part 3 – Parts II.D and II.E in particular. And I think that those answers are entirely consistent with Sheinman's intuition that the trade brings an improvement. This is best shown by grappling directly with the principal – indeed I think the only – potential challenge the story might seem to pose: namely, the fact of the purchasing party's pocketing the whole of the surplus:

Note first that it might be the case in Sheinman's story that neither party has any way of knowing the WTP/WTA spread, hence the surplus. We're simply not told anything about the epistemic characteristics of the bargaining situation, and we probably assume informational symmetry as the default. In this case, that's joint ignorance. My bet is that most non-theorists, moreover, insofar as they think of such things at all, probably likewise assume some such informational unavailability as implicit backdrop.

Now given that backdrop, the reader likely assumes herself into being one or the other of Sheinman's parties – hence, either of two (unquantifiably) *satisfied* parties. To the degree that she does, the bargaining situation naturally seems quite unobjectionable. For in such case there is, as an informational and pragmatic matter, simply no scarce item over which any two parties might dispute. And recall from Part 2 that that's a critical predicate to distributive-assessment's, hence potential objectionability's, being so much as implicated. There is nothing in the story, that is to say, that might be cardinally quantified per Part II.B, then divided and doled out fairly or unfairly per Part II.D. So there is no occasion for the improvement that the trade in the story effects to come into an apparent conflict with distributive norms.

Now turn to the other epistemic possibility in Sheinman's story: Suppose that either or both parties *is* indeed able to ascertain the WTP/WTA spread. In such case it is quite likely, given the institutional backdrop that most of us now likely find most familiar and thus also assume into the story, that at least one of the parties is unable to *do* anything to ensure a more *equitable* spread of the (now known) surplus. We've long since arranged our world (the world into which we read Sheinman's story), indeed to the point where most of us don't even notice let alone bother to question it any longer, in such a way as ensures that most sellers are price-takers.

Now a price-taking party, of course, is "held up." He gets the bare minimum that he prefers to the status quo ante, allowing his counterparty much more; or he gets nothing at all. So of course he takes that minimum. It's the best that his counterparty allows him. And that's at least preliminarily ethically troubling, I think most would agree on

reflection.²³⁷ So perhaps there indeed is potential for our distributive-ethical commitments to come into conflict with our “welfare-improvement” intuitions invoked by the story, at least on reflection, such that we must choose between them sometimes, or “trade them off” against one another?

I don’t believe so. Note first that most people upon reading the story likely do *not* notice or reflect upon the significance of the hold up. For again, we’ve grown accustomed to thinking inchoately both of “ourselves” as consumers, and of the hold up of price-takers and its upshot – the consumers’ surplus – as inevitable if indeed even any longer noticed features of the institutional backdrop against which we typically transact. Our initial acceptance of the story as involving a welfare improvement, then, does not of itself signal a judgment that such improvements can come at the expense of some “traded-off” “increment of” fairness.

Note next that even upon growing a bit more reflective in considering the story and accordingly noticing that there’s hold up and unfair division, we’re likely not thinking that either of the *parties* in the story actually knows what we know or is thinking as we think in consequence. That’s because, for one thing, we’re not told anything about their knowledge in the story, and it’s natural to assume that they themselves do not think about such things as WTP/WTA spreads and consequent surpluses and those surpluses’ division. And it’s because, for another thing, the parties actually *trade* in the story, and

²³⁷ It is intuitively tempting to think of the WTP/WTA spread as ethically exogenous and thus ethically subject to equal division, at least against a backdrop of antecedent exogenous endowment equality such as the opportunity-egalitarian distribution formula prescribes. I think that the intuition is grounded in some such consideration as this: Against the backdrop of an antecedently equal division of the ethically exogenous endowment, each of us is responsible for his WTA or WTP in any given transaction. (To hold otherwise is to hold that we are addicts.) But that means that each of us is, as it were, “equally” responsible for the spread. And so we should evenly divide it. But I confess that I must think this through more before I can commit with full confidence. What ever the end result of that planned consideration, for present purposes it suffices to make the point that the spread would at least be divided some way other than 0/1.

that itself tends to suggest that the selling party does not know what we know, hence does not think as we're thinking. For we know from the experimental economics literature that parties eschew even potentially Pareto-improving transactions when perceiving that they're being treated unfairly, or being held-up or otherwise dictated to.²³⁸

Note finally that, even if we do, upon reflecting a bit more carefully and thus noticing that there are hold up and unfairness in the story, attribute such reflections to the transacting parties themselves, we still need perceive not real "conflict" between the Pareto gain and the interests of fairness. For if we think about the matter at all we probably remind ourselves that over time and across commodity space hold-up gains "all balance out" when we arrange things as we have done. For we're *all* of us consumers in *most* of our transactional contexts. The price-taker in one transaction is a holder-up of price-takers in countless other transactions, sharing in the spatially and temporally extended aggregate consumer surplus with everyone else. And that's, unsurprisingly, no doubt thought simpler and easier and more time-saving than dividing surplus more evenly transaction-by-transaction through dickering.²³⁹ So even when we don't assume that there's ignorance about WTP/WTA, and even when we don't assume that there's in

²³⁸ A serviceable overview of the large literature here is Alvin E. Roth, *Bargaining Experiments*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 253 (John H. Kagel & Alvin E. Roth eds., 1995). Some very interesting recent results are reported in Raymond Fisman et al., *Pareto Damaging Behaviors* (May 15, 2005), available at Mr. Fisman's and his co-authors' SSRN sites.

²³⁹ I recognize that this judgment will be seen to sit in some potential tension with my earlier proposed proposition, at II.D.4, that distributive fairness generally be maintained as nearly as possible on a "direct, transaction by transaction" basis. But please recall, first, that I do not postulate that as an exceptionless axiom, but only as desirable so far as is practicable; and, second, that I am not here defending department stores over trade fairs, only stating how the former mode of surplus-distribution – to consumers – can be viewed in macro as being just as fair as the latter mode of surplus-distribution – more evenly over buyers and seller alike – is likely to have been in micro, particularly given the unlikelihood within a fair or bazaar economy that counterparties possess equal bargaining power in every transaction. So again our intuition that the Pareto gain in the story really is an improvement entails no judgment what ever to the effect that it is a gain notwithstanding some perceived "fairness sacrifice."

consequence no measurable item – no surplus – over the distribution of which parties might bear conflicting interests, we still assume away unfairness in Sheinman’s story.

Now to the second question I raised in connection with Sheinman’s first story: Does one’s intuition that the story involves a welfare improvement have anything to do with a perception that some aggregate – even a welfare not wealth aggregate – has been increased? I see no reason to think so.²⁴⁰ And indeed, if it’s apt to appeal to Occam’s Razor here, there being no reason to think so itself constitutes a reason to assume to the contrary.

The simplest explanation for our intuition in response to the story is, of course, this: The post-transfer situation is better simply because quite literally all in the story *prefer* it. Now of course it can be said that a by-product of the latter fact, at least given the backdrop as described in which the possibility of measuring and dividing the surplus has in effect been bracketed, is that arguably ethically cognizable welfare (as indeed wealth) has increased.²⁴¹ But the very definition of “ethically cognizable welfare” (or “-wealth”) is such as to indicate the sense in which this “growth” *is*, indeed, a by-product – the “cart,” so to speak, not the horse: It’s the sense in which ethically cognizable maximization was seen at Parts II.D5 and II.E.2 to “take care of itself” when the opportunity-egalitarian distribution formula is satisfied: What *matters* in Sheinman’s story is *only* that both parties presumptively *prefer* the trade’s outcome and “gain” in that sense, while, insofar as we unreflectively ignore the possibility of measuring and splitting surplus, we in effect think of the gains as being “equal” by default, as it were. And so to

²⁴⁰ Neither, it should be noted, does Sheinman. See Sheinman, *supra* note 225 at 278.

²⁴¹ I say only “arguably” in this case because we do not know here how the surplus, if any, has been distributed. We know only that all prefer, without knowing (a) the reasons, (b) whether there are fairness grounds for preferring the same transfer on somewhat different terms so as to distribute the surplus properly, etc. More on these matters in the ensuing several paragraphs.

speak of an aggregate's growth here is none but another way of saying – quite elliptically, by reference to a post hoc constructed “output” – that all prefer it.

Note moreover that even in our unreflective versions of the response to Sheinman's story, we have not judged that ethically cognizable welfare or wealth have been maximized in macro – hence that the post-transfer situation is even pre-reflectively optimal, unobjectionable, or proper. Indeed we are not equipped to do so, for we do not know whether the full distribution of material opportunity in the pre-transfer situation is proper. (Nor can we know in macro, then, even on a reflective reading of the story pursuant to which we recognize that the surplus might have been divided, whether the macro-distribution of surplus wrought by this trade is fair by those lights.) Such information has not been supplied in the story. But the valence-grammatical mode of viewing such stories at least tells us precisely what to ask for in determining how the surplus in the trade here should be divided. If the two parties prior to trading enter the trade with initial endowments that conform to the opportunity-egalitarian distribution formula, for example, it is quite tempting to hold that the book should sell for \$2.50, with the parties quite evenly dividing the surplus.²⁴²

Sheinman's second variation on Dworkin's story seems to me to speak more directly to the prospective value of aggregate-growing – though still not, as we'll see, to the prospective value of doing that apart from the equal treatment of agents.²⁴³ Rather than a voluntary or involuntary redistribution, this second story involves an initial distribution: Neither party holds the book initially. Now the benevolent tyrant somehow gleans the comparative valuations of the book. Then he simply gives the book to the

²⁴² See supra note 230.

²⁴³ Sheinman, supra note 225 at 278.

party who “would” have paid most, rather than to the party who “would” have paid least. Of course either such situation ex post represents a Pareto improvement over the status quo ante, while neither of the former two Pareto dominates the other.

Sheinman’s intuition is nonetheless that the outcome he posits “is on the whole better” than its alternative – the book’s being given the party who values it less. I for my part am at least partly inclined to agree, at least in the sense that I commonly give things, when I cull through my holdings, to those whom I think will most appreciate them. And this intuition of Sheiman’s and proclivity of my own might appear to be justifiable only by reference to some shared perception that aggregate-growing is cognizable as good even apart from distributional considerations. Is it?

Again I incline to think not. I speculate first on the tendency that I have just autobiographically reported, then on Sheinman’s story and reported intuition: The tendency I’ve reported dovetails with other, seemingly cognate tendencies: When approaching a crosswalk on foot that is simultaneously approached rectilinearly by a cyclist, for example, I’ll often wave the latter through rather than avail myself of my right to walk first. I do this even when quite sure the cyclist will happily stop if I do claim my right. When cycling, in turn, I often assume that the pedestrian will do likewise for me. And typically that is precisely what happens. I’m fairly sure that what’s happening in these cases is that the pedestrian is in effect thinking, “it’ll take more effort for him to stop his bicycle, then recommence pedaling, than it takes me to slow my walking pace slightly.” And that’s aggregate-cost-saving thinking, hence aggregate-maximizing thinking.

But now note another critical aspect of this speculation, an aspect that's not stated but seems nonetheless to be taken implicitly for granted: As with the observations concerning consumer surplus above, here there's presumptive "evening out" over time. Sometimes I'm walking, other times I'm riding. I assume that it's likewise with others. I'm not counting, for I'm not Pickwickian, but it is my rough perception nonetheless. And were it otherwise I'm quite sure I'd act differently. Indeed were I never to travel any way but by walking, I might very well begin to feel exploited by non-stopping cyclists, and in consequence start asserting my right in the crosswalks. My conjecture's that considerations of this sort are operative in others as well.

There seems a strong sense, then, as with the considerations in respect of consumers' surplus above, in which here too our intuitions are *not* grounded in aggregate-growing considered *apart* from equal treatment at all. Rather, the intuition's embedded in an assumed context involving shared gain. It's only against that backdrop that the aggregate-growing is seen as being so much as cognizable as good. Absent that backdrop, we'd see no good in it at all, no matter by how much the aggregate grew. That take's me to Sheinman's reported intuition in respect of his story, and what I think's illicit in the conclusion he draws from it. It also leads on to his third tale:

Absent some assumed backdrop such as that I've described in the immediately preceding paragraphs, the problem with Sheinman's second story and reported intuition in reaction thereto is that there seems nothing actually to *ground* the intuition. Or rather, there seems no reason to expect to *experience* an intuition, as opposed to a premature ethical "gun-jumping," here without first requesting additional information. The hypothetical is incomplete once we give it some thought – indeed dramatically so. For

the two parties in his story must surely have pasts, and must surely have futures, and the scarce goods they hold over time will inevitably be fairly or unfairly distributed, such that the sudden gratuitous bequest of a book to one of them inevitably will render things fairer or unfairer. Not referring to any of that, it is nearly as if Sheinman has said, “T gives a book to S. Is the world now better?” Would anyone know how to answer that? If not, how can things be decisively different when add but another detail, as in: “T gives a book to S who wants it more than R. Is the world now better than it would have been had T given it to R?” One still ought to shrug.

As soon as we view the matter valence-grammatically, we see precisely the sense in which both questions are incomplete, and we know precisely what additional information to request in order to be able to arrive at a judgment: We ask whether the two possible recipients are antecedently equal-material-opportunity-endowed. If they are, then simply giving the book to one of them actually worsens things: The distribution of goods now’s unfair.

The tyrant must then instead, if he is to improve the world as he finds it prior to giving, evenly divide the book’s possession into temporally equal leaseholds, for example, or convey a joint tenancy or tenancy in common. Or if for some reason the book’s not in such wise divisible, he should give the book to one party, then give the next item, once available, to the other party. Or if that isn’t possible, he should flip a coin, so to speak, affording each party an equal chance of receiving the book. That way he at least equalizes ex ante opportunity to benefit.

If the winner of the flip is the party who values it least, the party who values it more can then purchase it, leaving both parties in consequence better off. Likewise, of

course, if the parties prefer one another's gifts if and when both have received gifts successively. Cognate remarks hold in respect of temporally divided or joint ownership too. And variations on the 50/50 split – say 10/90, 20/80, etc. – are readily devised to make of any one gift an opportunity to equalize total ethically exogenous holdings between parties if such holdings are antecedently unfair. This leads quite nicely into Sheiman's third story, which is quite easily dispatched.²⁴⁴

The third story returns us to Dworkin's, save with two small alterations: First, the differential between WTA and WTP is now that between \$2 and \$300, rather than \$2 and \$3. And second, it is a poor and sickly person who would be willing to pay the higher price, while it is a wealthy and healthy person who possesses the book and would part with it for \$2.²⁴⁵ As in Dworkin's story, a benevolent tyrant now simply takes the book from the rich healthy party who values it little, and gratuitously bestows it upon the poor sickly party who values it greatly.

It might seem a bit odd, of course, that after taking such care to separate out distinct features of Dworkin's original story in his first two stories, precisely in order to isolate just what it is that accounts for our reaction to that original story, Sheinman now runs things together again. Both alterations, after all, appear meant to carry us the same way. But Sheiman's ultimate intention accounts for this: This story, like its predecessors, is meant to establish that aggregate welfare maximization is cognizable as a good even apart from the fairness of the aggregate's distribution, so that conflicts between spread and size might be possible, such that in turn we might countenance

²⁴⁴ See Sheinman, *supra* note 225 at 281.

²⁴⁵ The health and wealth distribution in the story effectively reverses that in Dworkin's, which latter is a revised version, in Dworkin's article, of the original story. (The first rendition did not speak to the antecedent distribution of health and wealth.)

“tradeoffs” once size grows “really, *really*” large. Once again, though, I think that the effort falls flat, and we can show why quite quickly by serial reference to the two alterations that Sheinman makes to Dworkin’s story.

The first alteration, of course, we have in effect treated already: It was essentially Posner’s, recall – which we found to make no ethical difference what ever.²⁴⁶ And in light of both (a) the foregoing paragraphs on Sheinman’s first two stories, and (b) the discussion in Parts II.D and II.E, it ought to be very clear why. Assuming for the moment that the original owner holds fairly, the taking’s a theft. And theft by a “really, really” desirous thief is still theft. The theft might seem (illusorily) to be “a good thing” by the thief,²⁴⁷ and might even seem more good to him than the same theft would seem to the thief who was only “a wee bit” desirous of the stolen good. But “we” aren’t the thief. “We” are a polity devoted among other things to equal treatment of all of us. And that commitment we have seen to entail, in light of our responsible agency and indeed of the fuller discussion of Part 3, our equally spreading such resources as none of us is responsible for the existence of. To the degree that we’ve fulfilled that commitment, we’ve defined entitlements – hence what counts as thievery – accordingly. And so thievery, no matter how (unjustly) pleased it might render the justice- and us-indifferent thief, will just not be cognizable as good to *us*. It’s simply *stealing* from *us*. That observation feeds into dispatch of Sheinman’s second alteration to Dworkin’s story:

²⁴⁶ Posner’s spread was yet larger – that between \$2 and \$3000. If that one was ethically irrelevant, of course, so is the smaller one.

²⁴⁷ I say “(illusorily)” for reasons that will be familiar in light of Part II.3 above. It is that “good” must be contrasted with “desirable.” “Good” means that “we” find it desirable. It means universally desirable in the eyes of a relevant population. And since we’re speaking here of the ethics of distribution over all of us with a right to be considered in policy-making, the relevant population’s the polity. Compare remarks on “welfare” and “well-being” as distinguished from mere “satisfaction” supra, Part II.3.

As with the first alteration, we've seen the problem that's raised by the second alteration already. It is that, without more information, its relevance – and with that its ethical force – is entirely indeterminate. There's just not enough here to underwrite an intuition. We can see this in Sheinman's reported intuition itself: Sheinman says he's conflicted. On the one hand, he says, there's a sense in which things are better after the taking: Aggregate welfare is boosted. We've just seen why that can't be thought good yet, to "us." But neither can anything be said yet in respect of Sheinman's other reaction: Notwithstanding the sense in which things are better post-taking, he says, things might still be thought better, "all things considered," pre-taking. Why? Because the taking involves a justice-loss, he says.

But of course, without more we don't know that. For note: We don't know *why* the beneficiary of the taking is poor and sickly in this story. (Perhaps he is responsible for his illness, perhaps he is not.) Nor do we know why the victim of the taking is wealthy. Indeed we do not even know whether the original holder in the story holds legally or legitimately. Absent such information, we know nothing about the justice of the transfer. All we know is that an aggregate has been grown – and that, for reasons now many times rehearsed, *until* we know the justice of holdings in the status quo ante, the ethical significance of that aggregate-growth is entirely indeterminate.

4. "Just Right" & Here's How: Calabresi

I think that something along the lines rehearsed over the foregoing paragraphs – more specifically, a variation of the sort I'll momentarily explain – was and is the

position of Calabresi.²⁴⁸ It is a position that Dworkin appears, regrettably if nevertheless understandably in view of Calabresi's occasional idiosyncrasy of expression,²⁴⁹ to have misunderstood in assimilating it to Posner's. It might also be described as a sort of via media, somewhere between (one extreme and ultimately unsustainable interpretation of) Dworkin's and Posner's positions, if nonetheless closer in fact to (the actual) Dworkin's:²⁵⁰

Posner, recall, seems in the 1980s to have taken wealth for *the* proper collective aim. That's at least so in the sense that he seems to have considered the singular pursuit of WM to afford an appropriate "mix" of other attained values.²⁵¹ Dworkin, in turn, at least on a cursory reading could appear to have taken wealth, as distinguished from WM, to be of no social interest at all. And Calabresi then in effect struck a middle course between the extreme Posnerian and erroneously-interpretable-as-extreme Dworkinian positions by holding that WM – or in his case, cost-minimization – was indeed a compelling social aim, but only as constrained by fairness: In view of the different logics of the two values – WM was teleological, fairness was categorical – the two values were, as Calabresi put it, of different "types."²⁵² They accordingly did not compete, but worked in tandem: One, we might say, was by definition an end worth pursuing; the other was a limit on means that could properly be employed in the pursuit. That accords with common sense, of course, as codified in familiar counsels to the effect that ends of course

²⁴⁸ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1971); Guido Calabresi, *An Exchange About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980).

²⁴⁹ Note that Calabresi titles a recent retrospective discussion of his seminal *COSTS*, *id.*, "Neologisms Revisited." They were delightful neologisms, to be sure, but new coinage nonetheless. See *infra* note 241.

²⁵⁰ For reasons that will shortly become apparent, I think that the "middle way" characterization might be misleading.

²⁵¹ As seen above, in an unspecified sense and on unspecified grounds.

²⁵² CALABRESI, *COSTS*, *supra* note 241 at 24 n.1.

recommend means, but do not themselves always justify them.²⁵³ The view is also akin to the position that's emerged over the course of the pages above, though perhaps also just a bit (subtly) different in a sense I'll explain.

Calabresi's treatment of fairness as a "veto" or "constraint" appears to be, if not a straightforward outgrowth of commonsense morality, then a consequence of two particular features of his understanding of fairness itself.²⁵⁴ The first feature of this understanding is its recognition that fairness is, at the very least, *lexicographically prior* to WM. Fairness is ultimately "more compelling" than efficiency, simply in the sense that if conflicts between the two values *are* so much as possible – "conceptually on the cards," in Dworkin's idiom – then fairness in all cases straightforwardly "wins." *It* must be satisfied "first."²⁵⁵ (Again, ends do not justify means, they only delimit the rational set from which we choose.)

The second feature of Calabresi's understanding of fairness – or "justice," as he also calls it – is that it is an elusive value to characterize affirmatively and comprehensively.²⁵⁶ Indeed, Calabresi claims, it is typically easier to recognize an unfair outcome as unfair than a fair one as fair.²⁵⁷ If we combine this feature of Calabresian fairness – its violation's being more immediately recognizable than its satisfaction – with the first one – its lexicographical priority – it is easy to see why Calabresi would

²⁵³ It also accords, of course, with the rough characterization of jointly operative moralities of "aspiration" and "duty" elaborated in LON L. FULLER, *THE MORALITY OF LAW* 3-35 (1964); and with the celebrated characterization of "rights as trumps" upon generally permitted teleological pursuits in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

²⁵⁴ These themselves, I should note, seem to be features of commonsense morality.

²⁵⁵ CALABRESI, *COSTS*, *supra* note 241 at 24. See the second sentence on the page.

²⁵⁶ *Id.* See third sentence on the page. At least until further along in the 1970s, that observation was a commonplace. For reasons that are obscure to me it still seems to be commonplace among some scholars. See, e.g., *infra* Part III.B.

²⁵⁷ *Id.* at 24-25. See also, in this connection, J. R. LUCAS, *ON JUSTICE* 1 (1980) (first chapter titled "Unfair"); JUDITH N. SHKLAR, *FACES OF INJUSTICE* (1992). Experimental economists have to some extent borne Calabresi out, at least as a matter, again, of commonsense morality. Unfairness appears to be more "salient" – more immediately discerned – than is fairness. See, e.g., sources cited *supra* note 231.

characterize the relation of fairness and wealth in the way that he did: Fairness is on the lookout for unfairness, so to speak. And then, since fairness trumps wealth, unfairness's being found in a policy will disqualify the policy, at least in comparison to any competing policy (any co-member of the rational set) that is not unfair.

My conjecture is that this two-fold characteristic of Calabresi's thinking accounts substantially if not entirely for the apparent difference between his position and Dworkin's – an apparent difference which seems to have occasioned some unnecessary and in consequence regrettable controversy between the two.²⁵⁸ For insofar as one *does* lack an elaborated affirmative theory of fairness, even if he be Dworkinian at bottom he will tend to be Calabresian at the surface. That's to say that he will *of course* suppose that "we" wish to minimize "our" truly *collectively* confronted costs, so long as our doing so does not offend the terms of our "collecting," so to speak – our ethical equality, hence fairness. It is only *after* working out a satisfactorily fulsome *affirmative* understanding of fairness in a polity whose policies decisively affect the disposition and distribution of benefits and burdens, that we are equipped to see that all *ethically cognizable* aggregate-maximizing is *already* – as it were "automatically," per Parts II.D and II.E above – taken care of in our acting collectively to satisfy the proper *distribution formula* by means of the appropriate distribution *mechanism*.

A plenary understanding of the specified sort was not only thought by Calabresi to be elusive at the time of his earlier writing: It seems to have been thought at least somewhat so by Dworkin as well at the time of his responsive writing, at least if we read

²⁵⁸ See Calabresi, *Letter*, supra note 241; also Guido Calabresi, *Neologisms Revisited: Remarks of Guido Calabresi*, 64 MD. L. REV. 736, 746-47 (2005); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1223 n.35 (1991).

his call for a theory of “deep equality” at that point quite literally.²⁵⁹ The root difference between Dworkin and Calabresi, then, I think is actually that Dworkin for whatever reason – perhaps greater confidence or optimism? – was more prepared than Calabresi to hazard an effort at that more affirmative, plenary theory of “deep equality.” And of course shortly thereafter, Dworkin indeed supplied at least the rudiments of precisely such a theory.²⁶⁰ Part 3 above, I hope, informed both by that and by other developments, indicates how to complete and indeed consummate that most worthwhile effort.

B. Fair is Foul and Foul is Fair: Fairness “versus” Welfare

Recent years have witnessed a revival of some of that heat which the early LE-foundational debates occasioned. The prompting occasion in this case is a series of articles, followed by a monograph, authored by Louis Kaplow and Steven Shavell.²⁶¹ Kaplow and Shavell’s project purports to be meant to displace what the authors call “notions of fairness” from policy – including legal – analysis altogether, and to supplant commitment to these “notions” with commitment to what they call “welfare.” Not surprisingly, one supposes, in light both of fairness’s centrality to ethical thinking and of what most of us take for its relation to welfare itself,²⁶² this proposal has generated a good bit of objection, some of it indignant objection.²⁶³

²⁵⁹ Dworkin, *supra* note 219 at 320. In light of his immediately subsequent publications, it is difficult now not to read Dworkin’s call here as calling for something he either planned or immediately afterward decided to supply. See of course Dworkin, *supra* note 115. Note also that Calabresi, in *Pointless Pareto*, *supra* note 250 at 1224, eleven years later still seems to have been planning to turn to working out such a theory. And there are further hints at such forthcoming work in *Neologisms*, *id.* at 746-47.

²⁶⁰ Dworkin, *id.*

²⁶¹ See, in particular, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281 (2001); Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63 (1999).

²⁶² See discussion of Calabresi *supra* Part III.A.

²⁶³ See, e.g., *Symposium on Fairness versus Welfare*, 32 J. LEG. STUD. 303 (2003); Jules Coleman, *The Grounds of Welfare*, 112 YALE L. J. 1511 (2003); Richard H. Fallon, *Should We All Be Welfare*

Upon careful – and in particular, what I have been calling “grammatically informed” – examination, however, it is difficult not to conclude that much of the controversy is rooted in misunderstanding. And that misunderstanding, I think, is to be laid at the feet of Kaplow and Shavell themselves. For the foundational material found in their monograph and the articles from which it derives is, more than anything else, an extended exercise in the misuse of English and the muddling of basic concepts. One consequence, in turn – or is it a cause? – is a truly remarkable misunderstanding of ethics, ethical theory and metatheory. I think we can show this and set things in order through simple recourse to the material above at Parts I and II, as well as to Kaplow’s and Shavell’s own words – supplemented here and there by a dictionary or thesaurus.

Begin, sensibly enough, with the critical terms themselves: Kaplow and Shavell offer two kinds of definition for what they intend to denote by their “notions of fairness.”²⁶⁴ One of these is what we might label “negative,” in a sense I shall presently explain. The other’s a bit more “affirmative,” in a sense that I’ll also explain.

The negative characterization involves defining the class of “fairness”-actuated prescriptions simply as the complement of a putatively different class: Fairness prescriptions are all prescriptions not found in the latter class. The latter class, in turn, is the class of prescriptions entailed by what Kaplow and Shavell call “welfare economics” (in part but not whole our WE, so I’ll in some instances call it “Kaplow-Shavellian WE,”

Economists? 101 MICH. L. REV. 979; Daniel Farber, *What (If Anything) Can Economists Say About Equity?* 101 MICH. L. REV. 1791 (2003); Marc Fleurbaey et al., *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle: A Comment*, 111 J. POL. ECON. 609 (2003); Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 SO. CAL. L. REV. 847 (2002); Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L. J. 173 (2000); Howard F. Chang, *The Possibility of a Fair Paretian*, 110 YALE L. J. 251 (2000).

²⁶⁴ We’ll get to Kaplow-Shavellian “welfare” below.

or “KSWE”²⁶⁵): “Under [KSWE],” Kaplow and Shavell observe, “normative evaluations are based on the well-being of individuals,” and “nothing else.”²⁶⁶

In light of what we have seen through Parts I and II, the latter characterization is apt to leave us scratching our heads. (It will leave many welfare economists scratching their heads as well, as we’ll note below and in the Appendix.) How can one “base” legal and other policy prescriptions upon well-being “and nothing else?” One cannot answer the question, “What should we do?,” by saying no more than, “Welfare,” can he? Mustn’t we also say who’s to receive or enjoy that welfare, via what means and in what amounts pursuant to what pattern as determined by what principles? Indeed, didn’t we see at Part I both that all legal and policy prescriptions effectively prescribe distributions of perceived goods and ills, and accordingly that where these critical – indeed, definitional – inputs to well-being are scarce, we must engage in distributive-ethical assessment? And didn’t we then see at Part II that determinate distributive-ethical prescriptions, in turn, to prescribe anything at all must be “based” not just on views as to what things are to be distributed – like well-being, which is itself either a distribuendum or a distribuendum’s byproduct – but also on views as to who or what we are to take our distributors, distributees, distribution formulae, and distribution mechanisms to be?

We did. But let us hear Kaplow and Shavell out a while longer:

Kaplow and Shavell familiarly take “well-being” for roughly synonymous with “subjective utility,” “welfare,” “preference-satisfaction,” and so on.²⁶⁷ No surprise there.

²⁶⁵ I’ll explain “for the most part” below. The short version is that Kaplow and Shavell show surprising lack of familiarity – or indeed even awareness – of a quite large and distinguished body of WE literature concerned with the economics of ... yes, fairness. See *infra* note 298.

²⁶⁶ KAPLOW & SHAVELL, *supra* note 261 at 18. This might be true of KSWE, which we’ll see proves prescriptively empty, but it is not true of any prescriptive WE. See *infra*.

²⁶⁷ *Id.*

But they also, now more controversially and ultimately more vitiatingly, we'll see, leave what *counts* as welfare undelimited and indeed unevaluable. Two closely related respects in which they do so will prove relevant for our purposes:

Kaplow-Shavellian “well-being” is, first, notwithstanding the ethical ring of the *terms* “welfare” and “well-being,” in no manner ethically delimited: In the idiom of Part II.C above, the “well-being” of thieves is improved, the thieves themselves made “better off,” when the thieves manage to steal more goods. Hence unethical – indeed fairness-violative – satisfactions enjoy the cover of ethical christening.²⁶⁸ We'll see below that this raises not only ethical problems, but prescriptive determinacy problems as well.²⁶⁹

The second sense in which Kaplow-Shavellian “well-being” is undelimited has less directly to do with ethics than with determinacy – though again, we'll see that the two difficulties trace down to one: Kaplow-Shavellian welfare is not stratified or insulated against impredicativity or interminable recursion. Individual preferences concerning aggregate preference-satisfaction itself – or, therefore, the distribution of preference-satisfactions – are included in the aggregate of distributed preference-satisfactions. So social welfare functionals end up, via impredicative self-reference, prescriptively empty. We'll come back to these interconnected features of Kaplow-Shavellian “well-being” presently.

Now it is clear that this characterization of well-being still leaves us scratching our heads as before. For there is nothing in well-being, thus characterized, to dispel the

²⁶⁸ KAPLOW & SHAVELL, *supra* note 261 at 18-19 (“The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts.”) This proves unsurprisingly to lie at the root of the confusions to come. When unethical preferences receive ethical blessing through ethical naming – “welfare,” “well-being” – of course we are set for an ethics (fairness) vs. “ethics” (“welfare”) showdown.

²⁶⁹ Rather as ethically unfiltered (distribution-indifferent) “wealth” raised prescriptive determinacy problems for Posnerian WM as discussed *supra*, Parts II.E and III.A.

puzzlement mentioned several paragraphs up: How we're to "base" prescriptions upon well-being "and nothing else" when, again, per Part I all legal and policy prescriptions have the effect of distributing benefits and burdens, and per Part II any determinate, actually followable prescription must prescribe not only what's to be distributed – welfare or some welfare-input – but also by whom and to whom and by what means per what formula. What, then, are Kaplow and Shavell actually recommending?

The answer is that they are recommending nothing – quite literally nothing – and deep down they know it. For Kaplow and Shavell, nearly as often as they repeat the "well-being and nothing else" mantra, repeat such directly contrary observations as this one: "[B]ecause analysts generally assume that each individual's well-being affects social welfare in a symmetric manner, [WE] is understood to include . . . a requirement that individuals count equally in an important sense."²⁷⁰ But this of course means that WE "analysts" take positions on distribution formulae – and in particular, on distribution formulae that they take to treat individuals fairly ("equally," "symmetrically") – in so much as formulating the social welfare functionals on the basis of which they prescribe. And that in turn means that they "base" their prescriptions on more than any mere *distribuendum* – like welfare – alone.

As if to drive home the point, after first conceding it Kaplow and Shavell go on immediately in effect to repeat it. They do so, in fact, in the very next sentence, though curiously treating it here as a "new" point assigned a new paragraph and new number in a

²⁷⁰ KAPLOW & SHAVELL, *supra* note 261 at 26. Please note the occurrences of the words "symmetry" and "equally," which the authors use profusely throughout their text while studiously avoiding these words' synonym, "fairly." More on this below. The "important sense" of "count[ing] equally" to which Kaplow and Shavell refer, incidentally, is the familiar sense that we saw above at Part II.5.1 to amount to a mere mistake – the ultimately ethically irrelevant sense in which maximization norms treat something akin to foreheads or noses, not persons, equally. See *id.* at 25, n16 especially. But this is not our present concern. It's simply indicative that this is all simply a warmed-over slice of stale utilitarianism if it's anything at all.

putative enumeration of distinct observations.²⁷¹ “Second, a *method of aggregation* is of necessity an element of [WE], and *value judgments* are involved in aggregating different individuals’ well-being into a single measure of social welfare.”²⁷² That’s a relief to hear. But what are such “value judgments?” They are precisely, by Kaplow and Shavell’s own definition – recall, all that is *not* “welfare and nothing else” – judgments proceeding from “notions of fairness.” And we know from Part II above that they could not fail to be. Welfare “exclusively,” as we now know, cannot determine a “method of aggregation.” Nor can any other distribuendum determine its own distribution formula.

Now as if to close the deal, Kaplow and Shavell admit that “[t]he choice of a method of aggregation involves the adoption of a view concerning matters of *distribution*.”²⁷³ And finally, we’re told: “*Various* methods of aggregation [hence what I’m calling distribution formulae] are *possible*.”²⁷⁴ Bingo. But this again of course means (a) that we must *select* a method of aggregation, and (b) that we’ll have to make “value judgments” concerning distribution – i.e., appeal to “notions of fairness” – in selecting from *among* the various possible methods of aggregation. The trouble is that Kaplow and Shavell keep denying this just as often as they admit it.

Now all of this literal nonsense is precisely the sort of trouble that Part II above is intended to clear up. The appeal to a conception of fairness in selecting from various possible methods of aggregation will amount to none other than determining what vector of distribuee-construal, distribuendum, distribution formula and distribution mechanism

²⁷¹ I think that this repetition of one point as if it were two points is simply another symptom of the authors’ comprehensive conceptual confusion. They’ve simply not sorted things out or achieved order in their thinking. The present paper’s in part meant to show how to arrive at such order.

²⁷² KAPLOW & SHAVELL, *supra* note 261 at 26, *emphasis mine*.

²⁷³ *Id.*, *emphasis again mine*.

²⁷⁴ *Id.*, *emphasis again mine*.

best coheres with our overall distributive ethic, or “isoquant” as I’ve called it by way of analogy. To admit that we must make that determination and at the same time suggest that we can effect it by appeal to welfare “and nothing else” is a bit like agreeing that we all must get dressed, then running triumphantly out through the door wearing only one sock. It isn’t helpful; it’s self-defeating. And let us be clear about the incoherence at work here: The point is not that there’s an occasional mis-statement that stands in some tension with some later mis-statement. The incoherence is unremitting, it runs through the whole work quite incessantly. Indeed it’s constitutive of the Kaplow-Shavellian project itself. It *is* the project.²⁷⁵

The point’s only further borne out by Kaplow and Shavell’s continual use of sundry cognate forms of the words “symmetry” and “reciprocity” throughout their monograph.²⁷⁶ On anyone’s reckoning, these words are synonyms for – yes, “fairness.” Indeed, as we noted above at Parts II.D and II.E, “fairness” even in nontechnical parlance consistently connotes equal treatment, albeit always within the bounds of some practice the purpose of which determines what counts *as* “treatment.” To treat fairly is to treat as identical in respect of that characteristic which the practice takes or defines to be salient. Common synonyms of “fairness” accordingly include, unsurprisingly: “equity,” “impartiality,” “even-handedness,” “disinterestedness,” and the like.²⁷⁷ Fair persons, processes and distributions are in turn commonly said, again unsurprisingly, to be

²⁷⁵ For formal treatment of the incoherence I am discussing, with generalization to cognate cases, see Robert Hockett, *The Impossibility of a Prescriptive Paretian* (2006) (working paper, under review).

²⁷⁶ See, e.g., the half-page of page-cites under “symmetrical/reciprocal contexts” in the book’s index, *id.* at 539-40. Likewise the half page of page-cites under “distribution” and “distributive,” *id.* at 517-18.

²⁷⁷ See cite to BLACK’S LAW DICTIONARY at Part II.5, *supra* note 142. See also, e.g., DOUBLEDAY ROGET’S THESAURUS 243 (Sidney I. Landau ed., 1977).

“unbiased,” “just,” “equitable,” and so on.²⁷⁸ Technical usage straightforwardly tracks ordinary usage: Synonyms in this case include not only such as I’ve here enumerated, but additionally such terms as “symmetry,” “reciprocity,” and the like – to which, again, Kaplow and Shavell themselves have unceasing recourse even while studiously avoiding use of those words’ widely used synonym, “fairness,” in any but an unrecognizable pejorative sense.

None of these words or phrases, it apparently cannot be emphasized enough, connotes anything one way or the other about welfare or well-being conceived as unfiltered preference-satisfaction or anything else. Nor, of course, could they. For as ought to be plain after Part II if ordinary grammar alone weren’t enough, fairness is, again, a property of distributions – what I’ve called a distribution formula. And welfare is an object of distributions or the byproduct of such object – what I’ve been calling a distribuendum. One can treat others equally, equitably, impartially, even-handedly, disinterestedly, unbiasedly, justly, symmetrically and so on with respect to *what ever* she bestows upon them, be that welfare, illfare, actions or items from which welfare or illfare are derived, or anything else.

Kaplow and Shavell appear obliquely to realize that there is great oddity in all of their talk against “fairness” and “notions of fairness” on the one hand and for “symmetry,” “value judgments,” and distributive normativity on the other. That is to say that they recognize not only that their claims risk committing them to prescriptive indeterminacy, but also that their claims are jointly incoherent. They register this awareness first in a footnote, then re-register it in a subsection-closing paragraph

²⁷⁸ Id.

immediately following the footnote, while then going on in each case to attempt, quite amusingly, to defuse it. The footnote provides all we need. It reads in pertinent part:

Throughout this book, we refer to [WE] as employing measures of social welfare that depend only on individuals' well-being. What we mean by this expression is that, *once a social welfare function is chosen* (that is, once a judgment about aggregation is made, see note 15), any two policies can be compared using only information about how each policy affects individuals' well-being. We note that there is some potential for confusion about our statement that social welfare depends only on well-being because of the very fact that one needs a method of aggregating information about individuals' well-being in order to make an overall assessment. In this sense, the evaluations under [WE] do *not* depend purely on the data (facts) about individuals' well-being.²⁷⁹

Indeed. But what is exceedingly strange here is that Kaplow and Shavell effectively void their entire project with this remark and its succeeding remark (to which I'll return), yet oddly appear either not to recognize it or unwilling to admit it. (Perhaps that is why the fullest statement of the point is relegated to a footnote.) There is not merely "some potential" for "confusion." The potential is fully realized – again, unremittingly and constitutively, throughout the whole project. And the confusion – or rather, again, full-blown incoherence – is no one's but their own. They own it, it's theirs. Why repeat, over and over and over, that what one calls WE is, and that LE ought to be, concerned "only with information about individuals' well-being," when one recognizes and admits quite expressly that it must be concerned also – and indeed at least as crucially, since all policy rides on its shape – with information concerning the character of the correct social welfare functional, hence the correct distribution formula?

As best I can tell, the only diagnosis on offer for this strange case of aphasia is some manner of confusion about what one is doing in formulating a social welfare

²⁷⁹ KAPLOW & SHAVELL, *supra* note 261 at 27-28 n. 23, first emphasis in original, second one – "not" – supplied.

functional – or, in the words of note 15 incorporated by reference in the just-quoted passage, making “a judgment about aggregation.” That confusion itself is perhaps rooted, in turn, in failure to appreciate (a) the interformulability of equalization and maximization formulae discussed above at Part II.D.3; and more generally (b) the equal semantic or cognitive status, so to speak, of *all* of the distributive grammar-opened variables – the need to fill all of them at once before one can prescribe or describe anything prescribable-about at all – that Part II as a whole is intended to convey. For in the remainder of the footnote I’m citing, after conceding that WE does not, after all, concern itself solely with “data about individuals’ well-being,” Kaplow and Shavell go on to say that “[their] contrast with notions of fairness, however, concerns the data themselves.”²⁸⁰ But what could *that* mean?

Kaplow and Shavell speak as if the repetition of such phrases as “the data themselves” (at other points they use the word “information”) were sufficient to underwrite some salient contrast. It is as if the referenced “data” were data in some fundamental or normatively relevant sense radically distinct from that in which data concerning the appropriate or chosen mode of aggregation hence distribution is.

Now if by “data” the authors mean nothing more than what I mean by “distribuendum” – which might be the case given the way in which the term “information,” which Kaplow and Shavell use as a synonym for “data,” typically figures into the WE literature²⁸¹ – then there is indeed at least a categorical distinction, as I’ve indeed been at pains to emphasize over the course of this paper. But in that case, as we also have seen, there simply is no capacity in the context of the quote for a relevant

²⁸⁰ KAPLOW & SHAVELL, *supra* note 261 at 28, n 23 carryover.

²⁸¹ See, in particular, Sen as cited at Part II.C.1, *supra* note 79, where this now canonical use of the term appears to have originated.

“contrast” with “fairness,” which names a distribution formula not a distribuendum. Objects and patterns of distribution do not *compete* in prescription, they’re jointly required to *complete* any prescription – including that made through a maximization-form social welfare functional. And certainly no one to my knowledge ever has recommended “distributing” a “notion of fairness” itself, which is what would have to be in the offing for Kaplow and Shavell intelligibly to contrast it with welfare as “datum” in the distribuendum sense.

If, on the other hand, Kaplow and Shavell do not mean by “data” simply my “distribuendum,” but instead mean roughly what I mean by “variable opened by distributive case grammar,”²⁸² then they are no better off. For there is no ethically relevant, cognitive or foundational distinction at all between “data” or “information” concerning the distribuenda that a distributive ethic takes for salient and “data” or “information” concerning what aggregation rules or distribution formulae that ethic settles upon. This too ought to be clear after Part II above. The distribution-constitutive variables are indeed all interdependent, as we have seen, in jointly constituting an overall distributive ethic.²⁸³ But no *one* of them alone is uniquely determinative of all of the rest.

²⁸² And what else they could mean if not this or distribuendum?

²⁸³ Note that Kaplow and Shavell eschew committing to such an overall ethic. See KAPLOW & SHAVELL, *supra* note 261 at 27 (claiming “not [to] endorse any particular view about the proper distribution of well-being or income.”). Were they so to commit, then it would at least have been open to them to avoid nonsense in committing to welfare as distribuendum and in so doing claim to be committing against fairness as distribution principle. I can’t see how it would be plausible, but at least one could imagine its not being syntactically nonsensical. For one could argue, by reference to an overall distributive ethic – what I’ve called a “distributive isoquant” – that one variable’s valuation, at least in conjunction with others, might as constrained by the isoquant rule out another variable’s proposed valuation. This is what I alluded to earlier at note 14. Note that, in light of the grammatical observation that animates this paper – that one must fill all of the variables, including the distribution formula variable, in order to claim anything at all – if they really intend not to endorse any view about proper distribution Kaplow and Shavell cannot responsibly endorse any particular view about welfare either.

Note that there’s cognate confusion afoot in Kaplow and Shavell’s attempt to quarantine another problem that their inattention to distributive valence grammar occasions: their incapacity, given the one value of a distributive grammar-opened variable to which they confine themselves – welfare, for the

If the Kaplow-Shavellian “analyst” casts her prescriptions in maximizing form, as we saw at Part II.D.5, she’ll describe the maximandum in one way. If she holds the same set of distributive-ethical commitments but casts her prescriptions in equalizing form, she’ll describe the equalisandum in another way. But in both cases – and this is the critical point – she will do so to yield the same distributive output, the same “isoquant,” which itself is the product of her inevitably *multivariate* distributive-ethical commitment.

Now all of this means, of course, that any particular distribuendum-characterization or distribution formula-formulation is in a certain sense arbitrary. It is as arbitrary as Kaplow and Shavell’s own self-limitation, registered and indeed emphasized by the authors themselves in the passage cited above, to “*once [that is, after] a social welfare function is chosen.*” For there’s no reason to restrict one’s attention in this way, at least if we are in effect inquiring at “square one” as to what our mode of policy assessment is to be, hence what our distributive ethic entails. And especially if one claims to be purging all recourse to “notions of fairness.” One does not choose a social welfare functional merely at random. One chooses that functional – including its shape i.e. aggregation rule i.e. distribution formula – by reference to reasons. Those reasons in

distribuendum variable – to say anything at all about how we should delimit or construe the class of *distribuees*. At KAPLOW & SHAVELL, *supra* note 261 at 26 n.19, we’re told that “a complete account of social welfare” will “address questions about membership in the group of individuals whose utilities are to be aggregated,” then told that the subject is “beyond the scope of [their] inquiry.” Yet we’re then assured nonetheless that the “difference between evaluative principles that are denominated solely in terms of well-being and principles that are based in whole or in part on other factors” will be “qualitatively similar regardless of how these other questions are answered.” That of course is not simply untrue; it is incapable of being true and it is indeed difficult to see how anyone could think it true save by not even so much as having considered how the distributive variables might inter-relate, let alone having so much as begun to work out a full social ethic. For of course the same general set of value considerations to which one will appeal in attempting to address the question of who the distribuees are will figure into one’s attempt to address what should be distributed to them and what pattern or formula should characterize the distribution. That’s of course another way of saying that something which meets Kaplow and Shavell’s peculiar definition of “notions of fairness,” not to mention that of “value judgment” which they admit to bear upon the choice of aggregation rule, will figure into the valuation of *all* of the variables, not simply one or all but one.

turn can of course not themselves be “individual welfare and nothing else,” because the very *question* with which we’re concerned in selecting the functional is *what weight* to accord – i.e., how to *distribute* – particular satisfactions, pursuant to what ethical criteria. And so the choice of the functional itself is inevitably carried out pursuant to, by Kaplow and Shavell’s own definition, a “notion of fairness.”

The only thing that is *entirely* nonarbitrary in elaborating a distributive ethic, then, is the “full package” – what we have called the distributive isoquant, so to speak, that is our full set of distributive-ethical commitments. And that means in turn that there is no normatively important or otherwise fundamental distinction to be drawn or appealed to between information or data concerning what is distributed on the one hand, information or data concerning how it is distributed on the other. All such information simply is valuation of open distributive case grammar variables, all of which must be filled before anything can be prescribed at all. And so, to note again what we’ve noted above, in proposing the filling of but one of the six distributive variables, which in their case takes the form of taking no position as to the appropriate aggregation rule, Kaplow and Shavell prescribe literally nothing, nothing at all.

It follows from all of this that in a certain sense all of the remainder of Kaplow and Shavell’s monograph is, at best, quite unmotivated by the would-be foundational discussion of the book’s first part. For the first part, being quite literally empty so far as recognizable description and determinate prescription go, can offer literally no guidance at all in respect of tort, contract, procedure or “law enforcement” – the substantive topics of the second part.²⁸⁴ At best the first part entails the second in but the trivial manner of

²⁸⁴ Kaplow and Shavell’s favorite betes noir appear to be corrective justice as a theory of tort law, promissory obligation as a theory of contract, and retributive justice as a theory of criminal punishment. To

material implication – the manner in which literally anything and everything is implied by the null set.²⁸⁵ That yields an interesting consequence from the point of view of distribution mechanisms as discussed above at Part II.E: In prescribing nothing, and in thus being incapable of saying anything helpful in the way of evaluating actual legal rules and policies, Kaplow and Shavell’s foundational material is fully as mechanism-indeterminate as we saw crude utilitarianism, Rawlsian justice theory and traditional normative LE above to be. (Indeed it is yet further from determinacy.) We can say nothing about what a regime that conformed to Kaplow-Shavellian tastes would look like. Nor, yet more poignantly, can Kaplow and Shavell.

I should turn now, however briefly, to Kaplow and Shavell’s attempt at a more “affirmative” characterization of what they call “notions of fairness,” to which I promised before to return. For this characterization flows directly out of the follow-up remark disclaiming their own incoherence that I noted before to succeed the block-quoted footnote devoted to the same end. It also nicely brings forth some additional ethical-theoretic confusions, some of them seemingly more widespread than those I’ve been covering, that result from insufficient attention to distributive grammar:

Immediately following the block-quoted footnote, Kaplow and Shavell close this full section of their monograph, and thus all of the puzzling discussion just discussed,

comment upon what they have to say about these bodies of thought will not be to present purposes, but we can say at least two things without being led too far afield. First, that *any* prescription in respect of tort, contract or criminal law will stem just as fully from a Kaplow-Shavellian “notion of fairness” as do prescriptions stemming from corrective justice, promissory obligation or retributive justice theories; they’ll simply be *different* “notions of fairness.” That’s clear from what we have said in the foregoing paragraphs. Second, Kaplow and Shavell’s criticisms of the promissory theory of contracts in particular, which sound in the familiar language of efficient breach, both (a) unsurprisingly neglect such considerations as those adduced *supra*, Part II.E.2 in connection with distribution mechanisms, and (b) manifest confusion similar to Sen’s in connection with autonomy rights as discussed *infra*, note 284 and accompanying text.

²⁸⁵ For again, as we’ve seen repeatedly now, no basis from which legal or policy assessment might proceed does *not* incorporate one or more “notions of fairness” per the authors’ own definition and characterization. And indeed nothing could ever be prescribed without such incorporating. Yet more on this below.

with a paragraph which repeats their admission that “there may appear some tension between [their] accepting the legitimacy of distributive judgments within [WE] and [their] criticizing notions of fairness, particularly since many views about distribution are expressed using the language of fairness.”²⁸⁶ They go on to assure us, however, that “[i]n fact . . . there is no tension because of the manner in which we define notions of fairness for purposes of this inquiry.” In fact that is false, as we’ve seen: For it is precisely what we have called Kaplow and Shavell’s “negative” definition of “notions of fairness” that *produces* their incoherence. But it happens that the “affirmative” characterization of “notions of fairness,” to which the authors immediately turn upon offering the just-quoted assurance, doesn’t help either. In fact it just makes matters worse. For unlike the “negative” characterization, which deprives Kaplow and Shavell of the capacity to prescribe, this one reveals that there’s no defined class of “analysts” against whom they’d *like* to prescribe. Watch:

Kaplow and Shavell’s first affirmative characterization of “notions of fairness” is as bearing “problematic aspects of meaning.”²⁸⁷ It’s far from clear what, or whom, they might mean. We’re told that “analysts often use words like ‘fairness’ without defining them.”²⁸⁸ But Kaplow and Shavell name no such “analysts.” They simply cite Bentham’s and Sidgwick’s (both of course utilitarians) having leveled similar conclusory

²⁸⁶ The “particularly” and “many” here of course constitute gross understatement. As likely is clear in view of the thesaurus cite just above if it wasn’t clear before that, not merely “many,” but virtually *all* “views about distribution” are expressed using “the language of fairness.” Concern with distribution in nearly all cases just *is* concern with fairness. The only exception, if such it be, is the case of the income-equalizers mentioned above at Part II.D.3 who have advocated equalization in the name of maximization in light of the diminishing marginal utility of income.

²⁸⁷ KAPLOW & SHAVELL, *supra* note 261 at 45.

²⁸⁸ *Id.*

accusations at again unnamed persons over a century ago.²⁸⁹ Nor do Kaplow and Shavell say anything as to why they think the *term* “fairness” sufficiently intuitively unclear as to require defining in what ever unnamed context they have in mind. And as we’ve noted above, dictionaries, thesauri, ordinary folk and “analysts” alike all seem quite clear about “fair”’s connoting equal treatment, impartiality, lack of bias, and so on: They employ the term, that is, rather as Kaplow and Shavell use the terms “symmetrical” and “reciprocal” – all while typically expatiating much more than do Kaplow and Shavell on those latter two terms.

It might also be true that some specific analyst or analysts whom Kaplow and Shavell have actually in mind often are “incomplete” in their elaborations of the principles that they have in mind, including as to the scope of those principles’ application.²⁹⁰ Or it might be that some such analyst or analysts have failed to specify how they propose to resolve conflicts between apparently conflicting values, as Kaplow and Shavell accuse.²⁹¹ But who ever it might be who is guilty of these charges is unlikely to have been less complete than are Kaplow and Shavell themselves in claiming first that value judgment is necessary in determining an aggregation rule in prescriptive WE, then that they will not defend any specific way of aggregating.²⁹²

²⁸⁹ Id. at 45-46 n.60. They cite the posthumous 1907 edition of Sidgwick’s *Methods*. They also cite Jim Henderson’s 1991 empirical study of judicial reliance on public policy rationales in products liability decisions. But of course here the concern is not with whether “notions of fairness” bear “problematic aspects of meaning,” but with whether judges in penning decisions appeal intuitively to fairness considerations or instead present comprehensive analytical accounts of fairness which they then apply. Not surprisingly, of course, it turns out that they do the former. One wonders how many judicial opinions include comprehensive accounts of “the concept of well-being.”

²⁹⁰ See id. at 46.

²⁹¹ Id. at 46, including at n.61. Now the cite is to the conclusory claim of another 19th Century utilitarian who names no offending “analyst,” Mill, and to a quite incontestable and, regrettably, irrelevant observation by Hardin to the effect that conflicts between rights are difficult to resolve absent appeal to a prior principle according to which to resolve such conflicts.

²⁹² Id. at 26-27.

It also seems unlikely that any analyst – again if any such there be – will be any less “specific” about “how to resolve conflicts between values”²⁹³ than are Kaplow and Shavell. For in declining to take any position as to the appropriate method of aggregation that must be embedded in any multivariate social welfare functional, of course, Kaplow and Shavell avoid precisely the place where such conflicts will tend to turn up. Again, then, it is simply obscure – entirely obscure – what Kaplow and Shavell can mean by “meaning problems” in their stab at more affirmatively defining what ever it is they intend to single out with their “notions of fairness.”

There is also, I’d be remiss not to note, a remarkable irony here. For there is a vast, vast *WE literature* on fairness, *fairness by name*, in which indeed the term itself figures both prominently and precisely.²⁹⁴ It is much more than puzzling that two self-proclaimed “welfare economists” could devote book and articles to attacks upon “fairness” and “notions of fairness” without so much as once registering so little as the existence of this vast, distinguished, and indeed growing literature. And it is more bizarre still that this should happen in a monograph that’s unsparing in its repetitive chastisement of LE practitioners for restricting attention to none but an over-narrow slice of WE.²⁹⁵

The second affirmative characteristic that Kaplow and Shavell attribute to “notions of fairness” is no more helpful in singling anything out than was the first. It is

²⁹³ Id.

²⁹⁴ See, e.g., cites to Baumol, Daniel, Foley, Pazner, Schmeidler, Thomson, Varian, etc., supra note 167. None of this literature is mentioned or so much as cited in the work of Kaplow and Shavell – rather an ironic lacuna, “to say the least,” in light of (a) its canonical stature in the WE literature, (b) its being overtly – indeed by name – concerned with fairness, and (c) Kaplow’s and Shavell’s lamentation over some LE practitioners’ misunderstandings or misrepresentations of WE at various points in KAPLOW & SHAVELL, supra note 261. See, in particular, id. at 28-38.

²⁹⁵ See supra note 294.

these “notions” putatively “nonconsequentialist character.”²⁹⁶ This one too is of obscure meaning, at least as used by the authors; and again, by now unsurprisingly, no “analyst” or approach is named as exemplar.²⁹⁷ “Consequentialism” is of course ordinarily taken to designate a particular attribute of fully elaborated ethical theories – specifically, their judging deeds, rules or policies by reference to the outcomes that the latter do or are thought likely to yield.²⁹⁸ Fairness, of course, is as analytically independent of and applicable within that orientation as it is of distribuenda and to specific distributive outcomes. Just as any distribuendum – wealth or welfare, for example – can be distributed fairly or unfairly, and just as any distribution can be a fair or an unfair distribution, any consequence can be fair or unfair, depending simply upon how affected parties who are ethical equals are in fact (consequentially) treated – viz., symmetrically (equally, fairly) or asymmetrically (unequally, unfairly).

Indeed if anything fairness as an attribute appears to be more readily applicable in evaluating consequences than what ever it is that might be thought ought be evaluated instead of consequences.²⁹⁹ And in fact when the latter, what ever they be, *are* evaluated for their fairness it seems more than likely that the evaluation will actually be

²⁹⁶ KAPLOW & SHAVELL, *supra* note 261 at 47.

²⁹⁷ Nor, now, are any 18th or 19th Century utilitarians or others cited as having made similar conclusory remarks.

²⁹⁸ The term originates with Anscombe. See G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958). Consequentialist ethical systems typically are understood by contrast to such alternatives as “virtue ethics” and Kantian “deontology.” I’m ultimately inclined to doubt the usefulness of these distinctions or this taxonomy, but that is a concern that need not presently detain us.

²⁹⁹ We do not, for example, typically judge one’s *virtues* – her temperance, her courage, her charity, etc. – as fair or unfair. We do not typically judge one’s Kantian “good will” as fair or unfair. We presumably might deem the distributive circumstances that partly account for one’s development of these virtues as fair or unfair. And we presumably might find that people who have developed such virtues or wills are more ready to acquit themselves fairly and to seek or advocate for fair distributive outcomes. For indeed it is typically decent people who are more apt to *be* fair and *affirm* fairness. But neither “we” generally nor “we” analysts typically engage in such forms of inquiry. Instead we employ the category of fairness to judge distributions of resources, deficits, welfare and illfare more generally. And that is what just about everyone does.

transparently parasitic upon the fairness status of consequences: It is difficult to imagine, for example, within the nascent “virtue ethics” tradition, how the oft-cited virtue of justice might be attributed to anyone without reference to her tendency (a) to treat others fairly and (b) will that others treat them fairly – hence to will and to work toward fair consequences. All of this should be clear in light of Part II.D.5 above.

The third and final feature that Kaplow and Shavell attribute affirmatively to “notions of fairness” is an alleged “ex post character.”³⁰⁰ This attribution is as mystifying as the attributed “nonconsequentialist character.” Indeed it is moreso, once the latter has been attributed, since to attribute both characteristics at once is akin to attributing “round-squaredness” – to attribute, that is, again incoherently.³⁰¹ As with *distribuenda* and consequences, however, the *ex ante* / *ex post* divide is quite analytically independent of the divide between fairness and other proposed distribution principles. One can adjudge distributions *following* some action or event – hence *ex post* – fair or unfair. And one can judge *contemplated* actions – *ex ante* – as right or wrong, better or worse by reference to the fairness of their reasonably anticipated distributive consequences.

There is one sense, however, in which the commitment to fairness does in fact incline one to favoring one of the terms in the *ex post* / *ex ante* divide. And, ironically, the orientation that fairness inclines one to favor is precisely the *ex ante* rather than the *ex post* – while fixating on welfare in isolation from fairness actually inclines one to think more in *ex post* terms: Recall that, as observed above at Part II.D, concern with fair distribution, as most straightforwardly operationalized in the opportunity-egalitarian

³⁰⁰ KAPLOW & SHAVELL, *supra* note 261 at 48.

³⁰¹ See *id.* at 48-49, where again-unnamed “analysts” who employ “notions of fairness” are said to tend to “focus on outcomes” – i.e., consequences – and the “situational character of events” (that last phrase obscure and left unelaborated).

distribution formula, fixes on that distribuendum which is distributed directly to active distributees *prior to their acting* – viz., material opportunity – when the actual distributing’s done. By contrast, it is precisely when one ignores (a) the natures of distributees – their actively fate-forging, responsible agential characters – and (b) the fairness of the distribution of what actually can be literally distributed – resources, wealth, material opportunity – that one tends to fixate upon ex post welfare levels considered apart from distributees’ role in *producing* their own welfare.

Kaplow and Shavell of course miss all of this precisely because they dodge all the thinking that must go into fashioning an aggregation rule for the social welfare functional – precisely that place where all of the action is in an actually worked-out distributive ethic when the latter is formulated within the traditional maximization-form apparatus of Bergson-Samuelson WE. And they duck that thinking, I believe, again precisely in owing to a failure to see that to think at all about inevitably resource-distributive rules or policies – to harbor real thoughts, cognitively complete propositions – one must fill *all* of the distributive variables. You’re simply not dressed when you’re wearing one sock.

I’d like now to wrap-up discussion of Kaplow and Shavell’s stillborn project first by returning to the earlier-mentioned intimate link between the nullity of their set of “notions of fairness” on the one hand, their unfiltered conception of well-being on the other; then by remarking upon something more general that their efforts show about the broader family of well-known impossibility theorems to which Kaplow and Shavell take themselves for contributing. For it happens that these matters all hang together, and moreover that closing with them serves quite nicely to chart future worthwhile efforts.

Kaplow and Shavell’s unwillingness to delimit what can count as welfare is both a product of their broader prescriptive indeterminacy – their failure to fill all, or indeed even more than but one, of what I have been calling the distributive variables – and in turn a guarantor of yet more indeterminacy. The sense in which it is a product of their broader indeterminacy is this: As soon as we see that we must fill-in all of the distributive variables to prescribe determinately at all, we see that we must take a position in respect of the appropriate distribution formula – or, in Kaplow Shavell’s preferred apparatus, of the aggregation rule that shapes the social welfare functional. But as soon as we do that – and it’s surprising that anyone wouldn’t see this – we have *in the very act* delimited “welfare.” We have taken a position as to what can *count* as welfare. For any preference that is effectively a preference against the distribution formula (or aggregation rule) itself will perforce be a preference that is not honorable by, hence not cognizable as welfare rather than mere un- or anti-ethical preference by, the ethic to which that formula gives expression.³⁰²

An example might help to clarify: I spoke before, both at Part II.C.2 and at the beginning of the present subsection, of the thief’s having succeeded in more thievery’s not being prescriptively cognizable as an improvement in the thief’s well-being. Rather, I suggested, the thief is no more than “more satisfied.” It is both false and corruptive, I noted, to afford the theft ethical sanction – the ethical sanction that comes with the ineluctably norm-laden terms “welfare” and “well-being” themselves. But this itself indicates precisely the sense in which the definitions of “welfare” and “well-being” must be formulated by reference to a view as to what is the appropriate distribution formula.

³⁰² This is of course, per discussion throughout Part II, a sense in which it will not be cognizable as welfare by “us,” the polity in whose name the distributive ethic prescribes.

For it is precisely that formula which determines each person's rightful share – what each person properly holds. And so it is precisely that formula which determines what counts as “thievery” – the expropriation of others' rightful holdings as determined by our distributive ethic.

There is no way to distinguish welfare or well-being – things that “we” appropriately, collectively, are ethically required to honor – from the broader sphere of mere ethically neutral or indeed ethics-antagonistic preference-satisfaction, *without* preference-filtering. Filtering's simply to fence out the un- or anti-ethical satisfactions from that broader class of satisfactions which “we” jointly honor. And to determine a satisfactory filter, in turn, which is simply to determine which preferences *aren't* ethical, *aren't* rightful claims cognizable by “us” – ethics's subjects – just is to determine a satisfactory distribution formula – i.e., the precise expression of a conception of fairness.³⁰³ It is precisely that conception which not only determines the distribution formula hence aggregation rule, but also converts the mere “is” of brute preference to the “ought” of collective prescriptive obligation.

The sense in which Kaplow and Shavell's ethically unfiltered “well-being” underwrites further – now more than ethical alone – indeterminacy is this: Because they are grammatically unable to do without a distribution formula in order to prescribe at all, and because they evidently sense this dimly at some “level of consciousness,” Kaplow

³⁰³ Kaplow and Shavell, in defending their unwillingness to distill unfiltered preferences into filtered well-being, attack some of the literature on objectionable and “external” preferences, which typically are characterized either as preferences to inflict suffering – so-called sadistic preferences – or as preferences in respect of others' welfare – so-called “external” or “other-regarding” preferences. I think that much, though far from all, of the literature on objectionable preferences of those forms is nearly as confused as are Kaplow and Shavell themselves. And I think it is so precisely because it attempts to unpack “objectionability” without view to distribution formulae, rather as Kaplow and Shavell themselves neglect to think about how distribution formula always perforce partition preferences that are socially cognizable “oughts” on the one hand, mere brute “is”s on the other.

and Shavell of course find themselves forced to smuggle distributive prescription back into their picture via distributees' individual welfare functions themselves – as what they bizarrely call “tastes for notions of fairness.”³⁰⁴ But to render fairness a “taste” rather than an external limit upon precisely which tastes are to be collectively – i.e., ethically – honored is not only violative of distributive ethics's logical form (recall the early Posner's puzzling use of the word “sensibilities” rather than, say, “prohibitions” against slavery in the previous subsection).³⁰⁵ It also renders pseudo-ethical *prescription* on the basis of such “tastes” recursively impredicative and thus indeterminate – again prescriptive of nothing at all.

Once more a simple example might prove helpful: Render my individual satisfaction function thus: $u(x, y, z \dots)$, where “ u ” denotes my satisfaction and “ $x, y, z \dots$ ” denote sundry particular determinants of my satisfaction – i.e., inputs into my satisfaction function. Render the social welfare functional, in turn, thus: $U(u_1, u_2, \dots u_n)$, where “ U ” denotes the social welfare aggregate and “ $u_1, u_2, \dots u_n$ ” denote the satisfaction levels of all the n members of the society in question, aggregated – hence distributed – pursuant to some aggregation rule.

Now suppose that I hold mere “preferences” in respect of the correct distribution formula hence the correct aggregation rule, rather than that that formula determines which of my preferences might plausibly underwrite obligations of general application, ethically to be honored by “us.” The only would-be ethical significance of the distribution formula vis a vis me, that is, is not the ethical equality – the fairness – with

³⁰⁴ This truly deranged locution turns up quite frequently. See KAPLOW & SHAVELL, *supra* note 261 at 540 for a list of entries. The earlier occurrences found through Part 1 of the monograph appear meant to assure us that WE indeed makes room for distributional concern.

³⁰⁵ See *supra* Part III.A.

which it treats me, or the way in which it reflects a collective judgment about which of my preferences treats my compatriots as equals – i.e., treats them fairly – but simply its effect upon my “satisfaction.” Suppose also that I am, of course, one of the members of the society all of whose “ u ”s are to be aggregated per the aggregation rule and then maximized. And call my satisfaction function “ u_{me} .” Then my satisfaction function will be characterizable thus: $u_{me}(x, y, z \dots U(u_1, u_2, u_3 \dots u_{me}))$. Ignoring extraneous – non “me” – inputs for the moment, my satisfaction function will of course be expressible, in pertinent part, thus: $u_{me}(U(u_{me}))$. That’s to say that my welfare’s a function of social welfare which is a function of my welfare, which is a function of social welfare which is a function of my welfare, which ...³⁰⁶

You get the idea. There’s little point in going on with this empty shell game. The whole project has misunderstood the structure of prescription – its grammar, so to speak – from the start. Hence it has misunderstood the category-structured relation that subsists between, among other pairs, distribuenda like well-being on the one hand and distribution formula like fairness on the other. It misunderstands that these are, to recur to Calabresi

³⁰⁶ A variation on the problem here would be that in which I perversely derive satisfaction from social *dis*utility. Rendering the prefix “dis” as “ \neg ,” we would have $u_{me}(\neg U(u_{me}))$. See generally Robert Hockett, *Recursive Social Welfare Functions* (2006) (working paper). The examples I’ve mentioned here amount merely to particularly simple cases of the more general phenomenon that goes by the name of “interdependent utilities” in the economic literature on altruism and the family. See, seminally, Robert A. Pollak, *Interdependent Preferences*, 66 AM. ECON. REV. 309 (1976); also Theodore C. Bergstrom, *Systems of Benevolent Utility Functions*, 1 J. PUB. ECON. THEORY 71 (1999). The trouble that interdependent utilities present WE stems from their posing multidimensional fixed point problems, which, if not solved, leave either multiple (indeed infinitely multiple) or no solutions to the optimization problems that are WE’s stock in trade. The challenge is typically circumvented in the literature by assuming contraction, in particular so-called “p-contraction,” a property whose most straightforward intuitive interpretation is as entailing that agents weight their own welfares more heavily than they weight others’. See, e.g., Gary Becker, *A Theory of Social Interactions*, 82 J. POL. ECON. 1063 (1974). Contraction is widely appreciated as empirically implausible in many contexts, if not indeed most (saving, perhaps, in the case of some economists). And it is not available as a solution to Kaplow and Shavell in any event because reliance upon it renders the solubility of maximization problems contingent upon empirical accident – something that Kaplow and Shavell view as disqualifying. See Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 YALE L. J. 237 (2000).

as discussed in the previous subsection, of different “types.” They are so just as u and x in the formulation of my satisfaction function, or U and u_1 in the formulation of the social welfare functional, or indeed nouns, verbs and adjectives more generally, or subjects and predicates and relational expressions, etc., are themselves all of differing functional types. Mutual ethical obligations – all too often misleadingly labeled “social values” – are not “preferences” any more than societies are individual persons. They *delimit* what individual preferences “we” are obligated collectively to honor. And so the Kaplow and Shavell project, precisely because it cognitively miscarries by running distinct categories together and in consequence dissolving the very basis of structured thinking itself, is as fully as misbegotten and incapable of determinately prescribing – indeed it is moreso – as was the early Posnerian WM discussed earlier.³⁰⁷

In light of all of this incoherence, muddle and consequent indeterminacy I’ve been describing and diagnosing, one might wonder what ever could have prompted two “analysts” to embark on so ill-starred a project as Kaplow and Shavell’s. A proximate though not ultimate answer, I think, lies in plenary misunderstanding of the import of the formal “results” Kaplow and Shavell announced in the periodical literature before writing their monograph.³⁰⁸ For we encounter much the same confusion in their descriptions and interpretations of those “results” that we have found afflicting the monograph itself. Rather than simply replicating the foregoing discussion in connection with those results, however, I think we’ll do better to take note of the relations between the latter and the

³⁰⁷ At least the latter attempted to take a position as to the distributor, distributee, and distribution formula and mechanism variables. Its problems stemmed simply from not taking more care in respect of defining the distribuendum – “wealth” – which effort would have revealed the inter-related ethical implausibility and ultimate prescriptive indeterminacy of the project.

³⁰⁸ See *cites supra*, note 261. The “ultimate” answer to which I allude, of course, is failure to think valence-grammatically.

broader literature to which Kaplow and Shavell take themselves for having contributed. For it turns out that theirs is no more than the most acute case thus far of a disease that's more widespread, even if generally in lower-grade form. We thus find occasion to indicate means by which health might be restored to the agendas of WE and LE. And that takes us back both to the discussion at III.A over the first foundational debates in LE, and indeed full circle to this paper's very first motivating paragraphs:

Note first that in all of the foregoing discussion of this subsection we have found no occasion to say anything about Pareto. That's because Kaplow and Shavell's monograph doesn't either, at least not above the footnote line, save for one page.³⁰⁹ Yet the articles from which the book derives are couched uniformly as showing "conflicts" between "notions of fairness" and "the Pareto principle," or "violations" of the latter by "non-welfarist method[s] of policy assessment."³¹⁰ And it's taken for granted in these pieces that such conflicts or violations must perforce disqualify, not Pareto, but the "notions of fairness" or "non-welfarist methods of policy assessment" that are in tension with Pareto.³¹¹

There's a sense, then, in which Kaplow and Shavell can be taken for assuming the contrary to Sen in an earlier-announced "conflict." I think, however, that the best way to view both Sen's earlier and Kaplow and Shavell's later "results" is as misunderstandings grounded in misapprehension of matters discussed through Parts 2 and 3. Indeed we have in effect indirectly addressed these misunderstandings already, in discussion over how best to interpret Sheinman's intuitions as reported in the previous subsection. And indeed we can now show more fully why that latter discussion is warranted, by

³⁰⁹ KAPLOW & SHAVELL, *supra* note 261 at 56.

³¹⁰ See articles cited *supra* note 261.

³¹¹ See Coleman, *supra* note 263 in particular on this point.

considering Sen's results on the one hand, Kaplow and Shavell's on the other, with reference to what we've observed about Kaplow and Shavell here already.³¹²

By "the Pareto principle" Kaplow and Shavell familiarly intend what more commonly and more helpfully goes by the name of "the Pareto indifference criterion," or "Pareto indifference,"³¹³ pursuant to which all individuals' being indifferent as between two social states translates directly into the social welfare functional's indifference as between those states. The contrast, no surprise, is with the so-called "weak" and "strong Pareto" criteria, pursuant to the former of which one social state is said to dominate

³¹² See, of course, A. K. Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970). Sen was correct, I believe, in sensing a tension between Paretianism and what he called "liberalism." But I think that the conflict is more general, and moreover that the more general conflict ironically is not implicated by the particular example Sen adduces to illustrate the conflict.

The more general conflict, as argued below and proved in Hockett, supra note 275, is between Paretianism and any form of prescription what ever. The sense in which Sen's story scarcely implicates it is that it fails to treat a right as something which the right-holder may invoke, or refrain from invoking, at will. See, of course, Allan Gibbard, *A Pareto-Consistent Libertarian Claim*, 7 J. ECON. THEORY 388 (1974); also Kaushik Basu, *The Right to Give Up Rights*, 51 ECONOMICA 413 (1984). The sense in which this confusion amounts to unclarity about what I am calling "Part I" matters in this paper is that, as we saw at Part I, distributive-ethical assessment, and the rights held by distributees pursuant to distributive ethics, are not implicated or apt absent conflicting claims. And Sen's story, of course, involves no conflicting claims. Note that for similar reasons there is no real conflict in theory (at most there might be one in practice, as an informational matter in the absence of stipulated damages) between efficient breach and the promissory theory of contract – at least if the non-breaching party is indeed paid the expectancy and particularly if any surplus gleaned, to the degree it is windfall, is split. See supra Part II.E.2, and note 284 in this subsection.

Sen was nonetheless on to something, however, and was only prevented from seeing it, I think, by dint of a feature of his story that's shared by Sheinman's first story discussed in the previous subsection. That feature is the effective restriction of the field of possible conflict to mere binary preference – prefer/disprefer fare. Those cases obscure Pareto's incompatibility with ethical normativity by dint (a) of their not implicating Pareto at all when claims conflict, and (b) of their not implicating ethical normativity when claims are in harmony hence in no need of adjudication. The same fact, of course, tends to obscure the superfluousness of Pareto. More on this below.

We should also note an irony in connection with Sen's paper and the Kaplow & Shavell project we're here discussing: Kaplow and Shavell on the one hand claim that Sen's result is a "special case" of their own. See Kaplow & Shavell (2001), supra note 261 at 282-83. Yet they also claim, on the other hand, that the conflict that Sen identifies actually stems merely from his inadequate understanding of the logic of rights – precisely the invalidity in the argument first identified by Gibbard loc. cit. See KAPLOW & SHAVELL, supra note 261 at 54 n.75. It is of course bizarre both to credit a particular result as a special case of one's more general result, and to deny the validity of the special case; indeed it amounts to a *reductio ad absurdum* of one's own putatively more general result. (If p entails q, then not-q entails not-p.) But in light of what we have been cataloguing throughout this subsection, another incoherence will not likely occasion surprise.

³¹³ I say "more helpfully" because "Pareto Principle" quite often also is used to designate an entirely distinct phenomenon also associated with Pareto – the observation that the income distribution pursuant to which 20% of a society commands 80% of that society's wealth is surprisingly oft-encountered.

another such state when all individuals prefer the one to the other, and pursuant to the latter of which one social state dominates another when at least one person prefers it and no one disprefers it. (Please see the Appendix for fuller discussion of the relations among so-called “welfarism” and the several Pareto criteria.)

Now the first thing to note about Kaplow and Shavell’s results is that what they actually prove, in effect, is that it is impossible normatively to assess policy *at all* without potentially coming into conflict with, or “violating” as they say, Pareto indifference.³¹⁴ For that which in their proofs *yields* the conflict with Pareto – what they call the normative relevance of something additional to a formula-contoured aggregate of satisfactions alone³¹⁵ – is precisely what we have seen in the foregoing paragraphs to be the *prescriptive element* of *any* social welfare functional: It is the “value judgment,” or “notion of fairness,” which both *dictates the shape of* and *mandates conformity with* that functional. It is precisely what converts potential satisfactions from the mere “is” of preferences to the cognizable “ought” of preferences formulaically-summed and then “maximized” in a particular way.

³¹⁴ See Appendix and Hockett, *supra* note 275. At least this is the case insofar as we assent to Kaplow and Shavell’s continuity assumptions and recognize, as Kaplow and Shavell appear not to have noticed, that Pareto indifference and “welfarism” are equivalent only if we restrict attention to a single profile of utility functions. Continuity as assumed by Kaplow and Shavell of course can be and has been contested, in particular by Chang, *supra* note 261. And Kaplow and Shavell’s rejoinder to the challenge amounts to a mere repetition of what we saw above at Part III.A in connection with Posner’s and Sheinman’s answers to Dworkin’s hypothetical – namely the question-begging assertion that the forced transfer would not be objectionable were the WTP \$300 or \$3000 instead of \$3. See Kaplow & Shavell, *supra* note 306. Chang points this out clearly, in an observation reminiscent of Calabresi’s earlier-noted treatment of fairness as a constraint upon maximization. See Chang, *supra* note 261. What Chang points out no more than Kaplow and Shavell – or for that matter anyone else thus far – however, is that if we do reject continuity, then there is no need to reconcile Paretianism and fairness or liberalism or anything else. For again in such case Pareto’s superfluous. The only time Pareto really does anything at all is when it acts to prevent fairness, and indeed any prescription what ever. See again *supra*, Part III.A, *supra*, note 312, and Hockett, *Prescriptive Paretian*, *supra* note 275. Also the Appendix.

³¹⁵ See in particular Kaplow & Shavell (2001), *supra* note 261.

If the social welfare functional is actually to prescribe, rather than simply to describe a particular possible pattern of satisfactions, it must be possessed of this element. It must issue out of a “value judgment,” a “notion of fairness” of precisely the sort that renders it ethically required rather than merely accidentally isomorphic.³¹⁶ And again it is precisely this element that brings “notions of fairness” into conflict with “welfarism” and Pareto. But this again means, in turn, that what Kaplow and Shavell actually have in effect “proved” is that to prescribe *at all* is to raise possible conflict with Pareto, meaning of course that if we’re to prescribe or “assess” or evaluate or opine at all, we are committed to acknowledging that there’s something unsatisfactory about Pareto. More on the implications of this presently.

The next thing to ask in connection with Kaplow and Shavell’s results is whether there really is anything that ought even occasion surprise, let alone troublement, in this fact. I think that the answer is quite clearly no. We can approach this in either or both of two ways: First we can remind ourselves of a few basic features of the nature of value-judgment or prescription in general, and its relation to ethically unfiltered satisfaction – which is all that Kaplow-Shavellian “welfare,” recall, amounts to – in particular. And then, when we see that there really is no surprise at all in the fact that value-judgment might conflict with mere fairness-indifferent (ethically unfiltered) satisfaction, we can remind ourselves why it might be that it’s been *thought* in some circles to be troubling or paradoxical, or even why the Pareto criterion might ever have been thought useful, let alone ethically attractive, in the first place.

So first, as to that matter of prescription and its relation to subjective satisfaction: Is it really surprising that value-judgments – including those that determine the

³¹⁶ The distinction here is cognate with that between normative rule and mere positive regularity.

aggregation rules that shape social welfare functionals – can come into conflict with subjective satisfaction? Hardly. It is in the nature of value-judgments that they deem some satisfactions as not rising to the level of ethical claims, i.e. as not being entitled to “our” collective sanction.³¹⁷ It is in the nature of acknowledgement of normativity *as such*, of there being a divide between right and wrong, how ever demarcated, that certain actions can be wrongful, hence that certain satisfactions – which are, after all, merely the successful consummations of actions – can be wrongful. And so it is far from surprising that it is at least conceptually on the cards that everyone within a particular class might in fact will wrongfully – be satisfiable only through wrongdoing. It’s of course quite unlikely ever to happen, but it’s in the structure of right/wrong judging – of normativity – itself that that is conceivable.³¹⁸

There was a time, for example, when perhaps everyone who thought about the subject considered the earth to be flat. If so, they were all wrong. It is just so with ethical judgment. If we believe that there is ethical right and wrong at all, then it is on the same footing with cognitive right and wrong so far as the possibility of incorrectness goes. Again it is generally quite unlikely, but it’s quite unsurprisingly conceivable. Indeed it seems likely that it is wrong, for example, to torture animals, or to enslave

³¹⁷ Note that this means they can’t be prescribed. See generally Hockett, *supra* note 275. Heavens, even every welfare economist’s favorite oracle, Kenneth Arrow, has long made remarks along these lines. See, e.g., KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 73 (“[D]esires in conflict with reality are not entitled to consideration.”).

³¹⁸ Welfare economists themselves have been, in stark contrast to Kaplow and Shavell, well aware of this. See, e.g., the venerable HLA MYINT, *THEORIES OF WELFARE ECONOMICS* 199-200 (1948) (“Thus when we have demonstrated that a particular pattern of allocating resources satisfies given wants better than others, this does not amount to a categorical imperative that this pattern *ought* to be adopted. To obtain that we need a further premise, viz. that these given wants are of the same ethical quality of goodness.”)

Rudimentary misunderstandings of normativity quite reminiscent of Kaplow and Shavell’s are manifest throughout a recent book on int’l law and its relation to normativity. See Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720 (2006) (reviewing JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW*).

human beings whose ethnicities were deemed to be “inhuman” ethnicities. And yet it is possible that there have been communities in which all or nearly all people enjoyed, or were unaware that or untroubled by the fact that others enjoyed, bear-baiting, and hence enjoyed wrongfully. And we know quite intimately that there have been societies of people who have thought this way in respect of slavery.

Kaplow and Shavell themselves, we have seen, are committed to this possibility as self-professed welfare economists – precisely as soon as they assent to the prospect of its being *prescriptively required* or *rightful* to *satisfy* a social welfare functional. For what ever “value judgment” they ultimately assent to as the *correct* one to appeal to – the one that it would be wrong not to agree with – in determining the functional’s method of aggregation, that judgment will be one that in principle could end up being “dispreferred” by everyone. Again quite unlikely to happen, of course – and even less likely to be honored by any polity – but conceptually possible. And it’s such remote possibilities alone that Kaplow and Shavell view as disqualifying such value judgments.³¹⁹

So what Kaplow and Shavell really are saying, if they are saying anything at all, is that we are to abandon all thought of right and wrong, hence all normativity and normative assessment, tout court.³²⁰ In the name of Pareto indifference one is simply to squish about indifferently to the normativity that is structured thinking, satisfy preferences indifferently to the normativity that is fair distribution of satisfactions, and in

³¹⁹ See, e.g., Kaplow & Shavell (2001), *supra* note 261 at 284 (“It is irrelevant to this conclusion that Pareto dominance will be rare among actual policy alternatives.”).

³²⁰ Note that this is nearly explicit in their earlier-cited “whose to judge?” remark made in attempting to justify their unfiltering stance toward “well-being.” See *supra* note 272. So is the self-undercutting to which I refer next. If we “prefer” they be “wrong,” they are thereby rendered wrong on their own reckoning.

essence live like no more than amoebae. That's not only unattractive, it's self-undermining: It cannot be said without violating its own stricture. Time to start afresh.

Since there really is no surprise that normativity itself could in theory “conflict” with Pareto indifference, the next question is why anyone ever would have thought it surprising, or equivalently, why anyone would have found this commonplace troubling. I think there are at least two related answers. The first has to do with the earlier-noted normative valence of such terms as “welfare” and “well-being” themselves. By using these words unreflectively simply in labeling ethically unfiltered preferences, “analysts” like Kaplow and Shavell have unconsciously conferred ethical compellingness upon those preferences. They've unconsciously elided from the mere “is” of preference and satisfaction, which is all that the terms as proffered by Kaplow and Shavell actually *denote*, to the “ought” of entitlement, which is what the words more ordinarily tend to *connote*. And thus it has naturally struck them as “paradoxical” – as pitting ethical value against ethical value – when it's turned out that preferences might actually conflict with what's right. But again, it is rightness itself – Kaplow-Shavellian “value judgments,” “notions of fairness” – that determine *which* preferences bear ethical weight, are regardable as compelling and indeed as true *well-faring* by “us” rather than simply as unbounded wants pressed by thieves.

The second answer has to do with both (a) the appeal in which Pareto itself grounds itself, and (b) our discussion in connection with that appeal carried out above in respect of Sheinman's reported intuitions in response to his posited hypotheticals. The putative attraction of all forms of Pareto is, as is often remarked, that they posit circumstances to which all are claimed to assent or at any rate not to dissent, so that

questions of distribution might be avoided. And we're bewitched into thinking that there might *be* such situations by the way in which choices are typically posited – as merely ordinal binary, “prefer”/“disprefer” affairs – by those trafficking in Paretianism. For if all really “prefer,” who but a tyrant could deny us our preference? This is what accounted, recall, for Sheinman’s reported intuition in respect of his first hypothetical.³²¹

The problem, of course, is that questions of distribution *never* are *really* avoidable – merely ordinal or binary – unless there’s no scarcity or conflict at all (recall Part I), or distribution already is viewed implicitly as fair (hence again no conflict, recall Part I). Nor will all generally assent unless either there *is* lack of scarcity, or that perceived fairness, or there is coercion. That’s what we saw in discussing Sheinman’s second two stories.³²² So Pareto really *is* “pointless,” and even moreso, I think, than Judge Calabresi pointed out some years back.³²³ It has been, from its very inception, a dodge – an attempt at escaping distributive judgment.³²⁴ But there’s neither reason, nor, as we’ve seen in connection with Kaplow and Shavell’s own admissions in respect of how social welfare functionals are constructed, so much as a real prospect, for dodging distributive assessment.

As we have noted now since the beginning of this inquiry, *all* actions result in distributions of benefit and burden. All such distributions call out for distributive-ethical assessment. And all such assessment requires deployment of “value judgment.” There’s no getting round this, and there’s no prescription that isn’t effectively doing this.

³²¹ See supra Part III.A.3. See also supra note 314 and accompanying text.

³²² Id.

³²³ See supra note 7.

³²⁴ See Hockett, supra note 275.

Pareto's once-perceived *raison d'être* has long since vanished – indeed it never existed.³²⁵ And it is more than remarkable that Kaplow and Shavell, who chastise LE practitioners for thinking that WE avoids distributional judgment,³²⁶ raise as the only disqualifier of “notions of fairness” – and the very notions that they themselves employ at that – the fact that these can conflict with a stale and sterile device that exists for no reason but to *avoid* distributional judgment.

Why, then, has the Pareto criterion so puzzlingly persisted as something that's viewed as attractive, when we no longer fear, and see that we cannot avoid, distributional judgment? I think there's a complex set of interconnected reasons, some cultural-historical, some disciplinary-sociological, others moral-psychological, which I elaborate elsewhere.³²⁷ But perhaps the most forceful one, and the one which we have already taken time to investigate above, is that which we've seen in connection with Sheinman: We tend implicitly to view any Pareto improvement wrought, synchronically in one transaction, against a backdrop of many transactions extended diachronically, in which transactions we tend to play differing roles over time. And so we envisage, under the aspect of Pareto, a world in which we each of us never lose and often gain – thus a world in which the aggregate is grown and grown fairly. And that is to say we envisage, in short, a world like that envisaged by Guido Calabresi some thirty-five years ago.

C. Appendix: The Impossibility of Prescriptive “Welfarism” or Paretianism

It might be helpful to provide formal expression to some of the claims made in Subpart B just above. Here I undertake to do that:

³²⁵ Id.

³²⁶ KAPLOW & SHAVELL, *supra* note 261 at 26-28 in particular.

³²⁷ Hockett, *supra* note 275; also Robert Hockett, *On the Puzzling Persistence of Paretianism* (2006) (working paper, on file with author).

Let “ x ” denote a possible state of the world as viewed under a normatively complete description. A normatively complete description includes all details that might be deemed salient under a mode of evaluation. Those details include facts concerning all individuals i belonging to a defined population N of n members. N may be defined to comprise individuals living at an instant, or to comprise individuals living at all instants along a defined temporal interval. It will sometimes be convenient to call x simply “a world,” or “a possible world.”

Let X be the set of possible states of the world invariant in N . We are interested only in possible worlds inhabited by the n individuals i who jointly constitute N .

A social welfare function, W , is a mapping from the set of possible states of the world that concern us, X , onto an ordering, R .³²⁸

An individual i 's satisfaction function, U_i , is also a mapping from X onto R .³²⁹

The internal structure of either a social welfare function W or an individual satisfaction function U_i can in principle be multivariate, mapping vector values onto R , or univariate, mapping scalar values onto R .

DEFINITION 1. A “satisfactionist,” or equivalently, “at least partly satisfactionist” social welfare function, W_s , is a social welfare function of the form $W(\bullet, U_1(x), \dots, U_m(x))$ the domain of which includes, but need not be limited to, m individuals’ satisfaction functions U_i . It is thus possible in such case that there exist $x, x' \in X$ such that $U_i(x) = U_i(x')$ for all i and yet $W_s(x) \neq W_s(x')$. It is also the case here that n might exceed m . In such case W_s can be characterized as “oligarchical.” If m were precisely 1, W_s could be characterized as “monarchical.”

DEFINITION 2. An “exclusively,” or equivalently, “strictly satisfactionist” social welfare function, $W_{e/s}$, is a social welfare function of the form $W(U_1(x), \dots, U_m(x))$ the domain of which is restricted to individuals’ satisfaction functions U_i . Hence it is a social welfare function for which there exist no $x, x' \in X$ such that $U_i(x) = U_i(x')$ for all i and yet $W(x) \neq W(x')$.³³⁰ Thus the following hold true: $\forall i \in N; x, x' \in X: U_i(x) > U_i(x') \equiv W_{e/s}(x) > W_{e/s}(x')$. And: $\forall i \in N; x, x' \in X: U_i(x) < U_i(x') \equiv W_{e/s}(x) < W_{e/s}(x')$.

³²⁸ The proofs here are derived from those in Hockett, *supra* note 275. I employ the apparatus of social welfare functions rather than functionals here in order to speak within the now prevailing Bergson-Samuelson-Arrovian idiom; but I could just as well have employed more generic social welfare functionals. Because most of the analysis to follow involves comparison between pairs of possible worlds alone, complete ordering of all possible worlds will not, strictly speaking, be necessary to it. Nor even will the prospect of a quasi-minimal Senian “choice function” per Sen, *supra* note 312. Comparability and asymmetry of (ordered) pairs of worlds will suffice. What holds true of any W here will hold trivially true of any information-rich Bergson-Samuelson social welfare function, and of any less information-cognizant, non-Bergson-Samuelson social welfare functional F defined in the more abstract space of satisfaction profiles.

³²⁹ I speak of “satisfaction” rather than “welfare” or “well-being” for reasons associated with the conclusions drawn via the present analysis and discussed prior to the present Appendix.

³³⁰ “Exclusively,” or “strictly satisfactionist” is extensionally equivalent both to “individualistic” as employed by Kaplow & Shavell (2001), *supra* note 261 (and earlier by Bergson (1938) and Samuelson (1947)), and to the, since Sen (1979), more commonly encountered “welfarist.” Reasons for preferring the term offered here are again associated with the conclusions drawn via the present analysis and discussed prior to this Appendix. The sources just referenced are: Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q. J. ECON. 310 (1938); PAUL A. SAMUELSON, FOUNDATIONS OF

DEFINITION 3. A satisfactionist social welfare function W_s is what we shall call “interpersonally aggregative,” or equivalently, “interpersonally distributive,” if and only if it is non-monarchical – i.e., is a function of more than one individual’s satisfaction function U_i . Hence it is of the form $W(\bullet, U_1(x), \dots, U_m(x))$, with $m > 1$.³³¹ An exclusively satisfactionist social welfare function $W_{e/s}$, being a member of a proper subclass of the full class of satisfactionist social welfare functions W_s , can of course also be interpersonally aggregative if non-monarchical, in which case it will take the form $W(U_1(x), \dots, U_m(x))$, with $m > 1$.

COMMENT 1-3. It proves pertinent below that every interpersonally aggregative social welfare function W_s is possessed of an internal structure, or “shape,” determined in part by the comparative weights assigned individual satisfaction functions U_i in its domain. Just as any multivariate social welfare function W is possessed of an internal structure determined *in toto* by the comparative weights assigned all of the variables in its domain.

DEFINITION 4. The assignment of weights to individual satisfaction functions U_i in the domain of an interpersonally aggregative social welfare function W_s will be called W_s ’s “aggregation rule,” or equivalently, its “distribution rule,” A .

COMMENT 4. I note that the assignment of weights constituting an aggregation rule A might be deliberate, arbitrary, or inadvertent – effected “by default” so to speak. In cases of the latter sort A might in some contexts usefully be termed a mere “regularity” as distinguished from a deliberately formulated “rule” or “norm.”

DEFINITION 5. A “prescriptive” social welfare function, W_p , is a social welfare function at least one of the constitutive features of which is deliberately selected or formulated with a view to giving effect to a normative principle – to a value judgment or set of value judgments. That is to say that at least one of its constitutive features is, normatively speaking, neither arbitrary nor inadvertent. Because one or more of its features is selected or formulated in order to *give effect* to a normative principle, moreover, a prescriptive social welfare function W_p is constructed or adopted with a view to its own incumbency in the world (see Definition 6). A “non-prescriptive” social welfare function, W/p , is simply a social welfare function that is not prescriptive.³³²

ECONOMIC ANALYSIS (1947); Amartya Sen, *On Weights and Measures: Informational Constraints in Social Welfare Analysis*, 45 *ECONOMETRICA* 1539 (1977).

³³¹ Where $n > 1$ but $m = 1$, there is a sense in which W_s is interpersonally aggregative “by default”: It counts the non-monarchs for naught.

³³² I am of course assuming a bivalent logic with excluded middle in so defining “non-prescriptive.” See Hockett, *Nonstandard Logics*, *supra* note 165 for more on the significance of that assumption, and of assuming alternatives, in welfare economic and other social choice contexts involving perceivedly problematic comparisons. I relatedly ignore here a conceivable distinction between what might be called “completely prescriptive” social welfare functions on the one hand and mixed cases, wherein some but not all features of the function would be selected or formulated with a view to giving effect to a value judgment or set of value judgments, on the other hand. In such case we might designate the mixed function an “incompletely prescriptive” social welfare function $W_{p\sim}$. A “non-prescriptive” social welfare function W_{p^-} then would be a social welfare function that is neither completely nor incompletely prescriptive. Because the present analysis is laid out to demonstrate the inconsistency of strict satisfactionism and Paretianism with *any* degree of prescription, the mixed cases needn’t further concern us.

DEFINITION 6. A social welfare function W is “incumbent,” or equivalently, “operative,” if functionaries or other agents are obliged to act in conformity with it – in particular, to act in a manner reasonably calculated to maximize W ’s output value along R .³³³ I note that W ’s being incumbent is a feature of the world, hence is partly constitutive of x , the world as completely described.

The reader may now verify the truth of the following observation.

OBSERVATION 1. All else being equal, a prescriptive social welfare function W_p deems a world better if W_p is itself incumbent in that world. Somewhat more formally, $\forall x, x' \in X$, if x is a world in which W_p is incumbent and x' is a world in which W_p is not incumbent, then $W_p(x) > W_p(x')$.³³⁴

REMARK. (See Definition 5.) The value judgment(s) pursuant to which W_p is constructed or adopted will itself (or themselves) deem W_p ’s incumbency normatively superior to its non-incumbency. A satisfactorily prescriptive social welfare function W_p , for its part, gives full operational form to a value judgment or set of value judgments. Hence W_p , in giving that full operational form to the value judgment(s) pursuant to which it is constructed, likewise will deem its incumbency superior to its non-incumbency.³³⁵

(Here, in the event it’s of interest, is how I suppose a social welfare function might turn out to be “mixed”: If some such function were multivariate and some but not all of its variables were selected, or its variables’ comparative weightings assigned, inadvertently or arbitrarily, it would fall short of completely prescriptive. Suppose, for example, that W deemed world x better, *ceteris paribus*, than world x' in virtue of x ’s being possessed of a larger proportion of “beautiful” inhabitants than x' . Then W would in part be a species of deliberately “perfectionist” (or better, “fetishist”) social welfare function. (Fetishism, I think, is simply to treat as ethically decisive that which is ethically arbitrary.) If it accordingly recommended, through differential weighting, the directing of more resources to beautiful people on the supposition that these people would in consequence procreate more, and then unthinkingly left all of the nonbeautiful peoples’ satisfaction functions weight-wise undifferentiated, W would be incompletely prescriptive. It would forthrightly prescribe with respect to beautiful people, but would only inadvertently default to a (still fetishist) weighting in respect of the nonbeautiful people (inadvertently favoring those born with steep utility curves over those not so born – the respect in which classical utilitarianism is fetishist.)

³³³ I have deliberately left “obliged” broadly open as to matters of specific normative valence and mode of enforcement. It might mean “ethically expected” or merely “authoritatively mandated,” and the obligation might be “voluntarily observed,” “culturally sanctioned,” “strictly enforced,” etc. I leave “functionaries” and “agents” open as applicable to anyone who might act in vindication or enforcement of the norm or fall under its jurisdiction. If only a planner or other state functionaries are obliged to act upon the social welfare function, then “functionary” will designate only such functionaries. If all citizens are regarded as being morally obligated to act in, or not to act out of, conformity with what ever social ethic receives expression in the social welfare function, then they too can be considered “functionaries” or “agents” for present purposes.

³³⁴ We could refine the grain here. A social welfare function’s output might vary with degrees or orders of incumbency, for example, varying between desuetude on the one hand, widespread or universal observance on the other. We may leave such prospects to one side in the present context because all that’s required to make the point is that *some* measure of incumbency renders the world better by the lights of any prescriptive social welfare function. I emphasize that incumbency is but a bare minimal entailment of prescriptivity. Fuller entailments include, among other things, any particular distribution of benefits and burdens over individuals prescribed via the prescription. More on the significance of that fact presently.

³³⁵ It seems to be in the nature of prescription that the prescriber deems the world to be better, *ceteris paribus*, when functionaries or other agents are obliged to act upon the prescription. Any injunction giving complete expression to the prescriber’s judgment will accordingly deem it likewise. I of course

DEFINITION 7. A satisfactionist social welfare function W_s is “interpersonally satisfied” when resources are distributed to individuals i in a manner consistent with W_s ’s maximization.³³⁶

OBSERVATION 2. It follows trivially upon Definition 7 that an exclusively satisfactionist social welfare function $W_{e/s}$ will be interpersonally satisfied if and only if it is maximized. But a satisfactionist social welfare function W_s that is not exclusively satisfactionist may be interpersonally satisfied even when not maximized. (Things may fall short of •’s being maximized.)

OBSERVATION 3. I note further that interpersonal satisfaction and incumbency are jointly independent. A satisfactionist social welfare function W_s can be interpersonally satisfied without being incumbent, and can be incumbent without being interpersonally satisfied.

DEFINITION 8. A satisfactionist social welfare function W_s ’ “interpersonally replicates,” or equivalently, “is interpersonally isomorphic to” (symbol “ \approx ”) another satisfactionist social welfare function W_s at an instant, t , if and only if they are both satisfied at that instant. Somewhat more formally, if x is the world in which functionaries happen to act in conformity with W_s and x' is the world in which functionaries happen to act in conformity with W_s' , then $W_s \approx W_s' \equiv \cdot \forall i: U_i(x) = U_i(x')$.³³⁷

combine semantic/propositional content with pragmatic/attitudinal stance, what formal logicians and linguists call “sentential force,” in the Wp as thus characterized. Since the social welfare function in order to prescribe must be articulated by a prescriber (in the present context, presumably some designated representative or functionary of the polity), I do not know how things can be otherwise if the function would be complete as a program embodying the prescriber’s (hence polity’s) intention. The only objection that I can envisage might be to the self-referential recursion implicit in the formulation. But that would not do. For one thing, recursion’s a common enough phenomenon in most formal theories, including economics and indeed within the Bergson-Samuelson-Arrovian framework itself. See, e.g., Barberà & Jackson (2000), Koray (2000), both *supra* note 306. For another thing, any social welfare function that includes unfiltered satisfaction functions in its domain will itself be recursive – indeed vitiatingly so. See Hockett (2006a). One need only consider the case where individual satisfactions are interdependent, or where individual satisfaction is a function of social welfare itself, by way of particularly simple examples. We then can have $W = W(U_i(W))$. Absent an assumption of p-contraction, which would be strong, empirically implausible, and in any event at best merely contingently and fleetingly warranted, there will be either no solution or an infinite number of solutions to the multidimensional fixed point problem that W ’s optimization requires. See generally Bergstrom (1999), Hockett (2006), both *supra* note 306. I note finally that self-reference appears to be latent in prescription itself: Prescription imports a divide between correct and incorrect, and recognition of such a divide would seem to import the possibility of self-assessment and self-correction in light of the divide. Perhaps recognition of something like this underlies the resonant story of Adam and Eve, who become aware of their nakedness after violating a command not to eat of the fruit that imparts knowledge of good and evil.

³³⁶ In the limiting case, *unqualified* “satisfaction” is merely a synonym for “maximization.” That is, a social welfare function is satisfied with respect to all of its variables when it is maximized. It of course follows that an exclusively satisfactionist social welfare function is interpersonally satisfied precisely when it is maximized.

³³⁷ I have indexed by temporal moment for heuristic reasons. It would seem empirically unlikely, to say the least, that intensionally distinct social welfare functions, i.e., social welfare functions formulated pursuant to differing sets of desiderata or normative criteria, would recommend extensionally identical distributions over persons for extended periods. But it is of course conceivable, meaning that I could in theory dispense with the temporal index.

ASSUMPTION. For any prescriptive social welfare function W_p considered at an instant, t , there is a non-prescriptive social welfare function W/p which interpersonally replicates it at that instant. (Simply suppose W_p 's being interpersonally satisfied without being incumbent, by way of minimal example.)

PROPOSITION 1. No prescriptive social welfare function is exclusively satisfactionist.

Proof. Assume a world x in which the prescriptive social welfare function W_p is incumbent. Assume another world x' in which a non-prescriptive social welfare function W/p interpersonally replicates W_p at instant t but is not incumbent. We then know the following to hold true at t : By Observation 1, $W_p(x) > W_p(x')$. Hence $W_p(x) \neq W_p(x')$. By Definition 8, $U_i(x) = U_i(x')$ for all i . Hence by Definition 2, W_p is not exclusively satisfactionist. *Q.E.D.*

That's strict satisfactionism. Now Pareto.

DEFINITION 9. A social welfare function W is "Paretian" if and only if it satisfies one or more of the Pareto indifference (PI), weak Pareto (WP) or strong Pareto (SP) conditions. Somewhat more formally: Either PI holds of W , i.e. $\forall i \in N; x, x' \in X: U_i(x) = U_i(x') \cdot \supset \cdot W_p(x) = W_p(x')$; or WP holds of W , i.e., $\forall i \in N; x, x' \in X: U_i(x) > U_i(x') \cdot \supset \cdot W_p(x) > W_p(x')$; or SP holds of W , i.e., $\forall i \in N; x, x' \in X: U_i(x) \geq U_i(x') \ \& \ \exists i \in N; x, x' \in X: U_i(x) > U_i(x') \cdot \supset \cdot W_p(x) > W_p(x')$.

COMMENT 5. So-called "full Pareto" (FP), defined in the literature as the conjunction of PI and SP, is of course trivially embraced by Definition 9. Definition 10 and Proposition 2, below, will afford warrant to our lumping all versions of Pareto together as here.

SUPPOSITION. There exists at least one indefinitely divisible resource, r , which, were every individual i to possess an increment $\varepsilon > 0$ more of it, would leave each individual i more satisfied. Somewhat more formally, taking $r_i/r(x)$ for person i 's allotment of r in world x , and $r_i/r(x')$ for i 's allotment of r in world x' , we have $\forall i \in N: r_i/r(x) - r_i/r(x') = \varepsilon \cdot \supset \cdot \forall i \in N: U_i(x) > U_i(x')$.³³⁸

I note one additional point of importance in connection with the temporal indexing here, a point with significance for the analysis of Paretianism's relation to strict satisfactionism and prescription below: A prescriptive principle which motivates a particular aggregation hence distribution rule will of course recommend one distribution at t_1 and another distribution at t_2 when the circumstances to which the principle is sensitive change in the interval. It would be a most remarkably happy accident, to say the least, were the change in distribution between t_1 and t_2 not to produce "losers" relative to the status quo ante. And it would be yet more remarkable were the change to yield not only no "losers," but no differential "winners." So incumbency truly is but a minimal entailment of prescription, one that we'll see immediately to rule out strict satisfactionism and thus, given the premises of the present analysis, Pareto indifference and "pure" weak or strong Paretianism as well. Prescription's fuller entailment – changing distributions in response to changing circumstances across temporal intervals – of course even more immediately evidently to rule out Paretianism.

³³⁸ One could word this somewhat more technically by saying that each U_i is responsive only to i 's own allotment, not to others' allotments, of the resource r and is at least weakly continuous and monotonically increasing in that allotment. See, e.g., Kotaro Suzumura, *Pareto Principles from Inch to Ell*, 70 ECON. LETTERS 95 (2001). By "weakly" continuous here I mean simply that if $r_i/r(x) > r_i/r(x')$, then there is a neighborhood $V(r_i/r(x'))$ of $r_i/r(x')$ all of whose members $r_i/r(x)$ exceeds. See, e.g., Donald E. Campbell & Jerry S. Kelly, *Impossibility Theorems in the Arrovian Framework*, in HANDBOOK OF SOCIAL CHOICE AND WELFARE, VOL. 1 (Kenneth J. Arrow, Amartya K. Sen, & Kotaro Suzumura eds. 2002). I note

DEFINITION 10. A social welfare function W is “unremittingly,” or equivalently, “unalloyedly,” “strictly” or “purely” Paretian if and only if for each individual i it is at least weakly continuous and monotonically increasing in $r_i/r(x)$ when ever the Supposition holds.³³⁹

COMMENT 6. Specifying a few implications of Definition 10 in prose might facilitate more immediate intuitive grasp both of the next proposition and proof and of their import. Here then is the intended interpretation: An unremittingly PI social welfare function allows no non-satisfactionist value – including, for example, incumbency per Definition 6 above, which recall any prescriptive social welfare function will at a bare minimum count for something – to count for anything in determining an optimum. Unremittingly WP or SP social welfare functions, for their parts, will not “trade off” so much as an infinitesimally small increment of gain in r , whether the traded increment of forgone gain is itself divided over everyone (WP) or is a traded increment of gain that would be realized by but one person (SP), for any gain, no matter how large, in respect of some other value – again including incumbency per Definition 6 above, which recall any prescriptive social welfare function at a bare minimum will count for something.

PROPOSITION 2. No prescriptive social welfare function is unremittingly Paretian.

Proof. There are three cases to consider:

For PI: We know from Sen (1986) that where that portion of the domain of what I have been calling a satisfactionist social welfare function which comprises individual satisfactions is restricted to a *unique profile* of individual satisfaction functions, weak transitivity and Pareto indifference jointly entail what I have been calling exclusive satisfactionism. Here we are indeed considering but a single such profile (recall, that of the members of N) and at least weakly transitive social welfare orderings (both per our opening remarks and per Definition 10), so our unremittingly PI social welfare function is exclusively satisfactionist. But by Proposition 1, no prescriptive social welfare function is exclusively satisfactionist. So the unremittingly PI social welfare function cannot prescribe.³⁴⁰

further that, strictly speaking, the Supposition here does not function as an *assumption*, per Suzumura (*idem*) and Kaplow & Shavell (2001), *supra* note 261, but as a contingent condition, “assumed” only *arguendo*. The idea, as will presently become clear, is that a Paretian purist is one who commits to certain consequences *should* the Supposition hold.

³³⁹ That is to say that W is itself weakly continuous and monotonically increasing in each individual’s allotment of the resource r .

³⁴⁰ The Sen reference is to Amartya Sen, *Social Choice Theory*, in HANDBOOK OF MATHEMATICAL ECONOMICS, VOL. 3 (K. Arrow and M. Intriligator eds., 1986). Two additional observations are germane in the present connection: First, assuming independence of irrelevant alternatives and unrestricted domain per Arrow, *supra* note 317 – which many social choice theorists and welfare economists, including Kaplow & Shavell themselves, appear to find attractive – Pareto indifference proves equivalent to what I have been calling exclusive satisfactionism even in respect of *all possible* profiles of individual satisfaction functions, rather than simply in respect of a unique such profile, meaning that we could dispense with the latter assumption. See again Sen, *op. cit.* Second, under a weak set of four assumptions three of which – one indefinitely divisible resource, in which individual U_i ’s and W are continuous and monotonically increasing – are largely incorporated into the analysis here and one of which – compensability in increments of the divisible resource – is commonly invoked in the literature of fair allocations and presumably acceptable to such as Kaplow & Shavell as well, all three Pareto criteria have been proved to be jointly equivalent. See Suzumura (2001), *supra* note 338. Were we to assume

For WP: We lightly modify the proof found in Kaplow & Shavell (2001), partly in keeping with the revised and supplemented apparatus employed in the present analysis, partly in light of observations made by Campbell & Kelly (2002) concerning the needlessly strong assumptions employed in that proof, and partly in light of a cognate proof offered contemporaneously by Suzumura (2001): By Definition 2, we know that if a social welfare function W is not exclusively satisfactionist, then $\exists x, x' \in X: \forall i \in N: U_i(x) = U_i(x')$ and yet $W(x) \neq W(x')$. Now suppose a particular such function and two worlds x and x' for which (a) $\forall i \in N: U_i(x) = U_i(x')$ and (b) $W(x) > W(x')$. Next suppose a world x'' identical to x' in all respects save that each $r_i/r(x')$ per the Supposition has been increased by $\varepsilon > 0$, so that $\forall i \in N: U_i(x'') > U_i(x')$. Now observe that, granted (even weak per the Supposition and Definition 10, not necessarily Kaplow & Shavell's full) continuity, as well as monotonicity, in $r_i/r(x')$, there is some ε sufficiently small that our W , which, recall, is assumed not to be exclusively satisfactionist, will rank worlds thus: $W(x) > W(x'')$. In that case since, per (a) just above we have supposed $\forall i \in N: U_i(x) = U_i(x')$, it must also be the case that $\forall i \in N: U_i(x'') > U_i(x)$. Hence if weak Pareto is satisfied, $W(x'') > W(x)$. But that contradicts what we found supposing weak continuity and monotonicity per the Supposition. Hence the unremittingly Paretian social welfare function per Definition 10 relinquishes non-exclusive-satisfactionism. But by Proposition 1, with that it relinquishes prescriptivity.³⁴¹

For SP: Strong Pareto trivially entails weak Pareto. What is true of the WP case here is accordingly true *a fortiori* of the SP case. (SP \supset WP; WP \supset no prescription; \vdash SP \supset no prescription.) Hence the latter too is incapable of prescribing. *Q.E.D.*³⁴²

compensability, then, which one suspects most Paretians would happily do, the proof of Proposition 2 would now be completed.

³⁴¹ I note that this portion of the proof goes through even when W is replaced by a weaker, nontransitive ordering relation falling short of functionality.

³⁴² I observe here that Chang, *supra* note 261, constructs interesting *mixed* "liberal consequentialist," or equivalently "Paretian liberal" social welfare functions that reject continuity. These in effect give formal expression to the commonsense mixed teleological/deontological ethics pursuant to which maximization of one or more goods is enjoined, subject to a side constraint sounding in rights to fairness or some basic minimum. See, e.g., FULLER, *supra* note 242 at 3-32 (jointly operative moralities of "aspiration" and "duty"), CALABRESI, *supra* note 232 at 2-3 (lexicographically ordered "just[ice] or fair[ness]" and cost-minimization as goals of accident law), RAWLS, *supra* note 102 at 37-39 ("right" ordered as prior to "good"), DWORKIN, *supra* note 97 at 75 (rights as "trumps") for canonical articulations. Chang's social welfare functions also of course escape the consequences of the proofs I here offer, at any rate in such circumstances as those in which their non-Paretian components kick in. For they are not strictly satisfactionist or unremittingly Paretian. This leaves them in better stead than any social welfare functional that Kaplow & Shavell might have in mind, which Proposition 2 indicates would be incapable of prescribing anything at all. I nonetheless think, by dint both of the results reached above in the text and of the interpretation of these results which I offer below, that we do best to abandon Pareto entirely for purposes of prescriptive welfare economics or social choice theory.

Here also is a fitting place to remark further upon the relation between Sen's earlier, *supra* note 312 referenced classic (1970) impossibility result and the results derived here. On the one hand, I think that Sen's result is that which has come closest in the past to those I've derived here. On the other hand, I think that its fixing upon a "sphere of liberal autonomy" obscured what was actually at stake. The critical, and more generally applicable point, it seems to me, is that individual satisfactions alone are not enough to prescribe at all, because the question for social decision is always at least in potential the *distribution* of preference-satisfactions, which preferences alone do not suffice to adjudicate. The question of the proper

CONCLUSION

We have covered much ground here – I hope not too much. As we have seen, though, there is much ground to clear, and perhaps that itself affords warrant for coverage. Notwithstanding what we have done here, however, it seems clear that much more remains to be done. Indeed, if I’m right in what I have been arguing, there is more to be done than we’ve realized. For it seems we’ve been on the wrong track now for years, where the theory of law’s inter-linking with economy is concerned. We have focused too long upon ultimately unmeasurable and ethically non-cognizable end-states. And all the while we should have been looking toward ethically relevant, guaranteed right-consequence-yielding “inputs” to our “life-building functions.” Just as our deep opportunity-egalitarian commitments have been seen here to counsel.

If all collective action results in distribution, we cannot *but* think-through the *ethics* of distribution. And if distributive ethics call out for the growing and spreading of ethically exogenous material opportunity, we must think-through how that can be done. Imagine the vastness of the research agenda that opens. What are the real determinants of

sphere of liberal autonomy – i.e., the ethically cognizable divide between internality and externality – is simply a proper part of this larger question of rightful distributive shares. And it is this larger question that both strict satisfactionism and Pareto have been – both from their inceptions and from the earliest days of “the new welfare economics” – employed in effect simply to dodge.

This deeper “issue” toward which I believe Sen was struggling was further obscured by what appears to me to have been a needless distraction raised by his misunderstanding, at the time, of the functional logic of rights: the way that rights “work” – viz., as rights to choose, including to choose not to use (to invoke), so to speak. I suspect that Sen placed the weight of his argument on rights as thus misunderstood at least in part because he knew that there was *something* problematic about Pareto which had *something* to do with its inimicality to the prescription to which rights-concerned liberalism (then being rediscovered by political philosophers after a long period of utilitarian vogue) attempts to give voice, but hadn’t yet drawn a bead on just what that something was. And no surprise here. For we cannot quite see it till we widen the angle a bit (rather than narrowing it, as Sen did in immediately subsequent efforts, to see that liberalism is ultimately a theory of justice more plenary understood, that justice in turn is about distribution thus plenary understood, and then that all *prescription* prescribes distribution (of variegated benefits and burdens) thus understood – precisely what strict satisfactionism leaves no space for (since preferences do not suffice to adjudicate between preferences) and what Pareto’s employed to avoid grappling with.

well-being – the real material opportunities? What means can be developed for more carefully limning the boundary between ethically exogenous and ethically endogenous such opportunity? How might we best then design means of properly spreading the former, such that the latter – the one ethically *cognizable* maximand – might be “maximized”? What institutions are better at what in that project, and how much functional specialization of the sort that renders institutions less visibly part of just wholes can endure? All of these questions and others press on us more urgently, the moment we see that we can’t really dodge them.

For far too long now – a century, in fact – Paretian complacency and its bedfellow fetishism have worked as a mere ball and chain. Now that we see that they’re not only unnecessary, but in fact incompatible with prescription itself, it is high time we tossed them. Think of how liberating that will be. It will be freeing of us and our fellows in our roles as citizens, whose lives and life prospects together will vastly improve. It will be freeing of scholarship too – work that can now be both practically useful and theoretically sound. Think also of what this will mean both for law and for economics: Both will be reconciled again to their origins, in ethics. Both will again be moral sciences. Both will be *healthy* again. For they will be home.