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Helen M. Stacy
Win-Chiat Lee *Editors*

Economic Justice

Philosophical and Legal Perspectives

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The Philosophical Foundations of Law and Justice

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Economic Justice

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Introduction

Helen Stacy and Win-Chiat Lee

I

Discussions about economic justice are mostly about inequality of some sort. This book is no exception. The USA has for the last half century been an economic paradox, with its small but very deep pockets of unimaginable wealth, its promise of the "American Dream" to all who might aspire to that small group, and then the rest of the population ranging somewhere between comfortable middle class to utter destitution. The outer edges of this spectrum, unthinkable to many other more welfarist nations, have become the new and awful signature tune of an America that since 2008 has seemingly led much of the world over the financial cliff.

Until 2008, mortgage-backed securities were marketed around the world. They were a financial product with hard-to-assess risks, but in a financial market with few regulations and many political friends inside the Washington beltway, naysayers were brushed off as yesterday's men and women. In fact, mortgage-back securities and derivatives were a key part to a more broadly-based credit boom that was feeding a global speculative bubble in real estate and equities. The USA was leading the world in a cascade of risky lending practices and overinflated asset prices, even while there were early signs that oil and food prices were escalating. Finally, what should have been identified as a perilous domestic and international financial situation burst into major global panic in September 2008 when the US interbank loan market fell apart. Many large and well-established investment and commercial banks in the USA and Europe suffered huge losses and even faced bankruptcy.

In the USA, the gap between the economic haves and the have-nots became a yawning chasm as the loss of employment signaled also the loss of health care. Many owners saw their paper profit in their home turn into negative equity and many others lost their home entirely to bank repossession. As share and housing prices declined, people found themselves not only facing mortgage foreclosure, but also job losses, as unemployment rates in the USA (and abroad) soared. Inflation-adjusted median household income in the USA peaked in 1999 at $53,252 (at the peak of the Internet stock bubble), dropped to $51,174 in 2004, went up to 52,823 in 2007 (at the peak

of the housing bubble), and has since trended downward to $49,445 in 2010. The last time median household income was at this level was in 1996 at $49,112.[1]

These days, America's middle class feels the chill wind of the destitution end of the economic spectrum. The official US unemployment rate had increased to 9.8% by December 2010. Even at the peak of the recession, the unemployment rate never reached levels of the early 1980s recession. As of May 2012, the unemployment rate was 8.1%. Between 2000 and 2010, the number of suburban households below the poverty line increased by 53%, compared to a 23% increase in poor households in urban areas.[2] This dramatic income drop and rise in people living under the poverty level has hit suburbia hard, causing households to take equity from their homes and overload their easily-obtained credit cards to make ends meet.[3] It seems that all middle class income gains for the last 15 years have been wiped out.[4]

Internationally, the ongoing global recession has led to a drop in international trade and a depressed housing market that has brought economic growth to a halt almost everywhere in the world. Rising unemployment in most countries, and slumping commodity prices, led some like Nobel Prize-winning economist Paul Krugman to compare this to the Great Depression of the 1920s.[5] And like the Great Depression, it is clear also that the global financial crisis presents a serious threat to international stability. Globally, mass protest movements have formed in many countries, responding in part to their perilous economic circumstances as a response to the economic crisis. The revolts taking place in the Arab world from December 2010 were sparked by the self-immolation of an unemployed Tunisian man who was prevented from selling produce from a cart. This act, combined with general discontentment about corruption, lack of political freedom, and high unemployment, led to the waves of social and political unrest that have rolled over Tunisia, Egypt, Libya, Bahrain, Syria, Jordon, Morocco, and beyond. In late 2011, the Occupy Wall Street protest took place in the USA, spinning off several offshoots known as the Occupy movement. In Europe, the protests against President Sarkozy's economic policies ultimately resulted in Sarkozy losing office in the May 2012 elections. Many Greeks are still protesting at the government cutbacks that followed their economic situation.

Public and policy debate in the wake of this century's first global economic downturn has been fierce, even polarizing. In the USA, mortgage funding was

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[1] United States Census Bureau Income Reports, 2010. Accessed at http://www.census.gov/hhes/www/income/income.html

[2] Bureau of Labor Statistics. Current Population Survey (CPS) Reports.

[3] Andrew Martin. "For the Jobless, Little U.S. Help on Foreclosures." From *The New York Times*. 4 June 2011. Accessed at http://www.nytimes.com/2011/06/05/business/economy/05housing.html?pagewanted=all

[4] Robert Reich. "Why Inequality Is the Real Cause of Our Ongoing Terrible Economy." From Robert Reich's blog. Accessed at http://robertreich.org/post/9789891366.

[5] Paul Krugman. "The Third Depression." From *The New York Times*. 27 June 2010. Accessed at http://www.nytimes.com/2010/06/28/opinion/28krugman.html?gwh=BFD2D8482F1DE926141350F657D06E34

unusually decentralized, opaque, and competitive. The failure of ratings agencies to properly assess the risk of such assets, the failure to apply fair accounting values, and the failure of regulators and supervisors spotting and correcting the emerging weaknesses, has stirred both the liberal and conservative side politics. A central part of the debate has been about the proper roles played by the public monetary policy and by private financial institution's practices. With the USA and much of the world's economies in such a perilous state, even at risk of a "double-dip" or second recession, the economic crisis has raised deep and important questions about the appropriate values to underpin a system of governance.

II

It is against the backdrop of the stark economic cascade following the 2008 financial market meltdown that we re-enter many of the old debates and provoke some new ones regarding economic justice. The time is ripe to re-open the debate about the haves and the have-nots in economic justice: about how we get there, and why it is that public policy and general sentiment in the USA seem blind to the distance between them. While the current economic crisis has brought new pain to new and growing numbers of people, the structural inequalities of wealth preceded 2008. Well-known US commentator and former Secretary of Labor, Robert Reich, claims that the level of debt in the US economy had well-established roots in economic inequality and that this recession has ensured that middle-class wages remained stagnant and wealth even more concentrated at the top.[6]

This volume originates in the 2010 AMINTAPHIL meeting in Rochester, New York. The topic of Economic Justice had been selected in 2009, when the US housing and financial sector problems seemed likely to be short-lived and containable. A year after Rochester, it was clear that a temporary blip had become a fully-fledged international crisis. To the philosophers and lawyers in Rochester, current circumstances emphasized the importance of material circumstances to fundamental philosophical issues of justice. Principles of justice underscore institutions, and these institutions in turn have the power to overdetermine how people live their everyday lives. The market, the banking and finance system, the price of goods, and the cost of housing affect whether, and how, one earns a living, enters into contracts, and exchanges goods and services with others, all rely upon values of justice.

Discussions of economic justice are often intertwined with economic theory. Just as abstract principles of justice cannot be disconnected from empirical realities, economic theory cannot be disengaged from economic reality. The argument about the inherent justice of free-market capitalism, for example, cannot be separated

[6] Robert Reich. "Why Inequality is the Real Cause of Our Ongoing Terrible Economy." From Robert Reich's blog. Accessed at http://robertreich.org/post/9789891366.

from an account of how that system works. For some, "working" is evidenced by efficiency (i.e., profit) and self-correction through the market mechanisms (i.e., non-regulation). When reality hits, as it has in recent years, it hits not only the economic theory, but also the theory of justice associated with it. A market of unregulated mortgage securities and derivatives causing so much economic (and social, and personal) harm suggests an urgent need to reconsider claims about the inherent justice of the free market. While efficiency, rational self-interest, and self-regulation ought to play ongoing roles, so too might government regulation, which will ensure that the many vulnerable are protected from the greedy few.

The recent recession has renewed international interest in Keynesian economic ideas and the historical debates that underwrite Keynesian ideas. The International Monetary Fund has urged governments to expand social safety nets and to generate job creation even as they are under pressure to cut spending. As the economic crisis has developed into deep recession in many major economies, economic stimulus meant to revive economic growth has become the most common policy tool. After implementing rescue plans for the banking system, major developed and emerging countries announced plans to revive their economies. Here the debates about the proper role of government, tax policies, deficit spending, and other issues are never only debates about economics, but also debates about economic justice. Almost every chapter that follows is concerned about inequality of one sort or another in the economic domain. The debates about economic justice in this volume typically concern what justification can be given to inequality, and how far that justification ought to go. It is within this framework about justifiability that this book focuses on institutions, laws, and policies that either produce or attempt to resolve problems arising from economic inequality.

III

Our debates have their origins in the eighteenth century. Part I opens with three historical chapters: Hume, Rousseau, and Bentham. Adam Smith, another eighteenth century figure who is the focus of much debate on free-market capitalism, is referenced here and is also discussed in Part III.

Property is an important concept in many theories of justice. For some, property is the only criterion for economic justice. Both John Locke and David Hume held this view in the early modern period. However, most of our contemporary discussions of the "origin" of private property focus on Locke's account of the property rights as originating in the individual's natural right to appropriate, while Hume's conventionalist account – that property is an institution created by human beings for general utilitarian reasons – has largely been ignored. Charles Landesman corrects this in his chapter, "Some Remarks on Hume's Account of Property Including One Cheers for the Communist Manifesto," arguing that Hume's account has much to offer us. For Hume, property and the associated rules of justice produce the kind of stable social order that makes commercial activity possible. Individuals may then

succeed or fail by their own effort, motivation, as well as through simple luck. While private property makes it possible for people to improve their lot, it also creates inequality, which Hume argues can be justified on utilitarian grounds.

Whereas Hume worries that too much economic equality might require constant government interference and thus invite tyranny, Rousseau's concern is that too little equality could make some citizens dependent upon, or even enslaved by others, thus preventing them from participating in the democratic state fully and equally. In "Rousseau on Poverty," Sally Scholz proffers Jean-Jacque Rousseau's analysis. The kind of poverty that concerns Rousseau is relative: a condition of want that stems not from absolute deprivation but from some in society being worse off than others. Alleviating this kind of poverty, *poverty as relative,* would require some degree of economic equalization, which, in Rousseau's view, is both the responsibility of individual citizens to one another and that of the state to its members. Not as charity, but as justice.

David Jackson argues in his chapter "Bentham and Payday Lenders," that as a utilitarian, Bentham can defend the free market of interest rate only through consideration of its consequences. In the current practice of payday lending, Jackson finds a clear example of the devastating consequences of a free market of interest rate. Payday lending is a highly controversial contemporary financial practice that targets the poor who cannot access orthodox lines of credit. Typically cash is advanced by the lender to the borrower on the basis of the latter's post-dated check for a fee that amounts to a usurious interest rate on the loan. Presumably, the rate is determined by the free market – the fact that there is a buyer and a seller at that price. In his reply to Adam Smith's argument to the contrary, Jeremy Bentham defends the view that interest rate should be determined solely by the market.

Part II of the volume considers a number of specific current issues about economic justice that arise within the USA and Canada. Both Ken Kipnis and Emily Gill are concerned about unequal access to goods and services created by practices that may otherwise be justifiable. In "Justice and Correctional Health Services," Kipnis discusses prison inmates' inadequate access to healthcare. Their incarceration denies them the opportunity to participate in the market system of healthcare – which is the main source of healthcare in the USA – thus denying them access to adequate healthcare. If inadequate healthcare is not part of the inmates' punishment, then a remedy is necessary. Kipnis considers whether this remedy amounts to a right to adequate healthcare inmates can claim against the prison system upon entering the system.

In "Economic Justice and Freedom of Conscience," Gill considers religious accommodations in relation to non-discrimination on the basis of sexual orientation. Should one be allowed, for example, on the basis of one's religious belief to refuse same-sex married couples the same services on the same terms as one would provide a heterosexual married couple? Gill argues that the general principle for dealing with such issues is that an individual's religious belief should be honored but only to the extent that doing so does not disadvantage others from practicing what they believe. Applying this general principle, however, might require case-by-case

review taking into account the specifics of the situation, such as the nature of the goods and services at issue and the alternatives available.

In "Economic Justice in the Oikos: Freedom and Equality in Family Law," Christopher Gray discusses two Canadian court cases concerning the breakup of unmarried conjugal partnerships. The central issue is whether, in economic matters, such unmarried partnerships should not be treated differently than marriages upon dissolution. The two competing considerations are freedom and equality. In Gray's view, the main consideration is what exactly the two parties in an unmarried partnership have chosen to forfeit when they have chosen freely not being married. This requires a careful analysis.

In Part III we return to some of the broad and fundamental questions about private property and the free market discussed in the historical essays contained in Part I. One way to justify inequality is to argue that economic justice only requires the enforcement and protection of private property rights, as long as that property is justly acquired and transferred. This is Robert Nozick's position in his libertarian classic, *Anarchy, State and Utopia*.[7] In "Rights and Economic Justice in Nozick's Theory," Rex Martin takes a fresh look at Nozick's theory of justice, drawing distinction between different kinds of rights in the theory. Martin asks if the natural right to acquire property in Nozick's account is strong enough to support a property right that gives the owner of property continuous exclusive control over access to it.

The following two chapters in Part III form a for-and-against debate about the libertarian view and the virtues of the free market. Jan Narveson, in his chapter, "Poverty, Markets and Justice: Why the Market Is the Only Cure for Poverty," argues for the libertarian side that the solution to poverty is the expansion of commerce. This requires the removal of all kinds of obstacles to the free market, both locally and globally. Narveson argues this on both normative and empirical grounds. Relying upon individuals to make choice for themselves through the removal of all forms of government interference (including foreign aid to poor countries) has the normative benefit of respecting individuals as persons and also allows the means for individuals to improve their lot.

"In Fatal Flaws in the Libertarian Conception of the Market," Jonathan Schonsheck counters Narveson, arguing that libertarians' high regard for the market and property rights overlooks a crucial step, namely, that the mature market is the result of many other people's contributions and sacrifices that allow people to develop marketable talents and products to buy and sell in the market. Schonsheck also critiques "rational market theory" that underwrites libertarian's confidence in the efficiency and justice of the free market. In a narrative account of the 2008 market meltdown, Schonsheck argues that the free market is structured so as to be unable to discipline itself.

Wade Robison's chapter, "Adam Smith's Order for Distributing the Wealth of Nations," critique's Adam Smith's eighteenth century idea that any particular procedure (Smith's "order") for distributing wealth can be justified by the "end" (or outcome)

[7] Robert Nozick, *Anarchy, State and Utopia* (New York, NY: Basic Books, 1974).

it produces. The end that Smith has in mind is "the greater good of mankind." The procedure is the free market. For Robison, Smith simply fails to consider whether or not the procedure or the outcome is just. No procedure, in Robison's view, is intrinsically fair or value-neutral. Certain conditions must be met in order for the application of the procedure to be fair. When such conditions are not met, their repeated application will only perpetuate or amplify the unfairness involved.

In Part IV, Anne Cudd, William Nelson, and Alistair Macleod each address how the principle of distribution defines labor and capital input relative to the output of an economic system. The distributional features of private property within a free and open marketplace, participative justice, and productive contributions all frame principles of distributive justice. In "Economic Inequality and Global Justice," Ann Cudd argues that economic inequality is unjust if it allows the rich to become politically ascendant and they leverage that power to create unfair economic conditions. While democracy is available within national systems to temper the worst effects of economic inequality, there is no analogous mechanism in the international system. Cudd argues that one corrective is to demand more democracy within individual nation states and for the World Trade Organization to control the influence of wealthy nations in the WTO.

From this macro-level approach to mitigating bad distributional effects, Alistair M. Macleod, in "Monetary Incentives, Economic Inequality, and Economic Justice" narrows down on the distribution of economic rewards in the workplace. Macleod's focus is on different types of monetary bonus schemes, drawing out important distinctions between bonuses that incentivizes particular tasks, bonuses that are merit-based, and bonuses that pay extra for difficult or dangerous work. He argues that economic incentive schemes can be congruent with the demands of principles of justice, even if they contribute to economic inequality.

In "Property, Taxes and Distribution," William Nelson considers the relation between the belief in property rights and the belief in distributive justice, mounting an argument in defense of significant redistribution. Contra to the position of "everyday libertarianism" that distributive justice requires infringing justified property rights, Nelson argues that property rights cannot be justified unless distributive justice is also enforced. In other words, a philosophical defense of property requires institutions of distributive justice.

Part V opens the debate about economic justice to international issues and institutions. Mark Navin looks at the issue of international humanitarian intervention. In "How Demanding Is the Duty of Assistance?" In *Law of Peoples*, John Rawls described a Duty of Assistance the wealthiest societies owe to the less wealthy so as to reduce global poverty. Navin is skeptical, arguing that the amounts of assistance required to really reduce global poverty would require such rapid and radical changes to wealthy nations that it would change their ways of life.

Nicole Hassoun takes on the World Bank's lending policies in "Rules for Aid Allocation: New Institutional Economics or Moral Hazard?" Hassoun considers whether the World Bank (or more precisely, the International Development Association arm of the World Bank) has adequately justified its metric for distributing

international aid to the poor. Hassoun concludes the Bank has failed, and this is troubling given that Bank is one of the largest aid donors and similar metrics guide many other development organizations' aid efforts.

IV

Readers will find some of the views in the volume confronting and others more resonant with their own. Our purpose in composing Economic Justice is to offer a range of different vantage points that will stimulate and provoke. With little end in sight to global economic woes, it has never been more urgent to examine and re-examine the values and ideals that animate policy on the market, the workplace, and formal as well as informal economic institutions at the nation state and the international level.

Part I
18th Century Thinking and Current Issues in Economic Justice

Chapter 1
Some Remarks on Hume's Account of Property Including One Cheer for the Communist Manifesto

Charles Landesman

Abstract Hume's theory of property is founded upon an analysis of human nature in the context of permanent economic scarcity in all societies. This paper addresses seven questions to Hume about possessions and the nature and origin of property. Hume's answers reveal the salient features of his liberal and individualistic theory of society. The paper concludes with a discussion of the creative destruction (Schumpeter's term) described by Marx and Engels as a basic characteristic of industrial capitalism. It ends by pointing out a basic error in Marx's account that Hume had no difficulty avoiding.

Hume's account of private property is the major part of his discussion of justice, the moral virtue that is responsible for the ability of humans who possess lots of self-love and a limited supply of benevolence to live together in peace and in ordered freedom. In this paper, I shall select for discussion several salient features of Hume's views that are still of current interest or should be. I will conclude with remarks about certain passages in *The Communist Manifesto* of Marx and Engels that point to a feature of private property that Hume had little or no opportunity to notice.

At the outset of *A Treatise of Human Nature*, Hume asserts that his main interest lies in identifying the principles of human nature in order to elucidate the operations of the human mind in logic, morals, criticism, and politics.[1] Since there is no *a priori* access to the human mind, the only method available is experimental, namely "the observation of those particular effects which result from its different circumstances and situations."[2] Because, in the case of human nature, we are unable to conduct

[1] David Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge (Oxford: Clarendon Press, 1985), xvi.

[2] T, xvii.

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experiments "purposely, with premeditation," we must rely upon "a cautious observation of human life, and take them as they appear in the common course of the world, by men's behavior in company, in affairs, and in their pleasures."[3] Because property is a human institution, created in the course of the actions of countless people, we are able to identify its salient features by a process of abstraction from its concrete operations in history and common life and its admixtures with other institutions. Hume composed his theory of justice (about 1740) prior to the time that the industrial revolution began to enter the consciousness and behavior of the people of Great Britain. Although his conception of property does not contain the whole truth, it contains a large part of the salient truths about this fundamental institution that pervades human life.

I shall proceed at first by raising several questions and commenting on how Hume responds to them. (1) "*What is a man's property?*" asks Hume. He answers: "Anything which it is lawful for him, and for him alone, to use."[4] The term "lawful" indicates that property is a rule-governed institution in which possessions count as property when the rules entitle a person to their exclusive use. For persons operating within this institution, such rules count as norms that they feel obliged to obey. Hume is, of course, noting the existence of such rules; officially, as an inquirer into the science of human nature, he is not in the business of endorsing norms, although his own preferences are not hidden from view.

(2) What is the origin of property? Hume answers, "public utility is the *sole* origin of justice."[5] It should be noted that when Hume speaks of "origin", he is not referring to a particular historical episode, although his claim implies that numerous historical events must have occurred in every society in which the institution of private property has become embedded, namely those events that succeeded in establishing the existence of that institution, events leading to the establishment of the relevant rules of justice and of modifications of human behavior conforming to those rules. His theory of origins consists of a specification of an ideal type constructed by abstracting one particular practice from the variety of practices imperfectly exemplified by many human societies and by identifying the typical rules that regulate how persons operate within that practice. He is not writing history[6]; he is applying his science of human nature to understand one subset of common social rules.

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[3] T, xix. The way Hume's philosophical anthropology is grounded in experience is illustrated by this passage: "The practice of the world goes farther in teaching us the degrees of our duty, than the most subtile philosophy, which was ever yet invented." T, 569. So let us not exaggerate the gap between 'is' and 'ought' in Hume's philosophy. Wittgenstein might have learned from Hume that our 'language games' reveal not only verbal usage but also the variety of moral obligations.

[4] David Hume, *An Enquiry Concerning the Principle of Morals* in *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1902), 197. "Our property is nothing but those goods, whose constant possession is establish'd by the laws of society…" T, 491.

[5] EPM, 183.

[6] Although Hume's philosophical anthropology is not itself an example of historiography, nevertheless, he points out that "the study of history confirms the reasonings of true philosophy…[by] shewing us the original qualities of human nature…" T, 562.

Hume uses the term "sole" to exclude other theories of origins which he thinks are simply fictions,[7] such as a social contract entered into in order to emerge from the state of nature,[8] or the doctrine of natural rights, or the appeal God's will, or to the will of the ruler or of a sovereign legislator. It is utility and only utility that does the job of instituting property, although other factors may modify the practice in various ways.

(3) What does Hume take utility to be? He uses a variety of phrases to demarcate the type of utility he has in mind with respect to questions of justice. Here are some of them extracted from *An Enquiry Concerning the Principle of Morals*: public interest (193), order in society (186), peace and order (192), the good of mankind (192), mutual trust and confidence (195), the general interest (195), the convenience and necessities of mankind (195), general peace and order (304), common interest (306), indispensable necessities of society (309), and so forth. The rules that possess this form of utility are those that command "a general abstinence from the possessions of others."[9] Conformity to the rules leads to a widespread respect for the property of others, a hands-off attitude, an understanding that the possessions that people acquire under the rules are theirs by right. Since the desire to accumulate possessions in order to secure the basic needs and comforts of life in society is a common source of conflict among individuals and factions, rules of property are needed to imbue people with a reluctance to trespass. The result is social peace and orderly operations of commercial activity. The rules of justice, then, create a protected space for individual voluntary activity, secure property owners against aggression, and enable individuals to pursue their individual self-interest or benevolent inclinations as they see fit.

It is clear that Hume is not a utilitarian in the way Bentham was since he does not claim that the rules of justice function to maximize any subjective state such as pleasure even if they should sometimes succeed in doing so. Rather the rules produce a certain kind of social order necessary for the smooth operation of a commercial society that leaves people to succeed or fail according to their ability, motivations, and luck. According to F. A. Hayek, "Hume gives us probably the only comprehensive statement of the legal and political philosophy, which later became known as liberalism," a statement that emphasizes "the liberal ideal of personal liberty."[10] Since Hume's conception of utility is embedded in a point of view distinct from Bentham's philosophical radicalism and from that of many subsequent utilitarians, it is better to entitle the ethics that underlies his theory of justice individualism rather

[7] One of Hume's overall philosophical aims was to undermine the fictions and myths of traditional metaphysics. We can see that in this remark about property: "this quality, which we call *property*, is like many of the imaginary qualities of the *peripatetic* philosophy, and vanishes upon a more accurate inspection into the subject, when consider's apart from our moral sentiments. 'Tis evident property does not consist in any of the sensible qualities of the object." T, 527.

[8] "the suppos'd *state of nature*…a mere philosophical fiction, which never had, and never cou'd have any reality…" T, 493.

[9] EPM, 304.

[10] F.A. Hayek, "The Legal and Political Thought of David Hume," reprinted in *Hume*, ed. V.C. Chappell (Garden City, New York: Anchor Books, 1966), 340.

than utilitarianism. The individualist in this sense advocates a form of life that exemplifies a rule governed order under which individuals can exercise an ordered liberty to pursue their own ends as they see fit as long as they refrain from aggression against the property of others.

(4) What is Hume's argument that utility under this interpretation is a sufficient explanation for the rules of property of a liberal social order? He answers by referring to human nature expressing itself in the typical circumstance in which people find themselves, in combination with the need for peaceful social union in order to survive and prosper. The typical circumstance is the existence of moderate scarcity of the goods that are required for survival, combined with a human nature that possesses only a limited benevolence in combination with a healthy self-interest.[11] If scarcity were so extreme that life consisted of a war of all against all for mere survival, a rule-governed partition of goods would never have come into existence. If benevolence were unlimited, there would be no need for a distinction between thine and mine. People care about survival but are not so desperate as to be unwilling to cooperate in establishing rules to provide for social order as long as they understand that the rules serve not only the interests of others but their own interests as well. Given these circumstances and aspects of human nature, it is obvious that private property is useful in supporting the social state of mankind. Utility is a sufficient explanation; there is no need for any other.[12] In particular, the obligation of promises that underlies the appeal to a social contract is itself explicable in terms of the same utility; therefore, the contract theory is redundant and unnecessary given the utility of property and of the practice of promising.[13]

(5) How does utility actually account for the standard rules of property? Hume divides the question into two parts. That there are "steady and constant" rules that succeed in partitioning possessions "is absolutely required by the interests of society." Utility then explains how there must be rules of justice if one is to have an orderly society. But there are variations in the particular rules that a society adopts, and these are "often determined by very frivolous views and considerations,"[14] as well as by utility.

I will describe only one example that stands out because it provides Hume with the opportunity of applying his empiricist outlook against Locke's famous theory of the appropriation of possessions that no one owns. According to Locke, "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and

[11] "'*tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin*. T, 495.

[12] EPM, 183–190.

[13] See Hume's essay "Of the Original Contract," in *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Classics, 1987), 465–487.

[14] EPM, 309n.

thereby makes it his *Property*."[15] Mixing one's labor succeeds in appropriating objects no one owns because it is an extension of the person who, Locke claims, owns himself. There is a metaphysical transfer of ownership from the person to the object. Locke calls this a "Law of reason," an "original Law of Nature for the *beginning of Property*, in what was before common…"[16]

For Hume, on the other hand, mixing one's labor[17] merely creates an observable relation between a person and an object and leads *us* to connect it to him because of the mental mechanism of the association of ideas. This is an example of the "very frivolous views and considerations." But public utility also directly enters the picture because assigning property to a person who mixes his labor with it stimulates "encouragement given to industry and labour." Hume mentions a third motive to accepting such appropriation, namely "private humanity," which gives rise to "an aversion to the doing of hardship to another…"[18] So the creation of any particular rule of property, for Hume, can bring into play a variety of basic tendencies in human nature so long as the rule supports the basic requirement of social utility.

(6) Is the institution of property natural or conventional? In one sense it is not natural, since human nature uninstructed by experience and reason will not of itself tend to partition possessions according to rules determined by utility. Hume denies that there is a "simple original instinct", an acquisitive instinct if you like, that accounts for the origin of property.[19] Of course, Hume did not have available the theory of natural selection which could be used to argue in favor of an acquisitive instinct by reference to its utility in self-preservation. Very young children engage in ferocious arguments over their possessions.[20] The tendency today among students of primate behavior is to favor a primitive sense of justice. Hume claims that the variety and complications of the rules of property cannot be reconciled with the belief in an acquisitive instinct.[21] However, this variety and these complications could be the result of experience and reason taming, adjusting and extending an original instinct.

But in another sense the institution of private property is natural because it antedates government and the civil law. There are "rules of natural justice", a "natural code" that originates in the interaction among human beings who gradually come to apprehend through experience the advantages to themselves as well as the public utility of rules that partition and protect possessions. Later, after the emergence of

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[15] John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government* in *Two Treatises of Government*, ed. Peter Laslett (New York: Mentor Books, 1965), par. 27.

[16] Locke, par. 30.

[17] Hume notes that mixing one's labor is too narrow a relation to account for occupation or first possession: "There are several kinds of occupation, where we cannot be said to join our labour to the object we acquire: As when we possess a meadow by grazing our cattle upon it." T, 505n.

[18] EPM, 309n.

[19] EPM, 201.

[20] Although Hume was a childless bachelor, he knew about children: "every parent, in order to preserve peace among his children, must establish [the rule for the stability of possessions.]" T. 493.

[21] EPM, 203.

political society, the civil laws, "extend, restrain, modify, and alter the rules of natural justice, according to the particular *convenience* of each community."[22]

Hayek has pointed out that, for Hume, the rules of natural justice are conventions that constitute a spontaneous order.[23] Hume illustrates this with these examples: "Thus two men pull the oars of a boat by common convention for common interest, without any promise or contract; thus gold and silver are made the measures of exchange; thus speech and words and language are fixed by human convention and agreement. Whatever is advantageous to two or more persons, if all perform their part; but what loses all advantage if only one perform, can arise from no other principle."[24] The rules for the partition of possessions together with the division of labor and the propensity for exchange spontaneously produce a market order. The notion of spontaneity is intended to contrast with those orders produced by governmental legislation or by the coercive imposition of a political or other authority. The existence of spontaneous orders shows that useful arrangements embedded in basic institutions and practices can come into being independently of civil law and regulations founded upon coercion. This is the point where Hume differs fundamentally from Hobbes. Moreover, although the individuals whose interactions gradually produce a spontaneous order over time may become aware of its advantages, in itself the order lacks any overall teleology, as the examples of language, money, and markets illustrate. These orders provide individuals with opportunities to pursue purposes of their own independently of externally imposed goals, and thus extend the range of human freedom.

(7) How do the rules that direct the partition of possessions bear on the question of equality? This is a question of great interest at this time. It is difficult to justify perfect equality in the distribution of possessions. Why should having the same be any better than having different? Hume asserts that "the *levellers*, who claimed an equal distribution of property, were a kind of political fanatics."[25] Rawls appeals to the natural lottery in behalf of equality in order to show that no one deserves the capabilities and/or liabilities that account for different outcomes in the acquisition of wealth. Hume does consider an analogous point. Suppose an impartial distributor aimed to assign wealth according to virtue. Hume knocks that down by saying that "so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it."[26] A similar point applies to Rawls' argument from the natural lottery, namely that the uncertainty of the merit or lack thereof in the determination of responsibility for the characteristics that produce different outcomes in the apportionment of property leaves the whole issue in great obscurity. Of course there

[22] EPM, 196.

[23] Hayek has discussed the emergence of spontaneous orders in many places. See especially *Law, Legislation and Liberty, Volume One:Rules and Order* (London: Routledge and Kegan Paul, 1973), Chapter 2. Also see the very important book by Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

[24] EPM, 306.

[25] EPM, 193.

[26] EPM, 193.

is one sort of merit that is not obscure that reveals itself in human action. This is the practice of the market place that identifies the value of a person's labor according to demand and supply and that results in a partition of possessions that has an economically justifiable basis although unfriendly to perfect equality.

This last way of determining property relations leads immediately to inequalities whose nature and extent cannot be predicted any more than the preferences revealed in the marketplace can be known ahead of time as distinct from being conjectured. Hume, incidentally, has a moderate sympathy with the levellers. He admits that if we started with an equal division of property and improved it "by art and industry, every individual would enjoy all the necessaries, and even most of the comforts of life."[27] Moreover, anticipating the principle that later became known as diminishing marginal utility, Hume points out that "wherever we depart from this equality, we rob the poor of more satisfaction than we add to the rich."[28] However, we cannot start with an equal division of property because of differences among individuals in the capacity to improve upon the materials offered by nature; an equal division can only be imposed; it would not be a product of the spontaneous origin of the market order and the division of property but rather of legislation and governmental authority.

However, at the end of the day, Hume decides in favor of a system of property distribution that accepts moderate inequalities and rejects "a too great disproportion… Every person, if possible, ought to enjoy the fruits of his labor, in a full possession of all the necessities and many of the conveniences of life. No one can doubt, but that such an equality is most suitable to human nature, and diminishes much less from the *happiness* of the rich than it adds to that of the poor." Moreover, concentration of wealth in a few hands leads to too much power in the rich and enables them to oppress the poor.[29] However, an attempt in a modern commercial society to impose perfect equality requires "so much authority [that society] must soon degenerate into tyranny."[30] So if you do not want tyranny, and if you do not want the rich to oppress the poor, and if you want everyone to enjoy the fruits of their labor and enjoy the comforts and necessities of life, you must settle for a commercial society that involves a certain amount of inequality in possessions. The way to achieve that in a society capable of improvement by "art and industry" is by the use of governmental power and the civil laws to tinker with and improve and extend the spontaneous order that settles the basic economic structure of society.

Hume's account of property is intended to be an outcome of an analysis, based upon experience, of a relatively unchanging human nature. The principles of human action are fixed and permanent, and the rules of justice enhance prosperity and contentment provided interventions of one sort or another do not cause the economic order to swerve from its proper function. This is a picture of society that is relatively

[27] EPM, 193.

[28] EPM, 194.

[29] "Of Commerce," in *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Classics, 1987), 265.

[30] EPM,194.

unchanging and certainly fails to exemplify the dynamism and disruptions that people in advanced economies frequently experience and sometimes endure. But even if the principles of human actions are fixed,[31] the sweeping economic changes that occurred between the development of Hume's theory of property relations and the publication of *The Communist Manifesto* of Marx and Engels in 1848 created a new system of property relations, industrial capitalism, with a dynamism of its own.

In a few remarkable pages, Marx and Engels delineate basic features of this new industrial system: increasing division of labor, technological innovations, a world market that we now refer to as globalization as if it were something new, workers crowded into great factories, mechanization of work, growth of cities and decline of rural areas, disappearance of old industries, new products continuously coming into being as a result of innovations that the economy rewards, imperialistic control of colonies, and serious economic crises and crashes. In a famous passage, Marx and Engels summarize the unstable quality of life that has emerged as a result of unceasing technological innovation: "The bourgeoisie cannot exist without constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society. Conservation of the old modes of production in unaltered form, was, on the contrary, the first condition of existence for all earlier industrial classes. Constant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind."[32] Schumpeter summarized this characterization of the modern industrial world with the phrase "creative destruction".[33] According to Schumpeter, "the essential point to grasp is that in dealing with capitalism we are dealing with an evolutionary process….Capitalism, then, is by nature a form of economic change and not only never is but never can be stationary. [This evolutionary process] incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism."[34]

Despite the brilliance of his description of this new world, Marx made a fundamental error that Hume, with his deep analysis of the unchanging principles of human nature, was able to avoid. The error was the claim that the economic activity characteristic of capitalism is a zero sum game, that the wealth and power that the owners and administrators of the means of production gain represent losses

[31] See Ludwig von Mises, *Human Action: A Treatise on Economics* (New Haven: Yale University Press, 1949) for an economic theory founded on fixed laws of the human mind.

[32] Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* in *Karl Marx and Frederick Engels, Selected Works* (Moscow: Foreign Languages Publishing House, 1950), I, 36.

[33] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper Torchbooks, 1962). Chapter Seven is entitled "The Process of Creative Destruction."

[34] Schumpeter, 82–83.

for the working class and that gains for the working class point to the imminent demise of the ruling elite. Marx predicted falling wages and the immiseration of the working class along with the revolutionary overthrow of industrial capitalism later to be replaced a stable, affluent, stationary, classless, society.

But these predictions and anticipations turned out to have been mistaken. Despite the brilliance of their descriptions of the world of industrial capitalism, despite the "creative destruction" that marks our own epoch and our own time, rather than falling wages we have seen, in liberal societies, enormous increases in the income of the working classes and the generation of numerous affluent societies. Creative destruction brings costs, but it has also brought prosperity, increases in health and life expectancy, and access to useful and affordable products for the working class that could not have been imagined in 1848.[35]

There is no guarantee that this trend will continue since hostility to capitalist modes of production within the very societies that have most benefited from them has not abated despite these improvements, and it intensifies with every economic crisis. There is a persistent myth among numerous members of the thinking class that equality has some intrinsic value. Other sources of the anti-capitalist mentality are modern war that increases what appear to be justifiable or, at least, unavoidable, interventions of the state in economic life[36] and the belief that there are better ways of creating wealth if only the power elite or human greed or ignorance or stupidity or prejudice did not stand in the way. Let us also not forget the green color of envy.[37] For Hume, the question of equality, more or less of it, was not based upon an a priori assumption about its intrinsic value but was a question of utility and of the unchanging nature of human nature expressing itself permanently in situations of moderate scarcity. He never thought that one person's gain necessarily implies another's loss, provided we persevere in our conformity to the rules of justice.[38]

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[35] Here is an interesting example I recently came across. In 1959, Cuba was about 25% more prosperous than Portugal. In 2009, Portugal is more than twice as prosperous as Cuba. (cafehayek@gmail.com, August 5, 2010) To illustrate the general decline in poverty in societies which have sustained a relatively free market order over time, in their paper "The Level and Trend of Poverty in the United States, 1939–1979," Christine Ross, Sheldon Danziger, and Eugene Smolensky report: "Poverty, officially measured, fell from 40.5 percent of all persons in 1949 to 13.1 percent in 1979." (in *Demography*, Vol. 24, No. 4, Nov., 1987, Abstract, p. 587. One would not expect such changes in societies whose market system has been compromised by government intervention or extreme amounts of corruption.

[36] For an excellent discussion of how crises increase the state's degree of control over the economy, see Robert Higgs, *Crisis and Leviathan* (New York: Oxford University Press, 1987).

[37] The Chinese communist leader, Deng Xiaoping, discarded the anti-capitalist mentality when he enunciated what could be the motto of industrial capitalism: "It is good to be rich." It was not envy but emulation that captured his imagination. For a discussion of the role of envy in human life see Helmut Schoeck, *Envy: A Theory of Social Behavior* (Indianapolis: Liberty Fund, 1987).

[38] Here is an incisive summary of Hume's views on this issue: "Hume's great trinity of spontaneous conventions, 'the stability of possessions, its translation by consent and the performance of promises' satisfy the enabling condition for society to exist. Each convention is brought forth by an equilibrium selection mechanism, a 'game' whose solution is payoff-enhancing, advantageous to the players." Anthony De Jasay, "Ordered Anarchy and Contractarianism," *Philosophy*, Vol. 85, no. 333, July 2010, 401–2.

Chapter 2
Rousseau on Poverty

Sally J. Scholz

Abstract This paper presents Rousseau's account of poverty as a means of demonstrating the connection between economic and political justice in his political writings. After briefly presenting some of the causes of poverty that he identifies, I look at three key features of poverty. Poverty is relative in nature, it adversely affects the virtue of the individual and the security of the state, and it demands both individual and collective response informed by equity.

2.1 Introduction

Jean-Jacques Rousseau's unique articulation of the social contract theory has had tremendous influence in the nearly 250 years since it first appeared, inspiring revolutions in theory and practice alike. *The Social Contract* makes only brief reference to anything pertaining to economic life but arguably it is economic justice that motivated the entire project. Rousseau was deeply concerned with economic inequality and its effects on political power within society. His social contract does not directly address the institutions of economic justice, but it is clear that economic justice is partially constitutive of moral and political justice. A poorly organized state that allows some individuals to become enslaved to others or to be deprived of the conditions that will allow their equal participation in the democratic decision-making of the polity cannot be considered just, according to Rousseau. His *Discourse on Political Economy*, an article he wrote for Diderot's *Encyclopedie* before their dramatic break, is perhaps the cornerstone to understanding not only how these ideas fit together but, as has been argued (Cranston 1982), also his entire system. The *Discourse on Political Economy* offers a snapshot of Rousseau's political theory,

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including the general will as the basis of the moral legitimacy of law within the state. It is striking for a number of reasons. In addition to the connection between economics and politics, *Political Economy* also makes quite bold statements about the nature and function of government and is perhaps the clearest and most succinct statement of Rousseau's egalitarian democracy.

Reading Rousseau's social and economic justice as informing his system of moral and political justice, or as Ellison states, seeing that "economics and moral life were intimately intertwined" (Ellison 1991, 255),[1] accentuates the liberatory or revolutionary potential of Rousseau's work. In this paper, I am interested in exploring one facet of the connection between economics and politics. Rousseau is the only social contract theorist to spend considerable time discussing social ills like poverty. If economic justice is, at least on some accounts, concerned with distributive policies and institutions that place primacy in the well-being of the least well-off people in society, then attending to the causes and consequences of poverty is central to economic justice. I explore Rousseau's account of poverty to reveal its three key elements. First, poverty for Rousseau is relative; that is, poverty results from unequal social conditions rather than absolute conditions of deprivation. Second, a state marked by poverty is insecure, unvirtuous, and insufficiently attentive to the well-being of its citizens. Finally, when Rousseau addresses poverty, he almost invariably delineates the moral requirements for ameliorating or remedying it. The remedy is twofold: one pertains to the duty of individuals to one another and the other pertains to the economic institutions or structures under the control of the government. The latter have the further aim of ensuring the conditions for egalitarian democracy. In sum, Rousseau's account of poverty entails the prescription for an economically just as well as a politically just state.

Before addressing each of these three aspects of poverty, it is worth noting that Rousseau identifies several causes of poverty in the *Discourse on Political Economy*. Rousseau blames poverty on a poor distribution of the population across a nation's territories, certain entertainments or arts that encourage luxury, commerce at the expense of agriculture, and corruption (*Political Economy*, 19). These alone are only half of the message, however. Rousseau explicitly charges government "to prevent extreme inequality of fortunes, not by taking their treasures away from those who possess them, but by depriving everyone of the means to accumulate treasures, nor by building poorhouses, but by shielding citizens from becoming poor" (*Political Economy,* 19). This makes the government's role in economic distribution quite evident. All rights, including the right to property, "are founded on the social contract itself; no rights within the political community are understood to

[1] This is contrary to the critique Proudhon and other nineteenth century readers of Rousseau offered. Proudhon argued that Rousseau provided no insight into the economic organization of society whatsoever, that Rousseau was concerned only with political rights rather than economic rights, and that Rousseau ignored labor relations and the rules for wealth acquisition. The view I present attempts to make the connection between Rousseau's discussion of politics and his discussion of economics more explicit. For a careful study and analysis of Proudhon's reading of Rousseau, see Noland 1967, 33–54.

have foundations prior to it; all are founded instead on the considerations of the common good…" (Cohen 2010, 51). Taking the "baseline" as "a notional state of equality, with members having equal claims on existing resources" (Cohen 2010, 53) provides for the conditions within which a society ruled by the general will can exist. The government serves as the voice of the Sovereign whole acting on the general will; each individual gives up all rights, but "since the condition is equal for all, no one has any interest in making it burdensome to the rest" (*Social Contract*, 1997c, 50). Individuals would not authorize the granting of rights contrary to the common good or even contrary to the rights they too would enjoy in the social contract. The government is the body to facilitate this equitable distribution of property rights and political rights. Notice, too, that in the passage from *Political Economy*, Rousseau does not charge the good government with fixing maldistribution through taxes, but rather with organizing the governmental institutions so that there will not be extreme economic inequality in the first place. Appropriate population distribution, regulation of trade and agricultural policies, and constraints on arts and entertainment are some of the chief means through which a government might obviate the onset of poverty.

By population distribution, Rousseau means the ratio of people inhabiting the city and the country-side. Foreshadowing Marx's argument, he claims that the depopulation of the country-side will inevitably result if luxuries are not properly taxed. He also argues forcefully against land and grain taxes because these place an undue burden on those who populate the country-side and farm for a living. Without proper governmental support, rural people will move to the cities thereby causing the country as a whole to produce less. In keeping with this caution against city-dwelling, Rousseau also blames fine arts and luxurious entertainments for causing poverty. His argument is eloquently developed in the *Letter to D'Alembert on the Theatre,* but he holds a consistent position against the arts as causing luxury in numerous works. In short, by encouraging opulent dress and mocking natural virtue, the arts feed social needs and force some to be impoverished in comparison.[2] Commerce at the expense of agriculture means that a country relies too heavily on imports and fails to produce adequately. Moreover, Rousseau sees a heavy tax accompanying such a transition to commerce. As he explains, "commerce and industry draw all the money from the countryside into the capitals: and since the tax destroys any proportion that might still have obtained between the grower's need and the price of his grain, money constantly leaves and never returns; the richer the town, the more miserable the countryside" (*Political Economy*, 1997b, 33; see also 34–35). The farmer, in other words, sees prices go up a bit with increased commerce but taxes go up as well to support the infrastructure needs of commerce. The farmer's resources, however, do not go up and the peasant must bear the additional tax burden himself thereby becoming even poorer, according to Rousseau. Corruption, a final cause of poverty, pertains more to the people than the governmental institutions;

[2] Rousseau proposes spontaneous festivals as the appropriate entertainment for a virtuous republic. See *Letter to D'Alembert* (1960).

it is a commentary on the virtue of the people. When the people have been corrupted, the "springs of government" are weakened and poverty, like affluence, is allowed to flourish. Each of these might suitably be redressed if a state was properly structured or governed, according to Rousseau.

Similar arguments, of course, also appear in many of his other major works—most famously the *Discourse on the Sciences and Arts* and the *Discourse on the Origin of Inequality.* In the latter, the emphasis is on the development of political right; as some people amass wealth through property, they gain power. In the *Second Discourse*, the power becomes institutionalized in political power organized to guarantee the security of wealth and force the subjection of those who lack sufficient wealth. Looked at from the opposite end of the economic spectrum, poverty forces some people to become dependent on others. They lose their freedom in being forced to accept the rule of the wealthy. The *Social Contract* offers an alternative to this arrangement by destroying the link between wealth and power, and holding freedom and equality sacrosanct. Rousseau's aim is to create a political system that would avoid these problems that force some people to lose their freedom to others. The social contract does just that: "by giving himself to all, gives himself to no one, and since there is no associate over whom one does not acquire the same right as one grants him over oneself, one gains the equivalent of all one loses, and more force to preserve what one has" (*Social Contract,* 1997c, 50). According to Rousseau, economic inequality, then, breeds injustice. In contrast, limitations on economic inequality, according to Rousseau, contribute to the conditions for justice (*Social Contract*, 1997c, 109–110; see also *Second Discourse*, 1967, 167, 201; Cohen 2010, 16). Rousseau's account of poverty, and in particular, his analysis of *poverty as relative*, reveal the causal connection between (a) the wealth of some and the poverty of others, and (b) the political injustice that accompanies that relation. Subsequent sections further develop and respond to Rousseau's concept of poverty by looking at how it affects virtue as well as the individual and social duties.

2.2 Poverty as Relative

The first element of Rousseau's concept of poverty is that poverty is relative in the sense that the wealth of some is causally related to the poverty of others. Rousseau argues that poverty is a result of social factors that create extreme differences between the poor and the wealthy. Poverty, as opposed to being poor, is not merely a lack of certain material goods to meet one's basic needs. On the contrary, basic needs are relatively simple according to Rousseau, but poverty results with the proliferation of needs that accompanies the inequality between social classes. More to the point, poverty is the feeling of need that results in misery, regardless of whether the fulfillment of that need is necessary for existence or not. Poverty emerges out of the relation of social inequality. If there were only poor, there would be no comparisons between social classes, all would be equally engaged in the hard work of society, and poverty, strictly speaking, would not exist. The life of the poor, he argues,

is honest and natural (2005a, 9),[3] but it is clear that he valorizes the life of the poor only when it is an equally shared condition in society. As he says, "a man who has no gold or silver might be poor without being destitute" (*Government of Poland,* 1997a, 228). Poverty, in contrast, is a social ill that emerges when there are some who have plenty (and who determine the social and cultural mores) while others comparatively are made to suffer from lack.

Poverty as relative also differs from "relative poverty." The latter is a concept to indicate that poverty in one society might be materially or quantitatively quite different from poverty in another society. It contrasts with "absolute poverty," wherein an absolute standard is used across societies to label or determine conditions called poverty. In point of fact, one could conceivably argue that Rousseau embraces a concept of relative poverty because the same material conditions may be poverty in one society and not in another. Material conditions are not necessarily commensurable across societies. Sharon Vaughan adopts this approach and there is clear evidence in Rousseau's writing to support it (Vaughan 2008, 79). But such a minimal account of relative poverty is only a description of poverty rather than an element of it. The account of poverty as relative gets deeper into the concept of poverty as it pertains to Rousseau's political theory. Rousseau also seems to employ a minimal account of "absolute poverty." In his case, absolute poverty might be understood as the basic conditions which all societies would understand as impoverished; these he reduces to the conditions for mere physical subsistence. As he says, "Man wants his well-being and everything that can contribute to it; that is incontestable. But naturally this well-being of man is limited to what is physically necessary" (Rousseau 2005b, 63). In other words, failing to meet physical necessities serves as an obvious case of poverty in an absolute sense, but poverty is also a condition of want experienced in relation to the well-off members of society.

Poverty as relative focuses on the comparisons within any given society rather than across societies. In numerous places throughout his work, Rousseau cites the impact of poverty in an unequal social system not only on the poor but also on the rich. Whether rich or poor, when there are people with which to compare one's lot, one develops new needs. In both *On Wealth* and the *Letter to D'Alembert on the Theater,* for instance, Rousseau argues that comparisons between and among our fellows issue new types of needs. The poor grow discontent with their simple lifestyles in comparison to the rich; the rich grow discontent with their lavish lifestyles in comparison with other rich. Simplicity becomes pauperism and the well-heeled look for ever new phenomena to feed their expanding desires identified as "needs".

[3] Sharon Vaughan conflates being poor and poverty in her account (2008, Chapter 4). In contrast, I argue that Rousseau distinguishes what Vaughan and others call "the noble poor" from those who become impoverished and oppressed by the luxuries and wealth of others. The difference, as I show, is most evident in the virtue of the poor and the lack of virtue or the diminishment of virtue in those who are impoverished by economic disparities. It is also worth noting that Rousseau had firsthand experience of poverty and, in both autobiographical works and political essays, valorizes the life and virtue of the poor.

As Ellison explains this phenomenon: "Those who possess relatively little, whether enough to get by or not, are now confronted by forces—the production and consumption of wealth and goods unrelated to basic needs—that incline them to expand their desires and needs radically" (Ellison 1991, 274). By expanding our needs, many otherwise well-provided-for individuals now consider themselves impoverished.

This relative nature of poverty means that different societies create impoverished or destitute people based on the social conditions and expectations. As Vaughan points out, Rousseau's essay on Corsica provides an example. In that piece, Rousseau described "the people who could not raise enough money to pay their taxes were made to feel poor" (Vaughan 2008, 79). In a similar way, any given society might "impoverish" some people based on more or less arbitrary social standards. Rousseau's reflections in the *Government of Poland* provide a practical discussion of the relative nature of poverty, including even an explanation of how it differs from "relative poverty." Consider the following passage:

> Monetary wealth is only relative, and, because of relations that can change for a thousand causes, one can find oneself successively rich and poor with the same sum; but not so with goods in kind, for since they are immediately useful to man they always have their absolute value which in no way depends on a commercial transaction. I will grant that the English people is richer than the other peoples, but it does not follow that a bourgeois of London lives more commodiously than a bourgeois of Paris. Between one people and another, the one with more money enjoys an advantage; but this in no way affects the fate of individuals, and that is not where the prosperity of a nation lies. (*Government of Poland*, 1997a, 228–29)

Characteristically deft at weaving concrete examples with moral and political rules, Rousseau here acknowledges the distinction in wealth between peoples in different societies while also emphasizing that such differences are irrelevant to the health of a nation. His focus is on the relative gap between the rich and the poor within a nation. Moreover, throughout the section on "The Economic System" (section 11), Rousseau issues cautious warnings about money, advocating instead a return to "simple morals" and "wholesome tastes," even suggesting that money be made "contemptible" (*Government of Poland,* 1997a, 224). Money allows for the possibility of a nearly unchecked expansion of wealth and the accompanying deprivation of those who lack it. Finally, the passage also echoes the *Second Discourse* by linking the political health of a nation with limitations on economic inequality. Rousseau furthers this point by suggesting that officials take care to disconnect political honors (which carry with them some expectations of the subservience of others) from wealth (*Government of Poland*, 1997a, 227–228). Political right, as we have seen, ought not to be determined on the basis of property right.

One important practical outcome of these considerations of poverty as relative is a proportional tax policy described in *Political Economy.* As Rousseau explains, "in order to distribute taxation in an equitable and truly proportional fashion it should be imposed not solely in proportion to the taxpayers' good, but in a proportion that takes account of the differences in their stations as well as of how much of their goods is

superfluous" (*Political Economy*, 1997b, 33).[4] Or conversely, the distribution of benefits should also be proportional. As Joshua Cohen explains, "the general will must treat citizens *as equals*, as of equal importance and equally worthy of respect, when it imposes obligations and confers benefits, not that it must confer equal benefits on them" (Cohen 2010, 51). This discussion of poverty as relative reveals both the connection between economic inequality and injustice, the story of which Rousseau tells so eloquently in the *Second Discourse*, and the obligations of a good government to design institutions that ensure limitations on economic inequality as well as foreclose avenues that lead to economic injustice such as the causes of poverty discussed in the first section.

2.3 Poverty as Threat to Virtue and Security

This takes us to the second element of Rousseau's account of poverty: the poverty of some affects the virtue and security of all. Given that poverty is relative, and given that even the rich develop needs that go unmet, Rousseau argues that everyone becomes alienated when some are impoverished. Where social inequality is prevalent, we are all disadvantaged because we no longer know what truly makes us happy. As is well-known, according to Rousseau, gross inequality that results in poverty is contrary to natural equality and a violation of natural law. The final line of the *Discourse on Inequality* summarizes this well: "it is evidently against the law of nature that children should command old men, and fools lead the wise, and that a handful should gorge themselves with superfluities, while the starving masses lack the barest necessities of life" (Rousseau 1967, 246).[5] Most affected by poverty, virtue for the individual and security for the state are not only compromised but lost.

2.3.1 Virtue

Rousseau does not, as other social contract theorists suggest, hold that poverty is a result of individual idleness or laziness. Indeed, in Rousseau's description of social inequality, it is the wealthy who are idle; this contrasts rather sharply with Locke's

[4] Jeff Noonan argues that Rousseau articulates a needs-based social morality distinct from the rights-based social morality of the other social contract theorists (Noonan 2006). The question of what constitutes appropriate needs, of course, is not really what is at stake in shifting the discussion from rights to needs. Each society creates its own set of needs based on social expectation for such things as labor, dress, housing, food, and entertainment.

[5] Rousseau does not use natural law as the basis for the social contract in the manner that Locke does. Nevertheless, in his stronger communitarian moments, he appeals to "the law of nature" and, more prominently, natural virtue. These appeals help to explain the nature and character of the citizens of the social contract rather than the origin of right or law. These latter emerge from the social contract, or, more specifically, from the workings of the general will.

theory which sees property as a sign of rationality and industriousness (Locke II§34; see also Hirschmann 2007, 84). He argues in the *First Discourse* that Enlightenment progress in the arts and sciences is responsible for idleness and ultimately the corruption of morals in society: "Here is how I would arrange that genealogy. The first source of evil is inequality; from inequality arose riches; for the words poor and rich are relative, and wherever men are equal there is neither rich nor poor. From riches are born luxury and idleness; from luxury arose the fine Arts, and from idleness the Sciences" (1986, 45).

In an infrequently cited (and unpublished during his lifetime) essay called "On Wealth," written sometime between 1749 and 1756 (the same period in which he wrote *The Second Discourse* (1754) and *On Political Economy* (1755–1756)), Rousseau makes the source of poverty and its effects on virtue even more direct and explicit. He writes to the fictional "Chrysophile" ("lover of gold") expressing his concern about the path to wealth corrupting even the most noble intentions. Chrysophile, it seems, has ambitions to wealth in order to serve the poor. But Rousseau asks,

> How is it possible to become wealthy without contributing to impoverishing someone else, and what would one say about a charitable man who would begin by despoiling all of his neighbors in order to have the pleasure afterwards of giving them alms? You who reason this way, whoever you might be, I declare to you that you are a dupe or a hypocrite: either you are seeking to deceive others or your heart is deceiving you by disguising your avarice to you under the appearance of humanity. (Rousseau 2005a, 9)

In asking and answering these questions, Rousseau links the attainment of wealth directly with the impoverishment of others. The very act of gaining wealth forces others into poverty not necessarily by depriving them, but by setting up a situation in which their social status is disparaged in comparison. This makes perfect sense when, with Rousseau, we understand poverty as resulting from the gap between rich and poor rather than merely as a lack of some fundamental resources. The inequality affects the virtue of the poor insofar as their needs are replaced with covetous desires for what the wealthy enjoy. Envy and jealousy supplant the feelings of pride and contentment resulting from hard work. This is vividly discussed in the *Letter to M. D'Alembert on the Theatre* as the theatre (and the individual accoutrements and social infrastructure that accompany it) inspires just such a transformation of virtue into vice (Rousseau 1960; see also Akoma and Scholz 2009). While others have made similar claims about the emerging vices in socially unequal conditions, few have made Rousseau's further point that the wealthy also lose virtue. Among other things, the wealthy gain such a sense of entitlement to honor and power that they expect (and often arrange) to be obeyed by others; those others agree to submit at least in part because they hope to similarly force others to obey them (*Second Discourse* 1967, 239). This power becomes political power and the institutions and organizations of the state become shaped by vice or injustice, rather than the egalitarian justice Rousseau endorses.

In addition, in order to attain wealth, Rousseau suggests, one must compromise one's virtues and at least temporarily suspend one's commitment to aid the poor. Moreover, in "On Wealth," he argues that the wealthy think differently than the poor do such that when one is wealthy one no longer has the desire to help

the poor. He sums up his concern with a pithy dictum: "Wealth. One desires it in order to make good use of it, but one no longer makes good use of it when one has it" (2005a, 11). The essay thereby connects poverty and virtue. "If one cannot be truly human and remain wealthy, how could one be so and acquire wealth?" (2005a, 11). The wealthy have sacrificed all that is good and admirable about being human in the very project of attaining wealth. To embark on a path to wealth, in other words, inevitably destroys one's virtue and impoverishes others (see also Ellison 1991, 257).

This is not just a suspension or a weakening of virtue. Rousseau suggests that the rich become alienated from virtue and their true self through accumulation while the poor also become alienated, though theirs is through comparison with the rich as well as through losing sight of the simple needs. Ellison argues that this mutual alienation through the "socially determined excess of desires over needs," or the corruption of morals for the rich and the poor alike, is unique to Rousseau's understanding of poverty in its modern form. (Noonan, Vaughan, and others rightly see herein some of the Rousseauean influence on Marx.) Notice too that it shifts impoverishment from merely material deprivation to moral and political deprivation as is also evident in the *Second Discourse*'s account of the development of inequalities.

As Rousseau describes in the *Second Discourse*, the creation of property marks the moment of class division that creates rich and poor. This is important because, according to Rousseau, political power that is concentrated in the hands of the wealthy in a society with a large gap between the rich and the poor is also used to design social institutions that exacerbate economic injustice. Individuals are naturally good, but the corrupting influence of society creates an inequality which destroys the individual's relation to his or her natural self. The creation of private property is the crucial moment when social intercourse becomes unequal, the natural self all but vanishes, and poverty or misery results:

> …as long as they undertook such works only as a single person could finish, and stuck to such arts as did not require the joint endeavors of several hands, they lived free, healthy, honest and happy, as much as their nature would admit, and continued to enjoy with each other all the pleasures of an independent intercourse; but from the moment one man began to stand in need of another's assistance; from the moment it appeared an advantage for one man to possess enough provisions for two, equality vanished; property was introduced; labor became necessary; and boundless forests became smiling fields, which had to be watered with human sweat, and in which slavery and misery were soon seen to sprout out and grow with the harvests. (*Second Discourse* 1967, 220)

The last line of this important passage is particularly relevant to poverty's role in political justice. Misery and slavery, according to Rousseau, are experienced when one is subject to the will of others. Economic disparity breeds this subjection because some individuals are forced to sell their services to others. This quickly transforms into political subservience as freedom is compromised. Rousseau punctuates the harm by saying, "to renounce one's freedom is to renounce one's quality as man, the rights of humanity, and even its duties" (*Social Contract,* 1997c, 45). Poverty, resulting from gross inequality, causes the individual who suffers it not just

material harm but moral and political harm as well.[6] Rousseau's critique in the *Second Discourse* sets up the problem for political philosophy that he states in the *Social Contract*: how to devise a society "that will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obey only himself and remain as free as before" (1997c, 50). Such a society, in order to maintain the freedom and relative equality of all, must ensure that no one is enslaved to others. Rousseau does not advocate abolishing or forbidding the institution of property in order to accomplish this, but he does argue for strict limitations on inequality so that no one is forced into a position of poverty requiring the sacrifice of freedom and virtue (*Social Contract* 1997c, 78).[7]

A well constituted state that fosters virtue can obviate the inequality that emerges in society. Such a state would make certain that every citizen had a place in society; this is part of what economic justice means. Rousseau uses work as the primary means of ensuring equality and the chief lesson for a state that wants to avoid large gaps between the rich and the poor. Work, hard work, is virtuous, according to Rousseau, so long as everyone within the state works equally. No one ought to be marked as unique or privileged; all should avoid an idle life (see especially *Emile* (1993, 177–178)). Work of this sort avoids the alienation that comes with luxury/poverty by connecting an individual to his or her natural self.

2.3.2 Security

The presence of poverty indicates not only a poorly organized state but also one that has ceased to care for its members adequately and hence lost legitimacy; Rousseau thereby links economic injustice and political injustice. All of the causes of poverty mentioned in the introduction pertain not to some base level of material existence but instead to the division or gap between social classes in society. Such a gap fundamentally undermines the security of the state.

By this I mean not only that poverty might germinate crime (or insecurity), but also that poverty violates the nature and function of the state. Turning again to *Political Economy,* one sees that Rousseau takes the chief end or goal of a well-constituted state to be the well-being and security of the people. Unlike other social contract theorists, the security at issue, however, is not primarily security in one's property but rather security in one's well-being. The causes of poverty mentioned earlier, such as commerce favored over agriculture, maldistribution of the population

[6] Nancy Hirschmann discusses the effects of poverty in the form of the exclusion of the lower classes (and women) from civil and political freedom (Hirschmann 2007, 124–127). Cohen, too, presents the problem of inequality for political freedom in his discussion of what he calls "the fundamental problem" (Cohen 2010, 24–32).

[7] Cohen also provocatively mentions that Rawls "once said in passing that his two principles of justice could be understood as an effort to spell out the content of the general will" (Cohen 2010, 2).

in urban centers, and emphasis on the luxury arts (and listed in *Political Economy* 1997b, 19), are also the sources of those things that impede or destroy the body politic. Rousseau associates "commerce, industry, and agriculture" with the "mouth and stomach" of the body politic "which prepare the common subsistence." Furthermore, the blood of the body politic is the public income "which a wise economy, performing the functions of the heart, sends out to distribute nourishment and life throughout the entire body" (*Political Economy* 1997b, 6).[8] The body politic is a healthy body only when the economy and the politics work together for the good of all, not solely the good of the wealthy or the mere protection of individuals' property (*Political Economy* 1997b, 6). The government has an obligation to provide for the security of the people by avoiding the conditions that create poverty. This is established by the Sovereign people with the social contract (with its emphasis on the common good). In fact, he argues that should the state allow one citizen to die of poverty when such poverty might have been relieved, then that which caused the state to come into being disappears (*Political Economy* 1997b, 16). In other words, it is so incumbent on the state to prevent (and alleviate) poverty that to fail to do so is grounds for the dissolution of the state and the social contract. As Rousseau states, "The security of individuals is so intimately connected with the public confederation that, apart from the regard that must be paid to human weakness, that convention would in point of right be dissolved, if in the State a single citizen who might have been relieved were allowed to perish, or if one were wrongfully confined in prison, or if in one case an obviously unjust sentence were given" (*Political Economy* 1997b, 17). Clearly, welfare provisions are as important, if not more, to Rousseau's social contract as the protection of property that is normally associated with the reasons for a social contract. Another way to understand this is that an individual's ability to participate in the egalitarian democracy Rousseau advocates is harmed by economic injustice.[9]

In a note at the end of Book I of *The Social Contract*, Rousseau explicitly links poverty to the insecurity of the state when he comments on the equality the social contract is supposed to ensure: "Under bad governments this equality is only apparent and illusory; it serves only to keep the poor in their misery and the rich in their usurpations. In fact, laws are always useful to those who possess and injurious to those that have nothing; whence it follows that the social state is advantageous to men only so far as they all have something, and none of them has too much" (*Social Contract* 1997c, 56 note). By failing to prevent the impoverishment of some members of society, a government is deemed bad. Rousseau clearly holds that some form of economic equality is required for political stability and justice.

In Book II of *The Social Contract,* Rousseau describes equality in power and wealth as also relative. As he explains with regard to wealth, "no citizen should be rich enough to be able to buy another, and none poor enough to be forced to sell

[8] It might also be worth noting that Rousseau is revealing some of his affinity for Hobbes here. Hobbes metaphorically links money to the blood of the body politic in Chapter 24 of the *Leviathan*. Rousseau, according to Richard Tuck, was aware of his similarity to Hobbes (Tuck 1996, xxxvi).

[9] Both Hirschmann (2007) and Cohen (2010) make similar arguments. Hirshmann focuses on freedom and Cohen focuses on common good and the general will.

himself" (1997c, 78). In the note to this passage, however, Rousseau adds an important comment about security or stability in the state: "If, then, you wish to give stability to the State, bring the two extremes as near together as possible; tolerate neither rich people nor beggars. These two conditions, naturally inseparable, are equally fatal to the general welfare; from the one class spring tyrants, from the other, the supporters of tyranny; it is always between these that the traffic in public liberty is carried on; the one buys and the other sells" (1997c, 78 note). Hence, poverty not only affects the "general welfare," it also breeds political abuses, disrupts the security of the state, and ultimately destroys liberty. A similar warning about tyranny is found in *The Discourse on Political Economy* as well.

This explicit articulation of the state's obligation regarding the protections against poverty highlights the importance of economic justice for political justice. Moreover, Rousseau warns in the *Emile* that the disparity between social classes puts us on the brink of revolution (1993, 188). The avoidance of poverty is an integral feature of Rousseau's social contract but it is incumbent on the individual as well as the state to alleviate poverty when it is present.

2.4 Social Responsibility and Poverty

The third key feature of Rousseau's account of poverty pertains to the social responsibility for creating or fostering just conditions in society. By this I mean issues concerning both who is morally obligated to respond to poverty and what the conditions of economic justice are. As others have noted, Rousseau does not explicate the specific content of justice, economic or otherwise. Rather, his prescriptions are meant to respond to the character of a people and their material conditions or prospects. He does, however, present arguments for both individual or personal responsibility for the poor and state responsibility to both alleviate poverty and create conditions that will preclude poverty from entering the social system. State responsibility has been partially covered in the discussion of security, but it is also worth noting how it has been interpreted by some as foreground for the welfare state.

In *Emile* Rousseau argues that we as individuals are responsible to others not out of feelings of charity but rather out of communal responsibility or communal ownership. The tutor is said to be the "master of the money" only because he has made a promise to care for the poor (1993, 80; Scholz 2001, 36). This is similar to what we see in the body politic of *The Social Contract* wherein each citizen alienates his property to the Sovereign whole in order to get the right to property. The establishment of right is very important in this context. It lays the foundation for economic justice much in the same way that Rousseau establishes political or civil justice: in both cases equality and freedom are the primary values. Rights are established with the social contract. There is no natural right to property as found in Locke. Given the terms of the social contract, the right to property entails a duty to all others such that no one will be forced into a situation of having to dispose of his freedom in order to eat. In that way, all are equal. The relation of communal

responsibility rather than charity directly challenges the rich/poor relation or gap which, as we have seen, is the first crucial feature of Rousseau's conception of poverty. In other words, a "charitable relation" maintains the division between those whose wealth may be shared and those in need of assistance. A relationship of communal responsibility, in contrast, assumes equitable relations among free members of the community. In addition, communal responsibility shows that the emphasis is on what is needed for the community to flourish rather than on instituting some artificial split between rights bearers and those against whom one may make a rights claim.

In addition, Rousseau does not limit the individual obligation to ensure the well-being of others merely to members of one's community, although that is the focus throughout much of his writing on the topic. In the youthful days of his mid-twenties, Rousseau wrote an essay meant only for himself ("Universal Chronology or General History of Times From the Creation of the World up to the Present") wherein he likens humanity in general to a large family and expresses the familial obligation each owes to others *and to the collective whole* so long as he or she is able:

> The Universe is a large family of which we are all members; thus we are also obliged to be acquainted with its situation and its interests: however small the extent of a private individual's power might be, he is always in a condition to make himself useful somewhere to the great body of which he makes up a part; if he can, he owes it indispensably; and if he owes it, how will he do it as long as he knows nothing about what has happened, and about what is happening at present, and thus he will not know either where his services are most necessary, nor of what sort they ought to be, nor how he ought to make use of them to make them more advantageous to others and to himself. (2005c, 2)

This passage highlights the epistemic requirements of acting on a duty to others. One must seek to know about events adversely affecting others in order to know how and where to extend assistance. Private individuals are connected through a "large family" and that connection comes with obligations to respond to others in need based on adequate knowledge of their situation or conditions.

Actually existing societies, however, train individuals to accept social division rather than social cohesion, according to Rousseau. Emile's tutor is at pains to teach Emile the love of humanity as a way to overcome social division. As the passage below illustrates, the love of humanity or the social responsibility for the poor extends beyond merely giving material goods. Responsibility means also advocating on behalf of the poor and oppressed. Emile is to "be their agent". By being their agent, he attempts to bridge or even close the gap between rich and poor:

> the practice of social virtues touches the very heart with the love of humanity; by doing good we become good; and I know of no surer way to this end. Keep your pupil busy with the good deeds that are within his power, let the cause of the poor be his own, let him help them not merely with his money, but with his service; let him work for them, protect them, let his person and his time be at their disposal; let him be their agent; he will never all his life long have a more honourable office. How many of the oppressed, who have never got a hearing, will obtain justice when he demands it for them with that courage and firmness which the practice of virtue inspires; when he makes his way into the presence of the rich and great, when he goes, if need be, to the footstool of the king himself, to plead the cause of the wretched, the cause of those who find all doors closed to them by their poverty, those who are so afraid of being punished for their misfortunes that they do not dare to complain? (*Emile* 1993, 254)

This passage also makes clear that economic justice is tied up with political justice. Emile becomes the voice of the oppressed and virtuously demands justice on their behalf. Among the rights and duties of citizens is maintaining the public economy in the public interest (*Political Economy* 1997b, 20, 23). Among the rights and duties of the government in a society governed by the general will is the duty to ensure just economic relations; these include policies on labor relations, the acquisition of wealth, and the value of products, as well as proportional taxes (*Political Economy* 1997b, 33–36). Of course, Emile is specifically groomed to be the ideal citizen for Rousseau's republic. The republic itself is harder to groom but that is the very task of the essay *Political Economy,* not to mention, of course, *Social Contract* itself. The former text is much more explicit in trumpeting the value of just economic conditions and connecting those conditions to the work of the government than the *Social Contract*, but both argue that freedom and equality for Rousseau also includes ensuring the relative well-being of all. Finally, it is worth noting that the discussion of "The People," constituting three chapters of Book II of *The Social Contract,* takes pains to establish the conditions that would eliminate at least some of the causes of poverty discussed above. A nation ought not to be too big nor too small; its lands ought to be fertile enough to sustain the people; the population ought not to exceed the capacity of the land to provide; and the people should enjoy "abundance and peace" (Rousseau 1967, 53; see also Book II, chapter 8–10). When connected with the causes of poverty, one can clearly see that Rousseau's design is meant to ensure a degree of economic equality. That equality ensures that no one will be oppressed and no one will have the power to enslave others. Political or civil equality follow. Justice is only possible when members of the social contract are free and equal. Mark Cladis argues that even Rousseau's controversial account of civic religion at the end of *The Social Contract* seems focused on ensuring a moral commitment to economic justice among citizens in his republic (Cladis 2003, 193, 196).

The state's purpose, according to Rousseau, is to secure the well-being of its citizens, including economic well-being. The state carries the responsibility (collective given how Rousseau structures the State or what he means by State—the passive body politic) to ensure that economic justice as equity extends to all members of the body politic. He makes this clear by saying, "does not the undertaking entered into by the whole body of the nation bind it to provide for the security of the least of its members with as much care as for that of all the rest? Is the welfare of a single citizen any less the common cause than that of the whole State?" (*Political Economy* 1997b, 17).

2.5 Conclusion

For those revolutionaries inspired by Rousseau, little that I have said here comes as news. Readers of Rousseau cannot help but notice the persuasive way in which he links our economic well-being with our political power. Poverty, he argues,

is a result of unequal social relations. It is measured by the proliferation of needs as well as the lack of security and moral virtue among rich and poor alike. Alleviating poverty is the responsibility both of private individuals who are compelled by the duties emerging from agreed upon rights and by the love of humanity; states which are obliged to their citizens to be well designed, to provide security in the form of welfare, and to institute proportional tax systems when necessary.

Perhaps the most challenging aspect of his account of poverty is its relative nature. One might wonder whether that relative nature risks undermining the passionate appeals to virtue as well as the call for individual and social responsibility to respond to poverty. It certainly seems plausible that some of those individuals 'impoverished' (in the Rousseauean 'poverty is relative' sense) by the opulence of others do not really merit any sort of moral or political response at all. In response, it is important to note that being impoverished results in misery. Whether it is material misery (and hence the more common understanding of poverty) depends on the relative gap between the wealthy and the poor, as well as the ability of the poor to meet not only basic needs but also those needs that appear basic to acceptable social existence in any given society. This is one reason why it is not possible to delineate completely the content of economic justice for Rousseau. His social contract quite deliberately takes account of the people and their location. Although he postulates the ideal character of the people and their material conditions (see especially *Social Contract* 1997c, Book II, Chapters 7–10), he also acknowledges alternate arrangements. The misery of impoverishment—whether it affects one's ability to provide for one's basic needs or not—affects one's virtue and one's ability to participate in Rousseau's egalitarian democracy.

One objection to the account I have presented here is that "poverty" is just another name for "inequality." The two concepts certainly have significant overlap and often point to the same obligations for individuals, the government, or the state as a whole. Nevertheless, there is good reason to analyze poverty as distinct from inequality. "Poverty" and "impoverishment" makes explicit Rousseau's argument that the wealth of some is causally connected to both the economic disadvantage and the political disadvantage of others. More importantly, concentrating on poverty shows the harm involved in inequality. Inequality per se may not be considered harmful, but Rousseau argues that at least gross inequality is; poverty brings that harm—to the individual's moral and political life as well as economic life—into clear focus. Poverty, misery, and impoverishment signal not just a difference in material well-being, they also signal a possible loss of freedom as the impoverished individuals become subjected to the wills of others. Loss of freedom, together with gross inequality, is unjust according to Rousseau.

While there is much to gain in our understanding of Rousseau by analyzing his account of poverty, such a study also might inform other contemporary debates about the nature and extent of poverty, the effects of poverty on an individual and a state, and the moral and social responsibility to respond to poverty.

References

Akoma, Chiji, and Sally Scholz. 2009. Virtuous Bacchanalia: Creolizing Rousseau's festival. *C.L.R. James Journal* 15(1): 206–227.

Cladis, Mark. 2003. *Public vision, private lives: Rousseau, religion, and 21st century democracy*. Oxford: Oxford University Press.

Cohen, Joshua. 2010. *Rousseau: A free community of equals*. New York: Oxford University Press.

Cranston, Maurice. 1982. *Jean-Jacques: The early life and work of Jean-Jacques Rousseau, 1712–1754*. Chicago: University of Chicago Press.

Ellison, Charles. 1991. The moral economy of the modern city: Reading Rousseau's *Discourse on Wealth*. *History of Political Thought* 12(2): 253–261.

Hirschmann, Nancy. 2007. *Gender, class, and freedom in modern political theory*. Princeton: Princeton University Press.

Locke, John. 1988. Two Treatises of Government, ed. Peter Laslett. Cambridge: Cambridge University Press.

Noland, Aaron. 1967. Proudhon and Rousseau. *Journal of the History of Ideas* 28(1): 33–54.

Noonan, Jeff. 2006. *Democratic society and human needs*. Montreal: McGill-Queen's University Press.

Rousseau, Jean-Jacques. 1960. Letter to M. D'Alembert. In *Politics and the Arts*. Trans Allan Bloom. Ithaca: Cornell University Press.

Rousseau, Jean-Jacques. 1967 (Cited in text as *Second Discourse*). In *The social contract and discourse on the origin of inequality*, ed. Crocker Lester. New York: Washington Square Press.

Rousseau, Jean-Jacques. [1762] 1993. *Émile*. Trans. Barbara Foxley. London: J. M. Dent.

Rousseau, Jean-Jacques. 1997a (Cited in text as *Government of Poland*). Considerations on the government of Poland and on its projected reformation. In *The social contract and other later political writings*, ed. Gourevitch Victor. Cambridge: Cambridge University Press.

Rousseau, Jean-Jacques. 1997b (Cited in text as *Political Economy*). Political economy. In *The social contract and other later political writings*, ed. Gourevitch Victor. Cambridge: Cambridge University Press.

Rousseau, Jean-Jacques. 1997c (Cited in text as *Social Contract*). Social contract. In *The social contract and other later political writings*, ed. Gourevitch Victor. Cambridge: Cambridge University Press.

Rousseau, Jean-Jacques. 1997d. Discourse on the sciences and arts. In *The discourses and other early political writings*, ed. Gourevitch Victor. Cambridge: Cambridge University Press.

Rousseau, Jean-Jacques. 2005a. On wealth. In *Collected writings,* vol. 11. pp. 6–17. Ed. Christopher Kelly; Trans Christopher Kelly and Judith Bush. Hanover, New Hampshire: Dartmouth College Press.

Rousseau, Jean-Jacques. 2005b. The State of War. In *Collected writings* vol. 11. pp. 60–63. Ed. Christopher Kelly; Trans. Christopher Kelly and Judith Bush. Hanover, New Hampshire: Dartmouth College Press.

Rousseau, Jean-Jacques. 2005c. Universal chronology or general history of times from the creation of the world up to the present. In *Collected writings,* vol. 11. pp. 1–5. Ed. Christopher Kelly; Trans Christopher Kelly and Judith Bush. Hanover, New Hampshire: Dartmouth College Press.

Scholz, Sally. 2001. *On Rousseau*. Belmont: Wadsworth.

Tuck, Richard. 1996. Introduction. *Leviathan*. Cambridge: Cambridge University Press.

Vaughan, Sharon. 2008. *Poverty, justice, and western political thought*. Lanham: Lexington Books.

Chapter 3
Bentham and Payday Lenders

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Abstract Jeremy Bentham defends a free market in interest rates by appealing to liberty. As a consequentialist, however, he must also morally evaluate the outcomes of practices, such as payday lending, that set interest rates. Given how the entrenchment in poverty that is reinforced by payday lending has negative consequences both in terms of utility and liberty, I conclude that Bentham faces the dilemma of abandoning either his defense of usury or his consequentialist moral theory.

In response to Adam Smith's passage in *The Wealth of Nations* regarding usury, Jeremy Bentham argues forcefully in his letters to Smith – now collected as 'A Defense of Usury' – for a free market in interest. Smith's concern about interest rates that significantly exceeded their market value was that too much of a country's capital would go to those most likely to waste it, namely those who would borrow at the highest interest rates.[1] Bentham took great care in addressing Smith's argument, and offered trenchant analysis of the relevant issues.

One reason for Bentham's disagreement with Smith over regulation of the market in interest arose from the difference in how the two view the role of "projectors" – individuals who in some way extend the market into new territory. Examples of projectors range from inventors of life-saving medicines to Ponzi scheme perpetrators. Smith contends that projectors, while at times investing in productive ventures, tend to be too chimerical, and thus represent a threat to the productivity of the market by investing available credit in unproductive ventures.

[1] Smith 1776, p. 339.

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Bentham, by contrast, emphasized the role of projectors – the source of "invention" and "improvement" – as the very core of economic growth:

> …if I presume to contend with you, it is only in defence of what I look upon as, not only an innocent, but a most meritorious race of men, who are so unfortunate as to have fallen under the rod of your displeasure. I mean *projectors*: under which invidious name I understand you to comprehend, in particular, all such persons as, in the pursuit of wealth, strike out into any new channel, and more especially into any channel of invention.
>
> It is with the professed view of checking, or rather of crushing, these adventurous spirits, whom you rank with "prodigals," that you approve of the laws which limit the rate of interest, grounding yourself on the tendency, they appear to you to have, to keep the capital of the country out of two such different sets of hands.[2]

Smith and Bentham agree that both prodigals and projectors are inclined to borrow at higher rates of interest, but differ over whether lending to projectors at the higher rate is justifiable.

Smith's view is that the rate of interest on borrowed money ought to be regulated in order to prevent too much of an economy's available credit going to the chimerical use by projectors. Bentham counters this view with the argument that by characterizing projectors as on a par with prodigals in terms of the likely return on investment they represent, Smith conflates projectors and prodigals, thereby failing to take into account the crucial growth-spurring role projectors play in a nation's economy. This is Bentham's positive case against the regulation of interest.

However, under Benthamite utilitarianism, it is outcomes that count morally. Thus we must go to the consequences of investment to decide whether it ought to happen. But when we do so, we find that some apparent projectors turn out to be prodigals – that is, they aimed to project, but failed to do so. Such is the nature of invention. If this is the case, how are we to determine whether an individual is a projector or a prodigal in advance? It seems Bentham cannot, and thus his positive case against Smith appears to fail, since by Bentham's own normative theory, the distinction is unsupportable.

Bentham's basic *negative* argument against the regulation of interest rates is that, antecedent to custom, there is no means by which one definition of 'usury' can be shown to be more plausible than another. Bentham argues that since it is only to custom that one might appeal in defending a definition of 'usury', and customs vary widely, the use of this pejorative term for certain interest rates begs the question of their legitimacy.[3] A corollary of this, Bentham argues, is that since, under market principles, the general regulation of exchanges (such as price-setting) is to be avoided, we must have some compelling reason to regulate particular exchanges. Why then, he asks, regulate the lending of money at interest, and no other exchange?

The second of Bentham's arguments I will address here is his rebuttal of the protection of indigents as an argument for regulating interest. According to Bentham, while impoverished individuals prefer a lower rate of interest than the one offered, their acceptance of a loan at the rate offered is evidence enough of the value of the

[2] Bentham 1787, p. 45.

[3] Bentham 1787, p. 5.

loan to them.[4] The individual taking out the loan, Bentham argues, is adequately informed regarding his circumstances to be the best judge of whether the transaction ought to take place. By contrast, the legislator

> …who knows nothing, nor can know any thing, of any one of all these circumstances, who knows nothing at all about the matter, comes and says to him—"It signifies nothing; you shall not have the money: for it would be doing you a mischief to let you borrow it upon such terms."— And this out of prudence and loving-kindness!—There may be worse cruelty: but can there be greater folly?[5]

Since, Bentham argues, the impoverished individual is sufficiently acquainted with their circumstances, and the legislator is not at all, the attempt at protection of indigents by legislators cannot serve as grounds to regulate the market in interest rates, nor can it offer a viable definition of 'usury'.

3.1 Bentham's Moral Theory and Liberty

Benthamite hedonistic utilitarianism, as a species of consequentialism, seems at odds with a theory of substantive rights, such as liberty-based ones. However, Bentham himself insisted upon the importance of liberty throughout his works. As Douglas Long[6] and David Collard[7] have capably demonstrated, Bentham attempts to derive his principle of liberty from his principle of utility, by appeal to liberty's status as a compound pleasure: liberty is not desirable of its own accord, rather it is so for the ease and power it can confer. For Bentham, the provision of security by the state enables individuals to enjoy pleasures, and is thus justified by appeal to the principle of liberty via the principle of utility. Excessive liberty, however, results in anarchy, thus the curtailment of liberty by the state is itself justified by appeal to the same principle. The principle of liberty, then, is for Bentham a requirement for hedonistic utilitarianism to serve as the foundation for justifying legislation.

As to whether Bentham viewed liberty as positive or negative, there is some disagreement. It appears generally accepted that Bentham endorsed only negative liberty. However, in his review of Long,[8] Michael James makes the case that the notion of liberty, as employed by Bentham, is in fact positive, in the sense that one has "the *ability* to do what one wants to do".[9] I will forego adjudication between these views here. For this article, I will treat Bentham's conception of liberty as negative, since doing otherwise begs the question by assuring some justifiable cap on the rate of interest as a matter of provision for some set of positive rights.

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[4] Bentham 1787, p. 13.

[5] *ibid.*

[6] Long 1977.

[7] Collard 2006.

[8] James 1980.

[9] *ibid.*

Throughout 'A Defense of Usury', Bentham argues against the regulation of interest rates, on the grounds of a lack of justification for curtailment of the liberty to lend and borrow at various rates. His defense of usury is a defense of negative liberty. I turn now to the contemporary phenomenon of payday lending, with the aim of demonstrating that certain consequences of this type of lending curtail negative liberty, thereby posing a dilemma for Bentham.

3.2 Payday Lenders

In an informative article by economist Joseph Persky,[10] the author defines "payday lending" as that kind

> in which a borrower gives a payday lender a postdated personal check and receives cash, minus the lender's fees. For example, with a $300 payday loan, a consumer might pay $40 in fees and receive $260 in cash. With fees this high on short-term loans that are to be repaid within a few weeks, the implied per annum interest rates can reach 1,000% and more.

By Bentham's defense of usury, there is nothing inappropriate about such arrangements. Since only the borrower can know her circumstances, it is best left to her to choose those rates she finds appropriate to her situation. The legislator, Bentham asserts, knows nothing about her situation.

Well, we can know some things. Research undertaken by Leslie Parrish and Uriah King of the Center for Responsible Lending has yielded a report[11] in which the negative effects of payday lending are analyzed. Their general conclusion is that

> households with access to payday loans are more likely to pay other bills late, delay medical care and prescription drug purchases, and lose their bank accounts due to excessive overdrafts. These impacts can push families on the fringes of the middle class down into poverty. …Our findings show that becoming trapped in debt is the rule rather than the exception with payday loans.[12]

Becoming trapped in debt, with the resultant entrenchment in poverty for most who borrow on the terms payday loans offer, results in considerable disutility since, as Bentham claims, "to get money is what most men have a mind to do: because he who has money gets, as far as it goes, most other things that he has a mind for."[13] Lacking the means to achieve a level of utility sufficient to maintain one's health, for instance, as a result of entrenchment in poverty, represents a significant disutility to the payday loan borrower.

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[10] Persky 2007.

[11] Parrish and King 2009.

[12] *ibid.*

[13] Bentham 1787, p. 32. I would note that this admission counters Bentham's own argument about the peculiarity of singling out the market in interest rates for regulation, given that money constitutes – as a result of this unique attribute – a special case.

Here a discussion of short-term and long-term interests is in order, since in order to make my argument, I must show that the borrower is not maximizing utility by taking out a payday loan. While it is true that borrowing money at the rates offered by payday lenders may, at any particular time, result in greater utility for the borrower than any alternative course of action, this is so within the scope of the short term. However, this short-term serving of interests – in the sense of the borrower's well-being – comes at the expense of her long-term interests, as demonstrated by Parrish and King.

Moreover, practices that lead to entrenchment in poverty, such as payday loan arrangements, represent a curtailment of negative liberty. Barring consideration of contemporary innovations not present in Bentham's time (credit scores, etc.), poverty limits the opportunities by which individuals can engage in fulfilling basic satisfactions – opportunities such as gainful employment or the pursuit of education. It is not employment or education itself that is denied – for this would represent the curtailment of a positive right – but the liberty to pursue such opportunities. Since such opportunities obtain, and some individuals are inhibited in accessing them by reason of poverty (which arbitrarily affects individuals in morally significant ways), I conclude that it is negative liberty that is thereby limited.

The kinds of influence by which entrenchment in poverty curtails the liberty to pursue opportunities vary, and these influences can be mutually reinforcing. Social stigma, the inability to remain informed of opportunities, emotional stress (and resultant self-medication), and lack of self-confidence constitute but a few factors that limit individual opportunity to pursue employment and education. I contend that both the disutility of entrenchment in poverty and the resultant curtailment of negative liberty were foreseeable in Bentham's time, given how both opportunity for employment and eligibility for education (construed as including trade education) obtained. As a result, I argue that Bentham appears to face a dilemma: he ought to choose between his defense of usury and his consequentialist moral theory.

Do the negative effects of payday lending mean that its current practice ought to be unlawful? It is possible that enacting such legislation would result in the discontinuation of any loans whatsoever, for those without the means to secure a lower rate of interest. Bentham provides just such an objection:

> Think what a distress it would produce, were the liberty of borrowing denied to every body: denied to those who have such security to offer, as renders the rate of interest, they have to offer, a sufficient inducement, for a man who has money, to trust them with it. Just that same sort of distress is produced, by denying that liberty to so many people, whose security, though, if they were permitted to add something to that rate, it would be sufficient, is rendered insufficient by their being denied that liberty. Why the misfortune, of not being possessed of that arbitrarily exacted degree of security, should be made a ground for subjecting a man to a hardship, which is not imposed on those who are free from that misfortune, is more than I can see. To discriminate the former class from the latter, I can see but this one circumstance, viz. that their necessity is greater. This it is by the very supposition: for were it not, they could not be, what they are supposed to be, willing to give more to be relieved from it. In this point of view then, the sole tendency of the law is, to heap distress upon distress.[14]

[14] Bentham 1787, p. 16.

However, the argument that the legal capping of interest rates would entail the unavailability of loans for the poor is a non sequitur, without the following premise. The argument must be made that credit *would* be unavailable; that no company would extend such loans at a lower rate, or that a government or non-governmental organization could not assume some role in doing so. Without showing how such would be the case, Bentham's argument about availability of credit to the poor fails.

Bentham defends a free market in interest rates by appeal to negative liberty. As a consequentialist, however, he must also morally evaluate the outcomes of practices, such as payday lending. Given how entrenchment in poverty, reinforced by payday lending, has negative consequences both in terms of utility and as an infringement upon negative liberty, I conclude that Bentham ought to choose between his defense of usury and his consequentialist moral theory.

References

Bentham 1787. *The Works of Jeremy Bentham*, published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838–1843), vol. 3.

Collard, David. 2006. Research on well-being: Some advice from Jeremy Bentham. *Philosophy of the Social Sciences* 36(3): 330–354.

James, Michael. 1980. Review of Long. *Bentham Newsletter* 198(4): 49–52.

Long, Douglas G. 1977. *Bentham on liberty: Jeremy Bentham's idea of liberty in relation to his utilitarianism*. Toronto: University of Toronto Press.

Parrish, Leslie and King, Uriah. Phantom demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume, Center for Responsible Lending, July 2009.

Persky, Joseph. 2007. From usury to interest. *Journal of Economic Perspectives* 21(1): 227–236.

Smith 1776. *An Inquiry into the Nature and Causes of the Wealth of Nations by Adam Smith, edited with an Introduction, Notes, Marginal Summary and an Enlarged Index by Edwin Cannan* (London: Methuen, 1904). 2 vols.

Part II
Economic Justice in North America

Chapter 4
Justice and Correctional Health Services

Kenneth Kipnis

Abstract Because they are juridically excluded from participating in the market systems through which most American health care is distributed, more than two million incarcerated Americans have unreliable access to vital medical services. This paper sets out a normative geography of prison health care. While liberalism encourages debate on the limits of liberty, there has been scant interest in setting reciprocal limits to the penal forfeiture of liberty. This essay develops one element of this topic: inmate access to health services.

> Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably. . . . [S]tate-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level.
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> Supreme Court Justice Harry Blackmun. Concurring opinion in ***Farmer* v. *Brennan***[1]

4.1 Prologue

On February 27, 2005, ***The New York Times*** began a series on health care in state correctional facilities. That article reported an event that can introduce the issues addressed below.

[1] 511 U.S. 825 (1994).

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> Victoria Williams Smith, 35 and the mother of a teen-age boy, was jailed after attempting to smuggle drugs to her imprisoned husband. When she complained about chest pains, she was examined by the part-time medical director, a pathologist who had never treated patients in a hospital. Although her EKGs indicated abnormalities, the doctor hadn't followed up. A nurse, unfamiliar with the patient's record, noted the chest pains and contacted the part-time psychiatrist who, without seeing the patient, prescribed a drug for intestinal problems. Ten days after she began complaining about chest pains, Ms. Smith, weeping, told a guard she wanted to go to a hospital. The on-duty nurse dismissed the request as an attempt to obtain drugs but, minutes later, Victoria Smith was on the floor shaking. Taken to a hospital, she died from a heart attack in less than an hour. A letter to her husband was subsequently found in her cell: "My chest is tight & burns, my arms are numb. . . I been to the nurse about five times & no body will help me. I need to get out of this jail."[2]

Lest one conjecture that this was a rare occurrence, the Ninth Circuit Court of Appeals recently reviewed a district court relief order that placed the entire California prison system into receivership. In *Plata* v. *Schwarzenegger*[3] a panel of federal judges wrote:

> Because the Relief Order was the product of a settlement, attained without findings of fact, the district court conducted a six-day evidentiary hearing on the order to show cause. . . . Numerous experts testified as to the "incompetence and indifference" of prison physicians and medical staff and described an "abysmal" medical delivery system where "medical care too often sinks below gross negligence to outright cruelty."

Following the Ninth Circuit's upholding of the lower court's decision, the State of California appealed to the United States Supreme Court which granted certiorari and will issue its decision during the 2010–2011 term.[4]

In thinking about securing the health of incarcerated Americans, the deepest issues are problems of responsibility. Analytically, to have a responsibility is to be charged with an obligation to attend to some sphere of general concern. Others are counting on you to avert bad outcomes. A responsibility is not a mere duty: *e.g.,* to turn the lights on at dusk. Judgment is required. Consider how good parents respond to a child's shifting needs. They don't tick items off a list. If parents fail to attend to their children, they are "relieved" of their responsibilities. The law protects minors against neglect: the failure to obtain pediatric care, for example.

A focus on responsibility gives rise to three questions. First, how does responsibility settle upon those who have it? What is its justification? Second, what does it require? What is its scope? And finally, how is it implemented? What is supposed to bring it about that responsibilities are discharged? When fleshed out, these three inquiries can illuminate responsibility for prison health care: its justification, its scope and its implementation. We will explore the juridic status of convicts,

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[2] Paul von Zielbauer, "Harsh Medicine: As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence". *New York Times*, February 27, 2005.

[3] 560 F.3d 976, 979 (9th Cir. 2009).

[4] In May of 2011, after the completion of this paper, the United States Supreme Court issued its opinion in Brown v. Plata (563 U. S. _____, 09-1233(5/23011)), which addressed the issues raised in the case that is cited in the text. The Court's decision is largely consistent with the conclusions I argue for below.

consider who it is that has responsibility for their health care, look at circumstances that impede the delivery of adequate health services, and consider strategies for ameliorating its quality. Herewith my effort to map the normative geography of prison health care. While there are more questions than answers, the overview will contribute to further inquiry, or so I hope.

4.2 Justice and Imprisonment

To wonder about justice is to struggle with assessing the distribution of societal goods and bads. How are we to share the benefits and burdens of cooperation? Think of theater seats. If you want to see a show, you can buy a ticket at the theater. Though we think of the tickets as a market commodity, there are other ways of conceiving cultural events. Parades, library story hours and holiday fireworks displays can be open to all. While it is common to view the market as a just mechanism for distributing "goods" (the concept serves both economics and ethics), items and services can be bought and sold or they can be allocated in accordance with principles other than consumers' ability and willingness to pay vendors the going price.

Vaccinations, elementary education, drinking water, and firefighting services suggest that allocations need not always flow from market transactions. There are alternatives. We can call all alternative arrangements "non-market" systems and ask what considerations might justify them?[5] What makes this inquiry pivotal in addressing correctional health services is that inmates are ***juridically excluded*** from participating in markets.[6] So, broadly, what considerations could justify non-market systems? Here are three approaches.

In one category, the justification for a non-market system rests on an appeal to goals that are shared by the whole community. We may all be more secure if fires are contained quickly; if property owners need not negotiate with the vendors of fire-fighting services while homes and businesses burn. Sewage systems benefit entire communities and, likewise, where prisons breed pestilence, the effects of medical neglect will not be confined to convicts.

In a second category, the justification for a non-market system can involve appeals to rights. It is arguable that some goods and services ought to be provided because the beneficiaries have an entitlement to them. The victim of an ongoing assault has (or surely ought to have) a right to reasonable assistance from the police department. Children have (or ought to have) a right to be taught skills that are essential to a decent life in a complex society. Finally, those accused of criminal wrongs have a right to a defense attorney in proceedings that would be unfairly imposed in the absence of skilled defense counsel.

[5] Note the many "hybrid" systems. The sale of certain drugs, for example, is restricted to end-users possessing a doctor's prescription warranting that it is to be used for a proper purpose.

[6] Two minor exceptions: small purchases at prison canteens and the sale of contraband.

In a third category, non-market systems may be justified by an appeal to a special responsibility assumed by (or delegated to) those designated to provide the good. For example, it may be that where it is vital to their well-being, children should receive medical care, ***not because they have a basic right to health care*** (we may believe that no one does), but, rather, because ***in becoming parents, mothers and fathers come to have a social responsibility to provide that care***. The child is what lawyers call a "third-party beneficiary". While the duty is owed to the state, the child is the beneficiary of the duty. If I hire you to water my lawn, the duty is owed to me even as, without rights, the grass benefits from the care. This third justification will be developed below.

A concern about justice must focus upon societal goods ***and bads***; burdens as well as benefits. While goods attract ready takers, many will want to evade the bads. Think of the contested social "duties" to pay "burdensome" taxes, to be drafted into the military, to forbear the use of recreational drugs, to undertake "easy rescues," and to carry fetuses to term. While there are better and worse ways of thinking about such issues, disagreement complicates the criminalization of social behavior. Which wrongdoings are serious enough to warrant official punishment? It is this question that initiates systematic thinking about criminal justice.

Three assumptions set the stage for the following discussion. The first alludes to the connection between crime and punishment. Among all of the bads that society visits upon its members, legal punishment is the most burdensome.[7] First, **I assume that punishment is a permissible response to those who have been identified as having committed serious wrongdoings**.[8]

Second, sidestepping an avalanche of objections, **I assume that all those so identified have either been properly convicted of serious wrongdoings, or are being properly held in temporary custody pending definitive adjudication.**[9] Notwithstanding shortcomings in this general claim, my methodology assumes perfect compliance with a defensible account of substantive and procedural criminal justice. When the elements of criminal offenses are drafted with wisdom and precision; when the police officers, prosecutors, defense attorneys, judges and juries that implement, interpret and apply the criminal law take their social responsibilities seriously; and when the public appreciates that the criminal justice system that acts in its name must do so under its gaze and in the light of day: when all these conditions are satisfied, those who are convicted of criminal offenses may be consigned to a

[7] There are other ways of responding to wrongdoing. See for example Deidre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* (New York: New York University Press, 2005).

[8] The classic Kantian argument for punishment is set out by Herbert Morris, "Persons and Punishment," *The Monist*, 52 (1968): 475. But see also Jeffrie G. Murphy, "Marxism and Retribution," Philosophy and Public Affairs, 2 (1973): 217. John Kleinig offers a useful overview in *Ethics and Criminal Justice* (Cambridge: Cambridge University Press: 2008), 193–251.

[9] I set aside issues involving the incarceration of improperly documented aliens, prisoners of war and unlawful combatants, and other cases where conviction has not occurred nor is anticipated.

social status that is intended to be unwelcome. They become convicts. As convicts, they may be subjected to punishment: a societally authorized form of hard treatment imposed as retribution for wrongdoing.

We should not, however, take it for granted that those who are convicted should be sentenced to prison. As a venerable human practice, punishment has taken on an astonishing variety of forms. Chinese magistrates traditionally employed a complex range of punishments. Minor offenses merited lashings with a standardized light bamboo even as the most egregious of crimes warranted the execution of an entire family, three generations. Stalin's labor camps imposed fatal levels of material deprivation, European governments inflicted gruesome penal tortures, England famously transported its felons to Australia, and crucifixions were familiar in the ancient world. Prisons are not necessary and, indeed, as social institutions, they are only about 200 years old.[10]

While more work needs to be done on the nature and justification of imprisonment as a form of punishment, we should not be surprised to see retribution take the form of loss of liberty. Not only do liberal democracies celebrate freedom as a preeminent political good: they are, perhaps by definition, informed by the value rational persons are presumed to place on liberty. So the first of John Rawls' two principles of justice reads: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[11] And Joel Feinberg is rightly acclaimed for his discerning defense of John Stuart Mill's presumption in favor of liberty: that, unless there are good reasons to the contrary, individuals should be free to do as they choose.[12] Accordingly, when liberty is embraced as a political good, there are at least two reasons why punishment might take the form of imprisonment: an officially imposed, systematic suspension of liberty. First, the penal deprivation of liberty might be undesirable enough to deter rational malefactors, at least in the liberal societies where it will be imposed. The risk of unwelcome treatment gives everyone a reason to abide by the law. And second, the imprisonment of offenders can persuade law-abiding citizens that, given the risk of punishment, compliance is never foolish. Finally, as a bonus, imprisonment promises that those who have committed fearful wrongs will, at least for a time, no longer be at liberty to reoffend in the same way.

Accordingly, those convicted of serious offenses may be "remanded to the warden's custody." In so doing, the judicial system authorizes prison administrators to execute its sentences. Along with fines, probation, community service, and the occasional execution, the retributive loss of liberty is the most prominent form that judicial punishment takes. At this writing, there are well over two million persons in American jails and prisons.

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[10] While jails have long been used to hold the accused pending trial and punishment, being "under arrest" was not intended as a punishment in itself. The concept of a "penitentiary" emerged in the eighteenth century. Though jails are still used as holding facilities for those awaiting trial, they now serve for shorter sentences. Longer sentences call for prisons.

[11] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 60.

[12] Joel Feinberg, *The Moral Limits of the Criminal Law, Volumes 1–4* (New York: Oxford University Press: 1987–1990).

Finally, **I assume that the penal forfeiture of liberty is, here and now, an appropriate form of punishment; that the prison – more or less as we understand it – is an appropriate means of implementing such a punishment**. Excepting the few who are sentenced to death, prisons are not where convicts go to be punished. Rather, ***being held in prison is the judicially mandated punishment***. In prison, the liberal presumption in favor of liberty is reversed: unless there are good reasons to the contrary, inmates ***should not be free*** to do as they choose. Accordingly, prisons are constituted for the explicit purpose of systematically limiting the freedom of those convicted of serious offenses. But note that, while liberalism has given rise to intense debates on the limits of liberty, there is little interest in setting reciprocal limits to the penal forfeiture of liberty. What is the proper scope of liberty for those whose liberty has been juridically truncated? This essay develops one element of this topic: inmate access to health services.

Jurisprudentially, the prison's implementation of the inverted liberal principle has taken the form of broad judicial deference to prison administrators and the governments that employ them. Under their "hands off" policy, the courts have historically given wardens an authority that is largely unchecked. In consequence, prison management has taken on many forms and has been configured to serve a motley agglomeration of goals and functions. Along with the constituting task of implementing the retributive forfeiture of liberty, commentators and critics have spoken of rehabilitation, encouraging repentance, incapacitating convicted wrongdoers, deterring crime in the "free world," making available a population of tightly controlled research subjects, rectifying wrongs, promoting economic prosperity through the use of prison labor, eliminating predatory behavior in prison, excluding contraband, facilitating suffering, promoting institutional efficiency, disciplining marginal people, imposing the authority of the warden, and so on. Still others have commented on less obvious functions: serving as a rite of passage for young African-Americans, managing a surplus male labor force, warehousing those unable to function in the free world, protecting an atavistic enclave of a pre-Civil War social order, and offering educations for advanced careers in crime. This problematic variety is what one would expect when wardens can base their policies on personal judgment and when correctional authority is unmonitored. Obviously there is a pressing need for further inquiry. Which functions might be tolerated? Which should be rooted out? Here we can only gesture toward the troubling terrain that surrounds the practices of incarceration. There is a profound need for systematic thinking.

But notwithstanding the variety of goals and functions, there is one salient feature that sharply narrows the warden's focus: prisons are, by their very nature, coercive institutions. Inmates have been arrested, their sentences imposed upon them and, from the moment a prisoner first hears the steel doors slam shut, the most familiar elements of everyday life are palpably closed off. Accordingly those remanded to a warden's custody are presumed to be (1) intent on taking their leave should the opportunity arise, and (2) unenthusiastic about deferring to the prison administration's *de jure* authority. Thus the liberties inmates must surely forfeit are those that give way to the warden's core responsibility for prison security: the prevention of escape and riot. Here we can point to the military management model, the walls,

the razor wire, the locked doors, the armed guards, the regimentation, the periodic searches, and the secondary penal systems within the prison. Administratively, physically and philosophically, these familiar elements betoken an absence of trust. It is within this remarkable setting that correctional health services must operate.

4.3 The Mandate of the Correctional Health Care Professional

While it is relatively easy to discern the warden's role in the prison, the role-responsibilities of the correctional health care professional are not as easily appreciated. We begin with the rights of inmates. Apart from *ex gratia* privileges extended by the warden, it is useful to distinguish between two types of right that inmates can claim.[13] There are, first, residual rights that survive the sentence to prison. The general right to legal counsel, for example, cannot be abridged by wardens, though it is contoured to comport with penal regimes. And second, there are rights flowing from the status of being in custody: rights, for example, to food and, more generally, to living conditions that measure up to our "evolving standards of decency." The Eighth Amendment's right to be free from "cruel and unusual punishment" is another.

A word needs to be said about this Constitutional prohibition. While the restriction would seem to be reasonable on its face, the phrase "cruel and unusual" calls for interpretation. The words signal a plausible limit that reasonable people would want to place upon the state's power to visit deliberate suffering upon those coming under its penal authority. Recall that the protection of citizens against the abuse of sovereign power is a prominent theme both in the Constitution and in the Founders' writings. But there is another line of thought that can be advanced in defense of the provision. While democratic theory holds that the state derives its legitimacy from the consent of the governed, in a deeper sense, those with responsibility for the polity must take care not to discredit their offices and, by implication, the government in whose name they act. Recall that inmates have been "condemned" by the court and, *a fortiori*, by the community. Convicts are bad examples, reverse role-models so to speak, not to be admired or emulated. But when it comes to the conviction and punishment of the innocent, or the infliction of deliberate cruelty on one actually guilty: these can discredit the polity and erode the respect that is at the foundation of obedience to law. Further, the arrest and punishment of moral exemplars – Jesus, Gandhi and Martin Luther King for example – call into question the justice of the law. In this way, cruel and unusual punishments can imperil political legitimacy. Those with power are wise to forbear such excess, no matter how deserved these harsh measures may seem in the heat of a transient outrage. The Eighth Amendment can be read as a reminder of that salient political responsibility.

While it may well be legitimate, as I have assumed, to deprive the convicted of their liberty, the hard treatment that wrongdoers deserve does not include the imposition

[13] Here I follow Hugo Adam Bedau, "Prisoners' Rights," *Criminal Justice Ethics* 1 (1982): 26–41.

of other forms of suffering. The juridic forfeiture of liberty is legally sufficient, and any suffering beyond that may be unjust and unlawful. Here we can begin to discern the role of the licensed health care professional (LHCP) in the prison setting.

Although prison medicine has had a tarnished history in the United States, courts have occasionally scrutinized the source of the duty to treat inmates. In 1926, for example, a North Carolina court opined in ***Spicer* v. *Williamson*:** "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[14] An influential 1929 report elaborated:

> In exacting the penalty which society demands for the infraction of its laws, the state removes the individual from his usual societal conditions and places him under conditions which deprive him of the ability to help himself. . . . Having assumed this guardianship, the state is under obligation to care for the needs of the individual while he is deprived of the opportunity to care for himself. . . . Although the state may rightfully deprive a citizen of his usual freedom and social contacts, it is morally and traditionally obligated to care for him when, in case of illness and other forms of disability, he is unable to care for himself. This responsibility is as binding as is that of furnishing food, clothing and shelter to such individuals.[15]

This insightful analysis sees the duty to provide health care to prison inmates as a custodial obligation flowing from the prisoner's juridic deprivation of liberty. Notice how inmates resemble children. Both are in custody. Both are juridically disabled: not at liberty to attend directly to their basic needs. Notice how the legally narrowed liberty rights of children (children can do only what their parents allow them to do) are comparably paired with a reciprocal prohibition against parental neglect.[16] Even as they exercise lawful authority over the child, parents have special obligations to provide them with food, clothing and medical care. It is, in part, because children, like inmates, are juridically denied the legal powers needed to provide for themselves, that parents and guardians, like wardens, are properly charged with the legal obligation to make needed medical services available to those in their custody. In jurisprudential terms, the narrowing of the standard range of liberty-rights is tolerable, in part, because of the presence of special claim-rights. Upon emancipation in the case of minors, and upon completion of a prison sentence in the case of convicts, the legal adult and the parolee come to enjoy a greatly enhanced range of liberty rights even as they lose their entitlements to bed, board, and other necessities of life. So understood, the state's duty to provide health care to inmates flows from its decision to deprive them of their liberty.

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[14] 191 N.C. 487, 132 S.E. 291 (1926).

[15] National Society for Penal Information, F.L. Rector (ed.) *Health and Medical Service in American Prisons and Reformatories* (New York: J.J. Little and Ives, 1929). Quoted in Lambert N. King, "Doctors, Patients, and the History of Correctional Medicine", *Clinical Practice in Correctional Medicine, 2d Ed.* (Philadelphia: Mosby Elsevier, 2006), 6.

[16] For an overview of the status of minors, see Laurence. D. Houlgate, *The Child and the State: A Normative Theory of Juvenile Rights* (Baltimore: Johns Hopkins University Press, 1980).

However in 1973 the Supreme Court set out a different argument for prison health care. Appealing to the Eighth Amendment, the Court ruled, in ***Estelle* v. *Gamble***[17], that:

> . . . deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action . . . .

Thanks to ***Estelle***, convicted felons are the only population in the United States with something like a Constitutional right to health care.[18] But note that failure to provide care becomes a cause of action only when accompanied by "deliberate indifference." If vital care can be deliberately withheld because it is too expensive or too inconvenient to administer or because of other as-yet-to-be-specified reasons, it may be that the Constitutional mandate will mean little. The rule in ***Estelle*** requires only that inmates' evident health care needs appear on the warden's radar screen. It is not a right to "adequate" health care.

On either of these two analyses, what brings health-care professionals into prison are, first, the legal requirement that prison administrators attend to the serious health needs of inmates, and second (a feature we haven't considered yet), the background prohibitions on the unlicensed practice of medicine, nursing, etc. While wardens must be responsive to medical need, they are not licensed to provide the services themselves. Accordingly, when we take the duty to make health care available (as in ***Spicer*** and ***Estelle***), and add to it the prevailing practices of health-care licensure, what precipitates is the warden's special obligation to retain LHCPs to deliver health-related services to inmates.

4.4 Social Justice, Health Care, and Prisons

Justice in correctional health services, as a topic, names a multifocal problematic. In an essay as brief as this one, one can only characterize key issues and commend possibly useful strategies. Here are three ethical thickets.

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[17] 429 US 97 (1976).

[18] In a society without a general right to welfare, the worst-off free citizens might improve their lot by committing crimes. Police lore tells of homeless people smashing store windows in the autumn so they might spend winters in jail: "three hots and a cot." Given sufficient need, conditional offers of imprisonment might encourage crime. Here are three responses. (1) Prisons must become more barbaric. Lower prison welfare levels so ***no one*** could be better off if convicted. (2) Set a general social welfare minimum that is higher than the levels inside prison. Or consider "get-in-and-out-of-jail-free" tickets, so criminal convictions aren't needed for admission. And (3) This is a philosopher's problem. Don't bother with it.

4.4.1 Incarceration as a Juridic Disability

Though we usually conceive disabilities as physical shortcomings, some impairments are juridic. While a young child lacks the normal complement of adult physical abilities, the child is also unable to enter into binding contracts, get married, leave home without permission, have an intimate relationship with an adult, and so on.

Focusing on health care, most adults have options when dissatisfied with medical services. You can look for a different doctor, complain to organizational supervisors, and sue if injured by sub-standard treatment. You can move to a place with better services, take employment where they have a better health plan, or vote for candidates who promise improvement. We do these things to protect ourselves against the ravages of inadequate health care.

However, for inmates generally, ***none*** of these are options.

Recall Victoria Williams Smith's narrative at the beginning of this paper, and her phrase: "I need to get out of this jail." The suspension of essential liberties can be fatal. And, as deadly as that can be, powerlessness may be only the beginning. Those who administer prisons can retain practitioners who are barely qualified. Beyond that, wardens can impose constraints on health care professionals that compromise proper health care.[19] And because LHCPs working inside prisons may have few professional contacts outside, they may cease identifying themselves as professionals and meld into the penal culture. They may not be called to account when adverse events occur and they may discover that they have nowhere to go when clinical medicine has become a charade.

4.4.2 The Social Disvaluation of the Incarcerated

Concerns about justice can drive an interest in invidious discrimination. African-American history tells us about race-based chattel slavery, the rise of Jim Crow and the saga of the Civil Rights movement. During many of those years, women struggled to remove oppressive elements of a patriarchal society. On both fronts, disvalued peoples and their allies worked to eliminate discriminatory laws and practices.

But discrimination is not merely a set of malleable institutions. It takes its nourishment from deeply entrenched prejudice, eventually yielding in a broad and unreasonable societal readiness to discount the claims and interests of those within the disvalued group. One telling marker is illustrative. For women, prior to the ratification of the Nineteenth Amendment in 1920, and African-Americans, prior to the

[19] On the compromised professional autonomy of correctional health care professionals, see Kenneth Kipnis "Ethical Conflict in Correctional Health Services" Michael Davis and Andrew Stark (Eds.) *Conflict of Interest in the Professions* (New York: Oxford University Press, 2001) 302. Some material from that earlier essay has been incorporated here. Also note the striking parallels in military medicine. See, especially, Michael Davis, "The Poverty of Medical Ethics: An Argument Missing in Discussion of the 'Problem of Dual Loyalties of Military Physicians'", *International Journal of Applied Philosophy* 24 (Spring, 2010): 93–99.

adoption of the Voting Rights Act of 1965, the restriction of the right to vote was perhaps the most dramatic way of ensuring that the interests of neither group would be given expression in the political process. That African-Americans and women were denied the franchise is a salient indicator of their stigmatized status.

Now from the initial report of a possible infraction to an eventual release from prison, the criminal process is a lengthy ritual. The whole completes a circle: removing a wrongdoer from society, imposing a just and proportional punishment, and finally freeing the prisoner back into society. The pivotal event is a condemnation: by a jury, by a judge, and, through those offices, by the community itself. The denunciation is palpable and public, and the evidence for the conviction is on the record.

Convicts are a quintessentially stigmatized group.

Almost all states presently prevent inmates from voting in elections, and a significant minority disenfranchise ex-convicts as well. To the extent that this is so, electoral strategies intended to rectify wrongs and direct attention to unmet political needs are unavailable to those who run afoul of the criminal law. While it is hard to imagine how convicts could abuse the franchise, it is easy to appreciate how the abuse of convicts could be facilitated by suspending the right to vote. And, to the extent that political obligation flows from the consent of the governed, those who lack the franchise may have, at least in theory, only an attenuated obligation to conform to the law. This cannot be a desirable result.

This social disvaluation of the incarcerated is the critically important backdrop against which prison health care must be seen. Those who work in prison health care, who administer or oversee prison programs, and who play roles in formulating laws and policies: all need to be mindful of how easy it can be to tolerate "barbaric prison conditions" when those who must endure them are society's least deserving.[20]

4.4.3 The Management of Responsibility for Inmates

Recent decades have seen an alarming increase in the size of the American prison population.[21] Politically popular policies, like "three strikes," "truth in sentencing" and the "war on drugs," have accelerated the rate at which convicts enter prison even as longer prison terms have slowed the rate at which they leave. As inmates age, their health problems become complex and costly.

In a different context, hospitals prepare for patient surges by practicing "triage": a method of queuing patients when resources are scarce. But it would be a mistake to call for rationing as a response to a crisis in correctional health services. Instead we need to return to the question that initiates systematic thinking about criminal justice: Which wrongdoings are serious enough to warrant official punishment?

[20] The reader is urged to reconsider Philip Zimbardo's famous 1971 Stanford Prison Experiment and the notorious events at Attica and Abu Ghraib. Taken together, these raise profound concerns about the possibility of averting the malignant effects of unchecked authority in prisons. Pertinent information is accessible at http://www.prisonexp.org/ .

[21] For a useful overview, see "Briefing: Rough Justice in America" *The Economist* July 24, 2010, pp. 13, 26–29.

We have seen elected politicians and lobbyists move from fevered condemnations of vice to the criminalization of new offenses. Assuming that funds are insufficient to provide a decent minimum for inmates, and that it is indecent to provide inmates with any less, then (apart from barbarism) the only solution is to reduce the inmate population to a level at which the available resources will be sufficient. After decades of promoting prison as a cure for social ills (most notably drug abuse), after criminalizing new offenses without attending to the consequential costs of incarceration, we must apply triage to the substantive criminal law. Which offenses most require incarceration? Given that we cannot afford to underwrite prison for all the offenses mandating it, we should decriminalize the least harmful ones, bearing in mind the grave damage done by costly and barbaric prison conditions.

I began by contending that the problems associated with correctional health services are problems of responsibility. As it happens, there is a common-sense ethical principle that applies in matters like these: ***Individuals and agencies must not take on responsibilities they cannot manage.*** When the discrepancy between the burdens of an office and the resources available to it reaches a tipping point, worthy practices become cynical charades. On the political side, governments that lack resources must implement decriminalization, amnesty, prison alternatives, and reduced sentences, so that the available resources can meet the needs of a smaller inmate population. On the clinical side, LHCPs may lack the autonomy, supplies, medicines, support staff, privacy, respect, and physical space needed to care for a massively enlarged prison population. When a clinical service becomes so poorly supported – so over-stretched – that it becomes a health hazard, when the path to professional renewal is closed off, and when all that remains is a demoralizing illusion of "concerned attention," withdrawal of "services" is the only honest option.

4.5 Coda

This paper is not a defense of convicts. I have assumed that those convicted of serious wrongdoings deserve to be punished, and that imprisonment, much as we know it, is an appropriate form of punishment. But even if every incarcerated person had committed a serious crime, we would still need to think hard about the treatment that we, as a society, can properly impose upon wrongdoers. It is precisely because it is ***so obvious that we should disvalue*** those whom we have solemnly condemned in our courts of law, so clear that they do not deserve our sympathy, that we need to be impeccably careful about not visiting upon them a fate that is more burdensome than they deserve and more cruel, more barbaric, than we have any right to inflict.

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Chapter 5
Economic Justice and Freedom of Conscience

Emily R. Gill

Abstract As the rights of gay, lesbian, bisexual, and transgendered individuals become more prominent in public debate, so also do conflicts between these rights and rights asserted by some religious persons to discriminate on grounds of conscientious belief. Such conflicts may increase as the marriage of same-sex couples becomes more widespread and vendors potentially refuse to provide space, food, flowers, honeymoon accommodations, or other services to same-sex couples on the same terms as traditional couples. I shall first establish a theoretical framework for suggesting that religious accommodations may be legitimate but with a price. Second, using comparisons with conscientious objections in health care, I shall argue that refusals must not impede the ability of same-sex couples to obtain the benefits of civil marriage enjoyed by traditional couples.

5.1 Religious and Sexual Neutrality

The Constitution's First Amendment, prohibiting an establishment of religion and guaranteeing its free exercise, suggests that religion holds a special place in the pantheon of American values. This does not mean that religious values trump all others. Commentators may differ on the question of whether religious belief and practice outweigh competing values, but they may still agree that limits may properly be placed on the free exercise of religion. For Samuel Marcosson, for example, "Religion enjoys an elevated status in the public sphere, a status that does not vary depending on whether we happen to agree with the message" (Marcosson 2009, 136; see 137–142). Religious arguments have no legitimate claim, however, to exemption from criticism or rebuttal. Marcosson argues that although religion's special

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status calls for limited statutory exemptions for organizations and individuals that defer to religious belief and practice, the constitutional norms of equal treatment exact a price from those who would opt out. "Specifically, those who seek to remove themselves from the *obligation* to respect . . . their fellow citizens' equality may not demand the right to continue to enjoy the *benefits* of equal treatment and participation in government programs in which they might otherwise be entitled to participate" (137; see also 149–153).

Martha Nussbaum writes, "The argument for religious liberty and equality . . . begins from a special respect for the faculty in human beings with which they search for life's ultimate meaning." This faculty is conscience. Because it is both precious and vulnerable, it "needs a protected space around it within which people can pursue their search for life's meaning (or not to pursue it, if they choose). Government should guarantee that protected space" (Nussbaum 2008, 19; see 18–25, 52–53). How far does this space extend? Roger Williams exemplifies one model of the right of conscience, which on his view trumps the application of law and custom. As put by Nussbaum, "If a law says that people have to testify on Saturday, and your religion forbids this, then that law is inapplicable in your case. . . . Laws of general applicability have force only up to the point where they threaten religious liberty (and public order and safety are not at stake)" (50; see also 60–61, 66–67). Williams held that conscience might be "damaged and crushed" if individuals were forced to act against it. Persecution is equivalent to imprisonment when it denies individuals the breathing space to act according to their consciences, and it is "'soule rape' . . . in that it goes inside a person and does terrible damage" (53–54; see 53–58). For Williams, the individual conscience rather than organized religion was responsible for personal salvation. Peace is jeopardized "to the extent that churches overstep their boundaries and start making civil law, or interfering with people's property, livelihood, and liberty" (60; see 59–68, 91–97). We can infer that on this view, an establishment of religion, whether single or nonpreferential, is problematic not only for the usual reason that *civil* authority is likely to favor some citizens over others. An establishment can also give *religious* authorities and their communities of the faithful undue influence over civil law, thereby violating the consciences of those who must obey laws with which they disagree.

John Locke, on the other hand, exemplifies a different model of the right of conscience. Although he advocated civil toleration for diverse religious practices, the line between the civil and the religious was for him subject to civil determination rather than religious belief. An individual who is commanded by the magistrate or government to do something concerning worldly or civil matters that offends his conscience may "abstain from the Action that he judges unlawful." Nevertheless, "he is to undergo the Punishment, which it is not unlawful for him to bear. For the private judgment of any Person concerning a Law enacted in Political Matters, for the publick Good, does not take away the Obligation of that Law, nor deserve a Dispensation" (Locke 1689, 48; see 48–50). That is, practices need not be tolerated that are forbidden under civil law just because they have a religious justification. Animal sacrifice, for example, should not be forbidden as a religious rite if animals may be killed for food. If, however, the magistrate were to forbid the killing of cattle

for secular reasons such as species endangerment, "who sees not that the Magistrate, in such a case, may forbid all his subjects to kill any Calves for any use whatsoever?" (Locke 1689, 42; see also Nussbaum 2008, 60–61, 67, 122). This prohibition is not religiously based, but is a political or civil regulation that happens to affect religious practice. Nussbaum observes that "the difference between Locke and Williams on this point anticipates the difference between Justice Scalia and former Justice O'Connor (and others) over the issue of a judicial role in mandating accommodations" that facilitate the free exercise of religion (Nussbaum 2008, 67).

From Locke's perspective, then, a generally applicable measure forbidding the consumption of alcohol such as Prohibition in the United States should not have allowed exceptions for wine used in religious sacraments. Although the ban was enacted for secular reasons and reflected no animus toward religious practice, without the exemption it would have impacted this practice nonetheless. On the other hand, although Locke's belief that the line between the civil and the religious spheres was subject to civil determination can effect limitations on religious practice, such a policy can also protect those whose conscientious beliefs are in a minority from the potential tyranny of a dominant consensus. Although Locke writes that a church or religious body may rightly expel individuals at odds with its religious principles, "No private Person has any Right, in any manner, to prejudice another Person in his Civil Enjoyments, because he is of another Church or Religion. All the Rights and Franchises that belong to him as a Man, or as a Denison [denizen], are inviolably to be preserved to him. These are not the Business of Religion" (Locke 1689, 31). In this sense, Locke and Williams are united in their concern that religious communities and authorities not exercise undue influence over civil law. Although from one perspective, individuals should not be compelled by civil law to engage in actions that violate their consciences, from another, individuals should not be allowed by civil authorities to use the legal system to impose their own conscientious beliefs on others who do not share them. The government is responsible, therefore, for ensuring that no private person may "prejudice another Person in his Civil Enjoyments." Although, on the one hand, individuals' rights of conscience should in general be protected, on the other, individuals should not be deprived of the pursuit of their legitimate opportunities and interests because of the conscientious beliefs of *others*. When the pursuit of some people's opportunities and interests are curtailed where others similarly situated are not, those whose opportunities are curtailed are deprived not only of civil enjoyments but also of economic justice.

Although many would advocate formal neutrality between religion and nonreligion, Marcosson notes, "Laws may impose unique burdens on religious beliefs and practices that are not felt by nonreligious individuals, or are experienced only by people with particular religious beliefs but not others. Treating them as if they are the same does not represent meaningful neutrality, and it does not serve the values underlying the Free Exercise Clause" (Marcosson 2009, 148; see 142–149). On his view, this logic also applies to exemptions protecting those with religious objections to hiring or marketing to LGBT persons. The recommended price of such exemptions, however, is that a religious participant in government contracts or programs should be required "to waive or forgo any exemption from an antidiscrimination law

to which it, he, or she would otherwise be entitled as a function of religious beliefs" (152). Religious exemptions from antidiscrimination laws are rooted in the values of neutrality and equality. "Asking for the exemption represents a fundamental (and hence ironic) decision to foreswear the obligations imposed by these selfsame values, and those who do cannot then turn around and demand to enjoy the benefits of our society's commitment to neutrality and equality, as we put into practice the values of the Fourteenth Amendment" (151; see 149–153). Like Williams, Marcosson argues that religious or conscientious belief is unique and should be protected. Like Locke, however, he suggests that government contracts and funding should not be allowed to reinforce private convictions that prejudice others in their civil enjoyments.

Marcosson's interpretation of free exercise in part exemplifies what Stephen Monsma calls substantive or positive neutrality, which requires attention not only to the intentions behind a law or public policy, but also to its consequences. If a generally applicable law "makes it harder for a person of devout faith to follow the tenets of his or her faith, then that person's free exercise of religion has been hindered" (Monsma 2002, 266). Positive neutrality reflects Michael McConnell's contention that the proper question is not whether a policy advances religion, but rather whether its purpose or effect will "foster religious uniformity or otherwise distort the process of reaching and practicing religious convictions" (175; see also 168–169). Because individual believers must judge for themselves the dictates of conscience concerning their religious obligations, "the government must be 'religion-blind' except when it accommodates religion—i.e., removes burdens on independently adopted religious practice" (177). Although McConnell qualifies his accommodationism by admitting that it may be trumped by "important purposes of civil government" (168), he clearly views accommodation as the rule, not the exception. For Marcosson, on the other hand, "we should defer to the religious liberty being claimed where possible, and when it does not interfere with the accomplishment of competing constitutional values, but equality norms need not and should not yield completely merely because the 'religion card' is played" (Marcosson 2009, 152–153). Religious exemptions should be disallowed when their utilization would thwart important purposes of civil government.

If Marcosson's viewpoint on the special place of religion in American culture is an illuminating touchstone for the discussion of religious neutrality, Chai Feldblum provides a provocative counterpart concerning neutrality regarding sexual orientation. For her, "When the government decides, through the enactment of its laws, that a certain way of life does not harm those living that life and does not harm others who are exposed to such individuals, the government has basically staked out a position of moral neutrality with regard to that way of living," one that stands "in stark contrast to those who believe that the particular way of living is morally laden and problematic." In other words, the government is not stating a judgment that same-sex relationships are either bad or good. Feldblum also suggests, however, that if the government enacts civil rights laws that prohibit discrimination in housing, employment, and places of public accommodation on the basis of sexual orientation, the state has "made the prior moral assessment that acting on one's homosexual orientation is

not so morally problematic as to justify private parties discriminating against such individuals in the public domain" (Feldblum 2008, 131). Although same-sex sexual activity, then, is deemed neither bad nor good, at least it is deemed not harmful, unlike domestic violence or rape, and therefore those who engage in it warrant protection from discrimination.

Feldblum's definition of neutrality towards sexual orientation is one that we already use towards religion. When the government protects against religious discrimination, it is not stating that religion is either good or bad. It does state, however, that discrimination on the basis of religion is wrong. The absence of antidiscrimination laws sends a message about morality. "When the government *fails* to pass a law prohibiting nondiscrimination [*sic*] on the basis of sexual orientation . . . or *fails* to allow same-sex couples access to marriage . . . the government has similarly taken a position on a moral question. The state has decided that a homosexual or bisexual orientation is not morally neutral, but rather may legitimately be viewed by some as morally problematic" (Feldblum 2008, 132; see also 132–133 and Galeotti 2002, 14–15, 73, 100–101, 103–105). The same logic applies to religion. If the record demonstrates that some religions are traditionally despised and that their members suffer discrimination, and the government allows majoritarian sentiment to prevail by doing nothing, it has taken a moral position by default. The government's failure to act means that public authority is itself signaling that these orientations or religions are problematic. Because within a range the liberal state purports to be hospitable to diversity, it must step up to protect ways of life within that range that according to its own prior moral assessment are *not* morally problematic.

Feldblum posits the hypothetical example of a couple running a bed and breakfast establishment. The owners state clearly in all advertising that they run a Christian business and will not accommodate cohabiting unmarried couples, same-sex or opposite-sex, or same-sex married couples, unless these couples agree to rent separate rooms and not to engage in sexual activity while in residence. Otherwise, the owners believe they would be condoning activity that they consider sinful. If the owners are sued because, hypothetically, the state has an antidiscrimination law based on sexual orientation and/or marital status, they are likely to lose even if they claim that their free exercise of religion is burdened, because their religion does not require that they operate a bed and breakfast. If the state does not have such antidiscrimination laws, a same-sex married couple, perhaps previously unaware of the owners' policy but having previously made reservations, will be turned away, and will receive treatment unequal to that accorded to an opposite-sex married couple (Feldblum 2008, 123–124).

Feldblum draws a parallel here between religious belief and practice, on the one hand, and sexual orientation and practice, on the other. We readily accept the idea that although religious organizations and individuals have complete freedom of belief, they are not free to engage in every practice that flows from these beliefs. We tend to conclude that curtailing religious practice, while regrettable, does minimal damage because after all, we are not pressuring people to change their beliefs. As Feldblum observes, however, if religious people tell the same-sex married couple in her example that they should not object to abstaining from sexual activity while

staying at the Christian bed and breakfast because after all, they are not prohibited from having or acknowledging a gay identity, civil rights advocates will quite properly object. To her, it appears "the height of disingenuousness, absurdity, and indeed, disrespect to tell someone it is permissible to 'be' gay, but not permissible to engage in gay sex. What do they think being gay means?" (Feldblum 2008, 143; see 142–143, 123–124). Feldblum reacts similarly "to those who blithely assume a religious person can disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious means?" Although religion is grounded on belief, certain practices flow from these beliefs, and "the day-to-day *practice* of one's religion is an essential way of bringing meaning to such beliefs" (Feldblum 2008, 143). On her view, "Gay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice" (142; see also 124).

Despite her parallels between sexual orientation and religious belief, however, Feldblum does not end up leaving much room for religious accommodation. Although she argues that at the outset, "we should err on the side of accepting the person's allegation for purposes of deciding whether a burden on liberty exists" (Feldblum 2008, 143; see also 149), in her final disposition she implicitly admits that no solution is truly neutral. Nondiscrimination laws including sexual orientation are in her view neutral, as we have seen, not only because they suggest that this status is neither bad nor good, but also because sexual orientation is as morally neutral as hair color (Feldblum 2008, 141) and therefore discrimination on the basis of either is wrong. When identity liberty concerning sexual orientation conflicts with belief liberty concerning religion, however, "I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed an LGBT equality law, with no exceptions for individuals based on belief liberty, has acted arbitrarily or pointlessly" (152). Establishing a baseline allowing people with a morally neutral characteristic to live openly, safely, and with dignity in her view reflects the public good.

Feldblum does make a key point, however, that applies to the consequences of discrimination for both economic and dignitary justice. She states, "The touchstone for any approach, I believe, needs to be whether LGBT people might be made vulnerable in too many locations across society" (Feldblum 2008, 154). Although the "initial denial" of service is an "assault on my dignity" (153), surely the ubiquity and frequency of such denials matter. One of the most pernicious aspects of Jim Crow was that African Americans could *not* go to another establishment to secure a job, an apartment, a hotel room, or a restaurant table; commercial enterprises presented a united front. Amy Gutmann suggests, "Discriminatory exclusion is harmful when it *publicly expresses* the civic inequality of the excluded even in the absence of any other showing that it *causes* the civic inequality in question" (Gutmann 2003, 97). That is, when public authority sanctions the unequal treatment of individuals who are similarly situated, this carries consequences for both economic and dignitary justice. Like Feldblum, I view as problematic the idea that LGBT persons as a group should hypothetically wonder as they attempt to live their lives whether their pursuit of the next job, apartment, hotel room, or restaurant table will

be unsuccessful because of their sexual orientation. It is here that antidiscrimination laws including those regarding sexual orientation afford "protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society" (*Romer v. Evans*, 517 U.S. 620 [1996], at 630–631), in the words of Justice Anthony Kennedy. Therefore, we still confront the dilemma of how to honor religious belief and practice without risking the kinds of insecurity for LGBT persons that Feldblum details. How may this conflict be negotiated? It is to this question that I now turn.

5.2 Positive Neutrality at a Price

Although the claims of equality and those of religious faith may seem to represent two conflicting ethical visions of which only one may "win" (Stern 2008), Robin Fretwell Wilson seeks to draw lessons for religious freedom from the health care context. Once decisions such as *Griswold v. Connecticut* (381 U.S. 479 [1965]) and *Roe v. Wade* (410 U.S. 113 [1973]) transformed "noninterference rights into affirmative entitlements to another's assistance" (Wilson 2008, 79), health care conscience clauses were developed to protect both institutions and health care providers from being forced to participate in the provision of controversial services such as abortions or emergency contraceptives thought by some to be abortifacients (82–85; 91–93). Parallels with institutions and individuals who balk at supporting or facilitating same-sex marriage where it is a legal entitlement are clear. For Wilson, "The operative question is whether . . . a refusal would erect a significant barrier to a couple's ability to obtain and enjoy all the privileges and benefits of marriage" (97–98). This question parallels Feldblum's concern that those with minority sexual orientations not be rendered vulnerable in too many situations, or, to paraphrase *Romer*, in too many of the transactions of ordinary civic life in our society. In Wilson's view, "governments could permit public employees to refuse to perform a service *only* if that refusal does *not* stand in the way of exercising a fundamental right" (81), which to her implicitly encompasses marriage to the person of one's choice.

For Wilson, county clerks in the civil sphere who issue marriage licenses and in some states solemnize marriages need protections against sanctions for conscientious refusals. She argues that regarding clerks who only issue licenses, such protections are not incompatible with ensuring that refusals "would not erect a significant barrier to a couple's ability to marry" (Wilson 2008, 97–98). Clerks' offices should keep lists of clerks with religious objections and direct same-sex couples to those without them. In remote locations or where all clerks object, refusals to process licenses may lead to delays, but not to a denial of marriage itself. In all cases, objectors should be required to provide information about where to find other clerks who will issue licenses. Although this disposition will engender criticisms from both sides, Wilson believes that the interests of religious persons who never anticipated

same-sex marriage but who are now forced to provide a service to which they harbor moral objections outweighs the inconvenience of couples being asked to consult a different clerk (99).

Regarding judges or county clerks who also solemnize marriages, on the other hand, a refusal may constitute a denial of an entitlement by the state, although here again, Wilson suggests, clerks' offices should try to provide as seamless an experience as possible to same-sex couples (Wilson 2008, 99–100). Laycock suggests that judges may exercise discretion as they generally perform weddings only as favors for acquaintances (Laycock 2008, 199–200). In 2009, however, a Louisiana justice of the peace resigned his office following criticism of his refusal to marry an interracial couple, a refusal he said was routine because he worried about the futures of such couples' offspring. Although the justice maintained that he could pick and choose amongst couples he might marry, others maintained that officials legally obligated to serve the public must serve *all* of the public ("Louisiana: Justice of the Peace Resigns" 2009, A15; "Groups calling for justice's resignation" 2009, A7). Remarked Bill Quigley, director of the Center for Constitutional Rights and Justice in New York, "Maybe he's worried the kids will grow up and be president" ("'Ugly Bigotry': Official won't marry interracial couple" 2009, 9). Those for whom the default position is not to solemnize marriages may exercise greater discretion than may those for whom the default position is to marry couples routinely.

Wilson also addresses "second-order conflicts," or those in which private individuals representing neither church nor state refuse to facilitate the contraction of same-sex marriages or the conduct of ongoing marriage relationships. Although state legislatures must address these situations on a case-by-case basis, she does not think that refusals of service by some wedding reception sites or bakeries will cause hardships akin to the denial of benefits such as family medical leave or hospital visitations to spouses. In all of these situations, both sides cannot win. Wilson's "live-and-let-live solution . . . provides the ability to refuse based on religious or moral objections, but limits that refusal to instances where a significant hardship to the requesting parties will not occur" (Wilson 2008, 101; see 99–102). For Wilson, a key example of this conflict is provided by Catholic Charities in Massachusetts, which in 2006, after briefly allowing some lesbian and gay parents to adopt children, withdrew from the adoption business altogether to avoid being forced by state law to place children with lesbian and gay parents rather than only with heterosexual married couples. The Catholic Bishops of Massachusetts unsuccessfully sought a legal exemption from the state's antidiscrimination law, an exemption that Wilson thinks might easily have been granted because Catholic Charities handled only 4% of the state's adoptions, many of which involved difficult placements. "In this win-lose situation, Catholic Charities lost, prospective adoptive parents lost, and so did many children in Massachusetts" (102; see also 96; 257–258, n. 212–214). In contrast, before the District of Columbia passed a law permitting same-sex marriages, anticipated controversy concerning Catholic Charities there prompted a city councilman to respond, "Allowing individual exemptions opens the door for anyone to discriminate based on assertions of religious principle. . . . Let's not forget that during the civil rights era, many claimed separation of the races

was ordained by God" (Urbina 2009, A15). These competing statements clearly exemplify the divergent interests in these kinds of situations.

Although he is in substantial agreement with Wilson's case-by-case approach, Laycock makes a point that in application tends to weight equality over religious belief. Outside religious bodies themselves, "conscientious objectors to same-sex marriage can refuse to cooperate only when it doesn't really matter because someone else will provide the desired service anyway. But when a particular merchant's refusal to cooperate might actually delay or prevent the conduct he considers sinful, then he loses his rights and has to facilitate the sin" (Laycock 2008, 200). This resonates with Feldblum's concern about "whether LGBT people might be made vulnerable in too many locations across society" (Feldblum 2008, 154). As Laycock elaborates, "Religious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values" (Laycock 2008, 200). More LGBT people and same-sex couples undoubtedly live in Greenwich Village than in the Bible Belt, Laycock continues, but their rights must be equally protected in both locations. In practice, "that may mean that a religious merchant in the Bible Belt sometimes has fewer rights than a religious merchant in Greenwich Village. That may seem ironic, but it isn't; this whole proposal is about protecting minorities. The same-sex couple needs more legal protection in the Bible Belt, and the conservative believer needs more protection in Greenwich Village" (200–201). I agree with Laycock's reasoning. Although the special place of religion in American culture, not to mention the free exercise clause of the First Amendment, points to the wisdom of religious exemptions, free exercise means only that I should not be compelled to engage in practices that violate my conscientious beliefs. It does not mean that I should possess the ability to control the legal environment in ways that prevent others' practice of *their* conscientious beliefs.

A case-by-case approach is more difficult to negotiate and to administer than broad rules that almost universally favor either equality over religious belief or vice versa, but it also opens the door to greater creativity. Regarding controversy over same-sex marriage in Washington, D.C., some note that Georgetown University, a Catholic university in Washington, D.C., and the Roman Catholic Church in San Francisco have defined their employee benefits broadly, allowing employees to designate eligible adults other than spouses as recipients, called "spousal equivalents" in San Francisco. "These agreements preserved the beliefs of the church and the legal rights of the employees, without compelling the church to explicitly recognize gay marriages or domestic partnerships" ("The Church and the Capital" 2009, A24). Interestingly this type of compromise exemplifies the kinds of legal changes often supported by skeptics about marriage, who advocate reallocating the material benefits that typically accompany it in ways that support family diversity over more rigid traditional arrangements (Polikoff 2008). It exemplifies one way of balancing rights of conscience with economic justice, and it definitely prevents the sort of zero-sum game that characterizes many dispositions of these conflicts.

In 2004, for example, the California Supreme Court ruled that although Catholic Charities in Sacramento had requested a religious exemption, it must nevertheless include birth control in its employees' medical coverage in that state despite Roman

Catholic objections to artificial contraception. The generally applicable state law requiring employers to provide contraceptive coverage as part of their health plans takes precedence over any incidental burden that this may pose to religious belief and practice. At the time, at least 20 other states had similar laws, and the decision had broad implications for religious nonprofit organizations and hospitals. Although a spokesman for the California Catholic Conference maintained that Catholic Charities is a part of the Catholic Church, the court, however, ruled that Catholic Charities did not qualify as a religious organization within the criteria of a 1999 state law, which stated that a religious employer "must be primarily engaged in spreading religious values, employ mostly people who hold the religious beliefs of the organization, serve largely people with the same religious beliefs, and be a nonprofit religious organization as defined under the federal tax code" (Strom 2004, A12). In 2007, the United States Supreme Court declined on appeal a nearly identical case involving Catholic Charities in Albany, New York (Greenhouse 2007, A18).

As described above with reference to adoptions in Massachusetts, Catholic Charities is a separately incorporated legal entity receiving nearly two thirds of its operating funds from a combination of federal, state, and local governments (Hacker 1999). Before the inception of President George W. Bush's faith-based initiative in 2001, religious organizations could receive public funds only through such separate, nonprofit arms designed to separate the provision of social services from the inculcation of religious values. One of the points of controversy surrounding this initiative is the continuing effort of its supporters to allow religious social service agencies to pursue their religious missions while providing social services and to discriminate in the hiring of employees, both of which I believe should disqualify such agencies from receiving public funding (Gill 2004). Conversely, I agree with Marcosson that religious participants in government contracts or programs should be required to waive exemptions from antidiscrimination laws for which they would otherwise be eligible as the price of their participation. From a funding perspective, then, social service organizations such as Catholic Charities should *not want* to be classified as a religious organization that is part of the larger church!

Although in one sense Catholic Charities is part of the Catholic Church, as a separate legal entity it is *primarily* engaged in providing social services, not in proselytizing or spreading religious values. As such, it does not limit its employment or services to people who share its own religious beliefs (Steinfels 2004, A12). The fact that Catholic Charities in Massachusetts initially allowed gay and lesbian parents to adopt children under its auspices shows that at least some of its clients did not share its religious beliefs. Regarding employees, separately incorporated social service agencies, especially those that receive public funding, will generally not limit their hiring mostly to those "who hold the religious beliefs of the organization." Even if they did, moreover, what does it *mean* to share an organization's religious beliefs? If this means that they are Roman Catholics, many otherwise practicing Catholics do not agree with the church's stand on birth control. Do dissenting Catholic employees count as those who share the organization's religious beliefs? Finally, employees who are not Roman Catholics and who disagree with the church's stand must live under the authority of religious beliefs to which they cannot assent. President

of Catholics for Choice Jon O'Brien points out not only that "Catholic tradition requires Catholics to follow their own well-formed consciences even if it conflicts with church teaching," but that it also "requires respect for others' consciences. Doctors and pharmacists cannot dismiss the conscience of the person seeking a medication or a procedure to which they themselves may object." Although in the case of contraceptive coverage in insurance plans, the issue is who pays, not whether contraceptives are available, the principle is nonetheless the same. O'Brien concludes with the hope that Catholic bishops "are not suggesting that the only well-formed conscience is one that is in lockstep with their own interpretation of Catholic teaching. That would, in fact, be the antithesis of a well-formed conscience" (O'Brien 2009, 18).

The conscientious beliefs underlying religious organizations therefore also impact the beliefs of individuals who may dissent from them. Just as Marcosson argues that religious participants in government programs should be required to waive exemptions they might otherwise command as the price of their participation, I believe that social service organizations that are separately incorporated legal entities such as Catholic Charities that do not conduct religious services or teach the faith should also be held to this rule. It does not negate the possibility of exemptions as formal neutrality often does, but neither does it grant *carte blanche* to religious organizations and individuals just because they are religious, as in McConnell's version of positive neutrality. As we have seen, McConnell would eschew policies that "foster religious uniformity" and wants government to be "'religion-blind' except when it accommodates religion—i.e., removes burdens on independently adopted religious practice" (McConnell 1992, 175, 177). Individuals, Roman Catholic or not, who disagree with the Catholic social service agency that employs them are burdened in their health coverage because they are not treated the same as individuals employed by secularly based organizations. More important, they are forced into a position of uniformity themselves in the expectation they should not object to living by religious tenets to which they do not assent. If they did assent, they would not be purchasing contraceptives. If in McConnell's view government must be blind to religion except when it accommodates it, accommodating religious organizations and in some cases religious individuals means a refusal to accommodate other individuals who cannot live in accordance with *their* conscientious beliefs. Although they may of course pay for contraceptives themselves, they are still being deprived of "civil enjoyments" that employees of secularly based organizations possess, and are being deprived because of the beliefs of their employers.

As another example, even the provision of public funds for separately incorporated hospitals associated with particular faith traditions imposes costs on individuals. In recent years, a number of secular hospitals have merged with Roman Catholic institutions. Roman Catholic doctrine regarding reproductive health has then been extended to hospitals that formerly provided contraceptives, sterilization, abortions, and varied infertility services, but no longer do so (*Peoria Journal-Star* 2001, A4). In this kind of situations, accommodating the values of religious organizations tends once again to foster uniformity of practice that impacts the conscientious convictions of individuals who do and those who do not subscribe to the beliefs espoused by the

organization. In some geographic areas where medical facilities are sparse, few or no alternatives may exist. Laycock's point that religious dissenters should be able to "live by their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values" (Laycock 2008, 200) is in my opinion as applicable to the provision of medical services as it is to same-sex marriage. Even if one accepted the argument that patients could simply seek an alternative medical provider, many employers mandate the use of particular providers or offer limited choices. Both institutions and individuals should be able to decline to provide goods and services to which they conscientiously object, but they should not control the ability of others to secure goods and services to which they are legally entitled. Some are deprived of "civil enjoyments" because of the religious beliefs of others. As I interpret both Locke and Williams, civil law should not reflect a dominant consensus grounded on beliefs to which many do not subscribe.

In the health care field, Marcosson argues that rather than conditioning funding on allowing medical providers to opt out, the government should on the contrary "condition participation in federal programs (and receipt of federal funding) on the recipient's guarantee that it can and will deliver all medical treatment and services on a timely and equal basis. If the desire of any individual employees (even on the basis of religion) not to participate in that treatment interferes with that goal, then that desire should have to yield" (Marcosson 2009, 152). If individuals want absolute respect for their religious beliefs, he continues, "the answer is to withdraw to a field in which the government cannot use the fact of its own participation to impose conditions that are inconsistent with these values" (153). Marcosson's argument echoes one made by *The New York Times* in 2005 when reports of pharmacists refusing to dispense contraceptives, emergency or otherwise, on moral or religious grounds first surfaced around the country. Some pharmacists were lecturing their would-be customers on their morality. Additionally, pro-life groups could pressure many pharmacies in an area to refuse service or not to stock emergency contraception, thereby limiting the availability of services and posing a choke point as discussed above. Overall, "This is an intolerable abuse of power by pharmacists who have no business forcing their own moral or ethical views onto customers who may not share them. Any pharmacist who cannot dispense medicines lawfully prescribed by a doctor should find another line of work" ("Moralists at the Pharmacy" 2005, WK12).

Columnist Ellen Goodman notes the potential slippery slope here. "If the pharmacist is officially sanctioned as the moral arbiter of the drugstore, does he then ask the customer whether the pills are for cramps or contraception? If he's parsing his conscience with each prescription, can he ask if the morning-after pill is for carelessness or for rape? For that matter, can his conscience be the guide to second-guessing Ritalin as well as Viagra?" Although Goodman sympathizes with doctors who wish to be exempted from performing abortions on moral grounds, she believes that pharmacists are in a different category. "But there are other ways to exercise a private conscience clause. Indeed, in a conflict between your job and your ethics, you can quit. It happens every day." Concludes Goodman, "What the pharmacists and others are asking for is conscience without consequences. The plea to protect

their conscience is a thinly veiled ploy for conquest" (Goodman 2005, A4). Columnist Donald Hermann asks us to consider physicians who might refuse to provide antiviral medications for an AIDS patient because he believes that the disease punishes homosexuality, or who refuses pain medication for a dying patient because this might hasten death and therefore violate his conscience (Hermann 2005, 16). Although the Food and Drug Administration in 2006 approved the nonprescription use of emergency contraception after years of procrastination ("Easier Access" 2006, A22), the provision of health care nevertheless remains a fertile field for continuing tension.

A final issue for consideration is the fairness of suggesting that those with moral objections to certain facets of their jobs should simply "withdraw," as Marcosson argues, to a venue that does not require objectionable activities, or perhaps to a different line of work altogether. Individuals, whether medical professionals or bed and breakfast owners, have invested money and time in their businesses. Those embarking on a career cannot always anticipate some of the situations they may face years down the road. The onus is on them as individuals, however, to weigh in the balance the relative strength of their competing commitments and to decide which takes priority. There are many who view their occupations, even secular ones, as callings in which they strive to serve humanity or other values higher than that of ensuring that there is food on their tables. There may be some who believe that on balance, the good that they can do by continuing outweighs the distasteful activities in which they may occasionally have to engage. Others may see a line in the sand that they believe they may not cross, and in that case, they may decide of their own volition to withdraw to another venue or a different field of activity. In some lines of work, people can anticipate in general that they may have to pursue activities they find objectionable. As a university professor who teaches political philosophy, for example, I know that I must teach Marx and Engels as part of the canon even if I hypothetically adhered to religious beliefs that dictated that I not expose impressionable students to dangerous theories that might cause civil unrest.

In sum, I believe that conscientious belief, even when broadly defined, needs to be taken seriously. Nevertheless, although I believe that religious exemptions are advisable in particular circumstances, in win-lose situations the scale must be weighted on the side of equality when the personal conscientious beliefs of some reach the point where they can determine how others may live. Only thus can we maximize the chances that some individuals need not forfeit "civil enjoyments" to which they are entitled because of the religious beliefs of others.

References

Easier access to morning-after pill. 2006. *New York Times*, August 25, A22.

Feldblum, Chai R. 2008. Moral conflict and conflicting liberties. In *Same-sex marriage and religious liberty: Emerging conflicts*, ed. Douglas Laycock, Anthony R. Picarello Jr., and Robin

Fretwell Wilson, 123–156. Lanham: The Becket Fund for Religious Liberty and Rowman & Littlefield.
Galeotti, Anna. 2002. *Toleration as recognition*. New York: Cambridge University Press.
Gill, Emily R. 2004. Religious organizations, charitable choice, and the limits of freedom of conscience. *Perspectives on Politics* 2: 741–755.
Goodman, Ellen. 2005. Pharmacists dispensing morality. *Peoria Journal-Star*, April 11: A4.
Greenhouse, Linda. 2007. Supreme court turns down cases on religious separation. *New York Times*, October 2, A18
Griswold v. Connecticut, 381 U.S. 479 (1965).
Groups calling for justice's resignation. 2009. *Peoria Journal-Star*, October 17, A7.
Gutmann, Amy. 2003. *Identity in democracy*. Princeton: Princeton University Press.
Hacker, Jacob. 1999. Faith healers: Should churches take over social policy? *New Republic* 220: 16–18. June 28.
Hermann, Donald H. J. 2005. Right to treatment trumps health providers's conscience. *Chicago Sun-Times*, May 7, 16.
Laycock, Douglas. 2008. Afterword. In *Same-sex marriage and religious liberty: Emerging conflicts*, ed. Douglas Laycock, Anthony R. Picarello Jr., and Robin Fretwell Wilson, 189–207. Lanham: The Becket Fund for Religious Liberty and Rowman & Littlefield.
Locke, John. 1689. In *A letter concerning toleration*, ed. H.T. James. Indianapolis: Hackett Publishing Company. 1983.
Louisiana: Justice of the peace resigns. 2009. *New York Times*, November 4, A15.
Marcosson, Sam. 2009. The special status of religion under the first amendment. .. and What it means for gay rights and antidiscrimination laws. In *Moral argument, religion, and same-sex marriage: Advancing the public good*, ed. Gordon A. Babst, Emily R. Gill, and Jason Pierceson, 135–160. Lanham: Lexington Books.
McConnell, Michael W. 1992. Religious freedom at a crossroads. *University of Chicago Law Review* 59: 115–194.
Monsma, Stephen V. 2002. Concluding observation. In *Church-state relations in crisis: Debating neutrality*, ed. Stephen V. Monsma, 261–270. Lanham: Rowman & Littlefield.
Moralists at the pharmacy. 2005. *New York Times*, April 3, WK12.
Nussbaum, Martha C. 2008. *Liberty of conscience: In defense of America's tradition of religious equality*. New York: Basic Books.
O'Brien, Jon. 2009. Letter to the editor. *New York Times*, November 22, A18.
Peoria Journal-Star. 2001. Editorial, February 4, A4
Polikoff, Nancy D. 2008. *Beyond (straight and gay) marriage: Valuing all families under the law*. Boston: Beacon Press.
Roe v. Wade, 410 U.S. 113 (1973).
Romer v. Evans, 517 U.S. 620 (1996).
Steinfels, Peter. 2004. Beliefs. *New York Times*, March 13, A12.
Stern, Marc D. 2008. Same-sex marriage and the churches. In *Same-sex marriage and religious liberty: Emerging conflicts*, ed. Douglas Laycock, Anthony R. Picarello Jr., and Robin Fretwell Wilson, 1–57. Lanham: The Becket Fund for Religious Liberty and Rowman & Littlefield.
Strom, Stephanie. 2004. Catholic group is told to pay for birth control. *New York Times*, March 2, A12.
The church and the capital. 2009. *New York Times*, November 23, A24.
Ugly bigotry Official won't marry interracial couple. 2009 *Chicago Sun-Times*, October 17, 9
Urbina, Ian. 2009. New turn in debate over law on marriage: Church sees threat to social services." *New York Times*, November 13, A15.
Wilson, Robin Fretwell. 2008. Matters of conscience: Lessons for same-sex marriage from the healthcare context. In *Same-sex marriage and religious liberty: Emerging conflicts*, 77–102. Lanham: The Becket Fund for Religious Liberty and Rowman & Littlefield.

Chapter 6
Economic Justice in the Oikos: Freedom and Equality in Family Law

Christopher Berry Gray

Abstract This chapter considers two Canadian legal decisions about the effects upon unmarried conjugal partners when their relationship breaks down. In the absence of legislation, the courts compared married spouses' benefits to unmarried at breakdown in order to treat discrimination. The way of parsing discrimination is to determine whether human dignity is sought and achieved by provisions of the law. The two decisions hold that no discrimination and so no injustice arises from differences in benefits. This holding is supported by the argument in this chapter that it makes sense to claim that drawing the distinction on the basis of marriage respects human dignity.

6.1 Relevant Caselaw

Economic justice issues resonate within the family unit. Cases in domestic family law are a localized setting for the competition between civil-political rights and social-cultural-economic rights in the Universal Declarations. Rawls states this competition doctrinally as the difference between the first principle of justice and the difference principle (J. Rawls, *A Theory of Justice*, Harvard, 1975, ch. II, sec. 11). A pair of recent Canadian family law cases has set out this conflict in a piquant way. In a Quebec Superior Court decision *A. c. B*. in summer 2009,[1] the problematic issue in the Supreme Court of Canada case, *Walsh v. A-G (NS)*, [2002] 4 SCR 325, of 7 years earlier reemerged.

[1] *A. c B*. July 16, (2009) QCCS 3210, *droit de famille 091768*. Names of parties, dubbed "Eric and Lola" in a QC media blitz, cannot be published, since the plaintiff was a 17 year old minor when the union with her then 36 year old Canadian partner was begun at her domicile in Brazil. Plaintiff claimed in her own right $56,000 per month, a lump sum of $50M, and a share of the residences and acquests.

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In both cases the plaintiff is a woman who lacks access to legislatively mandated benefits after the breakdown of her conjugal union. Canada is a federal system and family law is within the jurisdiction of each Canadian province. In Nova Scotia an unmarried union is called common law marriage, and in Quebec it is termed a union between factual consorts or a *union de fait*. When a common law marriage in Nova Scotia breaks down there is no legislation that protects the partner's interest in the family residence and provisions for support which, were one legally married, would be guaranteed by the Nova Scotia Matrimonial Property Act. Similarly, the Civil Code in Quebec that provides for alimentary benefits to legally married people when their relationship breaks down does not provide them to those who are unmarried. While the Nova Scotia legislature filled this gap even before final judgment, as all other provinces now do, the provisions of the Quebec Civil Code remain the same.

6.2 Legal Issues

The central complaint of Lola and Walsh is this: legislation that benefits only married partners upon breakup is discriminatory because that law values married partners more than unmarried partners. The rigid grid for analysis of discrimination structures Bastarache J.'s majority opinion in *Walsh*, as well as L'Heureux-Dubé J.'s dissent there, while Judge Carole Hallée's judgment in Quebec is content to finesse agreed points of this analysis, so as to attend to the core dispute. In doing so, Hallée J. decides against the plaintiff because there was no pre-existing prejudice against factual consorts in Quebec, because the deprivation of personal liberties between party A and party B is disproportionate, and because there is no evidence as to deprivation of property (p. 222).

The plaintiff claims that coverage of benefits is discriminatory because, when the groups of married and unmarried partners are compared to find reasons for their different treatment, no such reasons appear except their differing marital status.

The point, then, became to show that the comparator groups of married and unmarried are, in fact, significantly different. The dissent in *Walsh* rehearsed the grounds why they might not be different: the same needs at the end of the union, namely, the economic deprivation; or the same incidents throughout—care, commitment,

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She had already won shared child care, child care payments of $36,260 per month ($411,122 per year), cost for two round trips to Brazil per year for her and their two children plus $1,000 per day there, all schooling, health professionals, two nannies, a chauffeur and a cook, a lump sum of $250,000, and the Lexus. When the Westmount home proved too difficult, her partner supplied her a $2.5M replacement with a half million more for renovations. Her court costs of $1.5M and experts' fees of $1.1M were paid by a friend of the court. The Court of Appeal heard the appeal 19 May 2010, (2010) QCCA 1978, *droit de famille* 102866, and reversed the SC judgment. The Supreme Court of Canada agreed to hear the Quebec government's appeal of this early in 2012, as *A.G.Que. v. A.,* docket no. 33990.

endurance. Need at the end of the union appeared to be especially relevant; for if the statutory provisions were taken to be remedial, then the need was just what the remedy was addressed to. Incidents during the union were allowed to be similar, despite evidence that unmarried unions did not last as long nor were as fertile and good for children. *Walsh*, however, found the apt comparator group to broken conjugal partnerships to be not broken married ones, but unbroken conjugal partnerships.

Instead, the Quebec court took the difference between the two groups of beneficiaries at breakdown to have occurred at the beginning. Marrieds exercise a choice for a status that carries with it the obligations to share economically; unmarrieds choose not to. They exercise this choice freely, and there is impedance to this freedom when these obligations, intentionally refused, are imposed upon the unmarried partner. There are other ways to achieve these obligations, without marrying, whether by opting into civil partnerships, or by constructing a contractual regime that mimics the marital property regime.

6.3 Philosophical Issues

6.3.1 Discrimination and Equality

The distinctive free choices, then, are what make the two comparison groups different, and keep the distinctive statutory regime from being discriminatory. In fact, insisting upon the freedom not so much to enter a married state, but rather not to enter it, rebuts the very feature that discriminatory legislation must involve. Discrimination needs to be judged by, among other features, its assault on the human dignity of persons not thought worthy to enjoy the same benefits that others do. But the distinction of marrieds from unmarrieds in terms of the recognition for their freedom not to have a commitment imposed upon them involuntarily is taken, instead, to be a support for their human dignity in an even more central manner.

Rebuttal arguments appear quickly to address the claim that marrieds choose freely to take on obligations, and that unmarrieds choose freely not to do so. Most people marrying do not even have economic obligations in mind, indeed more often they do not know them at all, much less choosing them freely. It can be presumed they would marry with more enthusiastic choice if those obligations are not in view, and with even more if they are not in place at all. Much the same could be said of unmarrieds. On the other side, many unmarrieds do not choose to be unmarried to their partners; without even counting the impediments to marrying for legal, cultural, economic and religious reasons, marrying requires both parties to choose it, so that one who would freely choose to marry cannot do so unilaterally, without the other partner's agreement; freedom to choose to take on marital obligations or not to is often absent between conjugal partners.

The opposite argument now comes into view, namely, that focusing on the freedom to choose not to marry, even if it can be confirmed, is not the appropriate way

to show respect for the dignity of human persons. The appropriate way, rather, is to meet their needs equally, needs which arise as the result of the choice not to marry but to remain factual consorts outside of the mutual obligations of marriage. Ignoring these needs because of the choice of not exercising the freedom to marry, but exercising only the freedom not to marry instead, appears to demean the dignity of persons to be deprived for having made that choice.

One answer which changes the orientation is that factual consorts have given no signal as to what the obligations binding the distribution by each of his or her own property are to be, what debts it is burdened with, when dealing with one's property among third parties. This approach gives prominence not to reporting what parties have actually done, but to the knowledge that needs to be conveyed in the third party relations to others in their society in order to function well. This pragmatic angle does not displace the point of principle, however, since it lies in the legislator's power to arrange a specific regime for unmarried consorts which does not equate the married regime and its obligations.

It is possible to appreciate the argument for dignity from freedom by itself, and also to appreciate it comparatively to the argument for dignity from equal treatment of needs. In the first strategy, a successful preservation of freedom to take on obligations or refuse them will be sufficient to remove the charge of discrimination from the disposition of resources under the alimentary legislation. In the second strategy, once each respect for dignity is set out, it will remain to determine which respects dignity more. The proportionality stage of treating discrimination handles this argument. That inquiry looks not only at whether there is a rational link between the legislative action and the end to be attained, but also the comparison of greater losses between the two parties.

Dutil J. at the Court of Appeal makes much (pp. 64–67) of Gonthier J.'s distinction in *Walsh* (pp. 203–204) between alimentary obligations and patrimonial obligations, that the former are determined by need as social obligations, while the latter are determined without consideration of needs and on the basis of entitlement. But Dutil J. draws from that premise the reverse conclusion to the correct one. She takes this to show that the alimentary obligations are owed by one conjugal ex-partner to another, as though their relation was the contractual one of patrimonial affairs; whereas the premises imply that whatever alimentary obligation is owed, is owed not as a personal obligation, but as an obligation of social solidarity. And not as social solidarity within the family (pp. 140, 144), which by definition is missing, but as social solidarity of vulnerable Canadians with others less so. That is, if anything is owed, it is owed as a matter of public care for vulnerable people, and not as one contractant to the other. The distinction is clearest in the words of Bastarache J. from *Miron* (p. 261) cited by Dutil J. (p. 61) to distinguish relations between the couple's two partners from the relations to a third party, in that case an auto insurer. The same is true in *A. c. B.*: the couple's alimentary needs, in the absence of contract marital or otherwise, is a social obligation falling to social fulfillment, that is, from the public resources and not the personal resources of one ex-partner. As a result, Bastarache J.'s conclusion there (p. 264) follows as well, that the objective of legislating only for third parties is to preserve freedom of choice. The legislative restraint does not occur because this partnership is less worthy of respect.

6.3.2 Public and Private Benefits

This set of strategies might seem moot, since legislation had already imposed some benefits upon partners who did not marry in order to take them on: in Nova Scotia, the public insurance provisions of support for unmarried partners; and in Quebec, their provision in statutes outside of the Civil Code. But this is not the quandary here, for the questions here bear upon partners' obligations toward each other, and not government insurance toward both partners. Here, once legislatures have required that private benefits be paid by and to some and not others, the courts remain tasked to find whether that is discriminatory. The discriminatory character of the legislation loses its centrality when the issue before the courts is whether there are additional ways for unmarried couples to achieve the benefits of married ones, namely contractual regimes privately constructed or civilly partnered. Recall this is a question not of equal access to governmentally ensured benefits, the dealings of the partners with a third party, but of the provision for benefits by one partner to another. The obligations in question are for one partner to provide support to the other, not a social assurance scheme designed by government and paid to partners out of public funding.

6.3.3 Benefit and the Structure of Choice

The vocabulary in which these points are discussed can be articulated in a set of expressions consistent with the usage by the several judges. Will is a faculty for making choices. Choice is the exercise of that faculty. Freedom is a feature of choices when coercion is absent. Autonomy and self-determination characterize such choice. Free choice is the name for this exercise. Liberty is the Charter value in which free choice is stated. Dignity of the human person requires free choice as one of its requisites (equal recognition of needs being another), and protection of free choice as its project. Unlawful discrimination involves treatment which (among other features) does not respect human dignity, but disrespects it.

The cases rouse two issues related to this discussion, first, how the exercise of free choice relates to its object and, second, how the law treats free choice by deeming it to occur even if the exercise is unclear.

6.3.4 Choice and the Intentionality of Object

On the first issue, choice is taken to relate to its object by intention, which is some kind of apprehension: grasping the object, not cognitively but in a way that puts it in relation to the chooser. The cases do not raise issues of standard philosophical discussions: issues such as what becomes of choice when there is not an alternative object available for apprehension at all (impossibility), or accessible to these parties

(no alternative). The main question, rather, is whether the choice of one object involves also the choice not to choose its alternative object or simply the fact of not choosing the alternative object.

Let us assume that the objects are inconsistent with each other, such that one cannot at once be choosing both the object of choice and its alternative as well. If one cannot exercise a grasp over the alternative object, alternative in the sense of the preceding paragraph, the failure to grasp it is not necessarily a grasp of a negative object, i.e., a grasp of the unavailability of the alternative object, instead.

One must query whether that works in reverse, so that by not choosing one object, one is choosing its alternative; or whether not choosing one is compatible with not choosing the alternative either. The chooser may remain indifferent before both objects, and remain inactive before them so far as the choice between them is concerned.

What of the state in which one finds oneself thereafter? That position is not indifferent; one finds oneself in one position or the other. Is that position to be described as unchosen but a mere outcome of circumstances? That is unsatisfactory, for one of those circumstances is having not chosen, having chosen not to choose between the alternatives, in fact.

These observations relate to the issue in family law because the married partner--let us assume for this first branch of the question--has chosen to assume the married status' obligations. Formally that is not equivalent to choosing not to remain unobliged in these respects, even though no longer being unobliged is a logical outcome of the choice which is made. The two attitudes, considered solely as attitudes, are compatible with each other, and do not imply each other.

Consider the unmarried conjugal partner, and whether there is an asymmetry in choice there. The unmarried has not chosen to marry, that is clear. It is less clear that s/he has chosen not to marry, and even less that s/he has chosen to be unmarried as a partner. Choosing to be a conjugal partner who does not marry is not the same as choosing to be an unmarried conjugal partner. On the part of marrieds, they do not choose not to be unmarried partners, even though they are not unmarried partners. What unmarried partners choose to be is to be partners, cohabitants conjugally.

Is there, then, on their part no dignity of free choice not to be bound by marital obligations, since that is not what they choose; nor in turn any loss of dignity by their exclusion from the alimentary and domiciliary obligations between married partners? The court provides justification for the exclusion by citing evidentiary considerations: marrieds take an unequivocal step by public choice to become married. Although perhaps marrieds do not choose the support obligations that "go along with" marriage, surely unmarrieds do not. Do unmarrieds choose instead the freedom from these obligations? Perhaps so; but surely marrieds do not choose freedom from these obligations. It appears from this evidentiary ground that unmarrieds may not, by their choice to partner, have exercised a choice which requires respect by excluding them from marital obligations One does not know. If they have exercised that choice, then the defense against discrimination is both needed, and successful. If they do not exercise that choice, then neither is their free choice interfered with by holding them to these obligations, nor is their dignity undermined by imposing

these upon them. Not only is there not the defense against discriminatory exclusion which the courts found to be present; there is no need for it either.

6.3.5 *Choice by Deeming*

The conclusion changes, however, when the more realistic object of choice is examined.

What "goes along with" free choice cannot be passed without notice. Whatever it is that partners choose in the reality of their acts, they do choose more than that, as well. It is a commonplace that exercising appetite differs from exercising cognition, in that appetite when acted upon seizes the object in its entirety, the object as it exists, its better and its worse, unlike our grasp in cognition of only some dimensions of the object, and its preparation for appetite of only what appears the better. The commonplace receives some application when choosing to marry involves choosing to be obligated toward a partner not only for the partner's good looks but also throughout his/her alcoholism. Less naturalistically, when choosing to marry, the alimentary obligations of wealth-sharing go along with it. This is part of the structure of choosing, so it is not inappropriate that choosing not to marry carries with it, as not incompatible with the free choice, the free choice not to take on those economic obligations.

This can be expressed by saying that one is deemed (*réputé*) to have accepted or refused those obligations, along with the free choice of marital status. But this is not a case of the deeming which constructs legal fictions, as when Canadian lumber transactions are deemed American for President Obama's protectionist purposes, or when a child is deemed not to have been a person for inheritance purposes for not being born or being born non-viable. Deeming the taking or rejecting of alimentary obligations to be an object of free choice is, in fact not in fiction, to impart content to the free choice that is made when a marital status is selected, whichever it is. The partner's ignorance or inattention to these makes no difference to the reality of the choice.

This may appear untrue when it concerns legal obligations resulting from legal constructions instead of the more naturalistic examples of deemings. For the consequences are attached by legal construction to a legally constructed institution. That is to say, those consequences do not have to be there; marriage legally constructed without any alimentary obligations is surely conceivable, and probably exemplified in some legal culture. But neither is the institution to which they are attached necessarily a legal construct. Even though marriage is not a product of law and is that to which law attempts to attach appropriate conditions, activities and consequences, in order to realize the ubiquitous phenomenon of a legally privileged sexual relationship, still there need be no such legal construction at all. Marriage may remain socially privileged, even when not legally privileged. If true, does this mean that alimentary obligations are not part of the marital regime, so that they need not be chosen freely when one chooses to marry, and freely not chosen when one does not choose to marry?

There is no reason that this conclusion follows. It is a different sort of case from attributing normative willfulness to criminal action done with some excuse which impedes conscious choice, but is still considered too outrageous to be tolerated: "s/he ought to have known." In that case the choice of unsociable conduct cannot become more informed by this normativity than it is in fact, while in the choice to marry or not the choice becomes less informed but not less free when more of the incidental obligations remain unknown to the chooser.

6.3.6 Protection of Autonomy

Once not having chosen to be married has been accommodated as above to having chosen not to be married, the upshot is that the free choice to marry and the free choice not to marry involve not only the marital status, but also the incidents of either status, the presence or absence of the obligations to share goods. These incidents are chosen as fully in either. In turn, the omission of choosing to marry becomes, in the circumstances where the issue is relevant to raise, namely, conjugal cohabitation, equally as autonomous an act as is choosing not to marry.

Calling this autonomous act an omission does not strip it of its intentional object, both the incidents in anticipation as well as those which are not anticipated as shown above. Omission is the absence of an act, but one for which a person is held liable, since s/he is expected to engage in the doing or refraining for which one is liable. There is no expectation for fulfillment of a duty involved with not choosing to marry. Even if this negative act is rightly called an omission, it remains an act of omission, not an absence of act.

The range of choices deemed or actual that the unmarried person is understood not to have made is not unbounded, however, as it might appear from Aristotle's assertion that definition cannot be negative since the excluded properties are unmanageably numerous. In our case, one who chooses not to marry does not choose not to engage in an indefinitely large range of possible choices. Set aside the choices having no relation to marriage; an unmarried is not taken to have chosen not to park red sports cars on the north side of the street. That does not belong to the relevant domain for choices unlike the incident of not paying alimentary support. Even in contexts akin to marriage, not all choices not to act are made, such as choosing not to carry out the garbage Monday mornings, or not to buy the partner generous life insurance. Others are; and child support is imposed as an obligation on unmarried parties.

In all of these cases, then, the relevance to our question is that there remains a free choice whose protection is equally as indispensible to protection of the dignity of the human person, as is the protection of the free choice to marry. That is to say, there is protection, and no infringement upon the dignity of the person, by protecting the free choice not to marry or the omission of choice to marry, and to assume or to avoid the obligations consequential upon that choice.

6.3.7 Priority of Respect for Freedom, or for Consumption

The policy advantages from imposing this position are arguable; but the power to do so has now been immunized from accusations of violating equality between persons by discrimination. The remaining question has to do with the importance to be given to this protection. That is to say, is free choice or the provision for needs the more pressing achievement of equality? If neither is, then how can proportionality be invoked in order to assign priority? What must be noted in this query is why the provision for needs is considered as potentially a Charter value at all. It is not because providing for needs is itself a matter of rights under the Charter (*Gosselin v Quebec*, [2004] 4 S.C.R. 429, but with four written dissents), but because differential provision for needs has the liability to be considered discriminatory. Not even the protection of property already in place is guaranteed by the Charter, much less the protection of property not yet acquired or some present entitlement to its future acquisition. Taking this as the situation, the proportionality phase of the analysis for determining discriminatory behavior would have to set, against the achievement of rights, some other unprotected achievement, and limit the protected value for the sake of that unarticulated one.

It would take an amendment to the Charter to raise and reassign a constitutional property right, such as the obligation to share goods with the conjugal partner. Without this change, the provision of an alimentary right amounts to a reversed discrimination, since one's choice to remain unmarried becomes the reason for his or her obligation of support. If alimentary support for a conjugal partner is taken to be a requirement of the law, it could not be waived, since to do so would be to make the alimentary obligation no longer a matter of free choice for other participants, nor respect the human dignity of that choice. Choosing to be unmarried but conjugal would allow a private person to legislate this obligation upon others. While one may waive the alimentary right for oneself if it were contractually provided, one cannot do so for other unmarried conjugal partners, which would be what would happen if approved, since this would be provided legislatively. All partners would have the obligation of alimentary support imposed upon them.

In the Quebec case it is clear that the plaintiff wanted to marry, and was refused; whether that is the case for the Walshes does not appear clearly, although they, too, had several children and purchased a home. This makes the Quebec plaintiff's attitude toward marrying and acquiring alimentary entitlements seem an irony. She has a free choice that she cannot waive, but also cannot exercise since the mutual agreement needed for the formation of the marital contract is missing. It is, however, only an apparent irony, not only because the possession and the exercise of a right are distinct, but also because her free choice remains: the free choice not to be in this conjugal partnership at all, and thus be free of obligation. Conjugal partnership must remain ill-defined, because being ill-defined is its non-marital character, among the several usual features of co-residency, sexual relations, shared homemaking and others that pretend to define it. This is true not just at the time of the

hearing when they are not in fact partners any longer, but also at the beginning of the 7 years their union endured, as well as at every moment within it, when separation did occur several times. This is more ultimately the free choice which is being protected: not just the free choice not to marry, but the free choice not to be in conjugal union at all. And that free choice, to be in or not to be in a conjugal union, is not one upon which the chooser depends for any co-contractant's agreement, unlike the choice to marry or not.

Marrying and conjugal partnering are not disconnected. As a consequence, neither is the free choice to marry disconnected from the free choice to partner conjugally. In turn neither is the free choice not to marry disconnected from the free choice not to live conjugally. While not synonymous, these choices are gradations of each other. The free choice not to marry is dependent upon the free choice not to partner conjugally. The choice not to live conjugally is within the domain of alternatives to the choice to marry. There are many non-exclusive contrasts compatible with not being married, such as being a pet owner or preferring chocolate, which have no specificity conjugally at all. The only exclusive contrast to being married is being non-conjugal, because marriage is not intelligible without its being conjugal. So plaintiff's freedom not to cohabit is remedial to the difficulties she had in exercising her free choice not to marry due to the difficulty of exercising alone her free choice to marry. Although she cannot marry, she can live non-conjugally, if she so chooses.

Although terminology has varied throughout this study, between approaching unwed union as status or as contract, that usage should not affect the outcome of the study. For both the definitional fixity of status and the volitional fluidity of contract are limited and so hospitable to claiming that the choice not to marry is a free choice and that dignity is respected by placing alimentary obligations only upon those who have chosen them by marrying. The variety of conjugal statuses is not so great as to confuse the landscape; but refusal of alimentary obligation is a defining factor among them. Other features are incidental, and are not important by their presence, nor problematic by their absence. The contractual regimes for unwed union are not so open to variety that they lose the particularity of conjugal union. While the terms of contract are innumerable, those which particularize terms for conjugal union are, as other contracts are, subject to intrusion by government for the sake of ensuring no harm to public benefit.

6.4 Policy Issues

The broader problematic feature of the Court of Appeal judgment is that it disavows what serves as the prominent aspect of Quebec's approach to equal respect. Superior Court had laid out extensively (pp. 99–142) the many occasions this issue of free choice had been studied by Quebec legislative committees. It was no accident that, in the option of valuing free choice not to marry against alimentary obligations toward the unmarried partner, the option had repeatedly turned out in favor of the former.

It was no accident because the alternative was clearly envisaged; it was not overlooked, but was uniformly rejected as the dominant value provincially. Particularly in the report of Dr Roy which the court accepted as relevant and sound (p. 99), the numerous occasions on which this happened give the lie to the claim that all this is a formalism and abstraction that doesn't meet the concrete reality of figuring equal rights. Legislative committees in 1980, 1989, 1991, 2002 and especially 1996 had considered these options, and had settled on upholding free choice not to have marital obligations imposed involuntarily, that is, to keep some distinction between marrying and not, with some difference that could be chosen by potential partners.

Quebec's social reality is not defined by the observation that one in three couples has to contract to get alimentary rights, as Dutil J. urged (p. 144). Its social reality is that women and men do not tolerate being forced involuntarily to marry. If marrying is defined by assuming alimentary obligations, then that is part of the package that is needed to marry, and that is rejected rightly in choosing not to marry. It doesn't have to be that marrying involves alimentary obligations for the partners; nor does it have to be that only marrying involves alimentary obligations for the partners. But this is a matter of policy, not of a constitutional right to be free from discrimination. And in matters of family policy simply, Quebec's repeated clear choice trumps: to identity equality rights in conjugal relationships with equal freedom of choice to take on alimentary obligations, or not to do so.

The Superior Court decided rightly in *A. c B.* that legislation placing an alimentary obligation upon only a married partner is not discriminatory toward an unmarried partner, since respecting the dignity of a partner choosing not to marry is both a bona fide obligation upon the legislator, and is more pressing than respecting the dignity of an unmarried partner needing maintenance. The Court of Appeal decided wrongly in reversing the Superior Court's judgment. The Supreme Court of Canada's judgment is anticipated to rectify this.

Part III
Private Property, Free Market and Economic Justice

Chapter 7
Rights and Economic Justice in Nozick's Theory

Rex Martin

Abstract In his book *Anarchy, State, and Utopia* (1974) Robert Nozick developed a well-known theory of natural rights understood as side constraints. In a situation in which there was no government (a state of nature, so to speak), individuals would have to protect their fundamental rights on their own, typically by utilizing mutual-protection associations. These ideas, side constraints and protection agencies, are discussed in Sect. 7.2. In the course of his argument Nozick introduces a second kind of natural right—the procedural right (the right to protect or enforce one's basic natural rights on one's own). But such rights are very different from the side-constraint protected natural rights that Nozick had discussed initially. Procedural rights are discussed in Sect. 7.3.

As regards the protection of rights Nozick claims that no state more extensive than the minimal state can be justified. His argument for this claim proceeds in two stages. The first stage involves just transfers between individual persons; at some point, second, such transfers presuppose the just acquisition (the appropriation) of something previously unowned. Nozick's defense of the minimal state and his account of the two key ideas, just transfer and just acquisition of holdings, involved in that defense are taken up in Sect. 7.4. The chapter then develops (in Sect. 7.5) four main criticisms of Nozick's theory. A short conclusion to the chapter follows in Sect. 7.6.

7.1 Introduction

In the period after the contemporary revival of political philosophy (a revival that began sometime in the mid-1960s), the leading counterweight to Rawls-type liberalism was provided by Robert Nozick (1938–2002). Nozick's theory (though

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indebted both to Kant and to Locke) was firmly planted in the tradition of laissez faire liberalism, emphasizing personal choice, a robust array of economic liberties, including freedom of contract and a strong right of private property in the means of production, free economic exchanges (including large-scale markets) unregulated by government, and overall a minimal role for government.

In his book *Anarchy, State, and Utopia* (1974) Nozick developed a well-known theory of natural rights understood as side constraints. In a situation in which there was no government (a state of nature, so to speak), individuals would have to protect their fundamental rights on their own, typically by utilizing mutual-protection associations. I will discuss these ideas, side constraints and protection agencies, in Sect. 7.2. In the course of his argument Nozick introduces a second kind of natural right—the procedural right (the right to protect or enforce one's basic natural rights on one's own). But such rights are very different from the side-constraint protected natural rights that Nozick had discussed initially. Procedural rights will be discussed in Sect. 7.3.

Nozick argues that no state more extensive than the minimal state can be justified. His argument for this claim proceeds in two stages. The first stage involves just transfers between individual persons; at some point, second, such transfers presuppose the just acquisition (the appropriation) of something previously unowned. Nozick's defense of the minimal state and his account of the two key ideas, just transfer and just acquisition of holdings, involved in that defense are taken up in Sect. 7.4. My chapter then develops (in Sect. 7.5) four main criticisms of Nozick's theory. A short conclusion (Sect. 7.6) follows at the very end.

7.2 Basic Natural Rights and Protective Agencies

Nozick began *Anarchy, State, and Utopia* by saying that "individuals have rights, and there are things no person or group may do to them (without violating their rights)" (1974: ix). Nozick refers to these things that no person may do to another as 'side constraints' (1974: 28–33); such constraints on conduct rule out, primarily, aggressive nondefensive actions that might kill or severely hurt another person.

"Side constraints express the inviolability of other persons" (1974: 32). "The side-constraints view forbids you to violate these moral constraints in the pursuit of your interests" (1974: 29). At one point Nozick even refers—in the context of human affairs—to "the absolute side-constraint theory," which accounts "for all (almost) of the moral judgments we have made" or may have to make (1974: 47). His point in the passage just quoted is a bit eccentric; it brings into the picture not only animals and alien beings superior to humans but as well the usual suspects, human beings themselves. So I will refrain from saying flat out that side constraints are inviolable or absolute and settle instead for calling them simply *very* stringent, very demanding duties (see 1974: 30n).

In a situation in which there was no government, individuals would have to protect their fundamental rights on their own, typically by utilizing mutual-protection associations (Nozick 1974: 12–15). Such an association can simply grow over time, without relying on either social compacts or force, into a local monopoly

(Nozick 1974: 17–22). Such a monopoly (a dominant protective agency, as Nozick terms it) doesn't include or cover literally everyone within the geographical domain it operates in; it protects only its paying clients (but not those independents who live within that domain but are not clients). And it doesn't have a monopoly over the use of force in its domain, e.g., it doesn't control what the independents might do to one another or to outsiders (Nozick 1974: 24–25).

What makes it dominant is that there are no other such agencies competing with it in its area of operation. A dominant protective association has a lot of de facto power. But it is not yet a state (Nozick 1974: 24–25)—for the two reasons just given. How might a state come about (in a way that violates no one's rights)? This is one of the main problems Nozick sets himself to solve.

7.3 Procedural Natural Rights

In the state of nature, individuals have certain 'procedural' rights to protect themselves from violations of or threats against their fundamental rights. A dominant protective agency might well want to curtail the non-clients who live in the area in which the association operates from protecting *their* own rights against the agency's clients (or, for that matter, against outsiders). The agency would do so if it concluded that the exercise by the independents, by the non-clients, of *their* procedural rights of protection sometimes actually harmed the agency's own clients or, even, that such exercises *might* harm them on occasion. Such a conclusion would be drawn, especially, where the non-clients' exercise of *their* own procedural rights of protection often seemed to the protection agency to be ill judged or excessive and thus highly *risky* (or likely to be highly risky) to the rights of the agency's clients. (The independents might rely on ill-behaved guard dogs, or set poorly designed booby traps in dubious locations, or engage in harsh punitive or even preventive raids against nearby outsiders.)

Thus, the agency simply shuts the independents down; it decrees that the independents can no longer use protective force (except in cases of immediate self-defense). But this decree infringes on the independents' procedural rights, which are themselves 'natural' rights. Nozick reasons that such a decree would be legitimate, and thus *not a violation* of the independents' natural procedural rights, only if the agency provided suitable *compensation* to the independents. The compensation would be in kind; the agency would now also protect the independents and their basic rights. Moreover, the agency might add an arrangement whereby paying clients continue to pay the costs of protecting the *poorest* independents. (See Nozick 1974: 26–27; and see 1974: chs. 4 and 5.)

In effect the agency now includes or covers everyone within the geographical domain it operates in and it now has a monopoly over all use of force, within its domain, except for that which is necessary in immediate self-defense. It has ceased to be a mere dominant protective agency; it has become a state. It has become a minimal state, become the night-watchman state. People would be protected--from being killed or seriously hurt by the initiative acts of others, from theft, from being defrauded or having contracts broken, etc. (see Nozick 1974: ix, 26, 162n).

In the course of Nozick's argument he has introduced (in 1974: ch. 5) a second kind of natural right--the procedural right. But such rights are very different from those natural rights that Nozick had discussed initially; the procedural rights are not protected by stringent 'side constraints' on the conduct of other persons, constraints that *forbid* certain kinds of conduct toward the rightholder altogether. Rather, as in the case of the natural procedural rights of the independents, these rights could be infringed and their exercise shut down completely.

7.4 A Defense of the Minimal State: Nozick's Theory of Just Holdings

Nozick believes that no state more extensive than the minimal state can be justified (1974: 149). His argument here (in 1974: ch. 7) proceeds in two stages. The first stage involves just transfers between individual persons. At some point, Nozick's account of just 'holdings' through transfers presupposes the just acquisition of something previously unowned, and this brings us to the second main stage of his argument.

Let us take these stages up in turn. Nozick first suggests a simple scheme for just holdings (in such matters as income or personal property). One is entitled or has a right to holdings where (1) the acquisition of something is justly done and (2) something justly acquired is voluntarily transferred to someone else (Nozick 1974: 160). Nozick's theory says: in a sequence of just acquisitions and just transfers, whatever results is just (see Nozick 1974: 151). Nozick describes this entitlement theory as historical; it "depends on what actually has happened" (1974: 152–153).

Examples of just transfer are not hard to come up with: a gift freely given and accepted, voluntary barter or a purchase with money. Nozick's best-known example of a just transfer is the voluntary purchase of basketball tickets—with the transfer of part of the ticket price from the ticket buyer's pockets directly to the pockets of the league superstar (who's playing in that particular game); Nozick argues for sticking with just transfers such as this in the face of egalitarian and redistributive objections. Nozick's main argument here is that *only* a 'historical' theory involving an unbroken chain of just acquisitions and subsequent just and voluntary transfers is consistent with liberty (see 1974: 160–164).

Now we come to second stage of Nozick's defense of the minimal state. He says that the argument for just and voluntary transfers presupposes (by hypothesis or as an idea of reason) that, at some point, something previously unowned was justly acquired by an act of original appropriation. Here, on this latter point, Nozick draws on Locke, not on Locke's idea of 'mixing' one's labor with that thing nor on Locke's idea of the value added through labor but, rather, specifically on Locke's proviso that "as much and as good for…others" must remain when one takes a previously unowned thing, for example, a parcel of land, from the 'common stock.'

Though the discussion grows a bit dense at this point, it is clear that Nozick's way of reading this proviso imposes a single fundamental test: the test is that somebody's ability to *use* a thing (or to use something like it) is not significantly reduced or worsened by someone else's owning that thing. But where owning--under the specific set of circumstances at hand--involves a marked reduction or denial of use, thereby making the non-owners' overall situation worse, the test is failed. This test is primarily what Nozick means by 'the Lockean proviso.' Ownership is allowed when (i) it passes this test; though it could be allowed even where it fails if (ii) compensation is provided to these non-owners for the net loss they've incurred (see 1974: 175–178). Presumably, the compensation intended here would be in *kind*, as it was in the case of the natural procedural rights of the non-clients (in Sect. 7.3), when their exercise of those rights was curtailed by the local dominant protective agency.

Even to pass the Lockean proviso test in the first place, the new appropriator (of something previously unowned) would have to make sure that non-owners could continue to use that thing (or something like it); in cases where the supply of the thing in question was quite limited 'compensating substitutes' would, most likely, have to be made available. (I have appropriated the quoted phrase from Win-Chiat Lee.) But if the substitutes on offer proved inadequate by the standard of use--and the non-owners' situation proved to be significantly worsened--then still further 'compensating substitutes' (additional ways to use or opportunities to use) would have to be deployed. Compensation in money is, of course, a possibility; but it's a weak substitute for the actual ability to continue use and would probably be at best a secondary consideration--part of a package, perhaps, of added 'compensating substitutes.'

Original acquisition (or original appropriation) is justified when it conforms to two basic standards: (i) satisfaction of the Lockean proviso and, should that satisfaction fail, (ii) adequate compensation provided to relevant non-owners to cover the reduction or denial of use, incident to the appropriation, and the resultant net loss, the worsening, in the non-owners' overall situation. Ownership that does not conform to these two standards is illegitimate.

The 'shadow' of the Lockean proviso falls also on transfers. (See Nozick 1974: 174–182.) Nozick believes, though, that "the free operation of a market system will not actually run afoul of the Lockean proviso" (1974: 182). Nozick's historical account of justice in holdings (in their acquisition—including original appropriation—and in their transfer) is intended to provide the main grounds, in his view, for denying that we can justifiably go beyond the minimal state.

There is one other feature of Nozick's account of just holdings—rectification—that stands somewhat apart from his historical theory.

Nozick allows that if a series of *unjust* acquisitions and *unjust* transfers, resulting in a serious running afoul of the Lockean proviso, has in fact occurred over the long run, then something more than compensation is owed those who've lost use entirely (and to those successively worsened by that loss). Some sort of basic rectification will be required. Nozick envisions a one-time rectification, suggesting that something like John Rawls's difference principle might serve as a '*rough* rule of thumb'

short-term device to accomplish this (see Nozick 1974: 152–153, 230–231). This is not the end (the termination) of the minimal state. For the standards of the minimal state would be restored and continued, after this one-off cleansing of the Aegean stables had done its work. So we might want to amend Nozick's claim to say that no *continuing* state more extensive than the minimal state can be justified.

Nozick's suggested program for rectification is problematic. In the case under consideration we have, taking account of what has actually happened, a long term history of unjust transactions. However, in Nozick's account, no real effort is expended or suggested for untangling and rectifying, on a case by case basis, the failures in justice in what has actually happened. Perhaps it would be impossible, or too costly or complicated, to do so. And certainly it would be so, if the injustices had an ancient or even a prehistoric origin. But a turn to Rawls's difference principle as the template for a solution really puts us at far remove from Nozick's historical theory of justice in holdings. Rawls's difference principle (the idea that the income and wealth of the worst-off group should be increased, on a principle of reciprocal benefit, and ideally maximized [Rawls 1971: 60, 302–303]) was not really intended as a principle of rectification, so it is difficult to see how it could even function in that role. In any event, use of the difference principle as a form of rectification would take us, just this once (but probably for several decades), well beyond the minimal state. Moreover, a one-time solution (of *any* sort) probably wouldn't last. The sort of thing I've been describing--a wide scale failure of justice in holdings--may well happen again, with long term (and perhaps amplified) historical effects, and this would require the minimal state to be much less minimal over the long haul. (For an account of Nozick's views in the context of other liberal theories see Martin and Reidy 2013.)

7.5 Criticisms

Let me turn now to some additional important problems in Nozick's overall theory, which in my view constitute grounds for criticizing it. I will take up four distinct concerns in the subsections that follow.

7.5.1 A Duality in Rights

Nozick's procedural "rights of enforcement" that the independents had before they were shut down by the dominant protective agency were, though natural rights, much weaker rights than the natural rights we started with. The rights we started with were attached to very stringent side constraints; these constraints ruled out certain things as simply impermissible; such things, when done, were not mere infringements of the right in question; they were *violations* of it. The procedural

rights, in contrast, were attached to more relaxed, less demanding duties on the part of others (of the so-called second parties). These duties might count as normative directives regarding the conduct of second parties; but these directives could be outweighed, even in fairly normal circumstances, and set aside. Doing so was permissible (and not a violation of the right) so long as adequate compensation was provided.

Here Nozick's argument maps Locke's in an interesting way. Locke distinguished between one's *inalienable* basic natural rights (to life, liberty, and property gained through labor), on the one hand, and one's 'executive' right to enforce (or protect by force) these basic rights in the state of nature, a right which can itself be *alienated* (divested or transferred) to someone else, on the other. But there is an important difference here as well. In Locke's theory, the natural right of protection and enforcement of one's basic natural rights is voluntarily given up, transferred to some other person or entity--transferred, in Locke's main example, to an agreed-upon and legitimate government. In Nozick's theory the natural right of protection and enforcement of one's basic natural rights is voluntarily transferred, by some, to a protective agency; but, for others, it can be entirely suspended and taken over by someone else (by a dominant protective agency, for example) and this suspension and take over of their right of protection can go against the rightholder's will or be contrary to their schedule of preferences. And this is okay with Nozick if, but only if, compensation in kind is provided (in the form of protection of one's basic natural rights by the dominant protective agency).

These weaker rights, these procedural rights of enforcement, are, Nozick says, "themselves merely rights; that is, permissions to do something and obligations on others [presumably outsiders] not to interfere" (1974: 92). The same would be true of the protected *liberties* (that is, liberties protected under very specific conditions) which Nozick mentions later (1974: 138). There is, in sum, a duality of rights in Nozick's theory that has been little remarked on. I mean the duality between (i) basic rights conjoined with extremely stringent side constraints and (ii) rights as themselves primarily permissions or liberties (with little in the way of significant obligations on the part of those affected by the exercise of the liberty).

Nozick's theory of just acquisition—just original appropriation—rests on a liberty to do something (to use previously unowned things as one's own, as one's property) which must satisfy the Lockean proviso. The terms of the proviso will sometimes rule out certain acquisitions—but would, even so, allow otherwise impermissible acquisitions to stand if suitable compensation is provided to the non-owners. The compensation has to be something tangible, and appropriate (a point I will return to later).

Let us assume that the tests of just acquisition have been met. The resultant property rights are very strong rights in Nozick's view. Nozick represents property rights as very powerful rights that stand on a par with those natural rights protected by stringent moral side constraints (1974: 171–173, 179n, 237–238). But, to the contrary, the rights of just ownership stand, at best, on the same ground as the weaker rights (the liberties and permissions) mentioned above.

7.5.2 Basic Natural Rights: Inalienable or Not?

Nozick holds both to a natural rights theory and to a strong doctrine of voluntary transfer. One problem here is that Nozick's theory (in 1974: ch. 9) allows the possibility of voluntary transfers so extensive that the content of any given right can be parceled into equal shares, with the result that "each person owns exactly one share in each right over every other person, including himself" (Nozick 1974: 285; see also pp. 172, 290–292). Each person's rights (formerly *whole* rights) are almost entirely alienated (in the classic sense of transferred to another) in this parceling out. This wholesale alienability may be a mere logical possibility which Nozick thinks won't happen (because it would be imprudent and self-defeating, let us suppose). Even so, Nozick's 'hypothetical' story (1974: 281ff) shows that peoples' basic rights in his theory are not *in*alienable. Note too his affirmation that, in a "free system," an individual "will be allowed to sell himself into slavery" (1974: 331). Accordingly, Nozick's strong doctrine of voluntary transfer extends even to the alienability of presumed basic natural rights. Someone might reasonably conclude, then, that those of Nozick's rights thought to be basic natural rights probably are not.

Of course, the question could be raised: are basic natural rights really inalienable? Locke seems to regard them that way. They are rights of persons as such, of individual human beings simply as human beings. These rights reflect essential elements of a person's *proprium*; they reflect what is one's own; reflect features of one's very self—including therein one's life, liberty, health, and labor (both mental and physical labor). So long as people continue to be individual human beings or persons, they necessarily have, inalienably, basic natural rights to their life, liberty, health, and labor (and the fruits thereof). Nozick claims to belong to this tradition on natural rights, the tradition of Locke and Kant.

One might reply that *some* natural rights theorists don't regard such rights as inalienable. Hobbes is often cited as an example—when he speaks, for instance, of *renouncing* one's natural rights or of *transferring* them to the sovereign (see Jessop 1960: 21; Orwin 1975: 27, 29; Hampton 1997: 41, 48–49). Now Hobbes does speak of individuals, in the context of ending the state of nature and entering civil society, as 'laying down' or 'standing aside from' their natural rights—their rights to do anything to preserve themselves (*Leviathan*, chs. 14, 28). But this should not be taken as a total renunciation or alienation of the basic right of self-preservation per se. Hobbes continues to speak of a right of nature, on the part of persons (as subjects of government), to resist "death, wounds, and imprisonment" at the hands of a rightful sovereign (*Leviathan*, chs. 14, 21). What the subject does (in Hobbes's theory) is lay down, permanently but conditionally (up to the point where the subject's own life or limb is at stake), the *exercise* of their natural right of self-preservation. The right itself is retained throughout and never alienated; it is neither renounced nor transferred in whole over to another (see Martin 1980; 1993: 10–11).

The idea that basic natural rights are inalienable is well grounded in the classical theory of Hobbes and Locke. Nozick's 'hypothetical' story (in 1974: 281ff) shows that peoples' basic rights in his theory are not *in*alienable; this warrants my conclusion that these rights, then, are not natural rights.

But another reading, an equally incisive one, is that Nozick believes this wholesale alienation of rights would *actually* happen in a modern democratic society, one that had gone well beyond the limits of the minimal state (1974: 290). Nozick entitles chapter 9 of his book "Demoktesis"; this is a hard term to translate but (thanks to Karen Bell) one plausible translation would be "collective property of the people." In contemporary majority rule democracy, where civil and constitutional rights are political rights, the net effect is that the rights of each person are part of the 'collective property' of the governmental system instituted by 'we the people.' *Demoktesis* is the democratic form of "ownership of the people, by the people, and for the people" (Nozick 1974: 290). The overall argument of the chapter indicates that Nozick has concerns about majoritarian democracy in principle.

7.5.3 The Right of Original Ownership

I will begin here with the right to own a *particular* thing that is previously unowned, which is what Nozick emphasizes (1974: 157n). The right to own is a liberty. One freely chooses or decides to become the owner of a previously unowned thing and to do so compatibly with satisfying the Lockean proviso (including, where appropriate, the compensation coda attached to the proviso). The right to own that particular thing, previously unowned, is established on this basis. Thus, one sets about doing certain specific things. By so doing one comes to own that particular thing.

Suppose there were no beaches, no lakes even, in Kansas. Then one day things happen. The earth shifts, rains fall, water moves; and there it is. A sizable lake with a definite beach, indeed with a cozy harbor, and nice views. I knew what such things were. I had traveled and encountered them in other places. And I had seen pictures. So there was this beach in Kansas, and no one owned it. It just so happened that I owned property that was exactly adjacent to the place where the beach and lake had appeared. I decided I wanted to become the owner of the only beach in Kansas, and in effect of the small cove that fronted it, lakeside.

So I set out to do certain things. I built a road, a parking lot, kept the beach clean, and added a few other touches: inflatable inner tubes for floating in the water, row boats, beach chairs and big shade umbrellas, a soda pop and hotdog stand, picnic benches and grills, toilets. In time I built a small motel, and there are plans afoot for a low-rise set of condo units in a wooded area. Lots of things to rent, buy, use. This way people could use the beach in a beach-y way.

My owning the beach satisfied the Lockean proviso: nobody's ability to *use* that thing or (or to use something like it) was significantly reduced by my owning the thing, not in such a way as to make the non-owners' overall situation as users worse. My exercising a right to own that particular beach was not unjust. Nobody could complain of an injustice toward them in such a case.

This is, apparently how Locke understood the "enough, and as good" constraint (*Second Treatise*, sect. 27); it was a sufficient condition for rebutting a complaint of injustice. This much is clear from the context in which that constraint is typically

invoked by Locke. For he talks repeatedly here of overcoming claims of "prejudice" or of "injury" (*Second Treatise*, sects. 33, 36, 37) or of removing grounds for legitimate "complaint" (sect. 34). (See also Waldron 1979: 321–322.) My ownership had indeed *improved* the beach experience for many. This is how I could legitimately charge for parking, for admission, and so on. I made a lot of money and enjoyed the beach myself, in season and out.

Now let us move from the right to own a particular thing (and from the proper appropriation of a particular thing, previously unowned) to the right to own in general. We call the general right here a liberty. In part this is because coming to own something (heretofore unowned) isn't a thing required of us.

To develop the idea of such a liberty further, let us imagine a plausible scenario. There is a local but largish area in which no one owns land; then one day someone appropriates a piece of land in accordance with the liberty to do so, satisfying the Lockean proviso in the process. In this local area, there is at this point one (and only one) original appropriator (of land). Nozick makes a useful comment about the liberty involved here. He says, "[A]n object's coming under one person's ownership changes the situation of all others. Whereas previously they were at liberty (in Hohfeld's sense) to use the object, they now no longer are" (1974: 175).

Let's take our scenario back one step. Before the original appropriator did the things that made for ownership here, *everyone* (including the person who later made the first appropriation) was on the same footing: each had a "liberty (in Hohfeld's sense) to use the object" So in order to understand the crucial liberty that Nozick's account rests on we'd need a fuller understanding of what a liberty in Hohfeld's sense amounts to.

Wesley Hohfeld (1879–1918), in his exposition of what he called fundamental legal positions, identified four basic types of legal rights, each type having a unique second-party correlative (Hohfeld 1964: 36–65). We can assume that there are *moral* analogues to Hohfeld's fundamental legal positions. (Carl Wellman has argued the case for such analogues in detail [1985: chs. 5,6].) So, in what follows, we will adapt Hohfeld's account of legal liberty rights to make it an account of moral liberties or permissions as well. (Hohfeld tended to treat liberties and permissions as synonyms [1964: 42–43], as did Nozick.)

The moral liberty right of a given agent amounts to the idea that the agent has a liberty (or permission) to do that which the agent has no moral duty *not* to do. Such a liberty involves as its correlative a "no-right" (or "no-claim") on the part of others. The second party, in the case of a liberty right, can claim no *duty* of the liberty holder (the rightholder) to forbear doing that action respecting which the holder is said to have a liberty. But in Hohfeld's discussion, this is the *only* normative direction that relevantly pertains to the conduct of the second parties.

Tom Campbell provides a telling example of a Hohfeldian liberty right. "I have a legal [or a moral] right to feed the birds if there is no law [no moral duty] prohibiting me from feeding the birds so that I am at liberty to do so" (2006: 30, and see his ch. 2 in general). But this liberty, be it a legal liberty or a moral one, is consistent with someone else's following behind the bird-feeding person and sweeping up the seeds or bread crumbs they've scattered, putting them in a bag, and dropping that bag into the trash can at home, that night.

If this is a paradigm example of a liberty right, such a right is indeed an odd one. Not because *no* normative direction is involved, regarding the conduct of second parties, but because no *significant* normative direction is involved. If, perhaps, the relevant duty of others had embraced at least two explicit features in particular--the Hohfeldian no-claim *and* a duty of second parties not to interfere directly with a proper exercise of the liberty (and maybe to restrain themselves in other ways as well)—that would be all right. But the Hohfeldian correlate to a liberty right does not require this; rather, only the first of these directives on conduct is actually entailed (or involved) in Hohfeld's view (see 1964: 41–43). The liberty to own that Nozick has identified is a Hohfeldian liberty, a mere liberty; there is no significant normative direction or duties of others attached to it. (For further discussion of Hohfeldian rights, see Martin 2013.)

Now let's return, briefly, to the scenario developed a few paragraphs back, to the point *before* the original appropriator did the things that made for ownership. Here *everyone* had a "liberty (in Hohfeld's sense) to use the object." It would appear (where this liberty is properly exercised, to use a piece of land as the possessor's own) that the second parties, the non-owners, have no significant duties not to continue using, in some way, the property so acquired. (At least this is what follows from Hohfeld's notion of a liberty right, the notion Nozick was relying on.)

Absent some strengthening of the duties owed by others, by the non-owners, to the property owner of a particular piece of property, this leaves the kind of duty involved here markedly *weaker* than the stringent side constraints which Nozick typically associated with legitimate property ownership (though mistakenly so, as I argued in Sect. 7.5.1). In fact, the kind of duties owed by others, by non-owners, is much weaker even than the duties attached, in Nozick's account, to the procedural rights of enforcement in the state of nature.

A Hohfeldian liberty doesn't allow a liberty that violates a duty but it doesn't allow anybody (including the non-owners) to violate duties either. For we can assume that everybody involved here had duties not do such things as kill, physically assault and batter, etc. one another. Owners and non-owners alike can only do what is permitted.

There is, of course, also the Lockean proviso to consider here. It says that an appropriation should leave the others (the non-owners) "as much and as good" of the thing (or kind of thing) owned; it requires that nobody's ability to *use* a thing (or to use something like it) is significantly reduced or worsened by someone else's owning that thing. When this is so, nobody could complain of an injustice toward them in such a case--as Nozick notes (1974: 176; see also pp. 161, 162n).

One could say that this proviso is a reasonable one. But it is not some sort of canonical or public standard that exists, as the decisive presupposition of ownership, and is widely acknowledged as such. Rather, it reflects a judgment one could reach, on one's own or in discussion with others. If the judgment, thought to be a reasonable one, is satisfied in an individual case, then one can plausibly say that nothing unjustifiable was done in that case.

The liberty to use some particular thing X as one's own is properly exercised when the owner had no duty not to do whatever it is that makes one the owner of X. That action is not unjust; others (the non-owners) could not complain that a duty

was violated, could not complain that something unjust was done—not where such a liberty exists and the Lockean proviso (with its compensation coda) is satisfied.

If we keep in mind Hohfeld's analysis, in which the one (and only) thing the second parties *must do* is acknowledge that the new owner had no duty *not to* appropriate that property, or Campbell's example of bird feeding in the park, it's not clear that the liberty and the proviso are all that different. The proviso is a reasonable consideration to have in view, but it adds little to a proper exercise of the liberty or permission in question. The liberty and the proviso both converge on ruling out injustices (including violations of duties) or complaints of injustice. But they otherwise permit the continued use of things said to be owned (in an original appropriation) that is, they permit continued use by both owners and non-owners.

I want to turn now to a further line of argument. One thing which is very problematic about Nozick's account is that the right to own a particular thing, previously unowned, is suspiciously like the thing that is itself said to be owned. In each case one chooses and acts, appropriately, both with respect to the right (the liberty or permission) itself and to the thing said to be owned. In each case that's how one gets it, that particular right or that particular thing, making it one's own. By the same token, one can dispose of the particular right just as one can transfer or sell (dispossess oneself of) a thing owned.

For clarification: I'm not saying that the disposal or destruction of the thing owned *amounts to* a disposal or destruction of the right of ownership itself. Rather, I'm saying that Nozick treats these as two distinct things and, in turn, says both that one can transfer or sell (dispossess oneself of) a thing owned and that one can dispose of the particular right itself.

Someone might reply, "Perhaps what you say is true of the right to own a *particular* thing and also true of legitimately owning that thing. But the matter stands differently with the right to own in general; it is a liberty or permission; one has the right in general on condition of satisfying the Lockean proviso. The right to own in general is a right one possesses; one does nothing to possess it. This is unlike the case of owning a particular piece of property, where one has to 'do' something to own it (like 'mixing one's labor' or adding use value or doing something that one has a Hohfeldian liberty to do and that satisfies the proviso)."

Here, though, we must take care. There really is no Hohfeldian liberty to *own* as such; there's simply a liberty to do what one has no duty not to do. One simply chooses and acts, doing what one has no duty to forbear doing. Clearly, one has a Hohfeldian liberty to *use* a thing. And if there's a Hohfeldian liberty to use something as one's own (to appropriate it), it too is simply a liberty to do what one has no duty not to do. One simply chooses and acts, in that context.

Even if, for argument's sake, one allows a general Hohfeldian liberty to use something as one's own, to appropriate it (something Nozick assumes, though I can find no explicit or implicit evidence for such a liberty in Hohfeld), there's still a problem for Nozick here. For just as there's no duty that requires me to exercise that liberty, there's no duty—no side constraint or aspect of the proviso--forbidding my alienating the general right to own altogether, either. I have a liberty to relinquish it entirely (a point made in Sect. 7.5.2, above). So, if I have that right, I have it because I did something—I didn't dispossess myself of it.

In short—whether we look at the right to treat a *particular* thing as one's own or whether we look at the liberty, at the right, to own in general (subject to the proviso)—we end with the same overall problem. The right to own is itself not significantly different from the thing (from anything) owned. Like the thing owned it's simply a piece of property.

One justifies something by referring it to something else. The entitlement to own a piece of property, whether that entitlement is taken to be general or particular in focus, cannot be justified by a right that is itself nothing but another piece of property. There's a self-defeating circularity in Nozick's argument. From what Nozick has said about the Hohfeldian liberty to use, in the case of what Nozick calls 'original acquisition,' and from what he said in his 'hypothetical' story designed to show that in his theory peoples' rights, even their basic ones, are not *in*alienable, I'm inclined to believe Nozick has the problem I've here attributed to him.

One could refer to the general right of original ownership as a second-order right that backstops the first-order right, the right to own a particular piece of property. If the two were significantly different in the crucial respect I've identified, then the second-order right could conceivably serve to justify the exercise of the first-order right. But they're not. Nozick's justification of original acquisition as such and his justification of the owning of a particular piece of property (such as the ownership of the only beach in Kansas) are of a piece. Both rest on a very permissive Hohfeldian liberty and on satisfaction of the Lockean proviso, a proviso that adds very little to the liberty. And each level of justification, consisting as it does simply in choosing and acting in a certain way, has the selfsame defeating aspect I described in the previous paragraph.

7.5.4 Property Rights: The Proviso and Compensation

Nozick thinks that property rights (including the property rights of original ownership) are very strong rights. An original property right in a thing (a piece of land, for example), like the same property right when received in a just transfer, means that the owner can determine what will be done with that thing, and the owner will reap the benefits of so using it (1974: 171). The owner can restrict the use by others of the thing owned, and even exclude them from using it altogether (so long as something sufficiently like it is still available for them to own and use). Ownership of X by someone changes the normative situation of others respecting X; they now have duties toward the owner and the thing owned that they did not have before the owner's original appropriation (1974: 175), or before the receipt of title in a just transfer. The right of ownership is permanent, in the sense that it is both inheritable and bequeathable (1974: 176, 178).

But it is difficult to say that a property right this strong could ever satisfy the Lockean proviso, at least if the proviso is taken literally, exactly as Nozick stated it. The key factor here, in a case of original ownership, is that the non-owners must be able to "use freely (without appropriation) what [they] previously could [use]" (Nozick 1974: 176; see also p. 178). It's the worsening of this ability of non-owners

freely to use the thing owned, or things like it, that the proviso is meant to rule out. A property right as strong as the one Nozick envisions does not allow *free* use by others of a thing owned by someone else.

Of course, one could fall back on the idea, clearly stated in the proviso, that someone's owning X does not restrict others from owning and freely using Y or Z—that is, so long as, beyond X, there's "as much and as good" for others to appropriate and use. But the Hohfeldian liberty right and the Lockean proviso are meant to apply not simply to owning *other* possible pieces of land than X but also to continued free use of X by others, by non-owners, "without appropriation" by them of X.

Even if we drop the idea of *using freely*, and rely simply on the claim that nobody's ability to *use* that thing (or to use something like it) was significantly reduced by someone's owning the thing, we still have a problem. A *strong* property right in X could—most likely would—significantly reduce the ability of non-owners to use X. In the end, it's now the owner who decides on the use of X (not the non-owners).

Suppose there was some significant reduction—so that the non-owners' overall situation as users worsened on the whole. This is the point where compensation would seem to enter the picture. But, again, the owner's property rights are so strong that it'll be the owner (not the non-owners) who has the dominant say, the last word, on what 'compensating substitutes' are appropriate ones, and which ones can be deployed by the non-owners.

Given Nozick's apparent indifference toward the increasing of inequality between persons, in matters of ownership, and given the limited character of the minimum state, there seems to be little recourse in Nozick's theory. The minimum state hasn't been set up to decide on questions of original entitlement (but, rather, presupposes the account Nozick has provided) nor has it been set up to decide on what 'compensating substitutes' are appropriate. Inevitably, it will be the owners themselves, with their strong property rights, who determine issues of appropriate use by non-owners and of appropriate compensation to them where one could plausibly deem the Lockean proviso not to be satisfied in particular cases. And given the fact that many natural resources (including land) are limited, finite, it is likely that there will be many such cases.

Something has to give here. *Either* the strong property rights that Nozick regards as entailed by his doctrine of just holdings—of just original ownership and of just and voluntary transfer—must be substantially revised, *or* the Lockean proviso has to be substantially revised (and effectively dropped). The former of these revisions would dramatically alter our understanding of Nozick's theory; the latter would simply remove what he regards as one of the main philosophical underpinnings of the right of original ownership. Doing the latter, then, seems unthinkable (within the confines of that theory).

A weaker account of property rights, together with augmentation by some notion of mutual and general benefit (as a ground of the duties associated with property rights) might yield stronger duties than those allowed for by a Hohfeldian liberty. Such a right might be a good thing to build into Nozick's argument. Indeed, the

elements for such a reconstruction are already found in his account (see Nozick 1974: 158–159, 177; also p. 218). But that weaker right is not to be found in Nozick's theory. So we must leave it at that.

7.6 Conclusion

Nozick relied heavily on a theory of just holdings—consisting in a series of just acquisitions and just transfers. When these two factors held good, we'd have no need or justification to go beyond the minimal state. Thus, Nozick was able to rule out in principle the situation in which the state could legitimately prohibit voluntary exchanges simply on the ground that they increase inequality or in which the state could justifiably rearrange the results of such exchanges (through redistribution, for example, or through legal redefinitions of property rights or of the second-party duties attendant on those rights) simply in order to decrease inequality, or to afford fairness in some other respect.

We have seen, though, that Nozick's arguments for his theory of just holdings and his defense of the minimal state is deeply flawed. In particular, Nozick's strong right of ownership is not well supported by the arguments advanced in his own theory. That right is not endorsed by the Hohfeldian liberty right on which Nozick relied in developing his theory of original appropriation and such a right was not really compatible with satisfaction of the Lockean proviso. On these grounds we'd have to say that Nozick's theory of rights and economic justice fails.

References

Campbell, Tom. 2006. *Rights: A critical introduction*. London/New York: Routledge.

Hampton, Jean. 1997. *Political philosophy*, Dimensions of philosophy series. Boulder: Westview Press.

Hohfeld, Wesley. 1964. *Fundamental legal conceptions*. New Haven: Yale University Press. (The two papers in this volume first appeared as articles in the *Yale Law Journal*, one in 1913, the other in 1917. Reprinted in a single volume, under the foregoing title, they appeared in 1919 and were republished in 1923 and 1964.)

Jessop, T.E. 1960. *Thomas Hobbes*. London: Longmans Green.

Martin, Rex. 1980. Hobbes and the doctrine of natural rights: The place of consent in his political philosophy. *Western Political Quarterly* 33(3): 380–392.

Martin, Rex. 1993. *A system of rights*. Oxford: Oxford University Press.

Martin, Rex. 2013. Rights. In *International encyclopedia of ethics*, ed. in chief Hugh LaFollette, Oxford: Wiley-Blackwell, forthcoming. (A source for the present chapter.)

Martin, Rex, and David Reidy. 2013. Liberalism. In *International encyclopedia of ethics*, ed. in chief Hugh LaFollette, Oxford: Wiley-Blackwell, forthcoming. (A source for the present chapter.)

Nozick, Robert. 1974. *Anarchy, state, and utopia*. New York: Basic Books.

Orwin, Clifford. 1975. On the sovereign authorization. *Political Theory* 3: 26–44.

Rawls, John. 1971. *A theory of justice*, 1st edition, Cambridge: Harvard University Press. (2nd edition, 1999. The passages comparable to those cited earlier from Rawls 1971 can be found in the 2nd edition, 1999 at pp. 53, 266–267.)

Waldron, Jeremy. 1979. Enough and as good left for others. *The Philosophical Quarterly* 29: 319–328.

Wellman, Carl. 1985. *A theory of rights: Persons under laws, institutions, and morals*. Totowa: Rowman and Allanheld.

Chapter 8
Poverty, Markets, Justice: Why the Market Is the Only Cure for Poverty

Jan Narveson

Abstract Poverty is not due to lack of resources, nor generally either to incapacity or lack of motivation. It is essentially always due to bad politics, specifically, a manifold of devices and initiatives that impede the freedom necessary for people to get their jobs done. The freedom we need is both local – removing obstacles imposed by public institutions, as well as due to prevalent corruption and graft by powers that be; and international, so that people in country A can benefit from interaction with the productive in country B, whatever A and B may be. Misguided interventions on behalf of "equality" and other distortions need to be avoided. The emphasis here must be on commercial exchange, not "foreign aid" which is generally a disaster, and certain to fail to benefit the very people it is intended to benefit. Philanthropic assistance should be limited to disaster relief, such as tsunamis, where voluntary private help works brilliantly – and local governments impede it hugely.

8.1 Introduction

There are rich people and poor people; there are rich countries and poor countries. This essay concerns mainly the latter rather than the former. There isn't much reason to think that some very large groups of people should be inherently incapable of achieving western levels of income and wealth. There is much reason for thinking that some individuals will do well and some not so well, economically speaking, in any country which allows people to do well or badly at the things that make people livings. The "cure" for the latter, if there is such a thing (and if that's the right word for it), is surely quite different from the cure for the former.

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The reference to "countries" is quite relevant to this subject. There is every reason to believe, as tersely argued by Mancur Olson, that the problems of regional disparity are generally speaking institutional, and especially political. They are not due to differences in resources – some resourceless countries are among the world's richest, while some countries blessed with natural resources remain mired in poverty. The Ricardo-Malthus thesis, holding that limited resources and excessive population make poverty inevitable, has been decisively refuted by the facts as well as by more careful analysis.[1] What remains is that the institutions of economic life are the decisive factor. They need to be designed so as to enable human energies to be effectively devoted to the production of what people want for themselves. Central control can indeed promote the production of war materials and the Great Pyramid. But to have better diets, houses, means of transportation, and entertainment, and intellectual and spiritual stimulation, we need free people and (therefore) free markets.

In this short essay on a large subject, I begin (part I) by sketching, very briefly, the general theory under which I approach the matter. I then (2) take up the subject of poverty in particular. Finally, (3) reasons for rejecting the general current approach, especially as involving "foreign aid" from one government to another, are developed.

8.2 Justice

8.2.1 It's Enforceable

The topic here is the relation among poverty, justice, and the market as a social institution. Some think that the first two are of themselves mutually incompatible. Is it unjust that some are poor while others are wealthy? If so, then presumably we in the comparatively well-off parts of the world are doing something wrong if we make no specific efforts to decrease these disparities. But justice is about what's enforceable. It is not just about what would be nice, if only…. Thus our question here really is this: would *enforced* assistance to the poor, via taxation and government administration, be morally mandatory? For that matter, some of us would ask, is it even morally *acceptable*? And we'd be inclined to answer that in the negative.

8.2.2 Distribution

Recent attention in social philosophy circles has been overwhelmingly directed to "distributive justice." This rich expression conveys different things, but especially one: the cutting of a given pie into pieces, of which some may get larger, some

[1] Mancur Olson is one source: see his "Big Bills Left on the Sidewalk: Why Some Nations Are Rich, and Others Poor" in Benjamin Powell, ed., *Making Poor Nations Rich* (Stanford, CA: Stanford University Press, 2008), 25–53.

smaller. And the bias of the profession has been, again overwhelmingly, on *equality*: if some people have more, some less, this is viewed as a sign of injustice somewhere in the structure by means of which the "distribution" came about. The effect is to divert attention from the questions, Where did the pie come from?, and – Doesn't that *matter*? The present essay begins by sketching, however briefly, the essentials of the contrasting, "classical" theory of justice, which corrects the situation by pointing out that economic life is a matter of exchanges among persons, each pursuing goals of his or her own, utilizing such capacities as he or she may have. The just society on this plausible view of society will pay attention to the freedom of these exchangers; thus economic society will have the structure of the *market*: justice will focus on property rights, security of person and of contracts, and lack of restrictions on trade, including reliable and predictable monetary management.

To be sure, the free society includes much more than strictly market activity in the economic sense: civil association, comradeship, cultural and religious activity, and charitable/philanthropic undertakings, will also flourish in a regime of freedom. But government-imposed altruism is the enemy of this, and will also impede the development of the wealth that we all hope for.

The free society will also include a fair amount of cooperative undertaking not aimed at individual profit, as such. Again, however, a centralized insistence on such cooperation, and an imposed hostility toward private profit and entrepreneurship, will stifle growth and condemn society to poverty.

8.2.3 Equality

The reigning paradigm theory of justice among contemporary social philosophers seems to be some mix of two mutually incompatible principles: Liberty and Equality. Egalitarianism calls for the equal distribution of some variable – that the egalitarian in question needs to specify and, preferably, defend – by those who produce the things in question. That the two theories are *prima facie* incompatible is obvious: If we must be equal, we cannot be free to do what would make us unequal. If we are to be free, we cannot be compelled to do what makes us more equal. Of course, there can be mixes of the two, so we should instead say: *insofar* as a theory of justice is egalitarian, it is anti-liberty; *insofar* as it is liberty-respecting, it is not egalitarian.[2]

[2] I say this in full realization of the fact that some want to classify libertarianism as a kind of egalitarianism in that it calls for "equal liberty for all." But the term 'equal' here is meaningless, since liberty is simply the absence of impositions to voluntary conduct, and there is no uniform metric for measuring such impositions, therefore no way to say that some have thus-and-so more or less than others. If we are to say liberty is to be "equal", what it calls for being equal is impositions – at *zero*. This is a *reductio* of the term 'egalitarian' and it serves only to muddy the waters to use it in this way.

8.2.4 A Distinction: Goods and Services

The topic is generally regarded as falling under the general heading of "distributive justice." But that is misleading. To put it that way is to put the emphasis on the question, what is there to "distribute", and then set to work to see who should get what by selected favored criteria.

1. Presumably, it will be said that what is to be distributed are distributable "things" such as quantities of manna from heaven, or coal, or whatever. Those you can more or less measure – though attempting to formulate rational general principles about any particular bit of stuff for this purpose is not recommended. This is especially true if you care whether the people being affected have any interest in the matter. Most likely they do!
2. The other general category is *services,* which, though more fundamental, are more difficult to handle conceptually. For to talk of services is to enable us to make clear a point that can possibly be glossed over when we talk instead of "goods": namely, the "stuff" we are distributing *is somebody's*, and when the "stuff" goes from someone to someone else, the first person is doing the second a service. It is not, as in Nozick's memorable example, "manna from heaven": it is the result of the ingenuity, labor, and in general the involvement of various people – especially of individuals whose contributions are saliently significant for the production of whatever is thought to be up for distribution.[3] To "distribute" such a product, then, is, on the face of it, to take it from some people – those who *made* it – and give it to others who didn't. When the something is a service, it is obvious that it is the time and energy of the service provider that is being "distributed" and not just a bunch of stuff. If the "distributing" is done *involuntarily,* as in the case of taxation, then, as Nozick also points out, this looks like a sort of slavery.[4]

When we focus on the goods that have been produced, it remains true that what we are doing is compelling some people to do things for others – but easier to hide. As Hume so long ago observed, the thing about owned objects is that it is so easy to separate them from their owners.[5] This led him to conclude, "No one can

[3] I obviously lean here on Nozick's delightful analogies and examples. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), Ch. 7. See esp. 160, and 168–172.

[4] Nozick, *Op. Cit.,* 169.

[5] David Hume: Treatise of Human Nature III, *Of Morals*, Part II ("Of Justice and Injustice"), Sect. II: Hume, Sect. II – (L.A. Selbye-Bigge, ed., *Hume's Treatise* (Oxford, U.K.: Clarendon Press, 1955), 491.

Previously, he had said "There are three different species of goods, which we are possess'd of; the internal satisfaction of our minds, the external advantages of our body, and the enjoyment of such possessions as we have acquir'd by our industry and good fortune. We are perfectly secure in the enjoyment of the first. The second may be ravish'd from us, but can be of no advantage to him who deprives us of them. The last only are both expos'd to the violence of others, and may be transferr'd without suffering any loss or alteration; while at the same time, there is not a sufficient quantity of them to supply every one's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment," *Ibid.*, 487–488.

doubt, that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that after the agreement for the fixing and observing of this rule, there remains little or nothing to be done towards settling a perfect harmony and concord."

Well, is there anything wrong with that? Yes. A normative view of this kind says, to would-be producers – don't bother! It says that they can't have what they make, which to many amounts to: not being allowed to *be* who they *are*. In any case, it's a great inducement not to produce, or at least, not to produce nearly as much as the agent in question otherwise might. This doesn't keep philosophers from siding with Rawls, the paradigmatic exponent of this not obviously coherent mix. I won't here argue further about this incoherence, but will assume the point as taken. [Readers are referred to some of the pertinent literature in a footnote.[6]]

I do take sides on the issue. Justice respects persons, and in particular their liberty (or what many call "self-ownership"), which in this respect consists in people refraining from violence, coercion, aggression – including fraud – against others. Justice asks us to refrain from trying to get our way at the expense of others, confining ourselves to what is (a) agreeable to those we deal with, and (b) nondamaging to those we do not. It is, in short, anti-war: it opposes the getting of things by violence, and insists on peace between people.

8.2.5 Two Kinds of Free Activity

Within this constraint, and if we in addition are sympathetic to the plight of people who are in adverse circumstances, what should we do? The constraint above limits us to free activities, for which, in economics, the market is usually taken to be a synonym.[7] But reference to what is usually called "the market" is a little misleading. For we can divide voluntary interpersonal dealings into two general kinds: commercial and noncommercial. *Commerce* is *profit-seeking* activity, in the narrow, financial sense of the term – each seeking to maximize his or her real but monetizable income. *Noncommercial* is, broadly speaking, altruistic, including the many charities and philanthropic activities people engage in – some aimed at reducing poverty, others at promoting culture, and of course some aimed to promoting a religion or some other ideology.[8] The noncommercial category is a huge one. Probably much

[6] See the book authored by James Sterba and myself, *Are Liberty and Equality Compatible?* (New York: Cambridge University Press, 2010). There is also G.A. Cohen's recent *Rescuing Justice and Equality* (Harvard 2008). See also my lengthy discussion of that book, "Cohen's Rescue" in the *Journal of Ethics*, 14:263–334.

[7] So I think; there are those who object.

[8] Still others, to be sure, are aimed at proselytizing for some or other religion, and of course some for various political ends. We omit the latter (apart from a short note) for present purposes – since our hope is to guide political activity, not to be driven by it, and we ignore the religious category as being not directly relevant here.

more of human activity fits into this category than the first: with families, sports, many social interests, religions, and so on, most of us devote much time and effort to pursuits not aimed at profit – yet we do so freely, which is the point. And some of these noncommercial voluntary activities are aimed specifically at such things as the relief of others from various sorts of suffering, or to benefit them in various ways well above that line. Once this distinction is appreciated, and in full recognition of the value of the noncommercial activities of mankind, I nevertheless argue that the best hope for diminishing world poverty is activity of the commercial kind, the other being a relative sideshow – though a very important one, and sometimes crucial.

8.3 Poverty

8.3.1 What Is Poverty?

The "ur" idea, no doubt, is that poverty is a lack: generally, and in this context, a lack of the sort of goods that are producible by human effort and transferable. But how much of a lack – and, lack of what?

Writers on this subject of poverty tend to speak as though there were some one, reasonably clear and clearly relevant concept of the matter. Whatever else, this seems to me pretty obviously not so. Here, for example, are several clearly distinct notions.

1. 'Below a decent minimum'
2. Having a low real income compared to some relevant reference group (usually, co-residents of the same State)
3. Having an income that leaves one in perceived severe need or with which one is very dissatisfied.
4. Having a real income (however tallied) too low to sustain that individual in life.

It is apparent that these concepts are markedly different. Now, our fundamental issue is this: should we be *obligated* to bring it about that everyone – or every one of our countrymen – achieves a life above this level, however specified? When we contemplate the differences among the four identified notions, we'll get quite different answers.

The first two, to begin with, are comparative, and the relevant reference group will of course vary hugely. "Poverty thresholds" in wealthy countries are such that most persons reckoned poor by that criterion would be regarded with envy in many of the world's poorer vicinities. (In America and Canada, the officially "poor" for the most part have two or three color TVs, housing at the level of at least one room per person, telephones, indoor plumbing, at least one car, and much more.) As to "decency" – the desire (often a felt "need") to keep up with the Joneses, is familiar in all walks of life. In some communities, an income below seven figures will get

you looked askance at. In some very low-income places, the odd lettuce will put you in the upper brackets. To say, as Stephen Nathanson does (and he would be seconded by many) that some "lack the basic resources required for a decent life" just moves the problem back one level: just what constitutes a "decent life"?[9] Why specify it as this, or that, or the other?

One possible answer to this is also supplied by Nathanson when he says, "… once people have the resources for a decent level of liberty to pursue their goals, there is no objection to a system that permits the otherwise unconstrained exchange of goods through the market or voluntary gifts. When the decent level criterion is not met, however, these liberties for some are purchased at the cost of denying others the liberty to pursue their goals."[10] But confusion threatens in this pronouncement. We *deny* people liberties when we *won't let them* act in pursuit of their goals, or we intervene to *reduce* or *deprive them* of their ability to pursue them, such as it may be. Clearly, however, we have done no such things with most of the people on the other side of the world, nor even, for that matter, next door, if we have simply let them alone. Here Nathanson seems to be succumbing to the familiar tendency to claim that not helping the very incapable is equivalent to *harming* them. But it isn't. Killing or imprisoning the poor is not just letting them alone; whereas not giving them a job, an education, or food, *is* at least *prima facie*, letting them alone. If, of course, they really had a right that we do more for them, that would be another matter. But that is the very question before us: *do* they have this further right? If the libertarian principle is correct, then they don't. And if they don't, what follows?

Nathanson also invokes "the phenomenon of the diminishing marginal utility of resources," inferring that the overall well-being of a society can be increased by moving resources from those with plenty to those who lack a decent level."[11] Those who speak this way talk as though the idea of utility thus employed is both clear and relevant. But insofar as it is the one, it's not the other. If it were relevant, the idea would appeal to a notion of interpersonally comparable utility units, and we surely know by this time that it is not a good idea to make free use of such problematic ideas. But insofar as it is clear, it refers to an *individual's* propensity to make trades. That in no way commits us to such moral ideas as that the "needs" of some very poor person, say, are more important than those of some very rich one. And the latter, of course, is what is relevant: it is what needs to be shown – but is invariably just assumed. The rich person's tastes may be more expensive than the poor person's – hardly surprising. But then, they are *worth it* – to him. And it is, after all, his money – he's the one who counts when it comes to controlling *his actions.*

As to the third concept on my list: if satisfying perceived needs – levels of *felt* dissatisfaction – is our interest, then everybody is eligible: we're all trying to

[9] Stephen Nathanson, "Equality, Sufficiency, Decency: Three Criteria of Economic Justice," in F. Adams, ed., *Ethical Issues for the Twenty-First Century* (Philosophy Documentation Center, 2005), 367.

[10] Nathanson, *Op. cit*., 372.

[11] Nathanson, *Op. cit*., 371.

improve our satisfaction level, all the time, and we all fail sometimes, some of us very often or most of the time. We can be very wealthy and yet dissatisfied – and, as Diogenes' example illustrates, *vice versa* as well.

Suppose we turn to an attempted objective specification. Just how much in the way of possible goods is compatible with poverty? Nowadays, the American poor are equipped, for the most part, with refrigerators, indoor plumbing, a whole separate room per person, two televisions, an I-pod, a cell-phone, and at least one computer, and quite a few more calories per day than is thought by nutritionists to be good for them. In many parts of the world, the typical person would have none of those things, and probably have little idea what they were.[12] It's pretty absurd to point to such things as "basic human needs." Nor are people who lack such things living "non-decent" lives.

The final category, starvation, has a certain bottom-line priority. If we want that people live good lives, we at least will want them to be alive, and, therefore, to stay alive. Yet even here, it must be pointed out, comparative matters soon obtrude. How long can Jones live and be "starving"? Suppose his diet is such that he's only good for 3 years. He'll be in the upper brackets of starvation: some will be good only for 3 hours or 3 days. And it will be pointed out that the diets of many of us will kill us off before we are 90. This usually wouldn't be accounted 'starvation,' but it's hard to see how it differs except in degree, so far as the basic criterion – life expectancy – is concerned. And there's always the problem of the person who considers himself better off dead – though we'll set that aside here.

I have noted that the notion of poverty generally seems to have a normative component: you're poor when you have "*too* little" – "not *enough*" – whatever the objective specification of that may be. Of course the issue here is, just what is the normative component in question – where does it come from?

Now, *our* issue is that of justice: is there a normatively relevant notion of poverty that is both plausible and implies that when someone is below the proposed threshold of real income (or whatever), then somebody (or somebodies) else is thereby doing him an injustice unless he pitches in and helps bring the person in question back up to or above that threshold? It is this last question that I am answering in the negative, for the general case.

A further point is raised by the citation of statistics about the "incomes" of very poor people in today's world. When it is said that the members of some tribe in central Africa, say, who wear very little and have no refrigerators, etc., have "incomes" of less than $1 per day, we have to ask: meaning exactly what? If they buy scarcely anything, but are about as well fed and live successfully in mud huts as they have for the past several thousand years, there is more than a little room to be puzzled by claims about their "incomes." In any case, the claim that they are "victims of injustice" by virtue of living the way they do, when we over here live much differently and in measurable respects more lavishly, has little to be said for

[12] The situation in 1987 is described by Robert Rector, "How "Poor" are America's Poor?" in Julian Simon, ed., *The State of Humanity* (Oxford, U.K.: Blackwell, 1995), 251–256.

it. If many in the tribe are murdered by their neighbors, or crushed by their rulers, then, of course they are indeed victims of injustice. But in those cases they are so in the familiar terms that I fully subscribe to: justice, of course, forbids inflicting evils on others for the benefit of those doing the inflicting.

The claim that someone is "poor," then, needs to be analyzed with some care. There is an evaluative component to the notion of poverty, in most people's usage, which has the effect of requiring us to distinguish between higher income and better life. If Smith lives what he regards as a better life despite having a lower income than Jones, is he "poorer" than Jones? Or does he merely have less money? Money is a medium of exchange: it is the means to get more of what you want, insofar as what you want is for sale. But insofar as it is not, money will have limited or no value. At the margin, as we might put it, it could be quite irrelevant.

Doubtless some good medical care now and then would be much appreciated by most people – though, again, they've gotten on without it for similar tens of millennia. Meanwhile, there is no limit to the amount of it that a given person might "need".

To sum up, then: there is no obvious, straightforward issue of anything familiarly recognizable as "justice" on this front. Much more important is that almost all the world's poor are literally victimized in numerous ways by their own and often enough by other governments, and by would-be conquerors and such.[13] No doubt they are sometimes victimized by corporations – but usually the claim that they are is based on objections to the agreements made rather than to their not being allowed to make them, which is what governments do. The ways are numerous and would have to be dealt with one by one. A blanket formula for providing "aid" for the world's poor is not going to be forthcoming.

8.4 The Market

8.4.1 The Normative Structure of the Market

David Gauthier notoriously claimed that the market is a "morality free zone."[14] And – much too often – the claim is made that commercial life and the market generally are a "jungle" or perhaps a Hobbesian state of nature. Gauthier's thesis is extremely misleading, however, since what he in fact held is that *if* there are *no externalities* – including, especially, the use of force or fraud by participants – and no transaction costs, *then* the participants could be guided entirely by their own interests. And that, of course, is true. But how do we get into the happy,

[13] Thomas Pogge has become the great spokesman for this point, though there are many others. See Pogge's *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, second, expanded edition (Cambridge: Polity Press, 2008) and also "Responses to the Critics" in Alison Jaggar, ed., *Thomas Pogge and His Critics* (Cambridge, U.K.: Polity Press, 2010), 175–238.

[14] David Gauthier, *Morals by Agreement* (Oxford: UP, 1986), ch. IV, 83–112.

externality-free condition posited there? It does not happen all by itself. Gauthier's own view is that it is arrived at by reason, when people see that the mutually worse outcome in prisoner's dilemma lies in wait for the heedless. Properly rational participants, he thinks, would be "constrained" maximizers – maximizers who refrain from maximizing whenever that would lead to suboptimal outcomes. Would all rational actors accept and act within such constraints? It is not easy to say whether all *accept* them, at some level, and there has been enormous discussion on the matter – though it's hard to have any confidence that they always will. It is fairly obvious that far from all rational actors always *act* within those constraints. Thieves, fraudsters, and so on, are in considerable supply and need not be seen as less than rational. But one thing is perfectly clear: what we call the market *rests on the acceptance of private property rights, and respect for same*. One is not being a market agent insofar as one proceeds by force or fraud: one who does that is, instead, taking advantage of people's trust and destroying the point of the market as a social institution. That point is: promotion of one's own life by each person and acceptance of others' right to do likewise – thus entailing respect for the like pursuits of others. So in short: markets work by voluntary exchange, which is driven by the interests and reasonings of the individual participants. Insofar as you use violence against someone, you cut short his voluntary activity. Insofar as you use fraud, you do the same: fraud supplies me, via routes that are mutually understood to be for the conveying of information, with misinformation instead, thus thwarting my interests instead of either promoting them or letting them be.

8.4.2 Desert

Stephen Nathanson observes: "It is widely believed that some people deserve greater rewards because of greater efforts or higher productivity, but equality would prohibit their having more."[15] The point is an important one, to be sure; but putting it this way encourages people to think of people's earnings as "rewards" – a vocabulary that smacks of grammar schools and missionary camps. For the issue is not one of whether the "rewards" that some authority chooses to dish out to this or that person are of the right size for that case. In free societies, what we get are *not* "rewards," but *earnings*, and the earnings in question come about as a result of their efforts plus their *agreements*, among independent persons with interests, powers, and resources of their own. Both are necessary: the work and the agreement. Economic value is brought into existence by exchange, which is freely agreed to by the relevant parties. Once the deal is concluded, each party to it *owes* the other the stipulated things – "rewards" are not in question. They can be, yes: employees could get a merited Christmas present, say. But the substance of the matter is the agreements made from

[15] Nathanson, *Op Cit.,* 370.

each actor's independent situation. While the content varies enormously, the form is always the same: the proposal to do x provided the other person does y, and acceptance of that by the other. So the "transfers" thus negotiated are of useful activities by free men and women.[16]

In a well-run enterprise, employees will probably, and normally do, deserve what they get. But management may have little choice but to make less than ideal arrangements with people who perhaps don't deserve what they will get – but are nevertheless now *due* that amount, provided they have done what's required in terms of their agreement. To treat the matter as if it were about how some powerful personage chooses to treat his "subjects" is to buy into a view of the matter that smacks of fascism, rather than the meeting of free persons with things to offer each other, in society devoted to the well-being of its inhabitants. And, of course, given that society is indeed made up of *people* – that is, organisms with minds and interests and capabilities of their own – then it is not a great leap to think that our model for society in the large ought to be the widest, the most fundamental, set of agreements about how we are going to do things that will be reached by those independent and interested beings with those various powers and interests.[17]

8.4.3 Institutional Protection of Market Rights

We need, then, to distinguish between two questions. First, what would society be like if it proceeded by actually respecting the rights that define the market? And secondly, what do we need to do in order to get people to respect them? Discussion of markets is invariably infected with some amount of confusion of these two issues. It is, for example, often just assumed that we have a market only if we have a system of government-created and government-administered laws about property – a regulatory system of greater or less intensity. If you make that assumption, then all the defects of the regulatory system will be attributed to the market as such. But clearly we could have had different regulations, and when there are criticisms of the ones we've got, we could have had better ones; nor is it necessarily governments that are needed, or even very well suited, for carrying out the regulation of markets. Perhaps, as anarchists claim, we would do best with no government intervention in the market place at all. But at the least, it is inexcusable to say "that's market failure!" when the failures in question are those of the officials whose efforts prevent it from working as it is supposed to.

Respecting property rights requires respecting the people who have those rights. When lives are not safe, the creation of wealth is impossible or pointless; whereas, when

[16] Narveson, "Deserving Profits", in in Mario Rizzo and Robin Cowan, editors *Profits and Morality*, (U. of Chicago Press, 1995). Now in Narveson, *Respecting Persons in Theory and Practice* (Rowman & Littlefield, 2002), Ch. 9, 131–162.

[17] This is the classic social contract, of course, expounded variously by Hobbes, David Gauthier (*op. cit.*) and myself (*The Libertarian Idea*, Temple University Press, 1988/Broadview 2001 and other places).

lives and properties are safe, we can go ahead and gain by our efforts. What is needed in the context of international economic activity, then, is free dealing with the persons, poor though they may be, whom we propose to engage in such activity. No doubt we need policing too. But the relative safety with which most of us in the "advanced" states live is not mainly due to policing – if anything, we live in much greater fear of the police themselves than of the people the police are supposed to be protecting us from. By far our greatest source of safety is the moral culture of our fellows, who believe – justifiably – that inflicting evils on each other is the wrong way to make one's way in the world. The cultivation of that attitude is worth more than any number of police and soldiers.

8.4.4 Emergencies vs. Poverty

Note that our topic is *not* emergency assistance, as with the great tsunami of 2004, etc. That we all should be ready to help each other – especially, our near neighbors – in time of desperate need is not in question here. Of course we should (but we should keep governments out of that, too.) But, as I have elsewhere argued,[18] we must be careful to distinguish between *emergencies* and *poverty*. When tornados strike, the well-to-do as well as the poor may need quick help. But the poor, as they say, we "have always with us" – poverty is long-term.

Only, it doesn't have to be: poverty is unnecessary, rectifiable. Moreover, as has been effectively pointed out very often, it generally is: those who are "poor" in America now are very likely to be middle-class or better 10 years hence.[19] But you don't rectify poverty by getting people into the habit of collecting handouts. Conflating emergency help with "foreign development aid" is a ground-floor mistake. To relieve emergencies, people need food, medical aid, water. To relieve poverty, we need to fix economic systems and government policies. A well-off nation doesn't need influxes of "aid" – it provides its own. Poor ones don't have them, and when the storms descend, help is needed.

8.4.5 Altruism and Its Shortcomings

The advantages of free market activity in the narrow sense noted above, in which it includes only voluntary commercial activity, are two:

1. When we deal on terms of mutual advantage, each is induced to produce maximally, whereas in an altruistic relationship, the giver is the more productive, the recipient

[18] Narveson, "Welfare and Wealth, Poverty and Justice in Today's World"; and "Is World Poverty a Problem for the Wealthy?" *Journal of Ethics* 8:4 (2004).

[19] See, for example, the statistics assembled from Census Bureau data etc. in W. Michal Cox and Richard Alm, *Myths of Rich and Poor* (NY: Basic Books, 1999),72–78.

unproductive (insofar as the relationship is altruistic – as real-world endeavors often are not, of course, or are partly so and partly not, often inextricably mixed.)

2. Regarded in a moral way, the trouble with altruism is that it inevitably makes the producer appear *superior* and the recipient helpless; the active principle is entirely in the giver. More than a few cynics would say that this, indeed, is the real intention of all altruists. I do not agree with these cynics for the general case, though I am sure it is true of some cases. But my point is that this is how it will appear and that this is not how it should be. If humans are to be dealt with as humans, it should be, insofar as possible, as fellow producers, fellow creators, rather than as two persons engaging in a relation of superior and subordinate. Altruism is, if not inevitably, at least inherently conducive to the missionary attitude: "I, the missionary, know what's good – including, therefore, what's good *for you.* So in your interests I impose it on you." – Well – no, thanks!

Largely for that reason, a continuing relationship of altruism, among adults, can generate resentment and worse. Biting the hand that feeds one is certainly a familiar phenomenon. Short-term assistance is sometimes crucial and welcome. But in the long run, a relationship in which there is a superior party providing the goodies and a bunch of unfortunate incompetents who receive it is intolerable.

8.4.6 Economics and Prosperity

The advice to "leave it to the market" is perfectly apt, once we are clear that this simply means dealing on a basis of respect for the persons and properties of all parties. It's fascinating that among social philosophers, economics seems to count for practically nothing. For example, take the following much-ignored point that has been well established in economics for more than a century. De Jasay summarizes a recent finding:

"One elegant achievement of economic thought is the Factor Price Equalisation Theorem proved by Paul Samuelson. It states that if trade in goods is free and transport costs are zero, the rewards of factors producing tradable goods will in equilibrium be equal everywhere. … [or] at least tend to converge. The significance of the theorem is that people do not have to migrate from poor to rich countries to achieve higher incomes; free trade will do it for them even if they stay at home. … both the rich and the poor countries gain, but the poor ones gain more, faster. Lovers of equality and worldwide "social justice" ought to welcome it, and not begrudge the transfer of less skilled jobs from the richer to the poorer countries."

"... In a public debate with anti-globalisers, Frits Bolkestein[20] once innocently asked them: 'Why do you want to keep the poor countries poor?'[21] The phenomenal

[20] In the outgoing Commission of the European Union.

[21] Anthony de Jasay, "'Globalization'" and Its Critics" in *Political Economy, Concisely* (Indianapolis, Ind: Liberty Fund, 2009), 310.

rise in income of Chinese and Indians in recent years, after considerable freeing up of enterprise in those countries, are major cases in point."

That the market "works" should by this time be a cliché, a matter of obvious common sense. David Schmidtz and Jason Brennan remind us of the visit by the then Soviet dictator Nikita Khruschev to the United States in 1959, when he was shown an ordinary middle-class home, one which at the time could be bought for $14,000 and contained the array of household gadgets which by that time were the norm in American households. Khrushchev assumed that this was a special setup – as, of course, it would have been had it been on display in the Soviet Union of the time. But at that time, 31 million families owned their own homes in the U.S. – about 80% of its then population. Currently, less than 2% of Americans work in agriculture, even though the country produces far more than it consumes, exporting vast amounts to all sorts of places. In 2009, the economic output of the U.S. was "about 50% greater than the *entire world's* output in 1950."[22] In distributive terms, this wealth is extremely widely shared -by world standards, the U.S. simply doesn't have poor people. It does have a great many people who would like to have more than they do, and are ready to complain about what they have, yes. But – *poor*? Ask any Ethiopian or Pakistani.

There is no reasonable account of this affluence other than the ubiquity and health of the market system. American wealth is due to the hard work and freedom of exchange prevalent among its people. The first factor is available everywhere. What is needed is the second.

8.4.7 A Short Aside About Foreign Aid

I say little about the programs advanced by governments under the heading of "development aid" or "foreign aid" – politically driven handouts from richer countries to poorer ones. These are objectionable as denying the freedom I hold to be fundamental here, of course; but additionally, the troubles with development aid are legendary. [23] When a program is not only wrong in its fundamental structure but in addition (and in consequence) hugely ineffective or worse, we may be forgiven for paying little heed to it. For example, the Interim Haiti Reconstruction Commission,

[22] David Schmidtz and Jason Brennan, *A Brief History of Liberty* (Chichester, U.K.: John Wiley & Sons Ltd, 2010), 120–122.

[23] See, for instance, Clark C. Gibosn, Krister Andersson, Elmor Ostrom and Sujai Shivakumar, *The Samaritan's Dilemma: The Political Economy of Development Aid* (New York: Oxford University Press, 2005), ch. 1, "What's Wrong with Development Aid?" This useful source comes up with many ideas about how to improve development aid. Nor is it confined to government-sponsored aid.

The downsides of foreign aid are admirably discussed in P.T. Bauer, *Equality, the Third World, and Economic Delusion* (Cambridge, MA.: Harvard University Press, 1981). See especially chs. 3–5. See also Moyo, Dambisa, *Dead Aid: Why Aid Is Not Working and How There Is Another Way for Africa* (New York: Farrar, Straus and Giroux, 2009).

"… has met exactly once. … Meantime, ordinary Haitians perceive their government to be both invisible and corrupt. In their view, as one recent visitor reports, "the government has done nothing but buy new cars with the aid money." Meanwhile, "building supplies are held up in customs for weeks or months at a time – while the government earns substantial fees for storage. [and] In the 20 years before the earthquake, it received $5-billion in aid from the U.S. alone, without noticeable effect."[24] That pretty well sums up the situation with government-to-government "aid." We need to do a lot better than that.

The way you do it is by *investment*, by companies that know how to produce things that people want and best utilize the available resources.

Some talk as though market society *forces* people into a "rat race." But there is no inherent reason why it should do so. The point is that it is not for us theorists, and not for politically powerful persons impressed by what some theorists have to say, to make such choices *either way*. Some will prefer the rat race, some won't; those who don't won't join the race: they'll do well enough to get by, then go home and have a beer.

What is important, though, is that the rat race has benefits for the rest of us. What Makes Sammy Run is, normally, the hope of great wealth. But if he makes that wealth in commerce – as we are supposing here – then he has made it by producing what is beneficial to a great many consumers, as seen by those consumers themselves. It is familiar stuff to decry great wealth, but more than equally familiar to fail to appreciate that great wealth is a function of *great benefit for others*. The dollars invested by Jones in a successful enterprise bring about lower prices or higher quality or new kinds of goods or services that would not otherwise have existed, and they benefit the people who avail themselves of them.[25] Benefits like that are what enable businessperson Jones to profit as he does. The notion that persons of wealth have somehow gouged it from others, as if they were thieves rather than producers, can only be based on spleen. Logically, it makes no sense: thieves steal what has been produced by others. They are, necessarily, parasites. Business people are not: they expand the available repertoire of good things for others.

This is what makes markets so special. *Provided* that its inherent restrictions are observed, markets improve the lot of many at cost to none. Of course, this is a strong provision. But in so many cases, those restrictions are very largely observed.[26]

[24] Margaret Wente in *The Globe and Mail* (Toronto), *July 13*.

[25] The "robber baron" Cornelius Vanderbilt brought huge reductions in train fares to Americans; Andre Carnegie cut the price of steel rail by 75%; John d. Rockefeller cut the price of oil by 80%. Matt Ridley, *The Rational Optimist*, New York: Harper-Collins, 2010, 23. See also James D. Gwartney and Richard L. Stroup, *What Everyone Should Know about Economics and Prosperity* (Vancouver: Fraser Institute, 2002).

[26] A lengthy discussion has had to be omitted for reasons of space.

8.4.8 Business and Poverty

Businesses don't characteristically think in terms of "alleviating poverty", even though they in fact do that. Should they? The short answer is: No. Businesses are out to maximize their profits (I will assume) and whether they do so by opening up branches in poor countries or wealthy one makes no fundamental difference to them. To be sure, some of them are quite likely to seek out opportunities in poor countries precisely from partially altruistic motives, and that's fine. But we should not be pushing them to open unprofitable enterprises in poor areas. We *should* be concerned about the innumerable restrictions, amounting to state kleptomania, that always prevent people from doing better. Forced investment is counterproductive. The best situation is when the external companies setting up shop in poor countries remain because they're doing well, and the people they employ remain because their wages and benefits are so good.[27]

These are the structures and motivations that work, and will bring poor countries out of poverty. And nothing else will. Investing in education, health, and welfare services makes sense only if their benefits can be sustained. But that requires independent employment – in short, business. The requisite infrastructures will improve as the situations of people improve; but not otherwise. Allowing business – enterprise, in general – to thrive is the essential condition for all this.[28]

8.5 Conclusion

This is something of a manifesto. The thesis is, first, that justice is summed up in a general right to freedom, and second, that with a political framework firmly oriented toward the liberty of individuals, problems of global poverty will disappear just as it virtually has in the wealthy countries today. People don't like to be poor, they will spend their lives attempting to better their situations, and their frequent non-success is due more than any other single thing to their being in an economic environment of unfreedom. Instead of looking upon the poor as incompetents, we should be dealing with them as free men and women. Instead of blandishing the poor with tax-derived "aid" we should be recognizing the rights of property and contract, and encouraging the virtues of enterprise and hard work. Encouraging, especially by allowing, investment in poor communities by profit-seeking companies will do far more good than the current orientation of entitlements to handouts.

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[27] Jack Powelson, *Dialogue with Friends* (Boulder, Col.: Horizon Society Publications, 1988), ch. 4 "Multinational Corporations", 54–58.

[28] Many discussions and books entered into the background of this paper. A very readable brief one is James W. Gwartney and Richard L. Stroup, *What Everyone Should Know about Economics and Prosperity* (Vancouver: Fraser Institute, 1993).

Chapter 9
Fatal Flaws in the Libertarian Conception of the Market

Jonathan Schonsheck

Abstract Schonsheck argues that libertarians typically begin the argument about the just distribution of commodities with assumptions about the origins of market itself, and the origins of its participants. These presumptions are wholly unwarranted; neither the market, nor they themselves, could exist without the fine-tuned sacrifices of others. Furthermore, the continuing crisis in financial markets worldwide exposed an array of failures in "rational market theory." Rational market theory's sole mechanism for assuring the efficiency of the market, and the rectitude of the participants, is "market discipline," administered in the context of "counterparty surveillance." But counterparty surveillance was made impossible, since the markets were opaque. Additionally, some bad actors were permitted to make themselves invulnerable to market discipline. In consequence, intelligent regulation of the market is essential.

9.1 Introduction to the Issues

It can be asserted without controversy that the well-lived life requires a non-negligible quantity of commodities, of goods and services. And it can be asserted, very nearly without controversy, that the efficient production and distribution of those essential goods and services cannot be the outcome of a command economy. For a number of compelling reasons, which need not detain us here,[1] we must look

[1] Except to say this: both class solidarity that eclipses familial bonds, and motivation based upon that class solidarity rather than the welfare of kith and kin, are proved impossible by the ineradicable, biological imperatives of kin selection. See Jonathan Schonsheck, "Rudeness, Rasp and Repudiation," in *Civility and Its Discontents,* ed. Christine Sistare (Lawrence: University Press of Kansas, 2004), pp. 182–202.

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to (some species of) command economy. The overarching question, then, is this: is there a design of economic arrangements for the production and distribution of those essential commodities that is both (i) *efficient*, and (ii) *just*? Can we get what we need, without unacceptably high levels of waste, or wrong?

With only slight oversimplification, it can be asserted that the libertarian position is that there is really only *one* condition to be met. The "free market" operates *efficiently*; when it does, the distribution of commodities – whatever it turns out to be – satisfies the demands of *justice.* For justice in holdings *is,* quite simply, *whatever* results from free market transactions, from the multiplicity of trades agreed to by the market participants.

Now the "free market" envisioned by libertarians is a market free from interference by the state. Contemporary libertarians are committed to, or at least reliant upon, what has come to be known as "Rational Market Theory." A central thesis of Rational Market Theory is the claim that state interference with the markets, in the attempt to make them more efficient, or more just, will have quite the opposite effect: efficiency will be undermined. The reason for this is that there are powerful forces, inherent in the market itself, which are quite sufficient to assure the efficiency of the market, and the moral rectitude of the participants. Agents in the market whose actions are unduly risky, or stupid, or untoward, will be found out; as a result, those agents will suffer the financial punishment of "market discipline." And once again, state interference – in the form of regulations constraining the markets – is counterproductive; such regulations impede the (otherwise) smooth administration of market discipline.

Were contemporary libertarians correct in all this, it would have important and far-reaching implications. For example, it would validate the bumper sticker of (at least "everyday") libertarians, "It's *my money!*" Or the more sophisticated slogan, for bigger bumpers: "I earned it, so it's *my money!*" These proclamations are intended to thwart any and all efforts at the so-called "redistribution" of wealth, i.e., the implementation of any principle of (re)distributive justice. That is clearly the intent of Jan Narveson's slogan, in "Poverty, Markets, Justice."[2] Requiring a Hummer bumper, it reads: "The stuff we are distributing *is somebody's.* It is not 'manna from heaven:' it is the result of many people's ingenuity, labor and involvement."[3]

Of course I quite agree that the commodities essential to a well-lived life do not fall like manna from heaven. I further agree that these commodities are the result of "many people's ingenuity and labor." Nonetheless, I believe that the libertarian conception of the market is fatally flawed. For these two theses do not soundly lead to the position that "It's my money," or that the state's taxing income and wealth to sustain specifiable institutions, including those of redistribution, is not morally justified. What is missing from the libertarians' conception: cognizance of the labor

[2] In this volume, Chap. 8.

[3] Paraphrased from p. 96; italics in original.

required to initiate, and sustain, and preserve markets, cognizance of the labor required to create, and nurture, and sustain all of the *participants* in the market, the marke*teers*. For contemporary market transactions take place within the context of complex social institutions, which have complex histories; these *institutions* did not fall like "manna from heaven" either. Nor are they like the barterings of primitives, in a grassy clearing in the state of nature, writ very large. A full understanding of this incredibly complex context undermines the plausibility of the simplistic slogan, "I *earned* the money!" Indeed, neither "earning" nor "money" can truly be understood in such primitive and splendid isolation; I argue this in Sect. 9.2.

My argument for the rejection of the libertarian conception of the market continues in Sect. 9.3, by focusing on its philosophical and economic foundation: Rational Market Theory [RMT]. In Sect. 9.4, I argue that the crisis in the financial markets – beginning in 2007, and continuing into the present – was caused by the disciples of RMT. For they were committed to the relentless deregulation of the markets, while simultaneously taking actions and enacting legislation which *prevented* the markets from operating as they had envisioned. The sole mechanism within Rational Market Theory for ensuring the efficiency and rectitude of the market is "market discipline," which follows "counterparty surveillance." But in a variety of ways – to be detailed in Sects. 9.4, 9.5, and 9.6, the Rational Marketeers made "counterparty surveillance" *impossible*, and made bad actors *invulnerable* to "market discipline."

By this point, I will have unearthed the root cause of the financial markets crisis – no mean feat. And by exposing Rational Market Theory's catastrophic failures, I will have constructed a compelling case for rejecting the libertarian conception of the market, and of justice in holdings.

9.2 Romanticizing the Markets

9.2.1 The Marketplace in the State of Nature

The appropriate place to begin is in the mythological "state of nature," as fanaticized by John Locke and Jean-Jacques Rousseau.[4] Two rugged individualists have a chance encounter in a clearing in the deep woods. One has gathered apples, but would like some acorns; the other has gathered acorns, but would enjoy some apples. Through various gestures, and guttural utterances, they negotiate a trade – some quantity of apples, for some quantity of acorns, agreeable to both. Each leaves the clearing well satisfied, and better off than before the exchange. Together, they are creating the "free enterprise" system. For soon thereafter, their encounters become scheduled, rather than occurring by chance. And soon after that, yet other

[4] But not as fanaticized by Thomas Hobbes; there's not much romance in a state of nature within which life is "solitary, poore, nasty, brutish and short." *Leviathan,* Chapter XIII.

participants appear, bringing new commodities to the clearing, to the incipient marketplace. And each participant, through these mutually advantageous transactions, improves one's own material position.

Well, usually. For it can happen that a participant invests significant labor in some commodity, only to find that no one else wants it, or doesn't want very much of it, or doesn't want it very much. All that effort has gone for naught. But then, that's the "risk" that one takes, participating in a free market: there may not be a demand for the commodity that one has created. However, there is the continuing enticement that other participants *will* indeed want what one brings, and then the subsequent "reward" for that risk can be great.

It will take some advances in language, and advances in abstract thinking: but it is easy to imagine the exchange of a *service* – hunting or gathering, let us say – for some product. And from that kind of transaction, to the exchange of one service for another service, is just a short imaginary leap.

Now let us suppose that one of the participants behaves badly – offers for trade a basket of apples with well-polished fruit on top, but well-rotted apples on the bottom. On the next trading day, the victim of the transaction makes the accusation, and presents the evidence. Information about the malefactor's wrongdoing spreads instantaneously to all the market participants; they refuse to trade with that participant any more. Consequently, the bad actor is financially ruined, having been punished solely by market forces.

Thus the entire marketplace for the exchange of goods and services, and the internal mechanism assuring efficiency and rectitude, could arise "spontaneously." That is, could all arise without a body proclaiming a monopoly on the use of force, and without the imposition of burdensome tribal regulations.

To anticipate a bit: we have here many of the essentials of Rational Market Theory. Participants in the marketplace assume risks by investing their labor (and other resources) in the production of a commodity; when they have efficiently met a demand, they receive – and are entitled to – a reward. The misdeeds of bad actors will be seen, as it is in the self-interest of everyone to engage in "counterparty surveillance." Market information flows quickly, and freely. Bad actors will be shunned, subjected to "market discipline." Information about that market discipline will flow quickly, and freely, to all the other participants. Thus they will all see that it is in their own best interests to avoid market discipline, and that they can do so only by acting with integrity in the marketplace. (I shall expand the discussion of Rational Market Theory in 3.0, below.)

But even at this point, the Romantic Marketeer will have to acknowledge some oversimplifications.

First, there could well be a delay between any transaction itself, and the discovery that it was deceptive or fraudulent. In the meantime, the bad actor will be undeterred; other market participants will have become victims. And delays of this sort will become longer, and more frequent, with the increasing complexity of the transactions.

Second, a market participant may go out of existence before discovering, or else due to, the bad act. Instead of rotten apples, imagine ineptly handled *fugu,* the potentially poisonous pufferfish, a Japanese delicacy. And to anticipate a bit more: if a

participant is ruined, that participant may be too distracted, or too impoverished, or otherwise unable to sound the alarm.

Third, information may well not flow quickly. It may not flow for free; it may be costly to gather the relevant information. And it may well not flow at all, due to "confidentiality" agreements among the participants.

Fourth, the administration of "market discipline" may not be so "automatic" as the Romantic Marketeers imagine. A range of factors, from fear of the market power of the bad actor, to conspiracies among some participants, could well blunt or even thwart the deterrent effects of market discipline.

9.2.2 Contemporary Romantic Marketeers

Let us engage in a thought experiment. Let us imagine that a contemporary Romantic Marketeer, in an "everyday libertarian" article, intends to specify property rights, and thus justice in holdings. Imagine that the article begins like this:

"Let us assume the existence of a mature, fully developed market. Let us further assume that the market is well-protected against domestic threats (by a police force), and against international threats (by a military). Let us even further assume a system of lawyers, courts, judges, etc. for the resolution of disputes, the enforcement of contracts, etc. And let us assume that creating, developing, and sustaining the operations of these essential institutions costs *nothing*.

"Let us assume the existence of participants in the market, "Marketeers" – individuals in the maturity of their faculties, with the ability to provide goods or services. Let us assume everyone wishes to participate in the market, and that everyone has the talents and abilities that constitute "marketable skills." Let us further assume that everyone is anxious to enter into transactions of trade, employment, etc. Let us even further assume that (pro)creating and nurturing these Marketeers, and sustaining them *as* Marketeers, costs *nothing*.

"Let us assume that the various Marketeers have clear title to the commodities they offer for trade in the market – their possession is not the result of fraud, or unjust social policies, or violence. Indeed, let us assume that, at every arbitrary time slice, the holdings of all Marketeers are *just*; there is no need to investigate how they came to have what it is that they have. In consequence, at any subsequent time slice, if the Marketeers have what they have through voluntary market transactions, then they are *entitled* to what they have – justice is satisfied.

"Finally, let us assume that this market is *our* market."

Were such an article to be written, it would be met with incredulous hostility, or contemptuous dismissal. These assumptions range from the very dubious to the obviously false. In consequence, it is not reasonable to believe that we will be able to gain any insights about the operations, or the rectitude, of our own markets – not with this set of unwarranted assumptions.

It would be rhetorically *fatal* to begin an article with a set of assumptions like this. So contemporary Romantic Marketeers, contemporary (everyday) libertarians, do not. Instead, these are typically the "suppressed premises" of the overall argument. However, they may appear, in rudimentary form, scattered about the piece. One popular tactic is to rather suddenly begin talking about (adult) participants engaging in various market transactions. This, without a word about creating and sustaining the market itself, without a word about creating and sustaining the Marketeers themselves, and without a word about the provenance of their goods, or their training in the services, that they bring to the market.

According to Narveson, "Economic value is brought into existence by exchange which is freely agreed to by the relevant parties." (Sect. 8.4.2) No, "economic value is brought into existence" by the *labor power* of the individual participants. In some way or another, they have to *produce,* in order to have something to actually *exchange.* And then there is the issue: how did it come about that these "parties" came to have the skills required for producing something to exchange? Indeed, and even prior to that: how did they survive, how did they grow up to adulthood? Narveson writes, "While the content varies enormously, the form is always the same: the proposal to do x provided that the other person does y, and acceptance of that by the other. So the "transfers" thus negotiated are of useful activities by free men and women." (Sect. 8.4.2) Narveson claims that "markets work by voluntary exchange, which is driven by the interests and reasonings of the individual participants." (Sect. 8.4.1) That is surely correct, as regards the motivations of the participants. Still, there is the matter of bringing economic value into existence, and the prior matter of being enabled to create economic value. And that brings us to another issue: whence cometh this market, within which exchanges can be made?

Throughout Narveson's article, we find the unwarranted assumption of an already-existing, well-functioning and enduring "marketplace." Its existence is axiomatic; nothing is said, and seemingly we need not inquire about, its origins or operations or protections from outside interference.

Additionally, we find the unwarranted assumption that we all *begin* as adults, as "men" and "women." Each of us has our own "powers" and "resources," able to "make different things," or "perform different sorts of other services," and able to advance our "interests" by negotiating with "fellow producers, fellow creators."

Finally, there is the assumption that the various participants are all entitled to all that they bring to the market for trading – we need not inquire how they have come to possess what they do indeed possess.

It is as if, like Juno, all this – the market, the Marketeers, the Marketeers' possessions – had sprung full-grown from the head of Zeus.[5] But of course it hasn't. We need to become fully cognizant of the extraordinary labor, and thus of the extraordinary *costs,* of developing and sustaining it all.

[5] Or Ayn Rand, or Milton Freidman.

9.2.3 The End of the Romance

As I signaled earlier, the most effective way to counter the contemporary Romantic Marketeers, everyday libertarians, is to surface their unwarranted assumptions, and then to offer a counter-narrative. Having done the first task, let us turn to the second. Let us look to the actual costs and sacrifices of creating and sustaining both markets and Marketeers. All the while, let us be mindful of the implications of these for economic justice.

Echoing David Copperfield, "I am Born." Many of us, whether delivered by stork or forceps, arrived as quite helpless infants – we did not arrive as fully qualified "Marketeers."[6] We were each born as babes, with a particular genetic endowment – encased in that month's egg, when penetrated by that night's best swimmer. We were born into a particular family, and more widely, a social context: a "starting place," as it were. The developmental recipe that is my DNA would have a powerful influence on my growth, my natural attributes and characteristics. My starting place would have a powerful influence on my social advantages and disadvantages: safety, nutrition, nurturance, education, family connections. Taken together, these two sets of factors very nearly *determine* my life prospects. And yet it must be acknowledged that "I" had nothing to do with my genetic endowment, nor did I choose my starting place. It will be some years before I know much about my emerging skills and talents, my aptitudes and general intelligence, etc. And it will be some time after *that*, that I will learn whether I have indeed developed what constitute "marketable skills," whether I can produce or serve in ways that will indeed be of value to others, and thus enable me to make mutually advantageous exchanges.

But we have gotten ahead of ourselves. Whether various "talents" or "abilities" constitute "marketable skills" *presupposes* a *functioning market*, at a particular point in social and technological development.[7] And that's yet another thing that I cannot "choose," that is not a "choice" I can make. And I can take no credit for that pre-existing market.

What I *can* do, however, is this. Having reached the age of reason, I can reflect on various, competing socio-economic arrangements. And I can decide which one embodies the principles of justice that I find most compelling. While I shall never be offered the opportunity to give my express consent to citizenship, with all the rights and duties attached thereunto, I could reason thusly: If I *were* to be offered such an opportunity, I surely *would* consent to citizenship. If I find myself in such a

[6] And many of us hope for – indeed, *long* for – a period when we are no longer fully-participating Marketeers: i.e., when we are *retirees*.

[7] Imagine that Michael Jordan was born in North Carolina some 300 years ago. He would have a set of "advantageous" skills – but "marketable" would mean something entirely different in the fields, than it does in the NBA.

society, I could choose to work at preserving it. If I do not, I could choose to work towards establishing it.[8]

So if I *could* choose my socio-economic system – since I do have the opportunity for "hypothetical consent" – what *would* I choose?

Well, I would agree with Narveson about cooperation and production; indeed, I could say that "Social cooperation . . . is always productive, and without cooperation there would be nothing produced and so nothing to distribute."[9] I would choose to live in a "property-owning democracy," whose "aim is to realize in the basic institutions the idea of a society as a fair system of cooperation between citizens regarded as free and equal. To do this, those institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these means is human as well as real capital, that is, knowledge and an understanding of institutions, educated abilities and trained skills."[10] Furthermore, I would endorse a concept of "reciprocity: "the better endowed (who have a more fortunate place in the distribution of native endowments they do not morally deserve) are encouraged to acquire still further benefits – they are already benefited by their fortunate place in the distribution – on condition that they train their native endowments and use them in ways that contribute to the good of the less endowed (whose less fortunate place in the distribution they also do not morally deserve)".[11] In this context, recall the determinative role of chance: the egg, the sperm, the family, the society.

As regards social institutions, I would insist upon "fair equality of opportunity," which "is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. To specify the idea of a fair chance we say: supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed. . . . Society must also establish, among other things, equal opportunities of education for all regardless of family income."[12]

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[8] "... a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves." John Rawls, *A Theory of Justice* (Harvard, 1971), p. 115.

[9] John Rawls, *Justice as Fairness: A Restatement,* ed. Erin Kelly (Cambridge: The Belknap Press of Harvard University Press), 2001, p. 61. Rawls goes on to admit that he failed to give this proper emphasis in *A Theory of Justice* (1971).

[10] *Justice as Fairness,* p. 140.

[11] *Justice as Fairness,* pp. 76–7.

[12] *Justice as Fairness*, pp. 43–4.

It is essential to realize that those who take advantage of these institutions of justice will not be looking for "handouts." *Quite* to the contrary, they will have *thereby* become qualified "Marketeers" (to various degrees). And in so doing, they will have acquired the bases of self-respect.[13]

Of course we cannot have education without educators, nor training without trainers. Shall we coerce those with the requisite abilities to become trainers and educators? Neither Narveson nor I endorse that mode. Indeed, here's the market at its best: social institutions freely contract with qualified individuals to provide these services. Needless to say, resources will be needed to make good on these contracts. Happily, one element of the principles of justice of the society to which I have given my consent (albeit hypothetical) is paying my fair share of taxes. "These principles specify the basic rights and duties to be assigned by the main political and social institutions, and they regulate the division of benefits arising from social cooperation and *allot the burdens necessary to sustain it.*"[14]

In addition to these internal, domestic institutions, the marketplace will need to be protected from external, from international threats. The more successful the market is in organizing human labor for the creation of commodities, the greater the temptation for outsiders to forcibly seize the fruits of others' labor. It is likely that a standing army, including its supporting defense infrastructure, will be an absolute necessity. These burdens of defending the market itself will have to be allotted as well – further undermining the claim that "It's my money." A portion of it isn't – not, at least, if you wish to be secure in your enjoyment of the remainder . . ..

Finally, we must acknowledge the possibility that, in the past, these burdens were not allotted justly. It is possible that disproportionate wealth has been the result of disproportionate influence on the political process, that disparities in wealth have had much to do with inequitable schemes of taxation. So the claim that "It's my money" could be proved false on these additional grounds: it has been wrongly acquired, to the disadvantage of one's fellow citizens.

According to Narveson, "The notion that persons of wealth have somehow gouged it from others, as if they were thieves rather than producers, can only be based on spleen." (Sect. 8.4.7) As the arguments above have proved, the claim that arguments about inequality "can only be based on spleen" is palpably false.

Let us sum up, before moving on. The slogan "It's mine, because I got it by transactions in the market" fails as a moral justification of extant holdings, because it starts "in the middle." It presupposes that developing and sustaining and protecting the market is free – or at least, not the fiscal responsibility of the sloganeer. It presupposes that the sloganeer (i) always has been, (ii) is, and (iii) always will be a competent Marketeer. The first and last of these presuppositions are demonstrably false;

[13] "We may define self-respect (or self-esteem) as having two aspects. First of all . . . it includes a person's sense of his own value, his secure conviction that his conception of the good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions." *A Theory of Justice*, p. 440.

[14] *Justice as Fairness,* p. 7.

if the middle presupposition is true, it is so as a result of the sacrifices of all those who created, and sustain and protect that market, and also the result of genetic and social good fortune for which the sloganeer can take no credit.

It has been my experience that those who make the libertarian argument do so based upon full knowledge of their fortunate genetic endowment, their favorable place in society, their array of marketable skills (and the prospects for their abilities to continue to have market value), and their non-negligible index of tradable commodities. Conversely, and more sharply: those who are disadvantageous draws in the natural lottery, or have a disadvantageous starting position, or both – which are just as undeserved as their compatriots' advantages – find the libertarian concept of economic justice a transparently cruel and self-serving rationalization.

9.3 The Relevant Essentials[15] of Rational Market Theory

Some populations of Romantic Marketeers have evolved, into "Rational Marketeers." (Of course the *extent* of this evolutionary advance is a matter of considerable controversy.) According to contemporary Rational Marketeers, our existing markets – for commodities, for stocks & bonds, for all financial instruments, including financial derivatives – are just the clearing in the state of nature, "writ large." Well, writ very, very, very large…. And made electronic.

Rational Market Theory, and the "efficient market hypothesis," became the *zeitgeist* of a powerful collection of individuals in the government (e.g., Alan Greenspan, Chair of the Federal Reserve), Congress (e.g., Senator Phil Graham), and the academy. These disciples of Rational Market Theory believe that wholly unregulated markets are *efficient* markets. Internal market forces themselves will preserve market integrity, and market efficiency. Interference with the markets, in the way of externally imposed governmental regulations, is wholly unnecessary, as market forces are quite sufficient. Indeed, government regulations, and the machinery of enforcement, *impede* market efficiency.

Here is how it is supposed to function. Every transaction in the marketplace involves (at least) two participants; each is the "counterparty" of the other. Each observes, and takes note of, the actions of the other. This is known as "counterparty surveillance." Now if agents in the marketplace make imprudent choices – buy when they ought to have sold, sold when they ought to have held, took risks when they should have been risk-averse, timid when they should have been bold – these choices

[15] My concern in this paper is with Rational Market Theory's "efficient market hypothesis." Thus I set aside, as not relevant in this paper, another essential of RMT: arguments about the relationship between "price" and "value." For a thorough, compelling yet accessible critique of Rational Market Theory, see Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (New York: Harper Business, 2009).

will be observed, and will be noted by their counterparties. In a similar vein, "bad acting" in the marketplace – making deceptive claims, failing to satisfy contractual obligations, etc. – will be observed, and will be noted by the respective counterparties.

But "counterparty surveillance" is not passive observation, not mere market voyeurism. Counterparty surveillance leads, when appropriate, to "market discipline." Participants who act in inefficient or untoward ways will fail to realize profits, or will suffer losses. For other agents will refuse to do business with them. Put another way: they will be *punished* by the market for their imprudent or unethical actions. They may well be financially ruined, driven out of business.

Furthermore, the information about that punishment will flow freely throughout the market. The various rational agents that populate the market will observe the infliction of market discipline, and they will learn from it. They will see which market actions get rewarded, and which actions get punished. As the financial market grows, in both volume and diversity of transactions, ever more lessons will be learned by those rational agents.

Thus we have here an ongoing and continuous process of reward and punishment. Those agents whose actions are efficient and upright will reap rewards. Indeed, they will reap them *from* those agents whose actions are inefficient, or dishonest,[16] and who are there*fore*, and are there*by*, *punished*. And as this process continues, the market *itself* becomes continuously more efficient, and more rational.

The Rational Marketeers, like the Romantic Marketeers, have to acknowledge an array of oversimplifications. There may well be a delay between a transaction itself and the discovery of its fraudulence; during that time, the bad actor may well victimize unsuspecting others. Victims may lack the wherewithal, or the energy, to disseminate notice of the bad actor's conduct – especially if they have been driven out of business. And if financially ruined, it will be impossible for them to participate in "market discipline."

There is one other factor here worthy of note. The Rational Marketeers seem to believe that, since Zero Regulation is the ideal, that every step towards Zero Regulation is, necessarily, an improvement. Unfortunately, they seem to have held this without much consideration of the interrelationships that might exist among the remaining regulations. Abstractly, the repeal (or general non-enforcement) of some regulation might impede the workings of some other regulation. And again abstractly, the lack of regulation might impede, or completely thwart, the sole mechanism within RMT for assuring efficiency and rectitude in the market: market discipline. And the failure of market discipline might precipitate a genuine crisis in financial markets….

[16] According to Brooksley Born, Alan Greenspan believed that regulations against *fraud* were unnecessary – those who committed fraud would be found out, and would be disciplined by the market. See Rick Schmitt, "Prophet and Loss," *Stanford: A publication of the Stanford Alumni Association,* March/April 2009, p. 42.

9.4 Unearthing the Root Cause of the Crisis in Financial Markets

Collectively, we are coming to a better understanding of the various components of the crisis in the financial markets worldwide, a crisis that culminated in the truly terrifying month of September 2008. The effects of the crisis continue to reverberate throughout the economy, in the form of persisting high unemployment, an enduring distrust of financial markets, and the high level of anxiety felt by investors – exacerbated by the turmoil, the wild gyrations of the stock markets.[17] We are indebted to quite an array of individuals and institutions for their contributions to our better understanding.

And yet, despite all these contributions – and contrary to the claims of many contributors – the proverbial "root cause" of the crisis has yet to be unearthed.

The Commissioners and staff that produced *The Financial Crisis Inquiry Report*[18] conclude that the crisis resulted from "regulatory failures." I have termed these "lacks and lax." Some of the deleterious consequences arose from lacks (the absence) of regulation – in particular, of the burgeoning derivatives market. Additionally, the crisis was exacerbated by lax regulators, failing to enforce extant legislation. Both "lacks and lax" are key components of the mindless drive towards Zero Regulation, that every regulation that is repealed, or left unenforced, is necessarily a step towards the optimum state – and *could* not undermine the efficient markets hypothesis itself. But they cannot be the "root cause," for we can (and must) demand an explanation of these regulatory failures *themselves.*

In 2010, filmmaker Charles Ferguson accepted an Academy Award for *Inside Job*, a powerful film that dramatically captures significant wrongdoing – and claims the "root cause" was *fraud,* on a massive scale. To be sure, deep dishonesty permeated the crisis. What is less sure is whether the various instances of dishonesty satisfy all the elements constitutive of "criminal fraud." And even if they do, we have to go on to inquire: what features of the wider business environment enabled this dishonesty to become so prevalent, and so profitable?

Michael Hirsh, in *Capital Offense,* argues persuasively that key figures in finance and government, especially former Federal Reserve Chair Alan Greenspan, were libertarians devoted to "free-market fundamentalism," based upon "Rational Market Theory."[19] Hirsh is correct in this claim, but he is *in*correct in claiming that this devotion is *itself* the "root cause" of the crisis. Again, we must dig deeper; we must unearth the *reasons* for this devotion. And then we need to see precisely how that devotion contributed to the crisis.

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[17] These events make all the more astonishing Narveson's assertion: "That the market "works" should by this time be a cliché, a matter of obvious common sense." [106]

[18] *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States.* (New York: PublicAffairs), 2011.

[19] Michael Hirsh, *Capital Offense: How Washington's Wise Men Turned America's Future Over to Wall Street* (New Jersey: John Wiley & Sons, Inc.), 2010. See especially pp. 77–83.

My own thesis is that the "root cause" of the financial markets crisis is actually a *synergism* between two distinguishable elements. The first element is that devotion of many individuals – in government, in business, and in the academy – to "Rational Market Theory." The second element is the pursuit of policies and legislation that may *appear* to be mandated by RMT, but which in fact made it impossible for the markets to operate as envisioned – or more accurately, as *imagined* – within Rational Market Theory. This lethal admixture of (romanticized) theory and (actual) practice *is* the "root cause" of the crisis.

Please note carefully: my thesis is *not* that these mechanisms simply "happened" to fail, which implies that they *might* have succeeded, but just didn't in this instance. My thesis is a much stronger claim: that it was *not possible* for these mechanisms to succeed.

9.4.1 Houses and Mortgages

9.4.1.1 The Safe but Stodgy Business Model of the S&Ls

The original Savings & Loan business plan was perfectly straightforward. The S&Ls accepted money from depositors, paying them interest. The S&Ls made loans to home buyers, in the form of mortgages. The S&Ls charged a higher rate of interest on those mortgage loans, than the rate of interest that they paid to their depositors. From this differential, the institution earned a modest but dependable profit. S&Ls paid salaries to their employees, including their "loan officers:" those responsible for originating mortgages. These activities constituted the "primary mortgage market."

The Savings and Loans had an overarching fiduciary duty to safeguard the money of their depositors. In consequence, they were very selective in their granting of mortgages. They provided a "prime" mortgage only to prospective buyers who had steady income from secure employment, who had a spotless credit record, who had accumulated a substantial down payment, and who were demonstrably prepared for the various additional challenges of responsible home ownership – upkeep, repairs, and general "neighborliness." And all of these essentials of successful home ownership, of successful repayment of the mortgage, had to be fully *verified*. Credit agencies assure lenders that the applicant can indeed make the mortgage payments. An accurate appraisal of a house is essential to protect the lender – in the (presumably) unlikely event of a mortgage default, the lender will be able to recoup its costs by repossessing the house, and reselling it. The technical term for the totality of these requirements is "mortgage underwriting standards."

At this time, there were more prospective buyers, seeking more money in mortgage loans, than the S&Ls had available. The S&Ls need not, and did not, engage in any significant "marketing" activities; customers came to them. The financial dynamic here is one of "push" – prospective homebuyers "pushing" the S&Ls for loans; the S&Ls resisting the "push" of all but the most qualified buyers, in order to fulfill their fiduciary duty to safeguard the resources of their depositors.

This point can be made in a different way. The S&Ls as institutions, and the individuals they employed, were powerfully motivated to make *only* sound loans. Otherwise, loan originators could lose their jobs; institutions could fail to make an appropriate profit (or even suffer a loss); executives could be fired. It may seem too obvious to say – but its importance will be revealed soon – that neither the S&L as an institution, nor the individuals in its employ, had any incentive whatsoever to make bad loans, to consummate mortgages that were likely to fall into default.[20]

This business plan was not without problems. First, it was very constrained. For once an S&L had made a mortgage loan, that sum of money was essentially "gone" for thirty years. The S&L could not offer another mortgage to another prospective homebuyer until it had accumulated enough additional small deposits, together with monthly mortgage payments on existing mortgages, to have amassed enough money to grant another mortgage. Thus, there was insufficient money available; fully qualified prospective home buyers were turned away.[21]

Pressure was building against these constraints. Home ownership was becoming an integral part of the "American Dream;" it was as if the Declaration of Independence had been amended, so that one's "unalienable rights" included "life, liberty, and a freestanding house." Pressure was being exerted from qualified buyers, regardless of race, religion or ethnicity….

9.4.1.2 The Secondary Mortgage Market

The problem of the constraints of the stodgy S&L model was solved with the creation of the "secondary mortgage market," by investment banks. They would *buy* the S&L's mortgages, i.e., those *contracts* to repay the borrowed money. So after the S&L provides a mortgage to a homebuyer, it then "sells" the mortgage to an investment bank. Thus, the S&L instantly got that money *back* (rather than the money's being tied up for 30 years), so the S&L was immediately in a position to offer another mortgage, to another home purchaser. And of course the S&L could then sell *that* primary mortgage too, and start the cycle once again.

Now under the old, stogy business model, the S&L's modest profit came from that modest difference between the interest it paid on deposits, and the interest it collected from loans. Under this new, more aggressive model, profits come from the *fees* that S&Ls collected – the fees for originating mortgages, and subsequently for servicing them. Thus, the people who used to be bank mortgage officers, earning a

[20] It is true that some (small) rate of default is to be expected. If none of an institution's mortgages fail, the inference that is drawn is that too many applicants are being denied. Some of those being denied would have proved to be successful borrowers. This fact does not, however, constitute an actual "incentive" to the making of bad loans.

[21] Insidiously: high mortgage underwriting standards, together with wide discretion in applying those standards, could result in discriminatory lending practices. Conscious racism, unconscious bias, results in rejection. In the practice known as "redlining," no mortgages granted to applicants for houses in certain areas – typically low-income, ethnic minorities, etc.

salary for safeguarding depositors' money, were transformed into mortgage *sales*people, earning a *commission* for consummating deals. So now, instead of the S&Ls waiting for prospective homebuyers to appear at their counters, they were powerfully motivated to *seek out* prospective mortgagees. For when a housing transaction is consummated, the seller's real estate agent, and the buyer's real estate agent, both receive commissions. The appraiser receives a fee.[22] A commission is earned by the bank's loan officer – again, who has been transformed into a mortgage salesperson. The seller's attorney, the buyer's attorney, and the bank's attorney all collect fees. The lending institution collects an array of fees. And municipalities collect taxes, and filing fees. In stark contrast, if the deal is *declined*, *none* of this happens. Two real estate firms, three sets of lawyers, the lending institution, the municipalities, and the seller, all walk away empty-handed. Or more precisely, they are never gathered for the closing that does not occur.

It is essential to note that all these parties *keep* the fees and commissions, *even if* the mortgage falls into default. It is essential, because this is the origin of the incentive to make more and more loans – even questionable loans, even obviously bad loans.

9.4.1.3 Investment Banks and the "Securitization" of Mortgages

After the bursting of the "dot.com bubble," the Federal Reserve, under its Chairman Alan Greenspan, sought to stimulate the economy by lowering interest rates.[23] As a direct result, mortgage rates fell to (then) all-time lows. Thus did ideology – the "American Dream" of home ownership – get combined with monetary policy – the actions of the Fed. More and more people wanted to buy homes; historically low mortgage rates made it appear doable. And of course there were hordes of commission-driven mortgage originators, et al., who were most anxious to recruit every last one of them.

Let us pause to note a crucial fact about interest rates. Low interest rates are good for borrowers – but bad for investors. Those borrowing to buy a house want lower interest rates. But those whose income is generated *from* loans prefer a higher rate of return, i.e., higher interest rates. The Federal Reserve's interest policy drastically reduced the income stream of investors.

In their search for higher rates of return than those paid by Savings & Loans for ordinary deposits, private investors looked at the primary mortgage market. Even though mortgage rates were low, they were considerably higher than the rate for deposits. Private investors could realize *that* rate of return by participating in the "secondary market" for mortgages.

Thus, a vast ocean of private investor capital became available for purchasing primary mortgages. Before too long, however, the supply of credit-worthy families, with secure employment and the skills essential to successful home ownership, was

[22] In point of fact, the appraiser receives a fee whether the deal is consummated or not.

[23] See Lawrence G. McDonald, *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers* (New York: Crown Business [Random House], 2009), pp. 75–6.

virtually exhausted. Few people who were qualified for prime, primary mortgages were still seeking them. And yet there was all that private capital searching for primary mortgages to buy, investing in them for their higher rate of return. And there were all those commission-driven mortgage salespeople (and realtors, and appraisers, and sets of lawyers, and municipalities), anxious to continue raking in money merely for signing people up. What to do?

Eureka! The *sub*-prime mortgage!

Sub-prime borrowers tended to be fiscally unsophisticated: recent immigrants, low-income families, members of minority populations, folks with limited (or bad) credit histories, etc.

A smorgasbord of exotic new mortgages was created by mortgage originators, so that sub-prime borrowers could get their applications approved, and thus all the aforementioned parties could get their fees and commissions. "NoDoc" mortgages required no documentation of employment, credit history, etc. A variation on these was the so called "Liar Loan," whose applicants lied about their finances, and salespeople lied in claiming to believe the applicant's lies. An "easy-money mortgage" was written for more than the selling price of the house – the buyer receiving the balance of the loan principal in cash, at closing. Thus the new homeowner was able to purchase furniture, large-screen TVs, etc.: a powerful inducement to sign the mortgage application. And at the very bottom of the barrel was the NINJA Loan: *N*o *I*ncome, *N*o *J*ob or *A*ssets.[24]

In various ways, these exotic mortgages required the deterioration, or evaporation, of "mortgage underwriting standards."

The most insidious mortgage innovation, however, was the subprime loan (of any of these sorts) with a "teaser rate." "Subprimes" were presumed to be more risky than "prime" mortgages; the business textbook response to a greater risk is the demand for a greater reward – a higher rate of interest. And so it was with subprimes. But that created another problem: the higher interest rate meant a higher monthly payment, and that put the mortgage beyond the reach of too many applicants. So the lenders created a solution: the "teaser rate." For a certain period of time, the interest rate would be substantially (albeit artificially) lower, making the monthly payment lower, thereby putting it within the reach of the applicant. After that specified time, the mortgage would "re-set" to a substantially higher rate, thereby compensating the lender for the higher risk of the subprime loan.[25]

Investment banks bought all those mortgages – prime, subprime, exotic – and "bundled" them together, giving them the name "Collateralized Debt Obligations" [CDOs].[26] These CDOs were then "sliced" into various portions – these portions were given the relentlessly ugly name "tranches." These tranches were then marketed to investors, including (especially) pension funds, as if they were *bonds* – financial instruments which are relatively simple, relatively well understood, and for which

[24] For a discussion of these, see Lawrence W. McDonald, *A Colossal Failure,* p. 112.

[25] Borrowers were assured that "housing values always go up," so that when the rate was about to escalate, they could refinance the mortgage, using the newly-built-up equity to pay the re-fi costs – costs which included, of course, another set of fees and commissions for all around…

[26] The "collateral" backing them consisted of the primary mortgages, and ultimately the houses.

there is a well-established market. But they weren't really "bonds." These tranches of CDOs were dizzyingly complex financial instruments, designed by cadres of "quants" – short for "quantitatives," the mathematicians, statisticians, and physicists employed by investment funds to design these instruments, and to perform risk management. These tranches consisted of amalgams of various portions of various debts, owed by various debtors, at various rates of interest, for various terms.

Now the obvious question that arises: Why *ever* would private investors put their money into financial "products" that, quite bluntly, they did not understand? Well, for two sorts of reasons. First, they relied upon the assurances of the bond raters. Standard & Poor's, Moody's Investor Services, and Fitch rated these Collateralized Debt Obligations as "AAA" – the same as U.S. Treasuries,[27] and thus virtually risk-free. Second, they relied upon the assurances of the issuers of "Credit Default Swaps" (Sect. 9.4.3, below), as a kind of *insurance*, protection against loss, in the event that debtors defaulted on their obligations.

9.4.1.4 The Reversal of the Fundamental Motive Force

The creation of the secondary mortgage market was utterly transformative of the *primary* mortgage market – though this was not well understood at the time. The fundamental financial dynamic of the primary mortgage market was *reversed,* from "push" to "pull." The motive force was no longer the *push* of prospective homeowners against reluctant S&L personnel, who were dedicated to safeguarding the money of their depositors. Rather, it was the *pull* of the financial resources of the secondary mortgage market; these resources *pulled* prospective homeowners into the offices of mortgage originators, into the primary mortgage market. Savings & Loan personnel (and soon, many others) were paid fees and commissions to bring people into that market, to induce[28] customers to sign the loan papers. And of course the greater the volume of mortgage dollars, the higher the fees and commissions paid to the personnel. The "pull" of newly available money in the secondary mortgage market, together with the financial incentives to consummate mortgage transactions, became the *new* motive forces of the primary mortgage market.

This reversal of the fundamental dynamic of the primary mortgage market would have extensive and profound consequences for the broader financial markets.

9.4.1.5 The Inevitable Failure of Market Discipline: Invulnerability

Successful capitalists become rich; really successful capitalists become really rich. The standard justification offered, in defense of their wildly disproportionate wealth,

[27] Until Standard & Poor's downgrade of the United States' debt to AA+.

[28] As time passed, the array of "inducements" expanded. I resist here the term "persuaded" to sign mortgage applications. "Persuasion," strictly speaking, requires the engagement of the critical, reflective faculties; all too often, the methods used were designed to *bypass* the critical, reflective faculties. And that, even before we get to the issues of dishonesty, deception, and outright fraud.

is that the capitalists have put their own resources *at risk*. They have devoted what they owned to the purchase and expansion of the means of production; through rationality and industriousness, they created *value.* For having put their own resources at risk, for having risked the loss of their resources – but having succeeded in creating value – they are entitled to reap a *reward.* In orthodox capitalism, risk and reward are *inseparable*. Furthermore, they are *sequential*. First, one puts one's own resources at risk, and then *if* – but *only* if – that enterprise is successful, the capitalist reaps the reward.

This dynamic is exemplified in the old, stodgy business model of the Savings and Loans.

However, with the creation of the secondary mortgage market, and the reversal of the dynamic of the primary mortgage market from *push* to *pull*, risk got *separated* from reward. And the *sequence* got reversed. All those individuals who were marketing mortgages, who were inducing prospective homebuyers to signing mortgage applications, were able to reap rewards at the outset, *without taking any risk*. They were permitted to *pass along* the risk. Mortgage salespeople collected commissions, and passed along the risk to mortgage originators (e.g. Countrywide, New Century). The originators then sold them to investment banks, collecting commissions. The investment banks "securitized" them, and submitted them to the bond raters. The bond raters collected a commission from the banks. The investment banks then sold the CDOs to investors, collecting a commission, and passed them the risk. But investors were not told that they were accepting the risk; indeed, since the CDOs were rated "AAA," they were assured that they were taking no risk at all.

So, the Rational Marketeers relied exclusively upon "market discipline" as the enforcement mechanism. Simultaneously, however, they permitted the separation of risk from reward, and the reversal of the sequence. Since the bad actors had already passed on the risk of financial loss due to defaults, they were thereby made *totally invulnerable* to market discipline. Thus the Rational Marketeers relied, solely, upon an enforcement mechanism – market discipline – that *could not* succeed, since the bad actors were permitted to pass risk to other agents in the market, thereby making themselves invulnerable to the discipline of the market.

This is the first inevitable failure of RMT's enforcement mechanism, the lethal admixture of total reliance upon market discipline, and policies that guaranteed it could not succeed.

This is not the workings of a Rational Market. This is not free-enterprise capitalism – it is a travesty. And it is a moral outrage.

9.4.2 Whatever Happened to the Banks?, Or Why Willie Sutton Was Wrong

When asked why he robbed banks, Willie Sutton famously replied: "Because that's where the money is!" Though true in his time, it became false when the housing bubble burst. Let us see how this came about.

Some of the losses were due to the "carry trade,"[29] and some were due to "hung sales."[30] Most of the losses, however, were due to the banks' *leverage*.

9.4.2.1 Leverage

The ancient Greek mathematician (and philosopher) Archimedes proclaimed: "Give me a lever long enough and a fulcrum on which to place it, and I shall move the world."[31] Contemporary investment banks proved a corollary: "Give me enough unsecured debt, and I shall leverage the entire financial world into the abyss."[32] What the investment banks proved was that, with enough leverage, even a small drop in asset value would be so magnified by that leverage that it would be quite sufficient to destroy the bank. Indeed leverage, together with the catastrophically inept modeling of risk by the banks and the rating agencies,[33] have great explanatory power. Let me illustrate this with a thought experiment.

Imagine that you are an investor, with a million dollars to invest. You survey the economic terrain; there are few opportunities for high-yield investments. But now

[29] The various investment banks were involved – obsessed, really – with the creation of CDOs. These were attractive to investors because their yield was quite high, especially as contrasted with the interest paid on ordinary deposits. The yield was high due to the higher interest rate paid by subprime borrowers (to compensate lenders for the higher risk of default). But nonetheless, they carried an investment-grade rating of AAA, and investors were protected against loss by credit default swaps. For all these reasons, CDOs were attractive to the very banks that created them. The bank could improve the appearance of its balance sheet by including high-yield, AAA-rated CDOs. Since they were "carried" on the balance sheet, and not sold to outside investors, this practice was known as the "carry trade."

To retrench a bit: high-yield CDOs improve a bank's balance sheet *so long as the borrowers are actually making their mortgage payments.* When they fail to make their payments, when they default on their mortgages, the value of the CDO falls – perhaps precipitously. They become a liability on the balance sheet. As the housing bubble burst, the carry trade became a huge problem for many of the banks.

One way this problem was addressed – though obviously not "solved" – was to move these "troubled assets" *off* the bank's balance sheet, and into a financial instrument known as a "Special Investment Vehicle." For tutoring on this sort of accounting chicanery, consult the former employees of Enron, and the former employees of the former accounting firm Arthur Anderson…

[30] A bank's engaging in the carry trade was a management decision, the carrying out of an intention. In contrast, a bank could have CDOs on its balance sheet quite unintentionally – if it purchased mortgages from originators, bundled them, sliced them into tranches, got the tranches rated by the bond agencies – but could not find investors willing to buy them. As the news about the rising default rates on subprime mortgages began to spread, investors were no longer interested in purchasing these CDOs; the sale was "hung." Thus were the banks stuck with *profoundly* "troubled assets" – i.e., *liabilities.*

[31] www.brainyquote.com/quote/a/archimedes101761.html

[32] More precisely: secured by an asset whose "value" is subject to market volatility.

[33] Felix Salmon, "Recipe for Disaster: The Formula that Killed Wall Street," *Wired Magazine:* 17:03 (02.23.09).

there is some asset – real estate, for example, or a bond – that you believe will increase in value by 5% over the next year. If you are right, you could make $50,000 (5%) by investing all of your $1,000,000. But that's chump change for a person of your means, your cupidity.

Suppose now that you are in a position to borrow $25 million, at the very reasonable interest rate of 3% per year. So now: you purchase $25 million of that asset (keeping your own million for liquidity, and to pay the interest on the $25 million you borrowed). That asset will serve as collateral for the loan. If you are right, then you will make $500,000 on the borrowed money (5% of 25 million, less 3% interest charge, nets 2% of $25 million: $500,000). In the parlance of the day: *Now that's what I'm talkin' about!* A year ago, your net worth was $1,000,000; today it is $1,500,000. You have greatly increased your net worth, thanks to a shrewd investment – and by leveraging your investment 25:1 (you had $1 million, and borrowed $25 million). This is very seductive an investment strategy. Why *next* year you could…

But of course you might be mistaken about the future. Let us suppose that the asset does not increase in value by 5%, but actually *decreases* in value by that same 5%. Where do you stand? Well, you don't stand at all. You owe your lender $25 million in principal, and $750,000 in interest: $25.750 million. Your asset, purchased for $25 million, could be sold, but for only $23.75 million. You have spent $750,000 of your $1 million on interest, and you owe your lender $1.25 million dollars. You are wiped out; you are (technically) bankrupt: your liabilities exceed your assets by a cool million dollars. What to do?

You could attempt to borrow more, if you are still convinced that the asset will increase in value. However, you have only your good name, and perhaps a shoeshine and a smile – but no collateral. Perhaps you could sell some of the asset, looking to increase your liquidity. But you will sell at a loss, and in so doing, you will have less collateral.[34] Your lender may notice what's happening: the loan is under-collateralized. Your lender may well demand additional collateral – which you do not possess.

Note that, if your asset does not decline in value – it merely fails to rise in value – you are still in a predicament. You will not make a profit, of course – and three-quarters of your initial grubstake of $1 million will have been spent on interest charges. And as you look to the future – well, unless the market for your asset improves, you will be wiped out in just 4 more months.

Imagine now that you are not leveraged 25:1, but rather 40:1. And imagine that your asset's value has declined by a third. Or declined by two thirds. Or imagine that your "asset" has become worthless.

As the housing bubble burst, Lehman Bros. was leveraged at least 44:1. It was in possession, by carry trade or hung sales, of billions of dollars in CDOs whose value was plummeting. Additionally, Lehman had direct investments in real estate; it had leveraged up to buy the property, and now its value too had plummeted. Thus, Lehman went bankrupt, ruining its stockholders.

[34] And your sale may well reduce even further the value of your remaining collateral. By increasing the supply, you may well have reduced the demand.

9.4.2.2 The Inevitable Failure of Market Discipline: Opacity

According to Rational Market Theory, counterparties ought to have noted Lehman's increasing leverage, and concluded that Lehman was too highly leveraged, and thus vulnerable to collapse. Even a slight decline in asset value would be sufficient to render Lehman insolvent. Counterparties ought to have administered market discipline, refusing to engage in further transactions until Lehman reduced its leverage. Why didn't they? Well, although every one of Lehman's counterparties knew about their own transactions with Lehman, they could not know about Lehman's transactions with all its *other* counterparties.[35] And of course they could not have come to know the *totality*: all of Lehman's positions, in all of the markets in which it was a participant.[36] Put succinctly, Lehman Brothers was *opaque.*

In his famed *mea culpa* before the U.S. Congress, former Chairman of the Federal Reserve, Alan Greenspan, admitted that "… those of us who have looked to the self-interest of lending institutions to protect shareholder's equity (myself especially) are in a state of shocked disbelief. Such counterparty surveillance is a central pillar of our financial markets' state of balance. If it fails, as occurred this year, market stability is undermined."[37]

Why is it that "counterparty surveillance" failed? Bluntly, its failure was inevitable, since *it is impossible to surveil an opacity*. And because it was permitted to act in darkness, so that counterparty surveillance was not possible, Lehman's counterparties were unable to act in "self-interest," unable to "protect shareholder's equity." Lehman Brothers was thereby permitted to make itself *invulnerable* to market discipline.

The bad actors were permitted to separate risk from reward, and to reverse the sequence. They reaped the rewards "up front;" by means of leverage, it was the resources of others that was at risk. The opacity of Lehman's operations was impenetrable by counterparty surveillance, rendering said counterparties utterly defenseless.

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[35] Arguably, there is nothing more sacrosanct to an investment bank than its "positions:" its "longs," its "shorts," its options, its cash reserves, etc. – broadly, its balance sheet. Even if individual transactions are "transparent," at least to the parties, there is no transparency regarding each party's *positions*. A Romantic Marketeer will know how many apples one is willing to exchange for how many acorns – but will not know (except by chance) how many total acorns are held by one's counterparty. And conversely: the acorn-holder will not know the apple-holder's stock. Knowing a counterparty's positions would be a huge competitive advantage in trading – that's one reason why it is closely-guarded proprietary information. Even more so as regards contemporary market participants. Furthermore, there is nothing within Rational Market Theory that debars confidential information about one's positions, or that in any way permits (much less demands) transparency concerning them.

[36] Indeed, it is likely that no one at Lehman really understood the totality of its positions, due to the sheer number, and complexity, and changeability of those positions. See Lawrence G. McDonald, *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers;* William D. Cohen, *House of Cards: A Tale of Hubris and Wretched Excess on Wall Street.*

[37] http://oversight.house.gov/story.asp?ID=2256 I nominate this for the understatement of the millennium: "market stability is undermined." We were exceedingly close to financial Armageddon.

This is not the workings of a Rational Market. This is not free-enterprise capitalism – it is a travesty. And it is a moral outrage.

9.4.3 Financial Derivatives: The Credit Default Swap

There is one "financial derivative" that is especially implicated in the financial markets crisis: the "Credit Default Swap" (CDS).

9.4.3.1 The CDS As "Insurance" Against Default

To see the role of the CDS in the crisis, we can begin with an analogy.

Let us imagine that you are the "breadwinner" of your family. Acutely aware of your responsibilities, and the vicissitudes of life, you decide that you must have a life insurance policy. After due diligence, you purchase a term life policy from an apparently solid, highly-rated company. If you die during the term of the policy – the term being calibrated to the span of your children's dependency – your family will be financially secure. (Of course, if you do not die during the policy's term, no death benefit will be paid. But you view the monthly premiums, which you pay faithfully, as assurance of your family's security in the event of your untimely death.)

Tragically, you die. From your perch in Heaven – that placement a partial reward for your prudence – you watch events unfold on earth. You discover, to your great unease, that the life insurance company has sold a *great many* policies on your life – and many of them have a face value that well exceeds that of your own policy. Your unease arises from the fact that, unbeknownst to you, quite a number of unrelated individuals have had a financial interest in your demise. More bluntly: they profit if you die. (You continue to believe that they had no role in your death – but still…) Furthermore, the insurance company had relied upon a particular model of risk analysis; according to that model, *you were not going to die* during the term of the policy.[38] That is why they were delighted to collect a monthly premium from you, and from all those others who bought a policy on your life. Those premiums have all been paid out – as commissions to the insurance policy salespeople, salaries to the other employees, yet more commissions and bonuses to senior management, and dividends to the stockholders. You discover, to your great outrage, that the company does not have any reserves – or at least, not enough to pay the claims. Your family is left utterly destitute. You have a moment of self-doubt: did you do enough in researching the company? But the moment passes; you *had* done all you could. Although no one would *knowingly* purchase a policy from such an irresponsible company, there was no way you could have known. The insurance company had hidden from you all of the most important information.

[38] Felix Salmon, "Recipe for Disaster: The Formula that Killed Wall Street," *Wired Magazine:* 17:03 (02.23.09). More generally, see Nassim Nicholas Taleb, *The Black Swan: The Impact of the Highly Improbable* (New York: Random House), 2007.

Now those familiar with the life insurance business will object to this tale, at a number of points. Life insurance cannot be purchased unless the purchaser has an "insurable interest" in the insured, an interest in that person's continuing to live. No one else could buy a policy on your life. And certainly not a *host* of people, with no emotional stake in your life's continuing, and with a substantial financial stake in your death.[39] Additionally, life insurance companies are legally bound to maintain substantial reserves, so that they have the resources to pay claims. Additionally, they participate in re-insurance arrangements, dispersing the risk, so that no one claim imperils any given company.

Far from undermining my thesis, these considerations solidly *establish* it. For by highlighting these differences between life insurance and credit default "insurance," I highlight the lunatic irresponsibility of the operatives in the derivatives market – and also the lunatic irresponsibility of the Rational Marketeers who established the "terms" of its operation.

Consider a prudent investor, concerned about a borrower's defaulting on a financial instrument one holds, e.g., a Collateralized Debt Obligation. The investor could purchase an "insurance policy" to protect oneself against that eventuality. The buyer (investor) pays a premium to the seller of the CDS; the seller of the CDS agrees to indemnify the investor in the event of default. Recall that the conscientious breadwinner of our illustration "swaps" his life insurance premium for the fiscal security offered by the life insurance company; the insurance company "swaps" that fiscal security for the conscientious breadwinner's premium. In a similar way, the investor "swaps" a premium to the issuer of a CDS for insurance against default; the issuer swaps indemnification in the event of default for the investor's "premium," the cost of the CDS.

Now before buying a Credit Default Swap, the prudent investor might well attempt due diligence. But that attempt will fail. The Rational Marketeers, led by then-Federal Reserve Chair Alan Greenspan, and then-Senator Phil Graham, passed the Commodities Futures Modernization Act of 2000 – which explicitly prohibited the regulation of the financial derivatives market. In consequence, the entire derivatives market, including CDS transactions, operates "in the dark." Just as it would be foolish in the extreme to buy life insurance from a company that could not pay a claim in the event of your death, it would be foolish in the extreme to buy a Credit Default Swap from a company that could not pay a claim in the event of a default. But: *there was no way for the investor to determine whether the issuer of the CDS did indeed have sufficient reserves.* The Rational Marketeers believed that the threat of 'market discipline" was sufficient: if the issuer of a CDS proved unable to pay a claim, then no one else would do business with it, would purchase CDSs from it in the future, and thus it would go bankrupt.[40]

[39] Think about a world where evil people could insure your life, without your knowledge, eagerly awaiting your death. Or growing weary of waiting…

[40] Apparently, not much thought was given to the plight of the investor, contemplating the smoldering ruins of one's Collateralized Debt Obligation, with no CDS settlement forthcoming. The entire focus of the Rational Marketeers seems to have been on why it wouldn't happen, rather than what to do in the event that it did in fact happen.

The Financial Products Division of insurance giant AIG was a main issuer of Credit Default Swaps. As the financial crisis deepened, in the fall of 2008, it came to light that the FPD "salesmen" of AIG had pocketed gargantuan commissions, while AIG had bet that it would not have to pay any settlements, and thus had maintained only miniscule reserves. So investors had paid their premiums, but AIG could not pay their claims (without a government bailout).

The plight of investors who purchased CDSs from AIG is analogous to the plight of Lehman's counterparties. Each of the various counterparties of AIG knew about *their own* transactions, but they could not know, could not come to know, anything about any other transactions involving other of AIG's "counterparties." And this situation was true of all of AIG's counterparties. So when an investor purchased a CDS, one does not know, and cannot *come* to know, whether the seller has sold CDSs to others on that self-same CDO, or sold so many CDSs on other instruments, that even just a few claims will render it insolvent.

9.4.3.2 The Inevitable Failure of Market Discipline: Opacity

AIG sold huge numbers of CDSs; they maintained miniscule reserves, as they believed that the "insured" CDOs would not fall into default.[41] Why would anyone purchase a Credit Default Swap from AIG? Well, none of their counterparties knew about the enormous volume of their CDS sales, or the paucity of their reserves. Their operations were opaque. And since it is impossible to surveil an opacity, once again Rational Market Theory's sole mechanism of enforcement was thereby rendered impotent.

This is not the workings of a Rational Market. This is not free-enterprise capitalism – it is a travesty. And it is a moral outrage.

9.4.4 Too Big to…

Andrew Ross Sorkin's account of the financial markets crisis, *Too Big to Fail,* immortalized that catchy phrase.[42] But that canonization is most unfortunate. As it stands, the phrase is ambiguous; when disambiguated, it still fails to identify the root cause of the crisis, or to put this piece of the explanatory mosaic into its proper place.

To claim that a bank is "too big to fail" could be understood as the claim that it is so big that its failure is outside the realm of the possible, is not even a possibility.

[41] Perhaps they believed the AAA ratings of Standard & Poor's, Fitch and Moody's.

[42] Andrew Ross Sorkin, *Too Big to Fail: The inside story of how Wall Street and Washington fought to save the financial system – and themselves.* (New York: Viking), 2009. As it is 600 pages long, I sometimes refer to the tome as *Too Big to Read.*

A boulder "too big to lift" is so massive that lifting it is not a possibility – think of Australia's Ayers Rock.

Of course that is *not* what is meant. There was widespread fear that major investment banks would indeed fail (and of course some did fail); the fear was that *additional* failures would imperil the financial markets worldwide, and then the domestic and global economies. And that, of course, would be *catastrophic.* Measures had to be taken to prevent additional failures. Thus, as a matter of enlightened self-interest on the part of government officials, those investment banks came to be considered "Too big to *be allowed* to fail." Thus the Troubled Asset Relief Program (TARP) was enacted: *not* in the interests of the bailed-out banks themselves, but in the interests of the wider economy. Ultimately, in various ways, the Federal Reserve loaned the banks nearly 8 *trillion* dollars.[43] This is record-shattering extortion.

Within Rational Market Theory, those investment banks *ought* to have been allowed to fail. Their failure *ought* to have been the result of market discipline's being administered. For that is the absolutely *required* result of taking risks that turn out badly for the risk-takers. The fear of being disciplined by the market, in the form of severe losses or financial ruin, is the sole motivation – within Rational Market Theory – for market participants' efficiency and rectitude.

But as just argued, that discipline *could not be* administered, due to the absolutely unacceptable side-effects – the collapse of the financial markets, and consequent worldwide depression. Thus, the investment banks had made themselves *invulnerable* to market discipline. They achieved this by creating a situation wherein their being subjected to the requisite discipline would *itself* be devastating to the wider economy, indeed to society itself.

In consequence, the accurate diagnosis is this: the investment banks had become "Too big to be *disciplined.*" This is absolutely unacceptable – that investment banks are subject *solely* to market discipline, and that they cannot be subjected to market discipline at all.[44]

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9.5 Market Discipline and Justice

Inherent in the very concept of "discipline" is the concept of a *disciplinarian,* the "agent" who administers the discipline. Integral to the concept of social justice is the principle that discipline ought to be administered only at the conclusion of a fair process.

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[43] "Fed lent the banks nearly $8 trillion during the crisis, report shows." http://bottomline.msnbc.com/_news/2011/11/28/9067808-fed-lent-banks-nearly-8-trillion. It seems not very long ago that, when speaking of really large amounts of money, we would say, "That's *billion,* with a '*b*'." Of course a *trillion,* with a "*t*," is a thousand times as large…

[44] "The Fed defended its actions back then by contending that the biggest financial institutions in the country were too big to fail – a phrase that has become a bone of contention among lawmakers, some of whom argue that a 'too big to fail' bank is one that's too big to exist." "Fed lent banks…" *Op.cit.*

The disciplinarian must undertake a thorough and impartial investigation of those accused of bad behavior, and arrive at a reasoned and a defensible and objective decision. Punishment must not be meted out in the absence of an authoritative determination of wrongdoing. Or to paraphrase a Revolutionary War slogan: *"No discipline without adjudication!"*

So: who's the disciplinarian, administering *market* discipline, upon fair adjudication? Put so starkly, the question seems pretty silly. Of course there is no market disciplinarian; the "disciplining" is done by (obviously) unconscious yet powerful market forces, and not by an agency of any sort at all. There *is no adjudication*.

If "market discipline" is to replace market regulations and market regulators, and satisfy a reasonable conception of *justice*,[45] then economic pain must be inflicted on all (or very near all) of the actual malefactors. And those in the market who are innocent (or very nearly innocent) must be held harmless. Is this what happened? No, and no. *Very* much to the contrary, a huge number of bad actors were permitted to enrich themselves – some quite fabulously. And at least as many innocents suffered grievous economic losses.

Let us consider first the incredible array of bad actors who have evaded punishment. A brief review of the preceding argument will suffice, as so many have already been identified.

As regards the housing bubble, recall all those who took their rewards, and retained them, despite their retaining no risks (but rather, passed the risks on to others). This includes commission-driven mortgage salespeople: some committing fraud, some being deceptive, some taking advantage of the relative ignorance and naiveté of prospective homeowners (inducing signatures by means of "teaser rates"), some merely selling mortgages they knew would fail – or at least, had no good-faith belief that the mortgage could in fact succeed. It includes appraisers who looked at the principal on the loan application, rather than the objective resale value of the house in the event of default. It also includes all those who collected at closing, who cared only about their commissions and fees: realtors, sets of lawyers, tax collectors. And of course the set of unpunished malefactors includes the mortgage originators, who abandoned sound underwriting standards, and who created a full spectrum of seductive mortgage products. They retained their fees and commissions, while passing the risk to the investment banks. The bond raters collected fees – at least for their appraisals, sometimes for help in assembling the products. (And when these appraisals proved preposterous, they claimed that what they had provided were merely "opinions," protected by freedom of speech.) As essential enablers of the bubble's inflation, they too are undisciplined bad actors. The investment banks profited handsomely, using the "AAA" rating as a key selling point. And efforts to "claw back" some of their profits notwithstanding, they have extracted huge sums from unsuspecting investors. The sellers of Credit Default Swaps paid themselves

[45] Here, as above, I would subscribe to Rawlsian "Justice as Fairness." But here, there is no need to rely upon so sophisticated a conception. The transgressions throughout are so obvious, and so egregious, that common-morality concepts of justice and fairness are quite sufficient.

exorbitant commissions, swapping investors' "premiums" for empty promises of indemnification. Finally,[46] the senior executives of several investment banks were paid salaries and bonuses, despite their taking unconscionable risks with the resources of others – their stockholders – in their schemes of leverage.[47]

Economic losses were inflicted upon individuals throughout the economy.[48] Investors are justified in feeling doubly aggrieved: for the fantasy ratings of bond "experts," and the vacuous promises of Credit Default Swaps. And while some who signed up for mortgages were not innocent – those who coveted a house too big to afford, those engaged in eyes-wide-open speculation in the housing market – others were indeed innocent. Consider the plight of the homeowner who made a substantial down payment, has never missed a monthly mortgage payment, etc. – but who, because of the reckless acts of others, finds oneself with a mortgage that is "under water:" the remaining principal of the loan is substantially larger than the current market value of the house. Such a homeowner is trapped: financially unable to "upsize" to accommodate a growing family, "downsize" upon becoming an empty nester, relocate for a job opportunity, or retirement. And even more extreme: consider the plight of the (literal) "homeowner," who owns one's house free and clear, but whose house value has been savaged because it is in a neighborhood riddled with houses in foreclosure, or abandoned. All this through no fault of one's own, but due to the acquisitive and yet undisciplined actions of so many others.

Like the list of unpunished malefactors, this list of punished innocents is (very) far from complete. And yet, taken together, they are quite sufficient to prove yet another failure of "market discipline:" failing to punish the guilty, while failing to hold harmless those who were not.

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9.6 Salvaging Rational Market Theory: From Prometheus to Capitulation

Can Rational Market Theory be salvaged? Can something be done, so that opacity does not prevent counterparty surveillance? So that bad actors cannot make themselves invulnerable to market discipline, by separating risk from reward – retaining

[46] "Finally" here signals only the end of my list, limited by the space constraints of the article. Surely there are more malefactors to be identified.

[47] Note the profits reaped by Goldman Sachs in the collapse of the housing market: William D. Cohan, *Money and Power: How Goldman Sachs Came to Rule the World.* Note too the return to profitability of the remaining investment banks, with particular attention to the unconscionable "bonuses" of bank officers implicated in the crisis.

[48] I believe it accurate to say that losses were "inflicted." It would be adding cruel insult to serious injury to say that these people suffered "market discipline." For doing precisely *what,* are they being disciplined? Once again, there has been no adjudication.

reward, but not risk? So that institutions cannot grow so large that their failure would result in systemic collapse – so large, that they are too big to be disciplined?

Well, yes and no. All these laudable goals could be achieved – but what it would take is the intelligent regulation of the markets. And that is not merely promethean, but rather total capitulation. Regulation is required to prohibit the separation of reward from risk, and to assure the retention of risk. Regulation is required to guarantee some transparency in the operations, and the positions, of investment banks.[49] Yet additional regulation is required to guarantee transparency in the financial derivatives markets, e.g., that derivatives be exchange-traded.

Only with such regulations could an investor come to know the extent of an investment bank's leverage. Only with such regulations could an investor come to know the extent of the exposure, and the amount of the reserves, of a seller of Credit Default Swaps.

Only by means of regulations could the size of financial institutions be limited – "too big to be disciplined" really *is* too big to be allowed to exist. The wider society must not allow itself to be imperiled by such institutions.

Contemporary markets – especially the financial markets – are not the grassy clearing in the state of nature, writ large and made electronic. They are vastly more complex. They are not rational; they are subject to manipulation and abuse on a titanic scale. Counterparty surveillance, all too often, is clouded, or impossible. For those reasons – among others – market discipline cannot succeed as the sole mechanism assuring efficiency and rectitude in the markets. And reliance on it eclipses the romantic. It is, I submit, irrational. And it is morally irresponsible.

9.7 Summary and Conclusions

Libertarians have a conception of the marketplace that is, at best, overly romantic. They argue for justice in holdings as the outcome of transactions in a free market. But this argument, as we have seen, "starts in the middle." It is based upon a set of assumptions as implausible as it is extensive. The argument begins by assuming the existence of a mature market, populated by mature Marketeers; it assumes that the Marketeers offer commodities for trade to which they are entitled. But markets exist, and endure, through the contributions of many – for which compensation is owed. Marketeers exist, and participate, through the contributions of many – and they too are owed compensation. And we cannot consider Marketeers to have clear title to their holdings without inquiry, without assurances that they are not the result of fraud, or violence, or demonstrably unjust social policies (e.g., unfair taxation).

[49] Alternatively, regulations restricting leverage, or regulations governing an investment bank's reserves. On the latter, see Charles Gasparino, *The Sellout: How three generations of Wall Street greed and government mismanagement destroyed the global financial system* (New York: HarperCollins, 2009), p. 81.

The libertarian concept of contemporary markets rests upon Rational Market Theory. Within Rational Market Theory, the sole mechanism for assuring the efficiency and rectitude of the market is counterparty surveillance, triggering market discipline. In the financial markets crisis of 2008ff, this was proved wholly inadequate. Indeed, devotion to RMT, together with the policies of its devotees, has been shown to be the elusive "root cause" of that enduring crisis. And the problem is not merely that market discipline failed to work – the problem is that it *could not* have worked.

Could measures be taken, to rectify these failures? Yes indeed – but taken together, they constitute the repudiation of Rational Market Theory, and with it the repudiation of the libertarian conception of the market. To rectify these failures, what is required is the implementation of intelligent *regulation* of the markets.

Chapter 10
Adam Smith's Order for Distributing the Wealth of Nations

Wade L. Robison

Abstract In *An Enquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith is concerned, among other things, with "the order" by which the wealth of a nation "is naturally distributed among the different ranks and conditions of men in the society,…". We can look at this order as a decision procedure in the way in which flipping a coin or playing a game are decision procedures. The decision procedure is itself not value-neutral, and its continuous use over a period of time produces results that are anything but value-neutral. The decision procedure is best suited to self-interested individuals determined to do as well for themselves as they can, and among its predictable results are certain character traits that are less than fully praiseworthy and economic inequalities that, given those traits, grow significantly worse as the process continues.

10.1 Introduction

In *An Enquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith is concerned to justify a particular order by which the wealth of a nation "is naturally distributed among the different ranks and conditions of men in the society,…".[1] That order is a procedure for distributing wealth so that nations become civilized, with a level of prosperity that ensures that "the accommodation of an European

"This bill is based on the premise that we believe in private free-market capitalism to develop the resources of this land in a cost-efficient manner."– Rep. Joe Barton on voting for bill giving the oil and gas industries $2.7B in tax breaks and $500 M for research

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Vol. I, eds. R. H. Campbell, A. S. Skinner, & W. B. Todd (Indianapolis: LibertyClassics, 1981), p. 11.

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prince does not always so much exceed that of an industrious and frugal peasant, as the accommodation of the latter exceeds that of many an African king, the absolute master of the lives and liberties of ten thousand naked savages."[2]

Smith justifies this procedure for distributing wealth by the end it is to produce. That end is "the greater good of mankind" and, if realized, would justify the claim that the free enterprise system Smith hawks is beneficial. Whether it is just is another question, and there are two features to consider.

We should look at the end to determine how the wealth is distributed. We shall do that in Sect. 10.4, but the main focus of our concern is on the procedure by which the wealth is created and distributed. That procedure received little attention from Smith, but its libertarian view of justice is supposed to justify the "private, free-market capitalism" Representative Barton is so confused about. We shall find that the procedure which underlies the free enterprise system is anything but ethically neutral. Some of the conditions that must be satisfied for it to be fair cannot be satisfied in any ongoing society, and some of its effects are anything but morally praiseworthy. The results are economic injustice and a world significantly less ethical than it could be.

We shall begin by looking at flipping a coin, a decision procedure that seems uncontentious, but is not ethically neutral. The conclusion to draw is that if it is not ethically neutral, we should presume that no decisions procedures are: the burden of proof lies with those who claim a procedure is ethically neutral. We shall then turn in Sect. 10.3 to an extended example of a decision procedure which illustrates how Smith's "natural distribution" works out in practice and in Sect. 10.4 drive home the point that the end of "the greater good of mankind" will unjustly distribute a society's wealth.

We turn in Sect. 10.5 to how the social system created by the free enterprise system both depends upon and encourages certain human traits, some of them not at all what we would wish for in an ethical society. We sum up in Sect. 10.6.

The aim, again, is to show that the decision procedure called market capitalism, as understood by Smith and such libertarians as Robert Nozick, is not value-neutral, but embodies ethical judgments that are anything but neutral and has results that are anything but ethical and just.

10.2 Decision Procedures Are Not Value Neutral

If I take your iPad and you complain, it would be nice of me, from a rather perverse perspective, to offer to flip you for it. After all, I now have the iPad; possession is 9/10's of the law; and so it would seem to be a kindness on my part to give you a 50/50 chance to have my iPod, the one that used to be yours before I took it. I assure you that the flip will be fair. I will even let you call "heads" or "tails": your choice.

[2] Smith, Op cit., p. 24. Smith assumes in this quotation that in becoming civilized, a nation does not thereby produce a great disparity between the rich and the poor. Time has shown him mistaken in that assumption.

What is perverse about my offer is that the iPad is yours, and my taking it does not make it mine. So you should not agree to flip me for it. That would be to concede that the iPad does not belong to you. If you did agree to flip, and you lost, it would be mine. A flip is a decision procedure, and it presupposes that neither party to the flip has a right to the object in question – and that it does not belong to anyone else either. If you and I stole a car, and then flipped for it, I could hardly explain to the police that the car was mine because I won it in a flip with the person who stole it with me. It belongs to the person we stole it from, and our flipping for it makes no difference to who owns the car. A flip can determine ownership only if the object at issue has no owner.

There are other conditions that must be satisfied as well for a flip to be a fair decision procedure, and as we have just seen, at least one of these conditions has ethical weight. But it is not the only one. Not just anyone can be a party to a flip, for instance. If a small child and I see a 20 on the sidewalk and the child is about to pick it up ahead of me before I can reach it, I cannot properly tell the child to stop and then offer to flip for it: the child would be agreeing to a procedure for determining ownership when the child would have had ownership shortly and when the child would with no idea what the procedure entailed or even what it is for someone to have 20 dollars.

Flipping a coin is just one decision procedure among many, but it illustrates well what we should presume about them all: decision procedures presuppose conditions with ethical weight. To expose those conditions, or some of them, for evaluation, we shall make use of Wittgenstein's method of language-games, providing a simple example of a game that captures the essence of the decision procedure Smith invokes.[3] The aim is to capture the decision procedure in its purest form, without any of the current complexities Representative Barton's mangled sentence evokes. The game captures some of the central features of the procedure Smith adopts and illustrates both how that procedure is ethically loaded and how it is best suited to self-interested individuals determined to do as well for themselves as they can, among its predictable results being certain character traits that are less than fully praiseworthy and economic inequalities that, given those traits, grow significantly worse as the process continues. The game is one many of us are familiar with.

[3] It is not an accident that the example chosen is a game, but it is not essential to Wittgenstein's method of language games that it be a game, only that the example satisfies the description given, taken as we would ordinarily understand it. H. L. A. Hart makes use of this method when he proposes that John Austin's description of a legal system more properly describes the mafia – where an order becomes "law" because a penalty is attached to not following it (H. L. A. Hart, *The Concept of Law,* 2nd edition (Oxford: Oxford University Press, 1997)). David Hume makes use of the method when he proposes, as I argue, that Adam satisfies the conditions Descartes requires for knowledge – a mind completely clear of all the experience that makes us believe such things as that a bowl is empty when it looks to have nothing in it or that air weighs nothing because we do not have to push against it to move about the world (see my "Hume and the Experimental Method of Reasoning," *Southwest Philosophy Review*, Vol. 10, No. 1 (January 1994), pp. 29–37 and "Hume's Other Writings," in *The Blackwell Guide to Hume's Treatise*, ed. Saul Traiger, an anthology on David Hume ed. Saul Traiger (Oxford: Blackwell, 2006), pp. 26–39).

10.3 Making Free Choices

Monopoly lays out a decision procedure for distributing money and wealth. It is a board game. Players pick a token, which is what they are to move around the board, and they roll dice to determine how many moves they are entitled to make. When their token lands on one of the 28 pieces of property (4 railroads, 2 utilities, 22 streets), they are entitled to purchase that piece of property if they have the funds necessary to purchase it and if no one has purchased it already.

Each player begins with a set amount of funds – $15,140 in the usual American version of the game – and will earn additional money as the game progresses, $200 each time the player passes GO!, for instance. Once players purchase property, they can collect rent from other players who land on that property.

A set of rules governs what the players can and cannot do. The rules regulate the purchase of property, the building of houses and hotels on the property, the payment of fines and taxes, going to and getting out of Jail, and so on.

Many variants of the game exist, the differences traceable primarily to differences in the rules which govern the game. In all variants I am familiar with, the players begin by tossing a die: high die goes first, next the player to the left and so on, clockwise around the board. The determination of who is to start first is no small importance since the first to reach any property on the board has first crack at purchasing that property and so first chance at accumulating what the game considers wealth. So in the version I am used to playing, no player is allowed to purchase any property until after two circuits of the board. That way, it is assumed, we discount the luck that made the one player first, and the luck, good and bad, that follows each player around the board will tend to even things out before purchasing can begin.

The point of this complicated start is to help ensure that players all begin evenly situated: they have the same amount of money with which to start; they have the same amount of wealth – none; they have as much of an equal opportunity to purchase property as the game allows, no one player gaining any advantage from tossing high die or by sitting next to the player who tosses the high die. The aim is to ensure that players begin the game with equal income, wealth, and opportunity. The game ends with one player having a complete monopoly over everything of value.

We get from the beginning of the game to its end by taking turns throwing the dice, with the result of each throw being the number of spaces a player is to move a token. A player must move the token the number of spaces and satisfy other conditions for playing that are set by the rules: a player who lands on Community Chest, for instance, must draw a Community Chest card and then follow the instructions on the card – paying a fine, receiving a gift, and so on.

Most crucially, as players move through the game, they will need to make decisions about when to purchase property and when not and about how to invest what money they have – in more property, in houses for the property they already own, in hotels to replace the houses. They are not required to invest, of course. They may keep their money to pay for the rents they will surely have to pay the other players.

We can call throwing the dice, satisfying Community Chest, purchasing property and so on "plays" for simplicity's sake, and so the distribution of wealth and income at the end of the game is the result of the series of plays in the game.

Provided the players have all agreed to play, it would seem that only cheating and coercion would make the result unfair. My brother used to tell me as we began play that I was not to purchase any railroads: they were to be his. Since he was 6 years older than I and much larger, I never did purchase railroads when he and I played, but the result of our play was never fair. It was skewed by his skewing the rules in his favor. A neighbor boy was never allowed to play banker after his one, and only, stint as banker. Towards the end of that game, he suddenly had possession of about $8,000 we had not seen before. We all wondered how he could possibly have come to possess such a large amount since he had little property to generate income and came up with the money when it had appeared he had spent what little he did have on rent to others. We did not accuse him of cheating – though we all suspected that he had secreted money from the bank in his own account. We simply did not let him play banker again.

Cheating and coercion will influence the outcome of the game, and the game will be unfair to the extent that the end we arrive at is different from the end we would have arrived at without the cheating or coercion. Of course, that is a counterfactual we cannot test. We cannot prove that the game whose outcome we suspect does differ from a game without cheating or coercion, but cheating and coercion certainly throw doubt upon the outcome, and if the outcome really mattered – if it were life or death, for instance – we could argue that the burden of proving that cheating and coercion did not change the outcome would fall on those who cheated or coerced. Failure to provide a proof would invalidate the game and so invalidate the outcome.

What would also influence the outcome of the game is having the players start out unequally situated. If one player were to begin with an extra stash of cash or with some property already in place, the other players would be disadvantaged, and the outcome of the game would be skewed to the extent that the inequality of their beginning hands, as it were, skewed their capacities to obtain wealth.

Adam Smith would recognize this game. As we move through the game of life, we buy buns from the baker, beef and bones from the butcher, beans and broccoli from the greengrocer, expending what money we have earned. We exchange our labor for goods and services, and as long as the exchanges are fair, as long, that is, as no one cheats or coerces us, the outcome is fair, according to Smith. When the butcher puts his thumb on the scale, selling us 14 oz of meat for the price of 16, he cheats us, and to the extent that we are cheated, the new arrangement of money and goods is unfair. He has more of our money than he should have, or we have less of his meat than we should have. Just so for coercion: if a mugger grabs my wallet and runs off with my money, the mugger has changed the distribution of money that previously existed. What was in my wallet is now his. Indeed, the wallet is now his. This new distribution is unfair because it is the result of coercion, not our voluntarily providing him with money. The aim is to have whatever distribution of money and wealth occurs be the result of free choice.

Problems abound here, of course. What counts as coercion? If the butcher only presents me with the option of inferior cuts of meat because, unknown to me, he withholds the better cuts for other customers, have I been coerced? Or cheated? If the butcher displays an inferior cut in a way that makes it look like a superior cut, but charges me only the price of an inferior cut, have I been cheated if I am taken in

by the look of the cut? And what if I am somehow not quite with it – distracted by some problem in my life, sick and so not thinking clearly, whatever? Or what if I am a child sent by my mother? Does my age or state of health or mind change the nature of the transaction with the butcher? And so on and so on. These are all problems that would need to be addressed in a full examination of what makes a game – or market capitalism – fair.

The main point remains: the exchanges between us continually produce new configurations of money and goods – and wealth, and those new configurations are just provided only that they were not produced by coercion or cheating. The aim is to ensure that we each are able to make free choices within the constraints of the rules of the game.

10.4 Monopoly as an Historical Enterprise

Let us suppose that the inventor of the game meets every Thursday evening with three buddies and plays the game. After a few Thursdays, they decide, as most of us decide, that the game is long and relatively boring. So they change the rules to allow the economy of the game to expand: neither money nor property are to be in limited supply, and new forms of wealth can be created by anyone who innovates and comes up with new financial instruments. The first Thursday after the change of rules, one player introduces the concept of an insurance policy: players can purchase insurance, at so much per $1,000 of coverage, for bankruptcy, for instance. Another decides to provide a bail service for those who end up in jail, but want out. Financial instruments proliferate, and the board expands, with more and more properties becoming available as suburbs are built and shopping centers introduced.

One agreement the players make is that they all write wills giving their positions in the game to someone who will take over for them should they die or need to withdraw from the game – because of debilitating illness, for instance. That way the game can continue on without any concerns that the loss of one participant would draw everything to a halt: the game now has, as it were, a life of its own.

Let us suppose that one of the original players dies and his position on the board is taken over by one of his children, a lawyer. The lawyer prepares for the new role by looking over carefully the diary the father kept while playing and surprisingly discovers the following entry: “Was able to bilk John out of 2 K today.” The lawyer then discovers more and more similar entries: “Doubled the number of houses on Marvin Gardens without anyone noticing,” “Served as banker tonight and ‘transferred’ 5 K to my account,” “Reshuffled Community Chest before the others arrived to ensure I didn’t have to pay taxes tonight if the game went as long as usual.” All in all, the new player counts 12 different entries where the father has cheated.

The lawyer inherited the father’s position – all the money the father had garnered through the number of years the game went on and all the income property and other forms of wealth the father accumulated. The father was into derivatives and earned

a fortune, we may suppose. Yet, clearly, the position the lawyer inherited was tainted by the father having cheated the other players.

We have two different problems here. First, the inheritance of a position in Monopoly mimics life: we are each born into whatever social position our parents occupy. We have no choice in that matter any more than we have a choice whether to enter the game of life: we take on life in the game and thus a social position involuntarily. The lawyer could refuse the inheritance and so refuse to continue the father's play. That feature does not mimic the game of life, but is not relevant to the point I am making here: later players do not start the game on an equal footing. They are not issued, upon entry, a set sum of money; they do not start out with no property unless the original player failed to purchase any; they do not begin from GO. The position of their token on the board and their financial position in the game are already determined, set by the nature of the inheritance. It is certainly not obvious that how a player fares after inheriting a position is a measure of that player's capacities: starting out with no property in the midst of a game where everyone else has property would certainly make it more difficult to leverage any wealth.

The second problem comes from discovering that one's father was a cheat, someone who cheated again and again as he played this game, apparently without any concern for the harm he was doing to the other players or to the integrity of the game itself. These are separate points.

The harm he was doing to the other players can be put in a single line: he changed their choices and so denied them opportunities they might otherwise have had. Landing on the rental property to which he had surreptitiously added extra houses meant that they paid a higher rent than they would otherwise have paid, and more money went out of their pockets than should have gone out. A new configuration of income and wealth was produced that was unfair, and, among other problems that created, they faced different choices with fewer resources than they would have had otherwise.

The game itself is now tainted as well. The game is defined by a set of rules, and though there are always loopholes to rules, and lawyers to find them, and rules can be subject to alternative interpretations, which lawyers also find, the rules of this game have clearly been broken. No cheating is allowed, and yet the father cheated on numerous occasions. The lawyer cannot defend his father by arguing for loopholes or alternative readings of key concepts in the rules.

So the game is not now what it would have been without the cheating. Each play of the game requires players making choices, but the choices are now not what they would have been had the lawyer's father not cheated. Each player's position in the game is not what it would have been without the cheating.

So what is the lawyer to do? Because he is familiar with cases of rectification – the return of property stolen from Jews by the Nazis, for instance – and with the complications of tracing down the details of the thefts and then their consequences as those thefts reverberated down through the personal histories of the individuals who may, or may not, have been affected by the thefts, the lawyer knows that the task is hopeless. There is no principle or set of principles for rectification that are so compelling the lawyer can presume that all the other players – and their eventual

replacements – will agree to. An agreement can be imposed, and among a set of alternatives, the players may agree about what to do, but the choice will not be principled: it will be determined by political calculations about what others will agree to, not even necessarily about what is good for the game.[4]

Besides, the lawyer has another problem here. The father cheated, and the lawyer found out about it only because of the father's diary. Did others in the game cheat? Did they know the father was cheating and compensate in some way – by cheating him in turn, say? The lawyer cannot know. So the situation may be even more complicated than it first appears, and the lawyer has no way of knowing.

The problems are straightforward for Smith's view. If we all agree to play a game and we start off equally positioned by the rules of the game, with the same amount of money, for instance, and subject to the same rules, then if the game is played fairly, without coercion or cheating, Smith's theory has it that the end result is fair – even if one player ends up winning everything. But the crucial conditions here are not satisfied in the real game of commerce.

First, we are born into positions, the way the lawyer is placed in the father's position, with opportunities, or not, that are not of our choosing. We do not agree to be born, let alone born into any particular position in society.

Second, we do not start out equally positioned with others by the rules of the game. The lawyer who inherited the position of the father is now in a position that is different from the positions of the other players – with more or less available money, with more or less wealth, with more or fewer opportunities because of who has bought and developed what. The father may have been a great and lucky player, passing onto his child the best position in the game – or not. In any event, the lawyer did not choose that position any more than we choose our positions when we begin our lives.

Third, even if we did choose to enter the game of commercial life and could choose our positions in that game, we would still have the same problem that faced the lawyer. As Hume put it,

> …reason tells us, that there is no property in durable objects, such as lands or houses, when carefully examined in passing from hand to hand, but must, in some period, have been founded on fraud and injustice.[5]

[4] Robert Nozick handles this issue by putting it off, saying that rectification theory is another matter entirely from his theory of justice as transfer. The thrust of this example of an extended game of Monopoly is that it is not a separate matter, but a necessary feature of any theory of justice which makes the history of transactions instrumental to determining justice. With such a theory, none but Adam and Eve – and perhaps not even Eve – start off equally situated, and all owe their positions in life to the histories of those who came before. For an extended discussion of the issue rectification raises for any theory of justice that relies on the history of transactions, see my "Monopoly With Sick Moral Strangers," in B. Minogue et al., *Reading Engelhardt*: *Essays on the Thought* of H. Tristram Engelhardt, Jr. (Dordrecht: Kluwer Academic Publishers, 1997), pp. 95–112.

[5] David Hume, "Of the Original Contract," *Essays: Moral, Political, and Literary*, ed. Eugene Miller, 2nd edition (Indianapolis: Liberty Press, 1985), p. 262.

It is an irony of some historical import that Adam Smith fastened on a decision procedure for the free enterprise system that ignores a truth David Hume was at pains to establish.

The upshot of this examination of an extended version of Monopoly is that Smith's decision procedure is not at all value neutral – even if it were possible to set it in motion, as with Monopoly, with everyone equally situated. None are ever equally situated with others when they enter the game of life. In particular, we enter into an economic system that is tainted by all the ways in which individuals have defrauded others and cheated to gain an advantage for themselves. The position we enter into is one not determined wholly by the rules that govern the fairness of the outcome, but by the coercion and cheating that, as we all too well know, mark our everyday lives. Once a redistribution of the goods of the game occurs through cheating or coercion, all future distributions are tainted – changed from what would have been fair to the extent that the cheating or coercion have reverberated through the system, changing the choices of individuals.

The system is value-laden in another way as well. We need to look at differences between the players who enter into a game, differences made valuable by the structure of a particular game. These are differences that preclude everyone playing the game being equally situated.

10.5 The Evolution of Characteristics, Some of Them Unfortunate

Any rule-governed behavior – baseball, poker, football, basketball, market capitalism – favors, of necessity, it seems, a certain set of characteristics, both mental and physical. Baseball favors right-handers, for instance. The field is arranged so that it is easier for right-handers who get a hit to run to first whereas left-handers must first turn to make the run. Basketball favors those who are taller over those who are shorter. The basket is simply closer to someone who is 7 ft tall than to someone 5 ft tall. Bridge and poker favor those with photographic or near photographic memories and the capacity to bring those memories to bear on who has been dealt what cards. The list goes on and on.

Some of the favoritism built into the structure of any particular game can be overcome with training and perseverance. Basketball has had its share of great short players, baseball its share of left-handers, poker no doubt its share of those who started without good memories and worked on theirs until they sufficed. Practice does not make perfect, but it helps: we work at learning the ins and outs of the game, and we hone our skills. The skills can be of various kinds – learning how to putt, learning how to achieve and then maintain a poker face, learning how to keep track of all the cards dealt, learning how to dunk. As we practice, we presumably work at getting better and better at these skills, and as we play, we either get better or not: our practice either pays off or not. We either come to have a sufficient, if not full, measure of the skills necessary to play the game well or fail and so do poorly when we play.

Still, some individuals seem more suited to games and to particular games than others. Practice is not going to help much for someone ill-suited, physically or mentally, to master a particular skill. Not everyone seems capable of being a great golfer, for instance, or even any sort of golfer. Not everyone seems capable of playing baseball or even modest games of softball. Not everyone seems capable of playing football or soccer. Not everyone seems capable of high mathematics, or astrophysics, or philosophy, or teaching.

So for any particular game, for every practice we have, we have a subset of all who could play who will rise to the top and some who will fall to the bottom – the last ones chosen when captains choose sides on the playground. These characteristics do not necessarily have any moral value in and of themselves. It is not morally better to be right-handed or left-handed simpliciter. Such characteristics have value for the purpose at hand – playing baseball for right-handers, playing basketball for those way above average height, and so on. So such characteristics are not necessarily value-neutral. They may be so in and of themselves, but they gain value when the structure of a game or a practice makes them valuable.

Monopoly seems to require at least a modicum of what we may call "game sense." This includes some measure of competitiveness – enough, at least, to want to play. It also includes some measure of mathematical competence[6] – how to calculate one's own position, the positions of others in the game, and the means by which to elevate one's own position, at a minimum, and perhaps depress the positions of others as well. Purchasing Boardwalk and Marvin Gardens will elevate one's own position relatively modestly: the rent for these properties is higher than for Vermont Avenue, for instance, and with hotels can readily bankrupt an already financially fragile player. Purchasing them will also ensure that others cannot and so cannot put up high rises that might help bankrupt you. A player with game sense will see that implication and others like it.

Not everyone is going to have even the minor degree of competitiveness necessary to be a full participant in the game. Every game requires, elevates, and depresses virtues. One of the lessons any coach of youth soccer learns early on is that the boys seem much slower to learn that the only way to score is to share the ball with others.

[6] One issue of no small importance concerns which characteristics, if any, are innate and which must be learned. If it should turn out that only some individuals are born with the characteristics that make for success in the capitalist system, that would have serious moral import. It would mean that a system for distributing wealth and income, and opportunity as well, would favor those with the innate characteristics making for success in the system and so be unfair: some would be born into the real opportunity of wealth and some into the real opportunity of poverty because of features they have which they have no control over and because of features of the capitalist system in which they find themselves, through no choice of their own. It is worth noting that some recent research suggests that some innate abilities differ among children. See, for example, Melissa E. Libertus, Lisa Feigenson, Justin Halberda, "Preschool acuity of the approximate number system correlates with school math ability," *Developmental Science*, first published online 2 August 2011 at http://onlinelibrary.wiley.com/doi/10.1111/j.1467-7687.2011.01080.x/abstract, accessed 8.13.11.

The judgment veers too close to sexism for my comfort, but I found myself making it when I realized that my coed soccer team was not scoring because the boys – aged 9 and 10 in this case – simply would not pass the ball when they were close enough to the goal that they just might be able to kick it in. They would ignore an open colleague, especially a female forward, even if she was better, so that they could press through a pack of defenders with little hope of scoring. Soccer requires cooperation, and some seem more willing to cooperate initially than others. In the end, a failure to learn that cooperation is necessary will mean a failure to succeed as part of a team. Soccer both requires and elevates cooperation.

Good bridge players are adept at keeping track of which cards have been dealt, and playing the game over a period of time sorts out those players who are adept at that from those who are not. The former win more often than the latter and so move higher up the ranks of bridge. This capacity for keeping track of the cards dealt is encouraged by the game: it becomes self-reinforcing. Keep track of the cards, and you win and so are more encouraged to keep track of the cards.

It would be odd indeed if the free enterprise system did not have the same sorts of effects. We are all in the system whether we like it or not, but those whose end is to sell and to make money are more than passive participants, born into a system in which they must take part.

Which features are elevated and which are depressed? The old line about hoping one's daughter does not marry a used car salesman gives us more than a clue, and though the point deserves elaboration, the bottom line, so to speak, is obvious to anyone within the system. The system affects both our personal relations and what we may call, for wont of a better phrase, our corporate relations. We need only look at a few examples to remind ourselves of what we meet with every day when we read the papers or ourselves engage in the market – by buying groceries, for instance.

a. Corporate relations – It is a depressing feature of modern capitalist systems and perhaps of that in the United States in particular that many corporations put their profits before the well-being of citizens and, even more telling, the customers. It is particularly depressing when the companies are in the health-care industry and would presumably have an interest in ensuring the health of the patients who end up with their products. I will give just two examples.

Guidant manufactures defibrillators, and it certainly put its profits before the health of its patients, and the concerns of their physicians, when it failed to withdraw from the market the inventory it had of a defibrillator that would short out. It would short out because the wire leads could disintegrate once they were in contact with the body's fluids. Those who had had that defibrillator model implanted were thus at risk of dying when they tried to use it to jump start their heart.

Over 25,000 people had had that defibrillator implanted and thus were at risk of death should they need it to work, and over 4,000 more were given that defibrillator after Guidant discovered the problem. That took care of the inventory that Guidant had on hand and that were in the pipeline for implanting already. Guidant failed to inform those who already had the defibrillator that they were at risk while it proceeded to put 4,000 in that position of ignorance and danger.

Guidant lost no money on its defective defibrillators, selling all that it had on hand, and it saved the money it might have spent in informing all those who had a defective defibrillator. It argued that it did not inform physicians or patients of the problem because it judged that the risk of an operation to replace the defibrillator was greater than the risk of having the implanted defibrillator short circuit. Of course, it was surely correct in that assessment if the patients were going to have one defective defibrillator replaced by another defective defibrillator.

It is difficult not to make the judgment that Guidant was far more concerned to ensure that it did not lose any money than it was to ensure the health of patients who needed its defibrillator.[7]

The same holds for Baxter, the company that makes a blood thinner, Hep-Lock for infants and Heparin for adults. The bottles are the same, the only differences being the difference in names and one label's being a darker blue than the other. They are easy to mistake for one another, but giving an infant the adult version risks killing the infant. That happened in Indianapolis where three infants died because of a mixup. Baxter then redesigned the container for Hep-Lock, but did not recall any of the old stock. A year later, the Quaid twins were almost killed because they were given 10,000 units instead of the 10 they should have gotten: they received the adult version rather than the infant version. Baxter saved money by not recalling either of the drugs to repackage them, but that inaction put infants at risk – unnecessarily.[8]

These are two examples of how our relations with corporations are marked by a concern to maximize profits rather than a concern with us. I picked two health care industries to emphasize the point that even corporations whose aim is supposedly to help patients are more concerned to maximize their profits than they are to help, so concerned, in fact, that they are willing to put those they are supposed to be helping at great risk, as with Baxter, and to take the decision about whether to take the risk out of the hands of patients and professional health care providers, as with Guidant. But the industry chosen does not really matter; we are all familiar with many other similar cases in many other industries over the past several decades – Ford's ignition problems, BP's oil spills, the Firestone tire problems, and so on.

b. Personal relations – Our personal relations have also become commercialized. As Carlyle put it, long ago, "We have profoundly forgotten that Cash-payment is not the sole relation of human beings."[9] When we call customer service and finally work

[7] See Barry Meier, "Defective Heart Devices Force Some Scary Medical Decisions," *New York Times*, June 20, 2005 and "Repeated Defect in Heart Devices Exposes a History of Problems," *New York Times*, October 20, 2005 as well as the *Report of the Independent Panel of Guidant Corporation*, March 20, 2006, p. 33, available at www.softwarecpr.com/…/download.asp?File=/guidantpanelreport0306.pdf, accessed 8.14.11.

[8] Tara Parker-Hope, "A Hollywood Family Takes on Medical Mistakes," *New York Times*, March 17, 2008; the quotations come from the "60 Minutes" report on the issue of medical mistakes of March 16, 2008. For the article and a link to the 60 min report, see http://well.blogs.nytimes.com/2008/03/17/a-hollywood-family-takes-on-medical-mistakes/, accessed 8.14.11.

[9] Thomas Carlyle, Past and Present (London: Ward, Lock, and Bowden, Ltd., 1897), 202–3. Quoted in Colin Heydt, "Narrative, Imagination, and the Religion of Humanity in Mill's Ethics," *Journal of the History of Philosophy*, Vol. 44, No. 1 (2006), 100.

our way through the telephone tree to a "customer representative," we are often met with a script, not a conversation. When we go through the line at the grocery store, the cashier asks, "Did you find everything you wanted?" and whether you reply or not, the cashier is busily scanning your selections and bagging them. At the end, if you are lucky, there is a "Thank you," but the cashier has already turned to the next customer: "Did you find everything you wanted?" It is much easier – that is, faster and so cheaper – to deal with customers as though they were not individuals. Your job as a customer is to respond to the script, and if you ignore it, or jump the queue of lines in the script, you will not be heard or be thought somehow wrong for not doing what you are supposed to do. You slow things down, and, as my Scottish family's ancestral clock says, "Time is Money." Relations between individuals become impersonal, defined by economic considerations and nothing else.

The losses here are great, but the point I want to make is that the losses are perfectly predictable outcomes of the decision procedure Smith has chosen, making that decision procedure anything but value neutral.

The free enterprise system Adam Smith hawks requires and accentuates some features of individuals while depressing others. Those who are competitive and have a drive to increase their income and wealth along with a commercial game sense, as it were, are more likely to succeed than those who are not driven by financial considerations. Now we can see that it elevates the value of being impersonal and depresses the value of having a relation with others marked by good humor, kindness, and other virtues of such ilk – unless, of course, they produce a larger bottom line. The false sincerity of a cashier or salesperson is even more demeaning of us and corrosive of personal relationships than simply ignoring us while yet asking us if we found everything we wanted.

But we need to emphasize one other evolutionary feature of the system Smith hawks. As Mill puts it in his Inaugural Address,

> "One of the commonest types of character among us is that of a man all whose ambition is self-regarding; who has no higher purpose in life than to enrich or raise in the world himself and his family; who never dreams of making the good of his fellow creatures or of his country an habitual object,…"[10]

Such a type is common because the economic system in which all are immersed from their birth to their death elevates self-interested behavior – greed in the worst manifestation of this self-interest. As self-interest "pays off," those engaged in it are encouraged to act even more in their self-interest and others are encouraged, by the economic success of their fellows, to emulate their behavior. Self-interest is self-reinforcing in the economic system Smith proposes: the more self-interested we are, the more we stand to gain in the economic plays we make. Indeed, that is supposed one of the main virtues of the system: it is supposed to harness self-interest to serve "the greater good of mankind."

We do end up, however, with self-interested individuals whom the system itself encourages to become more self-interested, even greedy, as they play the game. So

[10] John Stuart Mill, *The Collected Works of John Stuart Mill*, ed. John B. Robson (Toronto: University of Toronto Press, 1963–1991), Vol. XXI, 253. Quoted in Colin Heydt, op. cit., 100.

the lawyer has to worry not only about rectifying the injustices created by the father's cheating, but also about which of his own character traits will be encouraged and which discouraged as the game progresses. Being a lawyer may be thought bad enough, but if playing the game makes one even worse?

10.6 A Value-Laden Competitive Order in a Cooperative Framework

The system of distribution Adam Smith advanced is what we may call a competitive cooperative enterprise – as is Monopoly, baseball, chess, indeed, it seems, any system with more than one participant. I cannot beat you in Monopoly if you do not play, and your continued cooperation as the game proceeds is essential to my being able to take your money and your wealth and amass my own fortune.[11] You cooperate by continuing to throw the dice, by moving your token the number of steps indicated on the dice, and so on. If you were to quit playing, or quit playing the way the rules of the game require players to play, then the game is over as far as you and I are concerned. Your cooperation in this competitive endeavor in which, according to the stated goals of the game, we each are trying to gain the advantage over the other is essential to my being able to compete with you. So it is a cooperative system in which the participants compete with one another and can only compete against one another if they cooperate.

We need only think of other games to see a similar configuration of cooperation and competition. Soccer? Passing to a cooperative team mate is essential to getting the ball past defenders and scoring. Chess? Moves must be made in accordance with the rules, and a player who ceases to follow the rules and moves a pawn like a knight, for instance, is no longer playing chess, but perhaps some variant of it, and is no longer your competitor in the game. Just so for the free enterprise system. It takes all of those engaged in commerce – and that is all of us except, perhaps, a few solitary individuals who somehow survive without ever shopping for groceries, say – to make the system work so that some may gain significantly.

Within the confines of Monopoly or chess or soccer, it is, by comparison with the free enterprise system, relatively easy to ensure that the rules are being followed. There is the problem that rules are always subject to interpretation, of course.[12]

[11] Thus, the sense of entitlement that much too often accompanies great wealth is only partially appropriate – if at all. Those who have amassed wealth through the free enterprise system have played the system well, presumably – although we must leave inherited wealth out of the mix here – but they have succeeded only because the system is a cooperative enterprise and others cooperate in making the conditions for wealth possible. The tax – and political – implications are perhaps too obvious to state.

[12] See Ludwig Wittgenstein, *Philosophical Investigations*, Trans. G. E. M. Anscombe, 2nd edition (Oxford: Blackwells, 1958), §§84 ff.

We see that at play in every game: in the Fischer/Spassky match in Iceland in 1972, Fischer pushed the boundaries by staring unremittingly at Spassky while Spassky tried to think through his next move. There is also the problem that any set of rules can be gamed. A wonderful New Yorker cartoon has one lawyer saying to another, "These new regulations will fundamentally alter the way we get around them."[13] But within the confines of a game, alternative interpretations of rules can be resolved by referees or by discussion and negotiation among the players, and within the confines of a game, we can block the gaming once it is noted and its effects on the game determined to be unfortunate, if not toxic.

Unfortunately, as we move beyond the confines of a game, both in time and in space, it becomes far easier for individuals to use favorable interpretations of the rules and to game the system in ways that defy easy detection. As long as the butcher and the baker and the greengrocer are all in a small town or city, Glasgow in Adam Smith's day for instance, word of mouth suffices to control at least the worst of excesses. But once we move beyond the constraint of size, we have Madoff and his ilk as well as financial derivatives that even those purveying them cannot properly value – and little way even of knowing how the financial system is being gamed, let alone who is gaming and how to stop it. The problem is knowing whether and how others cheat and coerce, and, as it turns out, that information becomes the most valuable commodity and is in short supply. Imagine that instead of the butcher putting his thumb on the scales, the scales themselves have been reset so that a small portion of an ounce is subtracted for every ounce the scales weigh. It would be like taking a penny from everyone's savings: it would not be missed, and yet the person filching the pennies would become rich. Just so, those buying meat would not be in a position that would allow them even to suspect a problem, let alone determine how to solve it. The more complicated the system, that is, the easier it is to game or cheat or coerce without others being the wiser.

The analogy with Monopoly thus begins to falter as we move beyond the confines of the game – move to make it an historical enterprise, as we did, and move beyond the ability of players or referees to control the game. What we see is that the values that Smith embeds in the order he espouses for distributing the wealth of nations make for a very different kind of system of distribution than, it appears, he intended. Our inability to rectify past cheating and coercion is sufficient to make that point: whatever the current distribution of wealth, income, and opportunity, for instance, it has been skewed by past unethical acts, and we can make no pretense of ever setting things right.

In any event, we shall end up with vast inequalities of income and wealth if Smith's procedure is allowed to run its natural course – as we can understand by seeing the consequences of playing Monopoly to its natural end. The differences in capacities and aptitudes that individuals bring to the table will account for some of

[13] This cartoon is by P. C. Vey and originally appeared in the *New Yorker*. You may find it at http://www.cartoonbank.com/2009/these-new-regulations-will-fundamentally-change-the-way-we-get-around-them/invt/132597/, accessed 8.17.11.

those different outcomes, but another variable will be at work as well. As the system proceeds through numerous generations, those in favored inherited positions are more likely to get more out of the system than those in less favored positions. Starting with your parents' legacy of name recognition and wealth can get you positions no one would ever have thought you suited for. We have numerous politicians and "celebrities" as examples. As one recent analogy had it for a political personage, some are born on third base and yet think they got there through their own efforts.

We know from such examples that the character traits that matter for Smith's system are not universally shared so that some individuals do not start out equally situated with others to play the game. Even worse than that, the gains possible within the system are highly likely to encourage just the sort of disreputable character traits that we should eschew in ourselves as well as others.

We should add that as we move beyond the game of Monopoly to allow different instruments of monetary value, we increase the likelihood that anything that can be commodified will be commodified by some player or other. It may be helpful to insurance companies and to automotive manufacturers, among others, to put a dollar value on the loss of life, but to take everything in the world as having a monetary value is surely to devalue some features of our world that enrich us in ways that money does not. Even trust is given a cost in the form of insurance. And we need to add the obvious: the likelihood of anyone understanding the details of any complex financial instrument – what its implications are for long-term wealth or poverty for both individuals and society, for instance – is miniscule. We end up acting in ignorance, never a good way to invest resources, either ours or society's.

10.7 Concluding Remarks

It is impossible not to get caught up in the system Adam Smith advocated. Although he might not recognize the details, or applaud all its features, the system we live in and are born into is, in broad outline, the system Smith articulated. We have no choice in the matter, of course, but we can choose to buy into the system intellectually, or not, and if we are to do that knowingly, we need to understand more about what values it embodies than "the greater good of mankind" that Smith claims his system will produce. That end may outweigh any of its disadvantages, but even if it did, we ought to recognize those disadvantages and, where we can, work within the system to make them strengths rather than weaknesses. A system that, like Monopoly, has the potential to enrich some greatly while impoverishing others and that encourages character traits we would otherwise think disreputable needs to be modified in a variety of ways to dampen its unfortunate effects. No one who espouses the system because it offers the greater good of mankind should object to any change that alleviates what is bad within the system – and so increases the good.

The argument about character traits is not that the traits which the system presupposes for success, and accentuates, are themselves valuable, but that they become

valuable within the system. So a system that makes those character traits valuable, and yet so dominates that no one can live or function in the world outside the system, is not value-neutral. Those who profit by the cooperative behavior of others should thus feel no reluctance to contribute to the well-being of those who lack the capacity to do well in the system. Taxation is not a denial of the liberty of those who succeed in the system, but a moral requirement imposed by the values of the system itself.

A thorough examination of Smith's guide to increasing the wealth of nations would require that we look at all the other effects and implications, but we have enough before us to see that, among other things, economic inequality is a predictable consequence of the system, that the distribution of wealth and income within a society at any one time will be skewed by the prior cheating and coercion – or "fraud and injustice," as Hume puts it – that we know will have occurred and is occurring, and that the inequalities of wealth will simply widen as those features of individuals which make for success in the system are enhanced by success, encouraging yet more self-interest.

Part IV
Economic Justice and Distribution

Chapter 11
Economic Inequality and Global Justice

Ann E. Cudd

Abstract This paper considers whether economic inequality apart from poverty is unjust. I argue that economic inequality is not unjust in itself, but that if it allows the rich to dominate politically and create unfair economic conditions, then it is unjust. The solution within democratic capitalist countries is to control the influence of wealth on the political system. The paper then considers how that solution works in the global case. Because there is no international democratic system, and because the determinants of global inequality are more domestic than international, the solution does not apply as neatly. However, a case can be made for demanding more democracy in member nations and controlling the influence of wealthy nations in the World Trade Organization.

11.1 Introduction: Poverty, Inequality, and the Domestic-Global Analogy

In a world in which severe poverty could be mitigated, it is an inexcusable moral horror that severe poverty continues to exist on a massive scale. We live in such a world, and much recent political philosophy rightfully focuses us on our duty to end poverty. This paper is not about poverty; it is about economic inequality, in particular, inequality that does not include severe poverty on the lower side. Thus, for the most part, this paper is not about the worst horrors in the actual world, but

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rather about those parts of the world where there is serious inequality without severe poverty, and about a hypothetical world in which economic inequality would exist widely without severe poverty. The point of this philosophical exercise is to examine some implications of economic inequality for questions of justice without confusing the issue with the clearly unjust circumstance of poverty. This is a relevant philosophical exercise because the dominant economic system, capitalism, tends to create and increase economic inequalities along with economic growth. Capitalism is often criticized for creating inequality.[1] But capitalism creates (and is the best system we know of for creating) economic growth,[2] which fights poverty, and this counts in favor of capitalism.[3] Keeping severe poverty out of the picture, is economic inequality as introduced by capitalism necessarily unjust? I want to argue that it is not. I think that the argument for this view is fairly easy to make in the domestic case, and I want to investigate how it extends to global economic inequality.

Economic inequality is not necessarily unjust, I contend, if it does not derive from unjust conditions and it does not amount to poverty on the poorer side. I define poverty as *the condition in which one lacks the wealth to procure a reasonable level of nutrition, shelter, food, education, and health care and gain access to public spaces that allow one to meet and enjoy the company of others.*[4] If there is someone with vastly more income or wealth than one has, that fact in itself is not morally problematic. Such inequalities are mere differences in ways of life, which are no more morally significant because these people co-exist than if they were from different historical periods.[5] Economic inequality that does not imply poverty on one side is like athletic inequality that does not imply disability or illness on one side. Just as there are other valuable things to do in life than to participate in athletics at the highest skill level, there are other valuable things to do in life than to enjoy the so-called "finer things" in life. Happiness studies that indicate that there is a modest

[1] I don't mean to suggest, nor do I take it that critics of capitalism believe, that there were no economic inequalities before capitalism, nor that capitalist countries are the only ones with economic inequalities today.

[2] This is a claim I defend in Ann E. Cudd and Nancy Holmstrom, *Capitalism, For and Against,* Cambridge, 2011.

[3] Growth also has a tendency to deplete the natural resources of the planet, and that is problematic in many ways, both prudential and moral. I am going to mark but bracket this difficulty with economic growth for the purposes of this paper.

[4] This definition glosses over physical and mental handicaps that prevent persons from being able to procure such things without an abnormal expenditure of wealth. Much needs to be said about this, but that is the topic for another paper. For my purposes it suffices to include persons among the impoverished anyone who cannot access such things for want of wealth rather than lack of interest.

[5] I am thinking here of the case of the later folks being far wealthier than the earlier ones, which is true for most of human history to this point. However, if the later folks were poorer than the earlier ones because of actions taken by the earlier ones, then there might be an injustice in such an inequality.

level of income beyond which people do not tend to be any happier give further evidence for the view that well-being does not depends not on equality but on sufficiency of income.[6]

However, great inequalities in wealth can define power relations in a society that are problematic for justice. First, they may allow the rich to dominate the economy in a way that threatens the less rich with future poverty. For example, the rich may have so much economic power that they provide the only viable employment opportunities for the less rich, which is their means of income, without which they would be poor.[7] This threat of future poverty is potentially coercive, and actually resorting to such coercion (say, to extract concessions from workers) would be morally wrong. Second, wealthy persons may be able to dominate the media so much that only their messages are broadcast widely; the less rich may have to resort to word of mouth transmission of messages, or at least to Facebook or Twitter (which actually might be quite effective). Through the media the wealthy may be able to control the dominant images of a society and thereby create stigma, stereotype, and other problematic images for the less rich. Third and most worrying, through the various ways that wealth can help to shape the culture and the message, the wealthy can dominate the political system, and thereby rig the rules of property rights and market interactions in their favor. If inequality leads to this imbalance in the political system, then it is unfair.

Thus, economic inequality can be problematic for justice unless its effects are controlled or counterbalanced by other forces. Other forces might include tax and transfer systems that guarantee a decent basic standard of living for all (and reduce inequality directly), macroeconomic policies that foster full employment, laws that limit the amount candidates can spend, or laws that define property rights and legitimate market transactions in ways that prevent current inequality from denying the less wealthy from competing economically.

Another way that economic inequality can be problematic is if one cannot change one's position given one's position at birth. Why is this problematic if one is not absolutely poor? One reason is that it would destroy incentives to hard work, so it would be a less efficient economic system, but this is a matter of efficiency, not of justice.[8] A reason connected to justice is that greater income or wealth can be a reward for good and hard work, and so a badge of pride. If some are unable to

[6] Daniel Kahneman and Angus Deaton, "High income improves evaluation of life but not emotional well-being," *Proceedings of the National Academy of Sciences*, Aug. 4, 2010, www.pnas.org/cgi/doi/10.1073/pnas.1011492107. The "modest level" at which Americans seem to be content is $75,000 (in current dollars), which is well above the US poverty line ($22,050 for a family of four 2009), as well as the median income ($52,020 in 2008), but still below the income of the top 10% ($77,500). After this point, however, income differences within that top 10% become much wider; to get to the top 1%, one's income has to be over $250,000.

[7] If the rich can effectively outbid the less rich for all the potential capital, then there would be no opportunity for the less rich to start their own businesses.

[8] This is an important argument for imposing restrictions and laws that reduce economic inequality to a level where all are better off, but that argument does not fall within the scope of this paper, which is strictly about justice.

compete for this badge, then that is unfair. If inheritance laws restrict the degree to which families can control wealth, and if education is provided equally for all children (or better yet, on an affirmative action system that favors poor children), then the transmission of inequality of opportunity across generations is less likely. Thus, within a society governments can reduce economic inequality and prevent the injustices associated with it. How much should it be reduced? That depends on why there is inequality and what good effects inequality brings with it. If inequality is required to bring forth effort and innovation, then some inequality is desirable for a society and for the world. Defenders of capitalism, like me, argue that this is the case, and that aiming to eliminate all inequality will have bad effects for justice and freedom.[9]

The argument sketch just presented shows only that within societies, in which tax and transfer systems can be implemented, macroeconomic policies can be pursued, and laws about property rights and markets can be debated and then enforced, economic inequality is not necessarily unjust. Is there a parallel between the justice or injustice of economic inequality in the domestic sphere and the justice or injustice of economic inequality in the international sphere? In this paper I will argue that economic inequality is not unjust in itself, but because it can bring about an unjust imbalance of political power, we have reason to mitigate economic inequality to some degree within democratic systems. I then look at how that applies internationally and argue that because there is no international democratic system, and because the determinants of global inequality are more domestic than international, this argument does not immediately apply. However, I suggest that the argument provides an analogous principle for international decision making bodies.

11.2 Economic Inequality, Capitalism, and Domestic Justice

The basic inequality objection to capitalism is the claim that the inequalities created by capitalism are inevitable and morally unacceptable. Inequality is a relation between two subjects with respect to some good. While a social system may reduce inequality with respect to some goods, or between certain groups or individuals, it may increase it with respect to other goods, and between some groups or individuals. The main inequality objection to capitalism is that it increases inequalities of wealth and income (or well-being or capabilities, which are closely related to wealth and income) between rich and poor countries and between individuals both within and across borders. This is not uncontroversial; it depends on which countries one looks at and what time periods one considers. The matter of how one measures inequality of wealth and income is also the subject of controversy. But there is wide agreement that after a period of declining inequality lasting for about 40 years during the last century, inequality has been rising sharply in the US in the past 30 years.[10]

[9] Ann E. Cudd and Nancy Holmstrom, *Capitalism, For and Against*, Cambridge, 2011.

[10] Paul Krugman, *The Conscience of a Liberal*, New York: WW Norton, 2007.

What constitutes morally unacceptable inequality? Goods that can be distributed unequally can be either rival or non-rival. A good is rival if its being enjoyed by one person precludes its enjoyment by another person. Status, political power and influence, and toothbrushes are all rival to some degree. Any good that is both essential to well-being and rival ought, morally, to be distributed as equally as possible, at least up to the point that all enjoy the essential level of the good. But wealth and income are not necessarily rival; they are not rival if the total wealth is rising. Therefore increasing the wealth of some does not necessarily decrease that of others.[11] So if capitalism simply raises some persons' wealth or income, while not decreasing that of others, then that inequality is not in itself morally problematic.

Amartya Sen argues that relative deprivation within a society is morally problematic.[12] He begins with the observation, which he credits to Adam Smith, that one of the essential social capabilities is being able to appear in public without shame. If one's income is not high enough to guarantee the minimal requirements for so appearing, then one is absolutely deprived even if, in another society, one's income would be high enough not to be considered absolutely poor. Furthermore, shame and peer pressure operate so strongly that relatively deprived persons may be willing to forego a basic need such as food in order to buy some seemingly frivolous good (such as the latest cell phone plan) that they feel is essential to maintain social standing. So again, Sen argues, relative deprivation, that is to say economic inequality, can imply absolute deprivation of essential capabilities.

While Sen's first argument is compelling, the second one is not. There are surely some minimal requirements for social standing, and these have to be factored into what counts as the poverty level in a society. My definition of poverty is meant to include lack of access to public spaces, which entails being able to appear without shame. But the second point suggests that relatively deprived persons should have no responsibility for their consumption choices, and if that creates a claim on others to restore their basic needs, that is unjust. To forego using one's own wealth to procure a basic need (i.e., food, shelter, nutrition, education, or health care) for the sake of a luxury good should perhaps be an allowable choice in the name of freedom, but should not create an obligation to compensate for by supplying the basic needs that have been foregone. Just because a person thinks that they 'need' the same goods as wealthy people in their society in order to gain social respect does not mean that it is true. Needs must be distinguished from mere wants on any theory of distributive justice. One example of how this commonly arises is that young people often think that they should be able to live with the same goods as people in middle age. But the older persons have earned their greater income and wealth than they had at an earlier period in their lives through experience, investment, and saving. The mere fact of inequality of income and wealth does not imply injustice in this case, and the

[11] I mean real wealth and income, not nominal wealth and income. Thus inflationary concerns do not play a role in this argument.

[12] Amartya Sen, "Conceptualizing and Measuring Poverty," in Poverty and Inequality, D. Grusky and R. Kanbur, eds., Stanford: Stanford University Press, 2006, 30–46, pp.36–7.

younger people should be criticized for envying the older ones' wealth. While it may be true that some potential peers will shun persons who do not have the same fashionable goods as themselves, there will be others who also lack those goods, and still others who do not care about those goods. A decent life does not require us to be able to meet any standard of consumption that others might require, only enough so that one can have some access to social spaces to meet and enjoy the company of (some) others. It cannot be a matter of justice, for instance, that I cannot fully engage the company in a Monaco casino without losing my home.

If the mere fact of inequality is not morally problematic, then if it has an unfair origin, does that make it morally unacceptable? Some origins of inequality are unjust, such as inequality that tracks oppression. For example, economic inequality that is consequent on or constitutive of racial or gender oppression. Other origins are not, such as the differences in persons' interests and values that lead them to exert their efforts in different directions with different results. Capitalism essentially creates inequalities because it distributes goods in markets, where trades take place because of different demands for goods and services. Inequality is created by a differential demand for certain goods, skills, or services. People seek to discover and create goods, skills, and services that are highly demanded because they are paid well for them. Admittedly, without capitalism there might be some happy coincidences between skills that are fun and interesting to exercise for the benefit of those who want or need them, or of goods that one creates because one needs them oneself, or services that are rewarding in themselves to provide, and the general need for them. But without the possibility of economic trade and differential reward, far fewer needed and wanted skills, goods, and services will be developed.

There are two main reasons for this. First there are severe information difficulties in finding out what is needed or wanted. Markets are decentralized devices for discovering what people want and need through many trials and errors. Persons try producing goods and services in order to obtain a financial reward, and either they find a market for their good or service, or they do not. Such trials lead to others in the pursuit of customers and clients. Second, there are incentive difficulties: it is difficult to believe that many people would seek to develop the many skills and products that others want or need – and they themselves do not – without a reward for providing them. But the price to society of the information and incentives that markets provide is economic inequality. Those who bring highly demanded or relatively scarce commodities or skills to the market are highly rewarded, while those who do not possess or develop those commodities or skills will not gain equal rewards in a system where people are free to make trades that satisfy their needs and desires. Innovation and development of goods and services is clearly a morally acceptable origin of inequality.

Even if the creation of inequality is morally acceptable in itself, inequalities in wealth and income can create unacceptably unstable social situations that make everyone worse off. Gross inequalities can cause great envy and frustration, which in turn causes social unrest, violence, and erosion of wealth. Furthermore, when people are desperate to gain wealth, no matter what the reason, they are more likely to

engage in undignified or morally repugnant kinds of exchange.[13] Women are most vulnerable to this both because they tend to be poorer and more desperate to ensure that their children are well fed, and because they are more likely to be made (and compelled to accept) undignified offers, such as surrogacy contracts or solicitations for prostitution, or to be sold by relatives. This makes degradation a likely outcome of severe inequality. But to judge whether this is unjust we need to ask whether people engage in these degrading exchanges because of poverty or envy. If it is indeed to provide economic security to themselves and their families, then such conditions are unjust. But that means that they suffer from poverty, not just inequality, and the injustice lies primarily in the poverty. If the degrading exchange is engaged in not because of poverty (or physical coercion), then I believe we have to say that the exchange is not coercive and not unjust, but merely envious.

Inequalities created by force or fraud are unjustified inequalities. However, they are unjustified because of the force or fraud involved, not the inequality. It is up to a society to determine through its laws and enforcement of those laws what constitutes property rights, force, and fraud. The way a society structures its laws concerning property rights and legitimate trading practices will in turn greatly determine the level of economic equality or inequality in a society.[14]

There is another source of unfairness leading to economic inequality, and that is inequality that is perpetuated or magnified by the rich who are able to rig the laws that determine what count as property rights and legitimate transactions in their favor. In a democratic society, governments have to be somehow responsive to the people. But if the systems of democratic deliberation and debate are dominated by the rich, then the government will be more responsive to them than to the less rich. This makes for an insidious feedback loop of inequality. It is not clear that it is in the interest of the rich to make this happen; inequality is not always good, even for the rich. But in any case, this vicious cycle of inequality is contingent, not necessary, in democratic capitalist societies. (Although economic inequality is high in the US, it is low in many other democratic capitalist countries, such as Canada, most western European countries, or Japan.) What we can conclude from this feedback effect is that in democratic societies justice demands the reduction in the effects of economic inequality on political institutions and educational opportunities, not necessarily on inequality itself, except where that inequality results from oppression, force, or fraud.

Thus, to say that inequality only matters insofar as the poorest are absolutely poor is inadequate. Gross inequality is harmful not in itself but because it biases the rules in favor of the wealthy and to the detriment of the poor or less wealthy. But to what degree and how should it be eliminated? If capitalism can help eliminate poverty by

[13] Elizabeth Anderson, "Is Women's Labor a Commodity?" *Philosophy and Public Affairs*, 1990 Winter;19(1):71–92.

[14] Joshua L. Rosenbloom and William A. Sundstrom, "Labor Market Regimes in U.S. History," in Rhose, Rosenbloom, and Weiman, *Economic Evolution and Revolution in Historical Time*, Stanford: Stanford University Press, 2010, 277–310.

stimulating growth,[15] then we need to recognize that tradeoffs will have to be made between eliminating poverty and eliminating inequality. To eliminate inequality entirely is to eliminate capitalism and its benefits for the least well off. Institutional rules must be formulated that give the poor a better chance to compete in the global marketplace in a way that both eliminates the worst poverty and reduces the most distorting, unfair inequality. Although the inequality objection does not rule out capitalism, for both moral and prudential reasons, inequality must be controlled.

Capitalism can be defended not only on grounds of poverty reduction and wealth creation, however. It is also embodies an important freedom, namely, the freedom to trade, and the freedom to choose one's occupation, where to live, and with whom to associate. To fully enjoy these freedoms, one needs to have adequate income and socially provided opportunities, such as educational opportunities and a vibrant economic environment where there are a variety of firms and service providers, and access to capital. These needs point in the direction of more capitalism to create wealth and encourage investment, but again, serious inequality will reduce the political power of the poor to ensure that the institutional rules allow them to capture enough of that wealth and secure adequate opportunities. The main objection to economic inequality from the point of view of justice, then, is that it can unfairly benefit the rich in the political system. In democratic systems, the influence of the wealthy can and should be controlled to reduce this unfairness.

11.3 Global Inequality

To this point I have argued that domestic economic inequality caused by capitalism is not necessarily unjust, and that some justified inequality is desirable as a spur to economic growth. I have also pointed out that in most democratic capitalist countries, economic inequality is controlled enough to keep the wealthy from accelerating inequality, although this may no longer be true in the United States. Still, it is possible for a democratic political system to control the effects of wealth on the political system through its laws. I also have argued that capitalism inevitably creates inequality, and cannot exist within a legal system that strips away all possibility for persons to employ capital and benefit financially and differentially from their innovations and efforts. If one takes into account the positive effects of economic inequality on motivation to work and innovate, both for the wealthy and the less wealthy, it seems that a capitalism in which the influence of wealth on the political system is democratically controlled is optimal for domestic justice, as well as freedom, and well-being. But how does this extend to the situation of global economic inequality? In particular, is there an analogous concern that the wealthy will politically dominate global institutions that define property rights, and is there an analogous mechanism to control the influence of wealth in global institutions?

[15] This has happened in China and India, for example, which have made enormous strides in reducing poverty since the 1980s through the growth of capitalist trade.

There are some important facts that should frame this discussion. Bob Sutcliffe and David Dollar are economists who argue on different sides of the inequality objection to globalization, but they agree on the following basic characterizations of economic inequality at present in the world. (1). Global economic inequality (between individuals throughout the world) has risen steadily over the past two centuries, but since 1980 has declined modestly; (2). Inter-country (comparing gross income between different countries) rather than intra-country (comparing income between persons in the same country) inequality is the largest contributor to global economic inequality; (3). The growth of the Chinese economy since 1980 is one of the main explanations for 1 and 2.[16] However, most of the growth of global economic inequality is of the "flying top" form, that is, it is due to the increase in wealth and income of the better off, rather than a lowering of the wealth and income of the worse off, although large numbers of persons remain in dire poverty.[17] Secondly, those countries that have fared the worst over this time span are the ones that have failed to develop a global capitalist economy. Thus, capitalism creates economic inequalities, but mainly through its positive, wealth creating effects on countries (and their citizens) that engage in global trade, and not by absolutely impoverishing individual citizens of capitalist countries. Capitalism has not created poverty, but it has created the current situation where it looks as though we could finally end severe poverty for everyone if only we would redistribute the wealth from rich to poor.

Critics of global capitalism often conflate inequality and poverty, objecting to the inequalities that capitalism creates while citing statistics about the poverty of the global poor.[18] Most proponents of capitalism will agree that severe poverty is not morally acceptable, although they disagree about how to address the problem. However, most will argue that capitalism is the best means to address poverty because it is the best means for creating wealth.[19] As I said before, capitalism creates inequalities through the differential demands for goods and services that

[16] Bob Sutcliffe, "The Unequalled and Unequal Twentieth Century." David Dollar, "Globalization, Poverty, and Inequality Since 1980," in Held and Kaya, eds., *Global Inequality*.

[17] The World Bank reports that "the number of people living in extreme poverty fell from 1.9 billion in 1981 to 1.8 billion in 1990, and to about 1.4 billion in 2005" according to the Millenium Development Goal measure of extreme poverty at $1.25 per day (PPP). (World Bank Group website, http://ddp-ext.worldbank.org/ext/GMIS/ accessed 17 Sept. 2010.) This is merely *extreme* poverty, and many more are poor by the standard I used at the beginning of the paper, namely "having a reasonable level of nutrition, shelter, food, education and access to public spaces." Nicole Hassoun, "Free Trade, Poverty, and Inequality,"(*Journal of Moral Philosophy*, 8 (2009): 5–44) disputes the World Bank numbers and claims that using PPP underestimates poverty rates. But that would hold for the earlier time as well as the later one, and I am making a point about the comparison rather than the absolute number. Furthermore, it is not to be denied that the percentage of people in extreme poverty has fallen significantly over this time.

[18] For example, Dalton Conley, "America is … #15?" *The Nation*, March 23, 2009.

[19] David Dollar "Growth is Good for the Poor," *Journal of Economic Growth*, 7(September, 2002): 195–225. Drusilla Brown, Alan Deardorff, and Robert Stern, "The Effects of Multinational Production on Wages and Working Conditions in Developing Countries," *NBER Working Paper* No. 9669. Shaohua Chen and Martin Ravallion, "How have the world's poorest fared since the early 1980s?" *World Bank Policy Research Working Paper* 3341, June 2004.

create the very possibility of trade. Capitalism also promotes innovation as people compete to generate demand for their goods and services, and innovation increases the total wealth in the world. Since inequality is part of the explanation for innovation and wealth creation, inequality that comes about through capitalist development is morally acceptable.

11.4 Global Governance and the Vicious Cycle of Inequality

However, things are not quite that simple, and the critics have a point when they decry inequality. As in the domestic case, global inequalities of wealth and income cannot be separated from inequalities in political power and influence. Global capitalism is loosely controlled by institutional systems that set the rules that structure markets, determine ownership rights, and provide legal enforcement of trade restrictions. The rules and the way that they are enforced can be shaped to favor one or another group or individual over the others. In this way it is similar to basketball, where allowing three points for long shots favors smaller players who would never be able to grow large enough to compete favorably with bigger inside players but whose shooting ability from the outside makes them more valuable, or where rules against body contact are differentially enforced when the contact occurs inside or outside the lane, which also favors the smaller players.

Rules governing global capitalist exchange are determined both internally within countries and internationally. International trade is overseen by the World Trade Organization (WTO), which can rule certain trade restrictions acceptable and others unacceptable, and so benefit one group of producers, workers, and consumers or another. The United Nations (UN) collectively decides who counts as a legitimate representative of the ruling government of a state at that body and in its associated bodies (e.g., the World Bank, the International Monetary Fund, the International Labor Organization) and thus whether the governments or rulers of a state can borrow on its behalf or trade in its national resources. As Thomas Pogge has pointed out, collectively nations can determine whether a government of a country is the legitimate owner of its territory's resource, or it can declare it an outlaw government and prohibit trade or deny borrowing privileges.[20] The WTO decides who can represent a state in negotiations and decisions about the legitimacy of its laws that govern international trade. A few individual nations can seek to militarily enforce or disrupt these rules. The WTO makes decisions about trading rules by consensus among the members, although it does adhere to a set of principles, including non-discrimination and gradualism in reducing barriers to trade. Beginning in 2006, during the current Doha round of negotiations, the WTO has allowed NGOs greater participation, although not

[20] Thomas Pogge, *World Poverty and Human Rights*, 2nd ed., Cambridge: Polity Press, 2008.

voting rights, in deliberations, and it has adopted as an additional principle that developing countries are to be given more time to come into compliance with mutually agreed upon rules.

Economic inequality between nations creates differential influence over global governing institutions. Affluent countries can influence the institutional rules of capitalism in a variety of ways. They can hire economists and lawyers to figure out what rules would benefit them (or some subset of their citizens), they can influence opinion through clever marketing of their point of view, they can leverage favorable agreements through exercising their bargaining power by refusing to make less favorable agreements which they can afford to walk away from, and they can simply bribe those in power to make the rules most beneficial to their businesses.[21] Thus in the global as well as the domestic case, international economic inequality can bring about greater inequality, and so it is unfair. Furthermore, greater international inequality brings about greater global economic inequality, compounding the unfairness.

In the domestic case I argued that the analogous political domination by the wealthy should be, and in many countries is, countered by laws that limit the effects of wealth on political power. Democratic influence over the global rules of trade is more difficult to achieve than in the domestic case, however. First, the international bodies are once removed from individuals, even if the nations that are represented in them are democratic. But many poor nations are highly undemocratic. So even if the nation is democratically represented at the higher level in the international body, individuals within the nation are not so represented. Second, the representation of nations in international bodies is not democratic. In the UN General Assembly each member state gets one vote, regardless of its population. But even more problematic is the Security Council, which has five permanent members and ten elected members, each of which get one vote. In the WTO, member states may send a representative to the important ministerial meetings, but not all countries are members, and the poorest countries often cannot afford to send a representative. Although decisions are generally taken by consensus rather than through majority rule, if the poorest countries have no representatives at the table, the body is not democratic. Furthermore, as with the UN, the representative of a country need not have been, and typically is not, an elected representative of the country.

Carol Gould argues that this undemocratic nature of international bodies is unjust. "Democratic accountability of these institutions is required, inasmuch as their financial and commercial policymaking directly bears on well-being levels in the countries to which their policies apply and also bears on environmental conditions that have a local or more global impact."[22] She argues this on grounds of both the "common activity" criterion that demands that people who share a common social activity have equal rights to codetermine the activity, and on grounds of the

[21] Thomas W. Pogge, "Why Inequality Matters," in David Held and Ayse Kaya, eds., *Global Inequality*, Oxford: Oxford University Press, 2007, pp. 132–147.

[22] Carol C. Gould, *Globalizing Democracy and Human Rights*, New York: Cambridge University Press, 2004, 179.

"all affected" criterion, which claims that those affected by a decision should have democratic input in making the decision. I agree with this view, and I believe it also follows from the injustice of economic inequality argument that I have been developing. Inequality, recall, is unjust insofar as it undermines democracy, giving the wealthy the ability to control the rues of private property and markets in order to unfairly increase their wealth.

How might democratic influence be achieved in order to constrain rich nations from having too much influence over the global rules of trade? The domestic case again provides an analogy, I think. The problem in the domestic case, recall, is that the democratic politics can be controlled by wealthy special interests. The solution is to pass laws that control the use of wealth in politics. Likewise in the global case the solution is to design the institution that creates the rules so that wealthy countries cannot dominate negotiations and so rig the rules in their favor. This clearly has been done in the domestic case in many countries. There is no principled reason that it cannot be done in the global case, and there are signs that the main global institutions governing capitalist trade – the WTO, the World Bank, and the IMF – are moving in this direction. All three provide technical expertise to the least developed countries to help determine their economic needs and strengths. More needs to be done, however, to make sure that such investigation is done with the values and desires of the people of these nations in mind, rather than those of wealthy governments that control the institutions. What kind of growth do the people want? What tradeoffs are they willing to make between goods and their own cultural ideals and values? While a full investigation of how institutional intervention should be undertaken is beyond the scope of this paper, these are the kinds of questions that such interventions must address in order to avoid allowing inequalities to create injustices.

The WTO is perhaps the most likely of these institutions to create rules that exacerbate inequality through the rule of the rich. Controlling that institution would be the global analogy to controlling the rules of private property and markets domestically. The WTO evinces no special concern for democracy, however. It does not require any degree of democratic rule by its members' governments. Furthermore, its primary rule is non-discrimination, which requires that the member countries treat all trading partners equally. The originating idea of the WTO is to avoid trade wars, and the disastrous results from trade wars in the past. This is an important goal, though, of course, peace should not be bought at any price. By treating all trading partners equally without any regard for democracy, the WTO empowers undemocratic governments against their people, allowing the governments to increase inequality within their borders by endorsing international rules of trade that privilege the interests of the rulers. In this way the WTO encourages unjust forms of inequality. In order to avoid this result the WTO should exclude undemocratic nations unless they can show that inequality is neither unjustly increasing to the benefit of the ruling class nor to the greater impoverishment of the poor. Putting pressure on non-democratic nations would not only decrease unjust inequality globally, but also domestically in those nations.

Even if undemocratic nations' ability to give greater power to the wealthy is controlled, however, wealthy nations can cooperate to gain unfair advantage over less wealthy ones. Wealthy nations are in a better bargaining position in negotiating

trade agreements because the poorer nations are less able to walk away from the table. If wealthy nations have similar interests in rigging the rules of trade to their advantage (for example, by allowing protectionist policies for agriculture), they can band together to ensure that their position wins; their combined power is all that much more formidable. Of course poor countries can also band together when they have similar interests, but they cannot help each other much when it comes to increasing bargaining power. The WTO's structure thus allows wealth to control the rules that increase wealth, making a vicious cycle for poor nations. How could this cycle be derailed? Clearly, the bargaining rules need to be changed. If wealthy nations were not permitted to collude, while poor nations were permitted to collectively bargain, there would be greater fairness in distribution of bargaining power. Of course the incentives to collude are great enough to inspire secrecy and cheating, and controlling that is notoriously difficult and inefficient. This is another unfortunate analogy between the domestic and global situation, for there are also tendencies to work around any system designed to control the influence of wealth in the domestic political sphere.

However, an important dis-analogy between the domestic and global cases is that even if the rules could be internationally set to deny the influence of wealth inequality on the rules of global trade, the domestic decisions of governments will still play an essential role in determining inter-country (as well as intra-country) inequality. Internally governments have the ability to determine ownership rights and influence trade, although members of the WTO are subject to its rulings. Still, the internal decisions by countries about their laws, property rights, internal subsidies, taxes, and so forth are far more consequential for the economic standing of their people. This is reflected in the differences in the degree to which each body can coerce those who reject their authority. While the WTO can allow other countries to raise tariffs against its products if a country refuses to adhere to WTO rulings, the government of a country can deprive an individual of her liberty if she refuses to adhere to its property laws. The governments of countries can determine the rules under which they will allow transnational corporations to conduct business in the country. This is a prime source of corrupt influence of wealth on the decisions that affect wealth and income inequality. Governments can also unilaterally decide which other countries they will permit their citizens to trade with. Thus, there is a great deal of internal political influence over the key determinants of global capitalist markets, and therefore over wealth and income inequality globally. To address global inequality, then, it is very important to do so at an internal, domestic level, and this points us back in the direction of controlling the domestic influence of wealth on political decisions.

11.5 Conclusion

The point of this paper has been to argue that economic inequality is not necessarily problematic for justice, if the connection between wealth and political power is controlled. If this is the case, then criticizing capitalism for creating inequality is mistaken. If it is poverty, corruption, and oppression that are the sources of injustice,

then capitalism may in fact be more of an ally than a villain in the fight against injustice. However, I have also argued that inequality is unjust when it allows the wealthy to control the legal system that determines property rights and the rules of markets in ways that privilege the wealthy.

Just as in the domestic case where the political influence of wealth has to be controlled to preserve justice, so the legal framework of global capitalism needs to be designed to control the influence of the wealthy over the rules of the system in order to insure fairness in trade and eliminate a vicious cycle of privilege for wealthy nations and (at least some of) their people. First, international institutions that govern trade and finance should emphasize democracy in member institutions. Second, the WTO should redesign its rules concerning collective bargaining among nations in order to reduce the relative power of wealthy nations to control the terms of trade. Finally, I argued that the influence of outside wealth on the domestic political affairs of a nation may be the most important element to control in order to prevent the basic injustice that stems from economic inequality, which is the control of the political decisions of nations by the rich.

Chapter 12
Property, Taxes and Distribution

William Nelson

Abstract Is an ideal of distributive justice, strong enough to require some redistribution, philosophically defensible? More, could such an ideal be made politically attractive? While it looks as if redistribution inevitably conflicts with property rights, and while property rights have great popular and political appeal, it is argued here that property rights are, in fact, hard to defend philosophically. And what can be defended has indeterminate, even open ended, content. Indeed, a strong argument for redistribution is that, unless property is qualified in such a way that it does not automatically rule out redistributive taxation, property cannot be defended.

12.1 I

In this chapter, I consider the relation between the belief in property rights and the belief in distributive justice. My underlying *philosophical* question is where an argument for insisting on, imposing, an ideal of distributive justice properly begins: What is, so to speak, its major premise, and how does this major premise affect its ultimate conclusion? In particular, does the philosophical justification for distributive justice put it on a collision course with the idea of private property?[1] My other—perhaps hopeless—*practical* quest is for an honest, politically, and pedagogically, *effective* starting point for an argument in defense of significant redistribution.

An example of an *effective* political argument (for a different conclusion) is Nozick's attack on redistribution based on an appeal[2] to natural property rights:

[1] Two recent books got me started: Barbara Fried, *The Progressive Assault on Laissez Faire*, Cambridge, MA, Harvard, 1998; and Liam Murphy and Thomas Nagel, *The Myth of Ownership*, New York, Oxford, 2002.

[2] See his *Anarchy, State and Utopia*, New York, Basic Books, 1974 esp. Ch. 7.

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Everyone knows, in virtue of arguments like this, that it's *our* money, not Washington's, and every student knows that appeals to the general welfare or the original position simply beg the question against property rights. Moreover, at least superficially, the natural property rights premise seems to yield a substantive theory of distribution directly, namely, the historical/procedural theory. Everyone, at some level, tends to fall into what Murphy and Nagel call "everyday libertarianism." (M&N, 15, 31f) But this example does little to solve my problem, since my question is whether there is a similarly persuasive, and also philosophically respectable, argument for a conception of social or distributive justice of the kind Nozick rejects.

My strategy is to agree that we need to establish and enforce property rights, but to argue that these cannot be justified unless requirements of distributive justice are enforced as well. An adequate defense of property actually requires the institutions of distributive justice. This will seem to some like a contradictory position, since, from the perspective of "everyday libertarianism," distributive justice requires infringing justified property rights. But that idea depends both on ideas about justice and on ideas about property. I begin with ideas about property found both in Fried and Murphy and Nagel. A word about Fried: Her book is essentially an intellectual biography of Robert Hale. Hale was both a lawyer and economist, active in the first half of the twentieth century. A professor of both law and economics (later just law), at Columbia, he was associated with both the legal realists and the progressives of his day. Though I draw on Fried's book, and though Fried is no doubt sympathetic to Hale's ideas, they are his. So even though I footnote Fried, I will normally speak of Hale's views.

12.2 II

According to Murphy and Nagel, "[p]rivate property is a legal convention." (8) Though considerations of autonomy and other rights may play some role in the justification of property conventions, there is no natural right of property per se. (45) What did Robert Hale think?

Robert Hale was involved, behind the scenes, in some of the most important legal battles of his day concerning property, labor and regulation. Full-fledged skepticism about moral rights to property would not have been part of a winning legal strategy. In any case, Hale probably thought the idea of natural property rights had some merit in the abstract. But he nevertheless thought, like Murphy and Nagel, that "the *existing* regime of property rights could not be deduced from or reconciled with any plausible version of natural rights: "all rights to the possession, use and exchange value of property are ineluctably creatures of the state," and the particular rights making up the prevailing legal idea of ownership were hard to "deduce from" or "reconcile with" Lockean principles. (Fried, 19, emphasis added)

There is considerable agreement, then, between Murphy, Nagel and Hale on the conventional nature of at least our de facto property institutions. Since Murphy and Nagel are interested primarily in an account of just taxation, it is enough for them

simply that the system of property rights need not be assumed to be an automatic, moral barrier to all taxes. Hale, on the other hand, is interested in the reform and regulation of property institutions themselves. He wants to identify a legitimate system. Accordingly, he develops an extended critique of de facto property conventions.

Fried sees two distinct lines of argument, in Hale's work, against the rights legally recognized in his day. First, Hale tries to show, contrary to the conservative rhetoric of his time, and ours, that protecting property rights is not necessarily protecting liberty. Indeed, he thinks property inevitably involves limitations on liberty, and regulating property may increase rather that restrict freedom.[3] Of course, even if one person's use rights and rights to exclude restrict the freedom of others, and even if rights to the exchange and capital value of property put owners in a position of relative privilege, it is possible that these rights are fully justifiable by sound arguments. But Hale's second argument attempts to undermine at least one such justification, going back to Locke: that we are entitled to the value of our holdings because of the work we have expended on them. Hale's main argument here appeals to the idea of economic rent. In my next section, I explain these arguments in more detail.

12.3 III

12.3.1 Liberty

Part of Hale's strategy, building on the work of forerunners like Oliver Wendell Holmes and W. N. Hohfeld, is to unpack the seemingly simple idea of a right to property. In a useful metaphor, Fried suggests that the naïve idea of property pictures it as a "vertical" relationship between an owner and the thing owned. On this picture, no one person's property right impinges on or overlaps with the property right of anyone else.[4] But Hale, and the legal realists, with their interest in how cases actually arise and are decided, saw not only vertical relations between owner and property, but also "horizontal" relations between owners (or owners and non-owners). It is out of horizontal conflicts that lawsuits arise, and it is here that the law of property has consequences.

Hohfeld, with his analysis of legal relations into specific rights of different types provided the analytical tools for thinking about the issues. Thus, property gives an owner claims against others, immunities against their legal actions, liberty to act against the interests of others, and so forth. Enforcing and protecting property was not simply protecting liberty. It was protecting a system of mutual restraints. (Fried, 51)

[3] That property actually limits liberty is an idea that Hale shares with later theorists like Allan Gibbard, in "Natural Property Rights," *Nous*, 10, 1976, 77–85.

[4] Fried, 50.

This idea played an obvious role in progressive attacks on the courts' objection to regulation as a violation liberty. Property itself limits liberty.

Hale went further than this. He argued that property owners, when they exercised their rights in the ordinary course of doing business—buying, selling, hiring and firing—were engaged in coercion. If I am selling you a product, but refuse to let it go for the (lower) price you would prefer, I am coercing you, he said. And, by the same token, if you refuse to buy at my preferred price, you are coercing me. A similar analysis applies to hiring decisions, as well as to decisions to exercise liberty rights over property in ways that others find objectionable. (Fried, 46–50, 71)

Fried finds this idea historically interesting because it is part of an early attempt to articulate a general analysis of coercion.[5] I do not agree with it myself. I do not, for example, think refusing to sell goods, or labor, for a lower price constitutes coercion. But, I do not deny that e*nforcing* property rights with threats of criminal sanctions is coercion or that civil judgments in defense of property are coercive. Enforced property rights, like any legally enforced rights, do limit freedom. Moreover, different systems of property, different property rules, distribute freedom differently. The variety of rules governing inheritance and bequest are one example. (Fried, 81, 91) But a more general example arises in the law whenever there are conflicting rights of use. What happens when your use of your property negatively affects my use of my property? Decisions inevitably side with one litigant or another, thereby affecting bargaining power, prices, and the distribution of wealth and opportunity. (Fried, 99–104)[6]

Hale and some of his contemporaries, some on the basis of analyses of freedom even more controversial than his, also thought that progressive changes in property institutions could *increase* aggregate freedom. (Fried, 33, 36, 71) Again, I am not persuaded. How, after all, are we supposed to measure aggregate freedom? But that does not mean it is a matter of moral indifference how liberty, or economic power, is distributed.

12.3.2 Rent

Suppose we think you own a piece of land. Or suppose we think you own the exercise of your talents and abilities (your labor). Now, one question—presuming we have already decided you own these things—is the question of just what your ownership implies. This is the question of just what rights it implies vis-′a-vis others, a question that occupied the realists and that Hohfeld helped clarify. Do you have the right to alienate it? Do you have the right to the full exchange value if you do? Our original acknowledgment of these rights leaves these further questions open.

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[5] Fried, 37. Nozick's well-known paper on coercion is a more recent attempt. See "Coercion," in S. Morgenbesser et al., eds. *Philosophy, Science and Method*, New York, St. Martin's, 1969, 440–472.

[6] Coase argued, of course, that different allocations of rights are equally compatible with (Pareto) efficiency. But that does not affect the claim that they have different distributional consequences. See Murphy and Coleman, *The Philosophy of Law*, Totowa, NJ, Rowman & Allenheld, 1984. ch. 5.

An apparently separate question is whether you actually have these ownership rights at all, and if so, why? What justifies them? Locke thought it obvious that you own your own labor, and he thought your ownership of something like land would derive, in the first instance, from your working the land—though Locke had little to say about what such ownership consists in.[7]

Suppose you clear the land, making it more valuable for pasture or farming, and then sell it to a farmer. Presumably, part of the increased value is due to your labor and is, by a loose application of Lockean ideas, yours. But now suppose, by contrast, that you hold it for a while and that, due to the development of a new commuter rail line, the land becomes much more valuable as a site for suburban, residential development. When you sell it, is the vastly increased value yours? Did you make it yours by the sweat of your brow?

The extra value is an example of, in a broad sense, economic rent. It results from the relative scarcity of appropriate land for residential development—scarce, that is, given the significant new demand generated by the rail line. The work of Ricardo and some of his contemporaries, in the early nineteenth century, is the original source of the idea of economic rent. (Fried, 120f) Ricardo focused on land rents, specifically on "inframarginal" profits derived from producing grain on relatively scarce, high quality land, where the sale price of grain cannot go below the (higher) cost of production on marginal land. But the term has come to be applied to a wide variety of cases of high exchange value resulting from scarcity. The owner of LeBron James's talents—LeBron himself—enjoys the large rents those scarce talents command.

We have already looked at Hale's account of how property restricts freedom and how it is underdetermined whose freedom is restricted and whose augmented. At the very least, this undermines any kind of argument for contemporary property rights on the ground that they unequivocally protect, much less enhance, liberty. In addition to restrictions on liberty, Hale also finds economic rents ubiquitous in the private property market, and he takes these, too, to weaken the case for property rights. There is an assumption here, of course, namely the Lockean assumption that justifiable property in things other than one's own person or innate talents derives from an investment of effort. We deserve our justified property because of the effort we expend on it. But this is an assumption that Hale is evidently ready to make, at least for the sake of argument, but probably also because he finds it attractive. (Fried, on Hale's relation to Locke, 73–4, 111, and on Mill's similar invocation of Locke, 90) Of course Locke thought our innate talents even more basic, more surely ours, than the external goods we acquired through their exercise, while for Hale scarce talents are just another source of rent. Whether he goes too far here is a question I leave for the reader.[8]

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[7] One might object that the implicit distinction between justifying ownership and justifying the specific "incidents" of ownership is somewhat strained. I agree. We can't do the one without doing the other.

[8] The property rights most assiduously defended by conservatives were not rights to use, but rights to sell—rights to the income from selling property or product. Hale thought price, and so exchange value, is driven largely by demand, rather than cost of production (effort). At least this is true enough that marginal product, as measured by sale price, is not a reliable indicator of effort. Fried, 108–111, 133.

Given these assumptions, the property rights Hale finds least well supported are rights to the exchange value of property, and so to the income derived from exchange. This suggests that the complaint of the ordinary person—"I earned it, it's mine, so the government can't take it"—is likely to be, at best, a partial truth. And if the earlier discussion of liberty is correct, interfering with market outcomes or regulating property rights, though it limits liberty, or at least rights, is far from unique in doing so.[9] The system of property rights is itself coercive. The question is, where do we go from here? If the present system is flawed, how do we improve it?

This question leads us to a fundamental methodological divide in political thought. It is closely related to the divide that separates Murphy and Nagel's approach to their subject from the approach of many other theorists—including, perhaps, Hale.

Hale and the other progressives were partly natural rights theorists and partly consequentialists: they wanted to satisfy both micro-level and macro-level aims. They hoped that progressive reforms would both advance the general welfare and bring property rights, and income, more into line with the ideal of Lockean natural rights. But in Hale's actual thinking, as reported by Fried, the second of these aims often predominated. He had to deal with problems like the following: If *some* portion of wealth, but not all, was produced by effort, how do we "move from the observation that one had in some general sense produced the property in question to a specific and unique set of protectable rights?" (Fried, 99)

How do we reform taxes, property rights and regulations so that people end up with just their *natural* entitlements? In principle, that would require that we single out the part of exchange value attributable to a seller's costs from the amount due to rent. It would also require distinguishing the interest surplus received by inframarginal savers (those who would save or invest at a lower interest rate than the one prevailing), and it would require even distinguishing the surplus earned by labor working for a wage higher than their reserve wage. One program progressives tended to support was progressive taxation; but they admitted that it did not really achieve the precise goal of securing to each just what he or she is entitled to—though it might have something to recommend it on utilitarian grounds. (Fried, 133, 155–7, 212–13)

Insofar as he focused on getting the system of property, in isolation, exactly correct, Hale stood clearly on one side of the theoretical divide to which I referred above. Had he chosen to step back from specific rights or tax schemes, taken in isolation, and to evaluate the overall economic and legal system from a utilitarian (or other consequentialist) perspective, he would then have moved to the other side of the divide. That, as we will see, is where Murphy and Nagel emphatically stand.

[9] As noted, Hale and other progressives might have said it augments liberty. But it is not obvious that it does so. Neither is it obvious that the regulation of some rights automatically creates new rights. It may just promote the general welfare. See H. L. A. Hart's "Bentham," *Proceedings of the British Academy*, 48, 1962. Pp. 314f.

12.4 IV

The progressive's rent-theory critique of private property did not lead them to a system of rights, corrected by taxes or regulations, that could claim to be intuitively correct, in the way in which natural rights are thought to be correct. Neither did it *imply* an alternative theory developed along consequentialist lines. It's enduring significance lies in its negative conclusion that the prevailing system of rights in their time (or in ours) cannot itself be justified either on Lockean grounds or on the ground that it secures all the liberty that must be secured. None of this shows, however, that *some* system of property rights is not essential in any just, rational and defensible social and economic system. The reasons are everywhere. Property, including the right to withhold property from sale, is essential for establishing a system of prices; it is essential to rational planning; it encourages production; it contributes to individual autonomy and self-development; and it provides a way to pool thousands of bits of particular and local knowledge to generate rational outcomes. In short, there are good consequentialist reasons for adopting some system of property.

Suppose, then, that we are going to have a system of property rights—as we do—what would it take for that particular system to be justified? Or, to put it differently, what kind of system, with what qualifications, against what background of further institutions, would be justifiable? I am going to approach this question obliquely, via a discussion of Murphy and Nagel's *The Myth of Ownership*. This may seem an odd place to start. Murphy and Nagel assume, and take their audience to assume, an extant, enforced, system of property rights. The question they take their audience to ask is what a justifiable system of *taxes*, if there is one, will look like. The question gets its bite from the assumption that the property rights would appear to argue against any taxation at all. Taxes, the audience assumes, infringe property rights. The justification of taxes, not property, is Murphy and Nagel's ostensible topic. How does this bear on the design and justification of property?

Their initial response to the anti-tax arguments is simple: Property and taxes are inseparable. Indeed, taxes help create property. (M&N, 8) Property and markets cannot exist without a government to enforce and define them, and that cannot exist without taxes. And a modern market, with money, banks, and stock exchanges even more obviously requires government. (M&N, 32) The question—assuming property and markets—cannot be whether we should have taxes, given independently existing and justified property. We both do, and should have, a system of property for a variety of consequentialist and rights based reasons; and this will in turn require taxes. But the question is what particular *combination* of property and taxation is justified. (M&N, 33)

Hale and the other progressives, recall, faced opponents who charged that taxes and regulations were a coercive interference with the free market. Progressives replied that the institution of property was itself coercive, as Murphy and Nagel surely agree. Property and taxes are both coercive. The question, again, is what combined system of coercive property and taxes can be justified. For not only does property require taxes. It will be partly defined by the regulations and liabilities to taxation present in a given system.

Now, there has already existed, for well over a century, a literature on just taxation, and Murphy and Nagel begin by turning to this literature. There is, for example, the traditional distinction between vertical and horizontal equity, the former concerning the appropriate differences in taxes for those at different levels of income or wealth, and the latter concerning the fair treatment of different persons at the same level.[10] Theories of vertical equity include the benefit principle together with various interpretations of the idea of ability to pay. All of these approaches, take property rights as given, while varying the distribution of taxes. One problem, we will see, is that the traditional tax literature not only abstracts from the issue of justifying (pre-tax) property. It also abstracts from a number of other issues about the system in which taxes function.

12.4.1 Benefit

One traditional criterion of vertical equity is the benefit criterion.[11] According to this idea, persons should be taxed proportional to the benefits they receive from the government supported by taxes. This might seem, in itself, fair. Virtually any system of property, together with money, financial institutions, and the protections of the criminal law is a huge improvement over the state of nature. Everyone benefits, and those who benefit more should pay higher taxes to support the system. If we measure benefit by income, then this looks like an argument for a proportional (flat) tax.

It is not obvious, though, that this is the right answer, even assuming the benefit criterion. If I make twice the income you make, should I pay twice the dollar amount you pay, or should I shoulder twice the burden you shoulder? Assuming the diminishing marginal utility of money, the two would not yield the same tax. Indeed, just as money might not be an accurate measure of what tax we should pay, it may also not be an accurate measure of benefit. Depending on the details, the benefit criterion might yield, in monetary terms, either a progressive or a regressive tax rather than a proportional tax. Moreover, we can't say how *high* taxes should be in the aggregate unless we have decided how the revenue will be used; and we don't know whether taxes proportional to income (say) are fair all things considered unless we know whether expenditures will themselves affect people fairly. What if some groups lobby effectively and end up with many special advantages, paid for partly by taxes on others?

It might be argued that using taxes to provide such benefits would be an unjust violation of property rights. But that begs the very question at issue here. There is

[10] M&N argue that the second is redundant. If we have already decided that the rich should be taxed twice as much as the poor, there cannot be a *further* question of whether two poor persons, say, should be taxed differently. For that would then violate vertical equity. 13–16, 37.

[11] The following remarks largely follow M&N's discussion, pp. 16-19

no doubt that property and the market provide many benefits, and so there is a consequentialist argument in support of having property. But we lack a theorem that any (unqualified) property system produces all and only the benefits we need, or an independent argument that the system of property and the distribution resulting from it is just. If our argument appeals to the benefits of property and their fair distribution, we also have to face the possibility that property and the market need to be supplemented to achieve these aims. If the system as it is isn't just, then perhaps those who benefit unjustly should pay disproportionately high taxes. Alternatively, perhaps justice requires, whether or not the property rules themselves are fair, that those with low incomes should receive supplementary benefits. But, if their incomes are too low for justice to begin with, then it would be silly to tax them at all, and we would have to reject proportional taxation. The failure even to look at such questions is an example of what Murphy and Nagel repeatedly call the "myopia" of the standard tax literature.

12.4.2 Ability to Pay: Equal Sacrifice

The principle of equal sacrifice is one interpretation of the idea that we should be taxed, not on the basis of benefits received, but on the basis of our ability to pay. (M&N, 24–28) This idea itself can be given different interpretations, but one, going back to Mill, is the idea that each person should be assessed a dollar amount that represents, for that person, a real sacrifice equal to the real sacrifice imposed on anyone else (taking into account the diminishing marginal utility of money). Why should we think that just? It would be fair if we saw a just tax burden as an equal burden on each, relative to pretax income, *and* if we thought that pretax, market, income was just. It would be fair if we thought pretax income (minus a fair share of the cost of making it possible) is exactly what justice entitles us to, all things considered.

If we were to assume that the market and the system of property yields just what anyone is entitled to *and* if government expenditures are limited to the necessary costs of securing these entitlements, then it is arguably just to expect each to make an equal sacrifice to support these expenditures. But these are extreme assumptions that almost no one makes, and we have certainly seen reason to be skeptical about the property rights we actually have. We have also looked at reasons to be suspicious of market outcomes. Thus, again, if there is an argument for property and market institutions, it will be broadly consequentialist in nature. But when we look to consequences, it is clear that we often get better consequences by instituting more than just property and a market—for example, by investing in public goods, social insurance, and programs to protect those with special needs. Since there is no reason to think these expenditures benefit everyone equally, and since taking more in taxes from those who should receive these benefits would defeat the purpose of providing the benefits, the equal sacrifice principle suffers from the same kind of "myopia" from which the benefit principle suffers. (M&N, 27)

Now, Robert Hale was a critic of the market and the property institutions of his time, and he took an interest in the project of improving them by such things as changing the tax structure or instituting minimum wage laws. There have been, of course, many, more of less radical proposals for tax reform over the years.[12] But the lessons of Murphy and Nagel's work apply no less to Hale's work than to less progressive ones. Unless we think it irrelevant how institutions and expenditures affect peoples' welfare, we cannot know whether a change in the tax structure or in property law is an improvement or not without looking at the whole system of institutions in which it is embedded.

12.5 V

I have been describing some of Murphy and Nagel's reasons why we should not let ourselves be guided by common precepts of tax justice. There are further variations on the precepts, and there are many objections I haven't mentioned. I mean merely to give you the flavor. Here, I want to focus on one kind of objection. In more than one case, the authors criticize a particular system of market rules and taxes basing their objection on the fact that the system might not satisfy requirements of justice. These might require additional taxes or a different distribution of the tax burden. My question is, what is the basis of these requirements of justice? Why does the question of justice arise in the first place? What is the *argument* that we are subject to further requirements of justice? In working toward an answer, I should say that I am not sure my suggestion is really that different from the one Murphy and Nagel would offer. But I should also say that I am not sure I understand theirs.

At a number of points (58, 59, 73), they speak of distributive justice as an end, or goal, or aim. This sounds much like an idea to which Nozick famously objects, and he says no such goal can be legitimate since we could achieve it only by interfering with property rights. And here, I think, Nozick voices the same attitude I find in the thinking of students, and, indeed, in what Murphy and Nagel call the "everyday libertarianism" of the general public. (31f) We may reject Nozick's absolutism about property rights, but we probably still agree that property rights serve valid purposes. We want to enforce them, and speaking of distributive justice as a goal or an end would suggest that what we now have is something like two competing ends. Why do we have to have both? How else might we think of justice?

Here is an idea. Suppose we think it is permissible for the state, or, better, individuals working through the institutions of the state, to adopt and enforce rules and policies for mutual security and mutual benefit. So far as it goes, this is an assumption many of us could agree with. It is weak, insofar as it claims only a permission, not a requirement; and it is vague, since so many different institutions contribute in different ways to mutual benefit, and mutual benefit itself is compatible with many

[12] One thinks of Henry George's "single tax" movement or of more recent proposals for "flat" taxes or for switching from an income tax to an expenditure tax. Each is presented as a panacea. M&N discuss some of these, e.g., pp. 99–103, 130f.

different distributions of benefits. Still, to my way of thinking, it would require significantly stronger assumptions to show that it is *not* permissible, that it inevitably involves violating rights, for example. Still, it is vague. But the rules and policies it permits presumably include something like the criminal law, as we understand it; civil law protections against torts and negligence; rules of contract; and rules of property enforced under both civil and criminal law. It would also include a legislature empowered to extend or modify these rules as necessary. And it must also include, as Murphy and Nagel remind us, taxation to support enforcement and adjudication. But all such rules can take a variety of specific forms. Indeed, as many parts of the law remain, and will remain indefinitely, subject to further elucidation by courts, no one can really specify the content of even our current law in these areas. And our partial, developing system of law is subject to change by legislatures as well as by courts. It may be hugely beneficial, overall, but anyone who buys into it also incurs unpredictable risks and costs.

It is compatible with my basic assumption, at points where our current system is reasonably definite, that it might have been definite but different. It is also compatible with this assumption that different systems could be equally legitimate. But any particular system will also, inevitably, be subject to objections and criticism from those who do less well than they think they would do under different rules. Such objections will certainly apply to property rules, though they will no doubt apply elsewhere too.[13] Complaints and objections may be accompanied with proposals for reform. And these will be met, in turn, by rationales for the rules as they are.

One direction argument can go—typified, I think, by much of the work that Hale and the progressives did, and also by some of the work on tax equity discussed by Murphy and Nagel—is toward ever more careful refinement of property rules or tax rules, at the micro level, in the hope that they can be made to coincide with some natural, moral rule. In property law, for example, we might seek a system of property and taxes guaranteeing that each ends up with just what he or she *deserves*. (Such a system, of course, would probably *deprive* many defenders of property of just the kind of *liberty* they think property affords them: the liberty to make bequests, for example.)[14]

A different approach is to give up the idea that there are natural, moral rules that laws, taken in isolation, might mirror. Instead, we might look for general constraints on the system as a whole, specifying outcomes that it must bring about, or prevent, if it is to be legitimate. These goals might include enhanced opportunities for those who would otherwise be left behind, and they might include distributive goals like more equal distribution of wealth and income. The details do not matter to my general thought, namely that, instead of having two different, independent, and conflicting goals—protection of property and, e.g., more widespread opportunities—we have the second of these as a condition or constraint on the former without which it would not be permissible. Satisfying the condition is necessary because of the often-arbitrary distribution of freedom and coercion in the system of property

[13] Think about arguments about different degrees of strict liability in the law of negligence.

[14] See Murphy and Nagel, p. 60, on the moral incoherence of common sense rationales for property. Nozick's critique of desert-based rules of property makes the same point. 1974, ch. 7.

and the undeserved pattern of rewards in the market. But there is no claim that the constraints of justice themselves satisfy any condition (to each according to his or her desert) of the sort sometimes associated with property. What could be claimed for them—or so the idea goes—is that the coercive system of property and taxes, supplemented by enforced constraints of distributive justice, is more justifiable than it would be without these further constraints. Of course that would have to be argued with regard to particular constraints of justice. But at least these constraints would no more stand in need of special justification than would the unmodified constraints of property that they supplement.

In fact, property, the market economy, taxes, transfers, social services, public infrastructure, and the institutional provision of other public goods constitute just one, big institutional and social system generating a variety of benefits and burdens. But certain parts of this system grant us, as individuals, particular rights, including rights we can exercise so as to acquire further rights. This part includes rights of bodily security, of course, but also property rights. It is unsurprising that men and women are especially interested in keeping (something like) the particular rights, of these kinds, that they have. Other parts of the system, provision of public goods, for example, while they benefit us, do not benefit us in a distinctively individual way. And other parts, like government transfers, may not directly benefit us at all, at present, and maybe not in the future. The argument for many of these is simply that, without them, the rest, including some of the particular rights we most care about for ourselves, cannot be justified. The restrictions on the liberty of others implied in our rights, together with the potential for reward unrelated to effort or other bases of desert, demands some kind of compensation, or mitigation, for those who might be less lucky and for whom the limits on freedom are a greater burden.

As I suggested earlier, Murphy and Nagel might not have any quarrel with what I say here. Certainly, the idea that the system has to be evaluated as a whole is something that we both agree on. If there is anything distinctive in what I say it is that the concern with distributive justice—with how and to what extent certain benefits and opportunities are distributed among citizens—gains its importance and rationale from the fact that other, conceptually distinguishable, parts of the system generate distributions and restrictions that cannot, *in isolation*, be justified. The concern for distributive justice is not one consideration among others that has to be balanced against them. Rather, it is a condition of the justifiability of the rest. And, if this is right, when we stand back to evaluate the whole system in terms of its consequences, the first thing we should do is ask whether or not it is, overall, just.[15]

I think my proposal is in the spirit of Rawls's idea in *A Theory of Justice*.[16] For example, Rawls early on recognizes that every society will include for coercive social

[15] I have said several times that institutions—from property to, I would now add, an active legislature—are to be justified by their good consequences. If justified, they, together, vastly improve our lives relative to some preinstitutional baseline. The question of justice is not the question whether these consequences are *optimally* realized. They never will be. Constraints of justice, like Rawls's, will specify something like specific, minimal conditions on the legitimacy of coercive institutions. Whether they can be improved upon beyond that will always be a matter of dispute.

[16] Revised Edition, Cambridge MA, Harvard UP, 1999.

institutions, and that we need these. When justified, we can view these basic institutions (including the institutions of the market) as a cooperative scheme for mutual advantage. (4, 73–4) But he also denies that we can reasonably take any particular restrictions on freedom or de facto market distributions as justified by any natural measure such as desert. (7, 13–4, 273–7) He does, on the other hand, think that we can accept market outcomes (in accordance with what he calls "pure procedural justice"), when they are suitably constrained by, for example, institutions that secure fair equality of opportunity. (76) And similarly, I think, we can see the role of taxes and transfers that prevent anyone's falling below a specified economic level as a condition on accepting market outcomes subject to these constraints of justice.

12.6 Conclusion

Like Nozick, I take the idea that we must enforce requirements of distributive justice as a nontrivial demand, needing justification. It involves redistribution and other restrictions on liberty. I have tried to describe a justification that is philosophically respectable and that could also be politically effective. This requires, in my view, not defending some distributive ideal (equality, the difference principle) as an end in itself, intrinsically desirable. It is not one goal, or end, among others that must be reconciled with other ends, such as liberty or specific, natural rights. My idea, instead, is that we ought to grant, from the beginning, the presumptive permissibility of coercively enforcing systems of rights and other requirements serving to promote individual and collective well-being. But we must also recognize that any such scheme, the particular restrictions it requires and the distributions to which it gives rise, are likely to be morally problematic unless suitably constrained. This is where distributive justice comes in. Its requirements, and the taxes it depends on, serve as a constraint on the operation, specifically, of the market and the property institutions underlying it—a constraint without which the latter institutions would not be justified.

In my view, this is a philosophically better way of arguing for distributive justice than some others.[17] I do not claim that it is entirely original. As noted above, I think it is suggested by much of what Rawls says about justice. But my remaining question is whether it has a serious *practical* advantage in political argument. I wish I were more confident. Its political effectiveness depends on whether people can be convinced that property and market outcomes are not *automatically* justified. It depends on undermining what Murphy and Nagel call "everyday libertarianism." Regrettably, that may be hard unless we can presuppose rather sophisticated ideas about property, liberty, and prices. Rent theory critiques are not an easy sell at a tea party.

[17] For example, because it does not claim that certain distributive patterns are good in themselves, it does not invite the sarcastic question whether, in the state of nature, we would have to impose a certain distribution, taking from one hunter-gatherer to transfer to another.

Chapter 13
Monetary Incentives, Economic Inequality, and Economic Justice

Alistair M. Macleod

Abstract After distinguishing between incentive providing bonus schemes and bonus schemes of two other kinds – schemes designed to recognize excellent performance and schemes that aim to provide compensation for the performance of unusually demanding tasks – I ask whether, and if so in what way, monetary incentive schemes can be justified from the standpoint of justice. Along the way I reject both (1) the idea that monetary incentive schemes necessarily generate (or exacerbate) economic inequality (understood as inequality of income or wealth) and (2) the idea that incentive-generated economic inequalities are bound to be unjust. Although economic equality is not **itself** an ideal of justice, I argue for a broadly egalitarian approach to questions of economic justice. Economic justice obtains when the distribution of income and wealth in society contributes to – or at any rate is consistent with – the realization of a number of equality ideals for which a justice rationale can be provided: equality of economic opportunity, social equality, equality under the law, political equality, and equality in educational and occupational opportunity.

> Economics, when you strip away the guff and the mathematical sophistry, is largely about incentives. Communism collapsed because it failed to encourage innovation, enterprise, and hard work; capitalism has thrived, broadly speaking, because it rewarded these things, while punishing conservatism and dawdling. … During the Greenspan era, however, lax monetary policy, deregulation, and financial innovation shocked the economy out of its stable configuration, placing it on the bubble path. No single one of these factors can be held solely responsible; it was the combination that did the damage. … Actually, there was another factor that played an important contributory role: the enormous "incentive packages" that many traders and senior executives on Wall Street received. This ultra-generous compensation structure didn't create the subprime industry and larger credit boom, but it helps to explain how they progressed to such extremes. John Cassidy[1]

[1] John Cassidy, **How Markets Fail: the Logic of Economic Calamities**, Viking Canada (The Penguin Group), 2009, pp. 285–288.

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13.1 Introduction

Economic inequality is often defended on the ground that individuals must be provided with incentives if they are to be induced to make the maximum contribution of which they are capable to promotion of the economic wellbeing of a society. However, as John Cassidy notes in his account of the US financial crisis in 2008 that came close to precipitating a complete collapse of the economy, the "incentive packages" offered to many traders and senior executives on Wall Street were so badly structured that, far from contributing to the healthy operation of the economy, they played a role in generating the crisis. This observation suggests at least two important questions. The first has to do with how incentive-providing schemes should be conceived if grave errors in the devising of such schemes are to be avoided. The second question is about how incentive schemes are to be defended even when they are intelligently structured and whether they are nevertheless open to objection because the economic inequalities they often generate or exacerbate are unjust inequalities.

These questions provide part of the motivation for the discussion in this paper of the relationship between economic incentive schemes of a certain sort and the kinds of inequality that can plausibly be regarded as unjust. I have two aims in the paper. The first is to distinguish between economic (typically monetary) incentive schemes that are designed to enhance workplace efficiency and two kinds of economic (again, typically monetary) schemes that are superficially similar in that they provide employees with bonus payments but are nevertheless misdescribed as incentive schemes. I argue that monetary bonus schemes that are designed to provide incentives for the performance of certain tasks are quite different, both in purpose and in rationale, from bonus schemes that give recognition to the meritorious carrying out of certain tasks and also from schemes designed to provide compensation for the performance of unusually burdensome tasks. My second aim is to explore the question whether, and if so under what conditions and in what way, incentive schemes can be justified on distributive justice grounds. Along the way, I shall point out that, contrary to what is often supposed, economic incentive schemes need not be viewed as a source of economic inequality (typically, in this context, inequality of income or wealth), and also that – again contrary to what is often supposed – even when they contribute to economic inequality this need not be seen as an obstacle to their being justified on justice grounds.

Because I want to distinguish "economic equality" from "economic justice" – in order to combat the view, sometimes adopted by sponsors of an egalitarian approach to issues of distributive justice, that **any** deviation from strict economic equality (that is, from strict equality of income or wealth) must be regarded as **unjust** – I shall take "economic justice" to mean "justice in the distribution of income or wealth." This will permit the debate to proceed as to whether economic justice is compatible with the existence of (certain forms of) economic inequality. In this debate, I want to argue not only that economic justice does **not** call for strict equality of income or wealth, but also that it doesn't require either that everyone have the

same "standard of living." It is wholly consistent with these negative claims, however, for a doctrine of economic justice to be broadly egalitarian.

The reason is that a just distribution of income and wealth must contribute to the realization of several familiar equality ideals[2] – equality in the distribution of opportunity to achieve a comparable standard of living to that achievable by others, social equality (understood as ruling out class distinctions of all sorts and as requiring equality of respect in social interactions of all kinds), equality under the law (understood as calling not only for evenhanded interpretation and enforcement of legal rules and procedures but also for the conformity of these rules and procedures with principles of justice), political equality (understood as guaranteeing to all citizens the right to participate on equal terms in all collective decision-making processes), equality of educational opportunity (understood as ensuring equal access to educational institutions of all kinds and at all levels on the basis of possession of relevant qualifications), and equality of occupational opportunity (understood as involving equal access to positions at all levels on the basis of possession of relevant qualifications).

All these equality ideals can be regarded as ideals of distributive **justice** because and so far as their realization would result in all the members of society having an equal opportunity to live satisfying or fulfilling lives. Moreover, this expansive version of the principle of equality of opportunity can be recast, for economy of formulation, as the "equal life chances" principle. Consequently, the short version of my general claim about economic justice is that it calls for whatever economic distribution (that is, to repeat, distribution of income and wealth) can contribute most effectively, whether directly or indirectly, to equalization of the life chances of the members of society.

13.2 Three Kinds of Bonus Schemes: Some Distinctions

Schemes that provide employees[3] with extra pay or monetary bonuses on a selective basis are of at least three different kinds; they differ, most fundamentally, in the goals they serve. Sometimes the extra pay or the bonus is designed to give employees an incentive to undertake certain workplace tasks or to execute them more effectively.

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[2] To say that a just distribution of income and wealth "must contribute" to the realization of several familiar equality ideals is to assume, of course, that a society's economic distribution – that is, the distribution it secures of income and wealth – **does in fact** have an impact (for better or worse) on the prospects for the realization of these ideals. While the impact may often be indirect, it would only be possible to deny that there is any such impact if the conditions for the achievement of these ideals were wholly independent of the distribution of income and wealth. While many of these ideals are ostensibly **non**-economic ideals – in that they are focused on the achievement of forms of equality (social, legal, political, educational, etc.) that are not expressly economic – the idea that expressly economic and nominally non-economic distributive arrangements are not causally interconnected in various ways is clearly false.

[3] The employees may be in the private **or** in the public sector, but the distinction doesn't matter to my discussion in this paper.

Sometimes the extra pay or the bonus is designed to give recognition to the unusual effectiveness with which they are carrying out workplace tasks. And sometimes the extra pay or the bonus is designed to compensate them for carrying out workplace tasks that are unusually burdensome (demanding, arduous, or unpleasant).

Schemes of these three kinds differ not only in the goals they are designed to help achieve but also in the kinds of justification they call for.

Monetary **incentive** schemes are justified if, in the circumstances in which they are sponsored, (a) the goal they are designed to serve – the goal that the schemes will help to realize if employees can be induced to take on certain tasks in the workplace or to carry out workplace responsibilities more effectively – is itself a defensible goal,[4] (b) the tasks employees are being induced to take on by the offer of a monetary incentive – the tasks which will help to facilitate achievement of the goal served by the incentive scheme – are in themselves unobjectionable tasks, (c) the undertaking of the tasks the scheme is designed to induce employees to take on will in fact contribute to the achievement of this goal, (d) in the absence of a monetary incentive the employees will not undertake the tasks the scheme is designed to induce them to take on, (e) the monetary incentive is substantial enough to induce them to take on these tasks, and (f) no smaller monetary incentive will suffice to motivate them to undertake the tasks.[5] What might go into the assessment of the goal served by an incentive scheme is a question to which I shall return below. For the purposes of this paper – that is, for the purpose of exploring the question whether an incentive scheme can be justified by appeal to considerations of justice – this is the question whether the goal served by a monetary incentive scheme is a goal pursuit of which is either required or permitted by principles of distributive justice.

If a bonus payment scheme is to be defended when it is designed, not to provide employees with an incentive to perform certain tasks, but rather to give **recognition to the unusual effectiveness** with which they are carrying out certain tasks,

[4] For example, the goal – which may turn out to be either defensible or indefensible – may be to enhance profits for the employment-providing enterprise, or to boost the sale of its goods or services, or to increase (or preserve) its market share, or to improve the quality of the goods or services it makes available, and so on. And the question about the defensibility of such goals is a complex question. It includes, for example, the question whether the goal is consonant with "the public interest" – on some acceptable formulation of this often-invoked but variously interpreted standard. Of special interest in this paper is the question whether, and if so in what way, principles of distributive justice have a role to play in the assessment of the goals served by incentive providing schemes.

[5] Thus, a monetary incentive scheme will **not** be defensible if any of the following is the case: (1) the goal the adoption of the incentive scheme is designed to help realize is an unacceptable goal, (2) the tasks employees are being induced by the offer of a monetary incentive to take on are objectionable tasks, (3) even if employees take on the tasks, taking them on will not facilitate realization of the desired goal, (4) the employees are willing to take on these tasks without the monetary inducement provided by the scheme, (5) the monetary incentive on offer is insufficiently large to induce the employees to take on the tasks, and (6) a significantly smaller monetary incentive would suffice to motivate employees to take on the tasks.

one plausible-looking answer – an answer which, rightly or wrongly, involves appeal to putative justice considerations – is that the scheme is justified if the employees **deserve** the recognition the scheme is designed to provide. It is, of course, controversial not only whether desert considerations have any general role to play in the articulation of principles of justice but also whether they can be invoked defensibly in contexts of this particular sort. I shall not stake out any position on these issues here. I merely point out that **if** desert considerations in these contexts can be made sense of without being recast in non-desert terms, and **if** the principle that special recognition (including recognition in monetary terms) ought to be given to employees who carry out their tasks with unusual effectiveness (and who are thus deserving of such recognition, in an irreducible sense of "deserving") can be defended as a principle of distributive justice, then the rationale for monetary incentives of this sort will be a justice rationale in a very straightforward way. Indeed, on this possible account, according recognition in this way to employees deemed to be deserving of recognition would arguably be required, and not merely permitted, by principles of justice.

How is a bonus scheme to be defended if it is designed, neither to give recognition to meritorious workplace performance nor to provide employees with an incentive to take on tasks they wouldn't be prepared to undertake in the absence of the scheme, but in order to **compensate** them for unusually burdensome (demanding, unpleasant, or arduous) features of the tasks they perform in the workplace? While I don't want to argue here for the preferred answer to this question, it is at least plausible to suppose that the rationale for the making of such "compensatory" payments is a fairness or justice rationale. It's only fair, on this view, for employees whose workplace burdens are unusually onerous (in one or more of a dozen ways) to reap greater-than-average benefit for the tasks they perform. And while it is of course both possible and sometimes also desirable for the additional benefit to be non-monetary in form, a plausible case can often be made for monetary compensation. The idea in such situations is to try to fix the level of the additional monetary benefit – the bonus payment – in a way that, at least approximately, **equalizes**, for all employees, the burden-cum-benefit "package" that serves to define the terms on which they are employed: "extra workplace burden" yields "extra pay." Equalization of the burden-cum-benefit package in this way is justified, on this view, on fairness or justice grounds. The principle of distributive justice that is invoked is a "fair compensation" principle.

To sum up: bonus payment schemes of three kinds can be distinguished, both because they are designed to serve different goals and because they must be justified in different ways. While it's plausible to suppose that schemes of two of these kinds – schemes designed to recognize meritorious performance and schemes designed to provide compensation for performance of unusually burdensome tasks – have a justice or fairness rationale, what remains to be determined (and it's a question I take up later in the paper) is whether, and if so under what conditions, incentive providing bonus schemes can be defended by appeal to principles of distributive justice.

13.3 A Justice Basis for Incentive Schemes? Two Confused Proposals

Before I turn to this question, however, I want to consider the view that monetary incentive schemes, even though they normally differ in both objective and rationale from bonus schemes of the other two kinds, can nevertheless be defended in certain situations (even if the situations occur infrequently) by appeal to the very same justice considerations as those that provide the rationale for "desert recognition" and "fair compensation" bonus schemes. On this view, in situations in which bonus schemes can be defended either (a) on both incentive and desert grounds, or (b) on both incentive and compensation grounds, an incentive scheme can be justified by reference to justice considerations. In situations of type (a), the justice rationale takes the form of appeal to a putative desert-based principle of distributive justice, while in situations of type (b), it takes the form of appeal to a putative "fair compensation" principle (roughly, an "equal burden, equal benefit" principle).

This view can be readily refuted.

In situations of type (a), it just happens to be the case that a bonus scheme serves two goals: provision of an incentive to employees to undertake certain tasks, and recognition of the special contribution made by those who undertake them. Since both these goals are served by the scheme in question, the scheme will have to be justified – if it is indeed justified (which of course it may not be) – in two different ways. It will have to be shown, that is, not only that the recognition the scheme is designed to accord employees who make a special contribution is recognition the employees **deserve** but also that the scheme passes muster as an incentive-providing scheme because it motivates employees in an acceptable way to undertake certain tasks. But although – if all goes well when these justifications are elaborated – the bonus scheme will turn out to be justified on grounds of both of these kinds, the differences between these justificatory strategies will clearly **not** be obliterated. Moreover, the claim that, in the circumstances supposed, a bonus scheme is defensible **both** on incentive provision **and** desert recognition grounds is quite different from – and clearly cannot provide the basis for – the (confused) claim that the rationale for the incentive providing scheme in these circumstances is a desert recognition rationale.

Again, in situations of type (b), it just happens to be the case that a bonus scheme serves two goals: giving employees an incentive to undertake certain tasks and compensating them for the unusual burdensomeness of these tasks. Since both these goals are served by the scheme in question, the scheme will have to be justified – if it is indeed justified (which, of course, it may not be) – in two different ways. It will have to be shown, that is, not only that the compensation the scheme is designed to provide for employees who take on unusually burdensome tasks is **fair** compensation but also that the scheme passes muster as an incentive-providing scheme because it motivates employees in an acceptable way to undertake these tasks. But although – if all goes well when these justifications are elaborated – the bonus scheme will turn out to be justified on grounds of both of these kinds, the differences between these justificatory strategies will clearly **not** be obliterated. Moreover, the claim that, in the circumstances supposed, a bonus scheme is defensible **both** on incentive **and**

fair compensation grounds is quite different from – and clearly cannot provide the basis for – the (confused) claim that the rationale for the incentive providing scheme in these circumstances is a fair compensation rationale.

13.4 Monetary Incentives and Economic Inequality

While it may be tempting to suppose that the upshot of implementation of any monetary incentive scheme will be to introduce (or to exacerbate) economic inequality, the supposition is false. It all depends on what the preexisting distribution of income and wealth happens to be.

It's true that the offering of a monetary incentive to (say) employees A, B, and C – to offer each of them $100, for example, if they do X – means that they will each be (economically) better off if they do X; $100 better off, in fact. And it's true that, if other employees P, Q, and R are not "targeted" by the incentive scheme (that is, are not offered the monetary incentives A, B, and C have been offered), A, B, and C, after doing X and receiving the promised reward, will have $100 more than individuals P, Q and R. But it can't be inferred from this that economic inequality will thereby have been increased (within the group constituted by A, B, C, P, Q, and R.).

The explanation is obvious. Whether economic inequality within the group increases or diminishes in the wake of incentive payments to A, B, and C depends on what the economic distribution within the group happened to be prior to the receipt of these bonus payments by A, B, and C. If, for example, A, B, and C were worse off (economically) than P, Q, and R – in particular, if they were (say) more than $100 worse off than any of them – their performance of X (in response to the proffered incentive) will diminish economic inequality within the group by closing the pre-existing gap between economic position of A.B, and C and the economic position of P, Q, and R. If, on the other hand, A, B, and C, prior to their performance of X, were significantly better off financially than P, Q, and R, then, since they will be even better off after pocketing the $100 reward for the doing of X, the incentive scheme (given their response to it) will increase economic inequality within the group. The general point is that, when an incentive scheme is sponsored – and targeted, as it always is, at the members of some particular group – whether uptake on the proffered incentives **increases or decreases** economic inequality between that group[6] and other groups depends on what the economic distribution happens to be, among the various groups, at the time the incentive scheme is implemented.

[6] I continue to make – as in the example given of the incentives offered A, B, and C – the simplifying assumption that the incentive scheme offers the same monetary "reward" to all of those who are "targeted" (that is, all who are eligible to take advantage of the scheme) and that all of those targeted respond to the offer in a way that qualifies them for the reward and are thus recipients of the same bonus payment. In reality, of course, incentive schemes, when targeted (as they typically are; indeed arguably must be) at the members of a particular group, need not offer them all the same monetary inducement, and in any case "uptake" on the incentives on offer may not be uniform across the group.

13.5 Economic Inequality and Economic Injustice: Preliminary Considerations

The assumption that monetary incentive schemes always contribute to economic inequality often goes hand-in-hand with a second assumption. This is the assumption that economic inequality is always open to objection on justice grounds and that consequently, whatever the case for permitting economic inequality on other grounds, there is always at least one objection to economic inequality. This second assumption is also false.

The question whether a strictly equal economic distribution (that is, a strictly equal distribution of income and wealth) can be defended on justice grounds is arguably problematic for two reasons. The first is that there is no good reason to think that this sort of equality is just **in itself**, when we abstract from its possible consequences. The second is that when account is taken of its possible consequences, there is no basis for the supposition that it can be relied on to generate just outcomes or that any departure from a strictly equal distribution of income and wealth is sure to be unjust in what it inevitably brings about.

This second criticism must be stated circumspectly, by distinguishing between two questions. The first is whether economic inequality **as such** can be shown to have consequences that are unjust – that is, whether there are bound to be at least certain resultant injustices **whenever** there is any deviation from strict equality in income or wealth. The second is whether there can be economic inequalities that play a role in generating injustice. To this second question – as I shall be arguing below – an affirmative answer must be returned. It's an affirmative answer to the first question that is open to objection.

To see why, consider a (perhaps seductive) example to see how an affirmative answer (to the first question) might be supported. Thus it might be held that even if inequality in income and wealth isn't unjust **in itself**, it is nevertheless unjust because it goes hand-in-hand with a form of inequality that is unjust – viz. inequality in standard of living. It is only to be expected (the argument might be thought to go) that inequality in income or wealth gives rise inexorably to inequality in standard of living, with those who have higher incomes or more wealth having a higher standard of living and those who have lower incomes or less wealth having a lower standard of living. It then only has to be added that people ought in fairness or justice to enjoy an equal standard of living for it to be concluded that it must also be fair or just for everyone to be equal in income and wealth. This is, evidently, a two-premise argument for the injustice of economic inequality: the first premise is that economic inequality (inevitably) gives rise to inequality in standard of living; and the second premise is that any inequality in people's living standards is unjust.

Consider the first premise first. Once the claim that economic inequality is **in itself** a requirement of justice is distinguished (as it should be) from the claim that there should be strict economic equality in society **because** this is an indispensable condition of everyone in society having the same standard of living, the question has to be faced – expressly – whether or not it's true that strict economic equality is necessary if everyone is to have the same standard of living. To this question,

the answer, however, is NO. In Amartya Sen's characteristically acute analysis of the idea of "living standards" in his 1985 Tanner Lectures,[7] a distinction is rightly drawn between "opulence" (of which "income and wealth" provide the familiar measure) and "standard of living." He writes:

> Consider two persons A and B. Both are quite poor, but B is poorer. A has a higher income and succeeds in particular in buying more food and consuming more of it. But A also has a higher metabolic rate and some parasitic disease, so that despite his higher food consumption, he is quite clearly more undernourished and debilitated than B is. Now the question: Who has the higher standard of living of the two? It is not, I believe, a $64,000 question (or, if it is, then money is easy to earn). A may be richer or more opulent, but it cannot really be said that he has the higher standard of living of the two, since he is quite clearly more undernourished and debilitated.[8]

But whatever the best account is of the complicated relations that obtain between people's level of "income and wealth" and their "standard of living," the more important question for present purposes is whether the second premise is defensible. Is it true, then, even that all the members of a society ought as a matter of justice to have the same standard of living?

To this question, too, the answer can be seen to be NO once a distinction is drawn between two claims: first, that the members of a society ought as a matter of fairness or justice to have the same standard of living, and second, the claim that they ought as a matter of fairness or justice to have the same (readily seizable) opportunity to secure for themselves a standard of living that is comparable to that of others in their society. To distinguish between these claims is to be alerted to the familiar fact that the existence of inequalities in the standard of living of the members of a society is sometimes (or to some degree) traceable to the fact that they do not have equality of opportunity in the economic domain to secure for themselves a standard of living comparable to that of others, but sometimes (or to some degree) to the fact that, while their economic opportunities may have been more or less the same (at least in relevant respects), some members may have chosen to take advantage of these opportunities while others may have chosen to pass them up.

Although it's clear that inequalities in people's standard of living occasioned by inequality in the economic opportunities they have – that is, inequalities in the opportunities they have to achieve a standard of living comparable to that of other people – are unfair or unjust inequalities, it's by no means as obvious that inequalities in standard of living that result from the choices people make (in responsible exercise of the autonomy they value to determine the direction and shape of the lives they lead) can also be regarded as unfair or unjust.[9]

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[7] Sen, Amartya, ***The Standard of Living***, Cambridge University Press, 1987.

[8] Op cit, pp. 15–16.

[9] It is of course a large and controversial question what the conditions are under which people can be said to have made fully responsible choices of these momentous kinds. I shall here assume, however, that even if it should turn out that the situations in which full responsibility for life-shaping choices can reasonably be imputed are few and far between, the class of such choices is not a null class.

13.6 Economic Inequality and Economic Injustice: Further Considerations

The complicated relationship between economic inequality (understood still – to repeat – as inequality of income or wealth) and inequality in standard of living isn't of course the only reason for rejecting the idea that equality in economic distribution is itself required by justice. While, as noted, it's important to distinguish between inequality in standard of living and inequality of opportunity to secure an equal standard of living, the standard of living of the members of a society is far from being the only thing that is affected – significantly affected – by the distribution of income and wealth. Sponsors of an egalitarian approach to issues of distributive justice generally have at least as much reason to want to ensure an equal distribution in some of these other areas and just as much reason, consequently, to take note of the adverse impact certain kinds of economic inequality can have on the securing of equality in these areas.

(i) For example, a just society for egalitarians is a society in which there is social equality (that is, in which respect is accorded on an equal basis to all members, and in social interactions of all kinds) – and the distribution of income or wealth in society clearly has some bearing on prospects for the achievement of this sort of equality. (ii) A just society is also a society in which there is equality under the law. Under the aegis of this ideal, all the members of a society must have the right to share equally in the benefits – for example, of protection from harm – that the legal system can secure when laws and procedures are in good shape and when they are interpreted and enforced properly. And a society's economic distribution clearly has a role to play in the implementation of this ideal. (iii) Again, a just society is one in which there is political equality. All members must be guaranteed the right to participate on equal terms in collective decision-making processes, where necessary through representatives who give effective expression to their interests and concerns. And the role economic inequality plays in obstructing anything close to full implementation of this democratic ideal is revealed almost every day in the pages of daily newspapers in even the most "advanced" democracies on the planet. (iv) Yet again, a just society must be one in which there is equality of educational and occupational opportunity – ideals that can be fully realized only if economic inequalities of certain sorts are diminished or eliminated.

Questions about the fairness or justice of a society's arrangements for the distribution of income and wealth – questions about the justice of a society's economic distribution – should consequently be answered by "justice egalitarians," not by insisting on strict equality of income and wealth, but by asking how income and wealth ought to be distributed if various other justice ideals are to be realized. Justice in the distribution of income and wealth – economic justice, for short – thus requires that (a) all members of society enjoy an equal opportunity to achieve a standard of living comparable to that of others, (b) all members be viewed, and treated, as "social equals," (c) all members enjoy full equality under the law, (d) all members have an opportunity to participate on equal terms in all collective decision-making

processes, even if only through representatives who give effective expression to their interests and concerns, (e) all members be guaranteed equality of educational and occupational opportunity. Provided all these equality ideals are protected by a society's economic arrangements, egalitarians can accept with equanimity any inequalities there may be in the distribution of income and wealth these arrangements bring about.

Justice theorists are not well-positioned to speculate on the detail of the economic arrangements that may be conducive to the implementation of the equality ideals they are committed to sponsoring on justice grounds – partly because economic institutions and practices of many different kinds can be expected to be wholly consistent with the full realization of these egalitarian ideals, and partly because the question how precisely these institutions and practices contribute to the realization of these ideals is a very complicated empirical question. It seems clear, however, that very large differences in income and wealth (of the kinds that currently exist in such countries as the United States, Canada, and the United Kingdom) will stand condemned as unjust.

13.7 Monetary Incentive Schemes and Justice

I return now briefly to the question whether and if so in what ways monetary incentive schemes can be defended on distributive justice grounds. As has already been argued, it's a mistake – a mistake founded on the confusion of incentive-providing bonus schemes with bonus schemes designed to give recognition to desert or to provide compensation for the performance of burdensome tasks – to think that monetary incentives can be represented as required either by a putative principle of just desert or by a putative principle of compensation-providing fairness.

Is there, then, any other way in which justice considerations might be brought to bear on the justification for incentive-providing bonus schemes?

In approaching a possible answer, it must be recalled that the objectives served by monetary incentive schemes are very diverse. Consequently, when questions arise about the defensibility of such schemes, it's clear that the defensibility of the objectives they purport to serve must form a crucial part of any supposed justification. Of course more than the defensibility of the objectives is involved. It matters, for example, whether the incentive schemes are so structured as to contribute, if properly implemented, to achievement of the objectives they are designed to serve. The schemes might also be objected to if there were good reason to suppose that significantly smaller bonuses would contribute as effectively to achievement of the objectives. Nevertheless, the defensibility of the objectives ostensibly served by incentive schemes is a **necessary** condition of the defensibility of the schemes themselves.

Given the diversity of the objectives served by monetary incentive schemes, it's natural to expect a good deal of diversity in what can be said in defense of the objectives, and it's natural, too, to expect that (perhaps even in **most** cases) no direct appeal

to considerations of justice will be built into the proffered justifications. For example, governments may offer to reduce the annual income tax bill presented to citizens by 5% if taxes are paid in full by some specified date. The rationale for pursuit of the objective of having taxes paid in full by that date may be that the borrowing costs governments incur in order to finance health care or educational programs in a timely manner can be reduced if income tax revenue comes in earlier than it would in the absence of the incentive scheme. The justification for the scheme will then consist, at least in part,[10] in the **desirability** of ensuring that valued health care and educational services continue to receive timely financial support without the government's borrowing costs having to be increased. Appeal to considerations of justice may play no readily identifiable role even in a full-scale rehearsal of the rationale for adoption of the incentive scheme. Private sector incentive schemes are often defended in broadly similar ways. Thus, for example, a grocery store may offer bonuses to its clerks if they agree to stock store shelves during night shifts so that it can compete effectively with other neighborhood stores and thus be in a position to continue providing both a valued service to its customers and stable employment to its workers. The provision of night shift bonuses – if it can be shown to be an indispensable as well as effective means of protecting customer and worker interests – will then be justified because it's **a good thing** for neighborhood residents to have easy access to a local grocery store and for workers to have a greater measure of job security.

What's striking about these examples, it seems, is that the objectives served by the monetary incentive schemes in question can be justified **without** any appeal to principles of distributive justice. It's simply **desirable** – **a good thing** – for health care and educational services to be provided and (in the private sector case) for members of a community to have ready access to local grocery stores and for the jobs of workers to be less insecure.

Could there be cases, then, where considerations of justice provide (at least part of) the rationale for the objectives served by monetary incentive schemes?

Two sorts of cases are worth identifying – and distinguishing. On the one hand, justice considerations may be relevant to the vindication of objectives served by monetary incentive schemes if it can be shown that there is a justice-based **obligation** to pursue them. On the other hand, justice considerations may be relevant even when they don't require certain objectives to be pursued if they serve to show that the objectives are **consistent with** principles of justice – if, that is, they are objectives that, from the standpoint of justice, it would be **permissible** for government departments or private sector organizations to pursue through sponsorship of monetary incentive schemes because the successful implementation of these schemes **poses no threat** to the establishment or maintenance of just distributive arrangements.

[10] That is, the justification of the part of the justification for the monetary incentive scheme that consists in the justification of the **objective** served by the scheme. (As already indicated, more is involved in any full-scale justification of incentive-providing bonuses than specification of the rationale for the objective the bonuses are designed to serve. It must be shown, for example, that provision of the promises bonuses will in fact contribute to achievement of the objective, and also that the objective couldn't reasonably be achieved by the offer of significantly smaller bonuses.

It will be recalled that I have earlier in the paper argued for rejection both of the view that monetary schemes are **bound** to increase economic inequality and of the view that justice in the economic domain calls for a **strictly equal** distribution of income and wealth. If these arguments are on the right lines, then determining whether given monetary incentive schemes do or do not contribute, when implemented, to greater inequality in income or wealth is **not** crucial to ascertaining whether the schemes in question are either consonant with or demanded by considerations of distributive justice.

The key-question is different. It is whether sponsorship of given monetary incentive schemes is either **required** or **permitted** by principles of distributive justice. Whether **or not** inequalities in income or wealth are, here or there (and let us suppose, to some modest extent), increased by incentive providing bonus schemes, what's critical to squaring the schemes with principles of distributive justice is ascertaining their impact on just distributive arrangements. And if (as I've argued earlier) the most fundamental principle of distributive justice is an expansive version of the principle of equality of opportunity, ascertaining the impact of incentive providing schemes on the justice of a society's distributive arrangements is a matter of trying to determine the impact they can be expected to have on the establishment or maintenance, for all members, of equality of opportunity to live satisfying and fulfilling lives.

As noted earlier, there are two interestingly different ways in which justice considerations can be brought to bear on the question whether putative monetary incentive schemes are defensible. They may be defensible, on the one hand, because (and so far as) they contribute, directly or indirectly, to the establishment or maintenance of a fair or just distribution of the opportunities the members of a society have to live satisfying and fulfilling lives. Incentive schemes of these sorts (and in these circumstances) will then have to be regarded as schemes there is a justice-based **obligation** to adopt. On the other hand, there may be incentive schemes that are merely **consistent with** the establishment or maintenance of justice in the distribution of life-chances, even though they neither contribute to, nor detract from, the achievement of this general social goal.

Examples of incentive schemes of the first of these two kinds are no doubt rare: it's seldom the case that considerations of distributive justice **require** a monetary incentive scheme to be adopted. Nevertheless, it is an important possibility. Consider what a government may have an obligation, on distributive justice grounds, to contemplate doing when a major overhaul of the income tax system is under review. The government may recognize that, in drafting a new set of rules for the raising of revenue through taxes on income, legislative and administrative measures must be adopted that will eliminate (or at any rate reduce to a practicable minimum) an unfairly unequal distribution of the burdens the income tax system imposes on individuals and households. The government may also recognize that, even if great ingenuity is exercised in the drafting of a new income tax code, special additional measures to maximize compliance with its provisions may be needed if, in the event, the **actual** distribution of the income tax burden is to be fairly distributed.

In the absence of such measures, there may be a disconcerting (and unfair) gap between the distribution the code is designed (and therefore **intended**) to effect and

the **actual** distribution yielded by imperfect compliance on the part of taxpayers. In these circumstances, the government may feel it has a justice-grounded **obligation** to adopt – as one of its measures to try to generate greater compliance with the provisions of the tax code – an incentive scheme that promises taxpayers who pay all their income taxes by a specified date a 5% reduction in their income tax bill for the following year. The incentive scheme might then be represented as justified on grounds of justice – indeed as a scheme the government has a justice-based **obligation** to sponsor – because (a) it can be expected to be the most effective means of reducing the gap there would otherwise be between the distribution of the income tax burden **envisaged** in the reformed tax code and the distribution that would probably be **brought about in practice** by imperfect (or seriously delayed) compliance with the code on the part of taxpayers, and (b) the cost of financing the incentive scheme can be expected to be significantly lower than the cost of pursuing other strategies to secure a greater level of taxpayer compliance – the cost, for example, of follow-up measures of a coercive or punitive kind, measures that involve, among other things, careful "tracking" of those who fail to pay their taxes, whether in full or on time.

It is much easier, of course, to cite possible examples of monetary incentive schemes – whether in the public or the private sector – that, while not required by principles of distributive justice, are nevertheless consistent with such principles because they don't violate any requirements of justice. Thus, when a government department charged with processing the issuance (and renewal) of, say, driver's licenses, offers its employees monetary inducements to deal with requests for licenses more efficiently (say, by reducing the time that elapses between receipt of requests and issuance of licenses), the incentive scheme may have to be viewed as defensible, not only because it serves a useful social purpose, but also because it cannot plausibly be represented as an obstacle to efforts to provide all the members of a society with an equal opportunity to live their lives in satisfying and fulfilling ways.

Similarly, if a firm in the private sector seeks to increase its productivity by offering its employees bonuses if wasteful workplace practices are abandoned, the greater productivity the incentive scheme might be expected to enable it to achieve may well be defensible, not only because it contributes to the firm's survival in a competitive economic environment and thus to its ability to continue to provide a socially valuable product or service, but also because its greater productivity, while not required by considerations of justice, poses no credible threat to the achievement, on other fronts, of the general goal of equalizing the life-chances of all the members of society.

13.8 Conclusion: An Egalitarian Doctrine of Economic Justice

The justice of an economic distribution, I have been arguing, is not a function of the degree to which the distribution conforms to a putative ideal of economic equality. The reason is that economic equality is not itself an ideal of justice. Rather, the mark

of a just economic distribution is the degree to which it contributes, directly or indirectly, to the realization of a number of equality ideals that **are** grounded in principles of distributive justice – equality of opportunity to secure a standard of living comparable to that enjoyed by others; equality of social and legal status; political equality; and equality of educational and occupational opportunity.

One plausible way to make the case for the basis in justice considerations of these equality ideals is to see them all as specifications of a more general equality ideal, one that has a claim to recognition as the most fundamental principle of distributive justice. Distributive justice in society obtains, on this account, if and only if all the members enjoy equality of opportunity to live satisfying and fulfilling lives. The opportunities to be equalized are more expansively conceived on this very general formulation of the equal opportunity principle than, for example, when it is taken to require (merely) equalization of educational or equalization of occupational opportunity, and these opportunities must, at least over time, be within the reach of all. The implementation of this principle can be represented both as the practical corollary of the view that all human beings are equal in worth or value and as underpinning their fundamental right (in a familiar phrase) to "equality of concern and respect."

The basic principle of distributive justice that calls for equality of opportunity to live a satisfying and fulfilling life can be referred to, in convenient shorthand, as the "equal life chances" principle. The question whether there is economic justice in a given society can then be said to be the question whether the existing distribution of income and wealth contributes – or is an impediment – to realization of the various equality ideals that must be implemented if the members of the society are to have "equal life chances." Thus the "short version" of the thesis about economic justice for which I have been arguing in this paper is that it obtains when the distribution of income and wealth in society contributes to equalization of everyone's life chances.

Part V
International Economic Justice

Chapter 14
How Demanding Is the Duty of Assistance?

Mark Navin

Abstract Among Anglo-American philosophers, contemporary debates about global economic justice have often focused upon John Rawls's *Law of Peoples*. While critics and advocates of this work disagree about its merits, there is wide agreement that, if today's wealthiest societies acted in accordance with Rawls's Duty of Assistance, there would be far less global poverty. I am skeptical of this claim. On my view, the Duty of Assistance is unlikely to require the kinds and amounts of assistance that would be sufficient to eradicate much global poverty. This is because the DA cannot require societies to rapidly or radically change their ways life, and because the kinds and amounts of assistance that are most likely to eradicate global poverty would cause rapid and radical changes to the ways of life of the societies that undertook them.

14.1 The Duty of Assistance

The world's wealthiest societies ought to do more to assist the world's poorest societies, but it is unclear whether John Rawls's Duty of Assistance (hereafter DA) is among the reasons why they should do so.[1] Most of the world's poor live in societies that lack the institutional means to provide for their basic needs.[2] In his *Law of Peoples*,

[1] For helpful feedback on this paper, I thank Samuel Freeman, Kok-Chor Tan, the philosophy faculty of Oakland University, the participants in the 2010 AMINTAPHIL conference, and the editors of this volume.

[2] Certainly, all too much poverty exists in societies that possess (otherwise) well-ordered institutions, where it results from the deliberate efforts of domestic elites. However, instances such as these – where poverty is caused by domestic human rights violations – do not account for much of the world's

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John Rawls introduces the DA as a response to this injustice. It requires developed societies to "help burdened societies to be able to manage their own affairs," by assisting in the development of "political and cultural traditions, the human capital and know-how, and…the material and technological resources needed to be well-ordered."[3] The DA aims at more than mere subsistence. It targets the satisfaction of persons' basic needs, which include all the needs that "must be met if citizens are to be in a position to take advantage of the rights, liberties, and opportunities of their society."[4] This includes healthcare and education, among other social goods. If developed societies could hit the target at which the DA aims, our world would be free of much of today's worst economic injustices. In this way, the DA identifies a demanding goal for international economic justice. However, I will argue that the DA may not require donor societies to sacrifice much in pursuit of this (admittedly) demanding goal. For this reason, I will argue that the DA is an inadequate response to contemporary global economic injustices.

Many others have criticized Rawls's Duty of Assistance. Some have claimed that global economic justice requires the ongoing regulation of international inequalities of wealth and income, which the DA does not require.[5] Others have argued that the DA focuses too much upon the institutional needs of societies, rather than upon the basic needs of individuals.[6] Still others have argued that the DA detracts attention from broader structural and historical injustices of the global economy.[7] However, many critics of the DA have claimed that wealthier societies would have to make significant sacrifices to satisfy that principle's demands, and that such sacrifices

(worst) poverty. For that reason, principles of poverty eradication that respond to the problem of (what Rawls calls) 'Outlaw States' are not central to efforts to alleviate global poverty. For the idea of 'Outlaw States' and the difference between them and 'Burdened Societies', see John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 5. See Nancy Kokaz, "Poverty and Global Justice," *Ethics & International Affairs* 21, no. 3 (2007): 317–336 for the role that responses to human rights violations may play within a broader Rawlsian scheme to alleviate global poverty.

[3] *The Law of Peoples*, 111, 106.

[4] Ibid., 38 n47. This quotation continues: "These needs include economic means as well as institutional rights and freedoms."

[5] For advocacy of global distributive justice, see Thomas W. Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989); Charles R. Beitz, *Political Theory and International Relations*, Revised. (Princeton, NJ: Princeton University Press, 1999); Darrel Moellendorf, *Cosmopolitan Justice* (Boulder: Westview Press, 2002); Kok-Chor Tan, *Justice Without Borders* (Cambridge: Cambridge University Press, 2004). For arguments about the inadequacy of the DA in comparison to global distributive justice, see Thomas Pogge, "'Assisting' the Global Poor," in *The Ethics of Assistance*, ed. Deen K. Chatterjee (Cambridge: Cambridge University Press, 2004), 260–288; Chris Armstrong, "Defending the duty of assistance?," *Social Theory and Practice* 35, no. 3 (2009): 461–482.

[6] Thomas Pogge, "Do Rawls's Two Theories of Justice Fit Together?," in *Rawls's Law of Peoples*, ed. Rex Martin and David Reidy (Malden, MA: Blackwell Publishing, 2006), 206–225.

[7] Kok-Chor Tan, *Toleration, Diversity, and Global Justice* (University Park, PA: Pennsylvania State University Press, 2000), 176.

would be sufficient to eradicate (much of) global poverty. That is, even though its critics claim that the DA is deficient in one or more respects (e.g., that it does not address the sources of international inequalities of wealth), many of them agree that the DA requires wealthier societies to act in ways that would bring about the end of (much) global poverty. For example, Thomas Pogge (a prominent critic of the DA) says that the DA:

> supports a critique of most of the more affluent societies today for doing far too little toward enabling poorer societies to be well-ordered. Given the magnitude of their failure and indifference, this critique might well qualify those wealthier societies as 'outlaw states' in Rawls's sense.[8]

Pogge's idea seems to be that, from the point of view of the DA, the existence of large amounts of preventable global poverty condemns the world's wealthier societies. If the world's wealthier societies were doing what the DA required, fewer poorer societies would be burdened by the absence of well-ordered institutions. As one might expect, many of those who are sympathetic to Rawls's account of international justice say similar things about the DA's demands.[9] For example, Rex Martin says that fulfilling the DA's requirements "would involve a high level of commitment. The delivery of such aid would be expensive, costing far more than the wealthier states are currently laying out."[10]

I am skeptical of the 'consensus' view that the Duty of Assistance requires far more from developed societies than they are currently doing. Specifically, I think it is unlikely that the DA can require the kinds and amounts of assistance that, under current conditions, would be sufficient to eradicate much global poverty. I will argue that this is because the DA cannot require societies to provide assistance when doing so would result in rapid or radical changes to their own ways of life. Since many of the forms of international assistance that are likely to be most effective against global poverty are also likely to cause rapid or radical changes to the ways of life of donor societies, the DA is unlikely to require sufficiently efficacious poverty eradication efforts. I begin my argument by showing that the DA is analogous to the natural duty of mutual aid that Rawls introduces in *Theory of Justice* (hereafter *TJ*). Then, I reflect on Rawls's claim that the duty of mutual aid does not demand significant sacrifices on the part of donors, and I argue that a rapid and radical change to a nation's way of life constitutes a significant sacrifice. Finally, I suggest that two of the most celebrated means of international economic development – export-led

[8] "Do Rawls's Two Theories of Justice Fit Together?," 223.

[9] Among the defenders of Rawls's DA are Samuel Freeman, *Justice and the Social Contract* (Oxford: Oxford University Press, 2007), chs. 8 and 9; David Reidy, "A Just Global Economy: In Defense of Rawls," *The Journal of Ethics* 11, no. 2 (2007): 193–236; Mathias Risse, "What We Owe to the Global Poor," *The Journal of Ethics* 9, no. 1 (2005): 81–117; Joseph Heath, "Rawls on Global Distributive Justice: A Defence," in *Canadian Journal of Philosophy Supplementary Volume*, ed. Daniel Weinstock (Lethbridge: University of Calgary Press, 2007).

[10] "Rawls on International Distributive Economic Justice," in *Rawls's Law of Peoples*, ed. Rex Martin and David Reidy (Malden, MA: Blackwell Publishing, 2006), 226–42, at 238.

growth and relaxed immigration restrictions – would likely cause rapid and radical changes to the ways of life of wealthier societies. For that reason, they cannot be required by the DA.

14.2 The Natural Duties

In *Law of Peoples,* Rawls discusses the demands of the Duty of Assistance. However, this discussion focuses only on the goal at which the DA aims, and on the fact that the DA demands nothing of donor societies after this goal has been met. That is, the DA requires developed societies to offer assistance up to the point at which all of the world's societies possess well-ordered institutions. After this goal has been met, the DA requires nothing more. For example, the DA does not require further actions aimed at mitigating international inequalities of wealth or income, beyond what is required to develop and maintain well-ordered institutions. This account of the demands of the DA is instructive, but it does not tell us about the magnitude of the sacrifices that the DA may require of donor societies in pursuit of the DA's goal. Furthermore, it does not follow from the fact that the DA continues to place *some* demands on wealthier societies, i.e., until all societies have well-ordered institutions, that these demands are onerous or that the DA will require sacrifices that are sufficient to alleviate global poverty.

Unfortunately, Rawls says almost nothing about the sacrifices that the Duty of Assistance can require of donor societies. However, we can make some progress on this front by showing that the DA is analogous to another principle Rawls discusses, the natural duty of mutual aid, and about whose demands Rawls is more explicit. For a discussion of this duty, we turn to Rawls's *Theory of Justice*. While the majority of *TJ* concerns principles for the regulation of the basic institutions of a domestic society, Rawls also discusses principles that ought to regulate the conduct of individuals. Among these are the natural duties, which apply "without regard to our voluntary acts," and which have "no necessary connection with institutions or social practices."[11] Rawls contrasts these duties with principles of social justice, which regulate the background institutions of social cooperation; and with obligations of fairness, which oblige a person in virtue of her willing acceptance of the benefits of participation in just institutions.[12] What makes natural duties distinct is that their authority does not depend upon institutional entanglements or historical interactions. Rather, the natural duties are a response to the fundamental moral demand to show proper respect for other moral persons.

[11] John Rawls, *A Theory of Justice*, Rev. ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 98.

[12] Ibid., 96.

One reason to think that the Duty of Assistance is analogous to the natural duties that Rawls discusses in *TJ* is that, like the natural duties, the authority of the DA does not depend upon institutional or historical facts. Rawls is explicit that the DA is not a principle of (background) distributive justice and that its authority does not depend upon the existence of a global basic structure that is analogous to the set of social and political institutions that shape social cooperation within domestic societies.[13] Among other reasons, this is because the DA aims to bring otherwise isolated societies *into* the Society of Peoples, and it, therefore, requires more than the mere regulation of existing forms of institutional interdependence. Instead, the DA requires that wealthier societies help those societies who are not currently benefiting from international cooperation (due to the failure of domestic institutions) to be able to do so.

Another reason to think that the Duty of Assistance is analogous to the natural duties is that, in *TJ*, Rawls anticipates that his account of international justice will consist of the application of the natural duties to the relations between societies. He says, "[o]ne aim of the law of nations is to assure the recognition of these [natural] duties in the conduct of states."[14] Of course, this statement predated the publication of Rawls's *Law of Peoples* (and his earlier article, "Law of Peoples") by over 20 years.[15] However, Rawls does nothing in his later works to reject the claims he makes about international justice in *TJ*. Therefore, the claims he made about international justice in *TJ* count in favor of the view that the DA is analogous to the natural duties.

I have said, so far, that I think that Duty of Assistance is 'analogous' to the natural duties. I mean by this that, like the natural duties (and, specifically, the natural duty of mutual aid), the DA does not depend upon institutional or historical facts, but is a response to the moral personhood of those in need. Others have attempted to give a more determinate account of the way in which the DA relates to the natural duties.[16] However, my argument does not depend upon any specific account of the way in which the DA is like the natural duties. I claim only that, like the natural duties, the DA is neither a principle of redress for historical wrongs, nor a principle of fairness in response to the existence of beneficial interactions, nor a principle for the regulation of background institutions. The DA, like the natural duties, is a principle for regulating the conduct of moral agents, and its demands do not presuppose the existence of any past or present relationships between those agents.

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[13] *The Law of Peoples*, chap. 15–6.

[14] *A Theory of Justice*, 99.

[15] Interestingly, the Duty of Assistance does not appear in the first published version of Rawls's full-length work on international justice ("The Law of Peoples," *Critical Inquiry* 20, no. 1 (1993): 36–68).

[16] Hugo Seleme argues that the DA expresses the demands of the natural duty of justice for collectively organized individuals. Nancy Kokaz endorses a broader account, and she includes the natural duty of mutual aid among the grounds of the DA. In contrast, Wilfrid Hinsch argues that the DA expresses the demands of a *sui generis* natural duty, one that applies in the first case to societies and not to individual human beings. See H. O. Seleme, "A Rawlsian Dual Duty of Assistance," *Canadian Journal of Law and Jurisprudence* 23 (2010): 163–255; Kokaz, "Poverty and Global Justice"; Wilfrid Hinsch, "Global Distributive Justice," in *Global Justice*, ed. Thomas Pogge (Wiley-Blackwell, 2001), 58–78.

While Rawls says almost nothing about the sorts of sacrifices that the Duty of Assistance can require, he does discuss the demandingness of the natural duties. And, inasmuch as the DA is analogous to the natural duties, its demands may be analogous, too. Rawls says that the natural duties are not very demanding. He says that one must fulfill the natural duties, "provided that one can do so without excessive risk or loss to oneself."[17] He says that one must work to realize the aims of the natural duties only when doing so is "relatively easy" and that one is "released from this duty when the cost to ourselves is considerable."[18] Of course, there is no obvious criteria of 'easiness' or 'excessiveness', especially since the ease or excess associated with acting on the basis of the natural duties depends upon the other duties and obligations that an agent may face. And, as Rawls observes, there are "no obvious rules" for dealing with questions about the priority of the various duties that one may face.[19] However, we can make some progress towards an account of the priority of the DA by identifying how it relates to the goals of Rawls's account of international justice.

14.3 Mutual Respect Among Societies

The goal of international justice that Rawls endorses in *Law of Peoples* is a society of peoples, whose members relate to each other on terms of mutual respect. Rawls elaborates on the conditions of respectful relationships between free and equal societies by reference to what he calls the 'two fundamental interests' of societies. Specifically, a society of peoples who relate to each other on terms of mutual respect (i.e., as 'free and equal' participants in international cooperation) is marked by mutual concern for societies' two fundamental interests. According to Rawls, a society's first fundamental interest is to possess and maintain well-ordered political institutions that have authority over a defined territory.[20] Therefore, international justice demands that societies not needlessly tolerate conditions under which other societies are unable to maintain just (or decent) domestic institutions. The DA is an expression of this demand. It requires societies with more-or-less well-ordered institutions to assist societies which lack functioning institutions.

A society's second fundamental interest consists of

> a people's proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments. Altogether distinct from their self-interest for their security and the safety of their territory [i.e., the first fundamental interest], this interest shows itself in people's insisting on receiving from other

[17] *A Theory of Justice*, 98.

[18] Ibid., 100.

[19] Ibid., 298–9.

[20] "Nations have two fundamental interests. First, is their interest to protect their political independence and their free culture with its civil liberties, to guarantee their security, territory, and the well-being of their citizens," *The Law of Peoples*, 34.

> peoples a proper respect and recognition of their equality…just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals.[21]

According to Rawls, a society is interested not only in protecting its borders and its political institutions (its first fundamental interest). It wants also to receive proper respect for its culture and its sense of itself. International relations of mutual respect, therefore, require that societies receive recognition that their ways of life are valuable, and that their cultures and histories are valued contributions to humanity's experiments in living.

This second fundamental interest provides additional reason for the Duty of Assistance. While the first fundamental interest speaks to each society's rational pursuit of functioning institutions, the second fundamental interest addresses each society's moral need to be recognized as an equal member of the international community. In order to satisfy this second fundamental interest, international cooperation must be governed by principles that ensure that all societies receive equal recognition and respect. Acting in accordance with the DA is one way in which the members of the international community demonstrate respect for each other, and in which they generate conditions under which societies can respect themselves. In *TJ,* Rawls claims that widespread commitment to the natural duty of mutual aid communicates respect for others and cultivates their self-respect. He says, "[t]he public knowledge that others are willing to act on the duty of mutual aid is necessary for us to have a sense of our own self-worth."[22] If the DA is analogous to the natural duties (including the natural duty of mutual aid), then it must be demanding enough to communicate to burdened societies that wealthier societies value them as equals. In this way, international relations of mutual respect require the DA to be demanding enough to communicate that burdened societies are "appreciated and confirmed by others who are likewise esteemed."[23]

While societies' two fundamental interests identify reasons to prioritize international assistance, they also identify reasons for restricting the demands of the Duty of Assistance. Recall that the DA cannot require excessive or burdensome sacrifices, inasmuch as its demands are analogous to the demands of the natural duties (including the natural duty of mutual aid). First, given that societies have a fundamental interest in the maintenance of well-ordered institutions, the DA cannot require donor societies to make sacrifices that would jeopardize those institutions. A more restrictive limit for the demands of the DA arises from societies' second fundamental interest. Given that societies have a fundamental interest in their self-respect, and given that national self-respect is based (in part) on international recognition of the value of a nation's way of life, the DA cannot require changes to societies' ways of life that would undermine national self-respect.

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[21] *The Law of Peoples*, 34–5.

[22] *A Theory of Justice*, 298.

[23] Ibid., 386. Especially relevant here is Rawls's claim, in *Law of Peoples*, that efforts to maintain a society's self-respect are of "great importance," and that the global basic structure ought to be regulated so that all societies can realize "a certain proper pride and sense of honor," *The Law of Peoples*, 62.

Even though international relations of mutual respect require a demanding duty of assistance, they do not require societies to be indifferent to the distinction between *their* institutions and ways of life and the institutions and ways of life of societies burdened by unfortunate conditions. The mere fact that a donor society could realize advantages for burdened societies that exceed the costs to its own does not, by itself, generate a reason for offering that assistance.[24] For example, a society that could create well-ordered institutions in three other societies need not do so, if such an effort would jeopardize the well-orderedness of its own institutions. Similarly, a society that could help protect the ways of life of three other societies need not do so, if such an effort would come at a morally significant cost to its own way of life.

My claim that a commitment to international relations of mutual respect restricts the demands of the DA is bolstered by Rawls's rejection of conceptions of international justice which focus upon (aggregate) well-being. For example, Rawls accuses advocates of global distributive justice of prioritizing the well-being of individual persons throughout the world, rather than the freedom and equality of societies.[25] On Rawls's view, international justice aims at maintaining and expanding the Society of Peoples, by preserving the well-orderedness of institutions in developed societies, and by encouraging the development of well-ordered institutions in burdened societies. It would be counterproductive to achieve increased well-being – or institutional well-orderedness – in some burdened societies, if it meant sacrificing the institutional well-orderedness or national self-respect of donor societies. In *TJ*, Rawls echoes this rejection of a morality of indifference to one's own projects or values. He says that justice "does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many."[26] On Rawls's view, mutual respect does not require that we treat the projects and pursuits of others as valuably as we treat our own. Instead, mutual respect requires only that we be "prepared to give reasons for our actions whenever the interests of others are materially affected."[27] Potential donor societies are able to provide burdened societies with good reasons for refusing to provide assistance, even before they risk causing harms to themselves that are comparable to the harms that their international assistance would have prevented in other societies.[28]

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[24] Rawls claims that the goal of international justice is the creation and maintenance of just institutions within the world's societies, and not the maximization of the well-being of individuals or of the world's worst off person, *The Law of Peoples*, 119–20. Furthermore, Rawls argues that the ideal of mutual respect between societies rules out classical or utilitarian principles of international justice, Ibid., 40.

[25] Ibid., 119–20.

[26] *A Theory of Justice*, 3.

[27] Ibid., 297.

[28] Here, I follow Richard Miller, who says "In general, in order to respect others, one need not be prepared to do violence to who one is, radically changing one's worthwhile goals in order to be a more productive satisfier of others' urgent needs…I can reasonably reject a rule that requires me to end the continuing presence of my current personality in my own life," "Beneficence, Duty and Distance," *Philosophy and Public Affairs* 32, no. 4 (2004): 357–383, at 359.

A society's two fundamental interests provide reasons for these restrictions on the demands of the Duty of Assistance. The first fundamental interest ensures that the DA does not require societies to jeopardize the well-orderedness of their institutions for the sake of global poverty relief. The second fundamental interest restricts the demands of the DA even further. It ensures that the DA does not require societies to undermine their national self-respect for the sake of global poverty relief. Since a society's self-respect can be undermined by sacrifices that radically and rapidly change its way of life (but do not go so far as to undermine the well-orderedness of its institutions), the second fundamental interest places the most restrictive conditions on the demands of the DA. For that reason, I will focus on it (and on the attendant ideas of national self-respect and the national way of life) in the following discussion of the limitations of the DA.

14.4 National Self-Respect and a National Way of Life

In order to recognize itself and its activities as valuable, a society needs to see that its way of life is *its* way of life. It needs to be able to connect its current way of being a society to its history and to the values and activities of prior times. Otherwise, such a society would be alienated from itself, and would be uprooted from its own history and from its prior sense of self. Such alienation would undermine a people's respect for itself as a people, since a society's self-respect is based – at least in part – on its ability to recognize its way of life as its own and as something worthy of passing on to future generations. Therefore, international relations of equal respect ought to make room for societies to pursue legitimate projects that are constitutive of their identities. I am not committed to any particular account of what a national way of life consists of, or of the ways in which parts of the national way of life may relate to national self-respect.[29] Instead, in the following section, I explore some examples of ways in which meaningful steps towards the alleviation of global poverty may damage donor societies' ways of life in a manner that may undermine national self-respect. I will conclude that the DA cannot require such sacrifices, even if they may be effective at alleviating global poverty.

Before moving on to a discussion of examples, I want to emphasize that changes to national ways of life, as such, need not undermine national self-respect. Cultural change is inevitable, and efforts to prevent changes to national ways of life would,

[29] Importantly, I need not be committed to any romanticized nationalistic ideas about the ways of life of individual societies. For example, what I say is entirely consistent with the idea that national ways of life are social constructions of the state. For example, see Benedict Anderson, *Imagined Communities* (London: Verso, 1983); Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); Eric Hobsbawm, *Nations and Nationalism since 1780* (Cambridge: Cambridge University Press, 1990). The fact that national identities and ways of life may be constructions of the state does not diminish the significance of their role in justifying restrictions upon the activity of the state.

themselves, introduce changes to our ways of life.[30] (Consider the sorts of cultural changes that might occur in a society that transitioned from a policy of laissez-faire multiculturalism to xenophobic cultural conformity.) Furthermore, there is no reason to think that more-or-less organic changes to a nation's way of life undermine a society's self-respect for itself as a people. For that reason, cultural change, as such, does not undermine a society's self-respect, and the DA can demand that societies make sacrifices that would have the effect of changing their ways of life.[31] However, the DA cannot demand radical and rapid transformations that would have the effect of undermining a society's self-recognition and self-esteem.[32] It cannot force a society to immediately abandon those projects and activities with which it most closely identifies, even while it may require a society to make (or permit) gradual changes to its way of life, as part of its efforts to alleviate global poverty.[33]

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[30] For an argument about the inevitability of cultural change and the disastrous results of resistance to such change, see Samuel Scheffler, "Immigration and the Significance of Culture," *Philosophy & Public Affairs* 35, no. 2 (2007): 93–125.

[31] This picture is complicated by what we might call 'second-order' ways of life, i.e., facts about a nation's way of life which are part of its way of life. For example, a society may be committed to the idea that it should never sacrifice any part of its way of life, or that its way of life should always be progressing. Such complications may introduce serious worries for my view, but a few comments may be helpful. First, a nation is not entitled to an unjust way of life, and this includes the injustice of being unwilling to make any sacrifices for the sake of global poverty relief. Simply, it cannot be part of a society's proper self-respect that it be so indifferent to the cause of global poverty that it is unwilling to do anything meaningful to address this problem. Second, a nation's way of life may improve (or progress) even if it becomes less expensive. For example, returning to the standard of living of a previous generation (for the sake of global poverty relief) may not be inconsistent with improvements to the national way of life. Specifically, were the United States to adopt a way of life with less per capita residential living space, fewer automobiles, and a greater reliance on mass transit, this might constitute an improvement (e.g., with regard to public health, the environment, social engagement, the autonomy of adolescents).

[32] It is not change, itself, that is morally problematic, but the way in which cultural change forces one to detach from goals with which one identifies. As Richard Miller says, a duty of beneficence does not oblige a person to detach himself from a "worthwhile goal with which he is intelligently identified and from which he could not readily detach," "Beneficence, Duty and Distance," 360. Miller's account of the demandingness of an individual's duty of beneficence is instructive here: "One's underlying disposition to respond to neediness as such ought to be sufficiently demanding that giving which would express greater underlying concern would impose a significant risk of worsening one's life, if one fulfilled all further responsibilities; and it need not be any more demanding than this," Ibid., 359.

[33] A disanalogy between the ways of life of societies and individual human persons may be instructive. While an individual might have developed a commitment to less expensive projects had she made different choices earlier in life, it is not so easy for adults to re-make themselves in dramatic ways. After a certain age, you are who you are. In contrast, societies can dramatically change their ways of life without serious harm. Given enough time – and enough intermediate steps – the wealthiest societies in the world may be able to develop ways of life that are much less expensive, without doing violence to their self-respect as a people. This is because the lifetimes of most societies extend beyond the lifetimes of individual persons. While the tastes of individuals are relatively static, there are often significant differences between the tastes of members of different generations.

14.5 Forms of International Development Assistance

There may seem to be reason to be optimistic about the ability of the Duty of Assistance to demand the sorts of sacrifices that could alleviate global poverty. Specifically, empirical work on development economics indicates that developed societies need only contribute moderate amounts of monetary assistance to combat global poverty. This is for two reasons. First, a (relatively) small amount of money may be very effective. For example, Jeffrey Sachs argues that we can meet the basic needs of persons in impoverished societies – while also building the institutions that will meet their needs in the future – for as little as $100–200 billion annually for the next decades.[34] The UN Millennium Goals (which, admittedly, aim at a lower target than the DA aims at), require contribution of 0.7% of GDP. Of course, in absolute terms, these are large sums of money. However, if the burden of meeting this goal were spread among the developed societies, each society would be responsible for a relatively small amount. For example, consider that the United States contributed almost $29 billion in official development assistance in 2009.[35] Even if the United States were responsible for a 20% share of Sachs's amount (i.e., $20–40 billion annually), the increase over current contribution levels would be minimal or nonexistent.[36] Likewise, meeting the demands of the Millennium Goals would be only slightly more burdensome, since it would represent an increase of about $70 billion in annual contributions.

Unfortunately, experience shows that many societies will fail to do their share to eradicate global poverty, or even to meet the lower standard of providing for persons' subsistence needs. Aside from the broad institutional failures of the U.N. Millennium Goals (where only a handful of societies meet the 0.7% GDP threshold), we can look to the failures to respond adequately to humanitarian catastrophes. For example, the international response to the flooding in Pakistan in the late summer of 2010 was woefully inadequate, even though potential donors knew that aid was needed and had resources available to offer assistance. Therefore, effective efforts at poverty alleviation are likely to require donor societies to give more than their share, and to make up for the fact that others were shirking their responsibilities.[37] As the dollar amounts

[34] *The End of Poverty* (New York: Penguin Press, 2005), especially ch. 15.

[35] OECD, *Development Aid Rose in 2009 and Most Donors Will Meet 2010 aid Targets*, April 14, 2010, http://www.oecd.org/document/11/0,3343,en_2649_34447_44981579_1_1_1_1,00.html. Of course, in addition to increases in the amount of aid, an effective response to global poverty would modify current aid programs which concentrate development funds in areas that are of the greatest politico-strategic interest to the United States.

[36] There are, of course, a variety of methods for determining fair shares. One method divides responsibility by share of global GDP. The United States has 20% of global GDP and, therefore, might be responsible for 20% of global poverty assistance.

[37] Here, I need not take a side on the issue of whether beneficence ever requires one to do more than her fair share. Instead, the relevant issue is whether the DA would be effective at requiring global poverty relief under real world conditions. For more about the relationship between beneficence and doing one's fair share, see Liam Murphy's *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2003).

of a greater-than-fair-share increase, so, too, do the odds that such contribution levels will require sacrifices to parts of donor societies' ways of life that are significant to national self-respect.

Empirical work in development economics reveals a second reason to think that effective global poverty relief need not demand burdensome levels of monetary assistance. This is because anything more than modest amounts of monetary assistance tends to be ineffective or counterproductive. For example, Paul Collier argues that large influxes of financial assistance can undermine the establishment of well-ordered institutions.[38] One reason for the diminished returns of foreign aid (even at moderate levels) is that infusions of monetary aid tend to interfere with the potential for transformative domestic governance, since domestic leaders and institutions have to expend large amounts of time and energy managing and maintaining the relationships and responsibilities that are attendant on international monetary assistance. So, even if the levels of aid that Sachs advocates or that UN Millennium Goals require were insufficient to end to global poverty, higher levels of monetary assistance might not be any more effective.

Unfortunately, the fact that monetary assistance experiences diminishing (and negative) returns after relatively low levels does not mean that attempts at effective poverty relief have been exhausted when those low levels of aid have been met. Non-monetary forms of international assistance may also be effective. The empirical evidence does not show merely that monetary assistance is no longer effective after relatively low levels of aid, but that monetary assistance suffers from diminished returns long before suitable levels of economic prosperity have been reached. And, since some forms of non-monetary assistance may be effective, optimal strategies of global poverty eradication will include non-monetary forms of assistance. Unfortunately, it seems that some of the most effective forms of non-monetary assistance create morally significant risks for the ways of life of donor societies. In the remainder of this section, I explore the social costs to donor societies of two of the most effective forms of non-monetary development assistance: facilitation of export-led growth and relaxed immigration restrictions.

One of the primary means by which developed societies could facilitate export-led growth within developing societies would be to make it easier for developing societies to export their agricultural products. However, the domestic agricultural industries of developed countries are liable to be destroyed (or seriously curtailed) by the introduction of these cheap imports. And, since the domestic agricultural industries of developed societies are often cherished parts of the ways of life of these societies (and, thereby, linked to national self-recognition and national self-respect), the DA may not require developed societies to open their markets to inexpensive agricultural imports from developing societies.

Agricultural industries are often closely associated with the national character. For example, the Swiss people identify with an agrarian lifestyle, one marked by care for

[38] *The Bottom Billion* (Oxford: Oxford University Press, 2007).

livestock and the production of alpine farm products, including cheeses and meats.[39] The French also identify with their agricultural industries, which produce large quantities of cereals, wines, and animal products.[40] Wealthy societies – like Switzerland and France – demonstrate their commitment to agricultural industries through a variety of institutional means. In addition to direct subsidies, wealthy societies protect otherwise vulnerable industries by making imports uncompetitive through the imposition of high tariffs or by preventing imports altogether. However, the industries that wealthy societies protect against competition from imports are the same industries that developing societies are relying upon for export-led growth. While this relationship between wealthier societies' import tariffs and poorer societies' exports may be obvious, its significance for global poverty relief is often overlooked. If export-led growth is a key component of successful economic development, and if export-led growth depends upon (relatively) open markets in the developed world for the developing world's exports, then wealthier societies will have to open their markets to the developing world's exports if they want to take advantage of one of the most successful methods by which developing societies may escape poverty.[41]

It seems unlikely that the Duty of Assistance requires wealthier societies to facilitate the export-led growth of developing societies. In many cases, freer trade would risk the destruction or marginalization of industries that may be closely connected to national identity and, thereby, to national self-respect. The worry here is not that developed societies will experience a net financial loss upon opening their markets to imports from developing societies. Indeed, the introduction of inexpensive agricultural imports into developed societies is likely to have aggregate benefits for both developing and developed societies. Rather, the worry is that industries that are connected to developed societies' national identities may be destroyed or marginalized as a result of developed societies' decisions to open their markets to the developing world's trade goods. I have argued (above) that the DA cannot require societies to cause rapid and radical changes to their ways of life, at least when such changes may undermine national self-respect. In the case of Switzerland and France, it seems likely that the rapid and radical destruction of their domestic agricultural industries may have such a result. If this were the case, the DA would not require such a sacrifice. The demands of the DA need not override a society's commitment to those parts of its way of life on which its national self-respect depends. The mere fact that other societies are in need may be insufficient to morally compel developed societies to sacrifice industries that express the national character.

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[39] For an evocative illustration of the role of dairy farming in the Swiss cultural imagination, see (or listen) to Kathleen Schalch, "Farm Subsidies Debated in Global Trade Talks" (National Public Radio, October 11, 2005), http://www.npr.org/templates/story/story.php?storyId=4953604.

[40] For example, recent debates within the European Union about reforms to the Common Agricultural Policy (CAP), which might result in reduced subsidies for some sectors within France's agricultural industry, have risen the ire of French citizens and politicians. See "Sarkozy Vows to Defend Agriculture from any EU Move," *Reuters*, March 24, 2010, http://www.reuters.com/article/idUSPAB00825420100324.

[41] For advocacy of these (and similar) proposals, see J. E. Stiglitz and A. Charlton, *Fair Trade for All* (New York: Oxford University Press, 2005).

Greater cross-border labor mobility is also likely to be a boon to the world's poor.[42] First, increased immigration may directly lead to employment and economic benefits for those who immigrate. Immigrants experience higher levels of employment and enjoy a greater quality of life than those they leave behind. Second, relaxed immigration standards create indirect benefits, including remittances and higher wages for those who remain in the home country. Therefore, developed societies may be able to alleviate global poverty by promoting international labor mobility (e.g., by relaxing restrictions on immigration).[43]

While relaxed immigration restrictions may help the world's poor, it is not clear that the DA can require developed societies to undertake these efforts, even they were among the most effective forms of global poverty relief. This is because increased levels of immigration may rapidly and radically change the ways of life of developed societies in morally significant ways. First, immigrant labor may displace domestic labor and may drive down wages. The worry here is not so much the monetary loss to domestic workers, but the loss of the collective way of life that the higher wages made possible. For example, there is reason to think that the introduction of large numbers of unskilled immigrant laborers into the US economy in latter part of the twentieth century contributed to increases in income inequality and helped to undermine the social power of organized labor.[44] Certainly, some of these results may be resisted because they undermine domestic justice (e.g., increased income inequality). However, some results may be better characterized as changes to the national way of life (e.g., the demise of social capital in the U.S. in the late twentieth century). If relaxed immigration restrictions lead to changes to the national way of life that undermine national self-respect, they may not be required by the DA. Second, higher levels of immigration have a tendency to undermine social trust and to erode support for social institutions.[45] This is another reason to think that the DA may not require developed societies to relax restrictions on immigration.

The DA may be unable to require developed societies to undertake two of the most celebrated forms of non-monetary development assistance. Of course, the DA may require other forms of non-monetary development assistance, though I lack the space to discuss them here. For now, though, it should be clear that the 'consensus view'

[42] For claims about the social and economic benefits to the poor that may result from their emigration to wealthier societies, see J. Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement*, ed. Barry and Goodin (University Park, PA: Penn State University Press, 1992), 25–47; Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1981).

[43] This example is less effective if it is true, as Thomas Pogge argues, that immigration can do little to assist the world's poor. See his "Migration and Poverty," in *Contemporary Political Philosophy: An Anthology, 2nd ed.*, ed. Goodin and Pettit (Oxford: Wiley-Blackwell, 2005), 710–20.

[44] G. J. Borjas, *Friends or Strangers: The Impact of Immigrants on the US Economy* (New York: Basic Books, 1990). Of course, my argument does not hinge upon the truth of particular claims about the potential harms associated with various levels of immigration.

[45] Stephen Macedo, "The Moral Dilemma of US Immigration Policy," in *Debating Immigration*, ed. Carol Swain (Cambridge: Cambridge University Press, 2007), 63–81.

about the DA is far from obvious (and is likely to be false). Critics and advocates of Rawls's account of international justice are not entitled to claim that the DA demands great sacrifices on the part of developed societies, merely on the basis of the ambitious goal at which the DA aims. Relatedly, the DA does not, by itself, provide reason to think that developed societies ought to be acting in ways that would make substantial short- or medium-term progress toward the eradication of global poverty.

14.6 An Alternative Foundation for International Assistance

The Duty of Assistance has a noble goal: All peoples ought to possess well-ordered institutions for domestic social cooperation and international relations. However, there are good reasons to doubt that, under current conditions, the DA will require the amounts or kinds of assistance that will be sufficient to make significant progress towards this goal. Those who are in search of duties to aid the global poor that require significant sacrifices on the part of donor societies would do well to look beyond Rawls's Duty of Assistance.

One place to begin to look for more demanding duties of aid is at the facts of past and present international relations. Wealthy societies are responsible for histories of colonialism, exploitative trading relations, imperial destruction, imposed courses of development, anti-democratic global institutional governance, and an unfair distribution of the benefits and burdens of greenhouse gas emissions.[46] Of course, different societies are responsible for more or less of these injustices. However, most developed societies are implicated in these injustices to a significant degree.[47] As a consequence, most (all) developed societies face (at the very least) backward-looking duties to repair these harms.

Importantly, a duty of repair may more require rapid and radical changes to a nation's way of life than can be required by the DA. Since peoples are not entitled to goods they gain from acts of injustice (e.g., colonialism, exploitative trade), it is morally unproblematic to demand societies to sacrifice their ill-gotten gains as compensation to those societies they have harmed. Furthermore, since the ways of life that developed societies currently enjoy may have been made possible by (and may still presuppose) harms that the developed world has imposed on developing societies, it may not be morally problematic for developed societies to sacrifice their current ways of life. Additionally, the rapid and radical transformations that reparations may cause to developed societies' ways of life are unlikely to undermine developed

[46] Here I follow Richard Miller's approach in *Globalizing Justice: The Ethics of Poverty and Power* (Oxford: Oxford University Press, 2010).

[47] Especially instructive is Richard Miller's attempt, in *Globalizing Justice* to show that transnational responsibilities that emerge from the existence of special relationships can extend to cover "virtually the whole developing world," and that these responsibilities place exacting demands upon (almost) all of the world's wealthier societies, Ibid., 217–218.

societies' national self-respect. This is because proper self-respect is inconsistent with the enjoyment of ill-gotten gains. Proper self-respect presupposes relationships of respect with others, and one fails to show respect for others if one's success is based on harms that one has caused to others. Therefore, rather than undermine national self-respect, a demanding duty of international reparations may cultivate a proper national self-respect among developed societies. While it will likely be painful for wealthier societies to adjust to (potentially radical) changes to their ways of life, such transitions may provide moments of needed national introspection and recommitment to the goals of international justice.

Chapter 15
World Bank Rules for Aid Allocation: New Institutional Economics or Moral Hazard?

Nicole Hassoun

Abstract This chapter considers whether the World Bank has adequately justified its metric for distributing international aid to the poor. The International Development Association (IDA) is the part of the Bank that helps the world's poorest countries, 1.5 billion of whom live on less than the equivalent of US$2 a day. In 2008, the IDA gave official development assistance worth 6689.24 million. It provides basic health services, primary education, clean water and sanitation, environmental protection, business support, infrastructure, and help with institutional reforms. This paper argues, however, that the Bank has failed to justify its claim that this metric gives enough weight to aiding the poor. Although it may turn out that some good justification is available, this paper suggests that there is ground for concern. This is an important conclusion for those who care about international economic justice. The World Bank is one of the largest aid donors and similar metrics guide many other development organizations' aid efforts. Many countries, including the United Kingdom and Canada, also use similar metrics for distributing aid.

15.1 Introduction

This chapter considers whether the World Bank has adequately justified its metric for distributing international aid to the poor. The International Development Association (IDA) is the part of the Bank that helps the world's poorest countries, 1.5 billion of whom live on less than the equivalent of US$2 a day. In 2008, the IDA gave official development assistance worth 6,689.24 million (OECD 2010a, b).[1]

[1] Unlike other "aid" ODA does not include military aid. Rather ODA primarily includes grants and loans to developing countries "which are: (a) undertaken by the official sector; (b) with promotion of economic development and welfare as the main objective; (c) at concessional financial terms

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It provides basic health services, primary education, clean water and sanitation, environmental protection, business support, infrastructure, and help with institutional reforms (IDA 2009a). This paper argues, however, that the Bank has failed to justify its claim that this metric gives enough weight to aiding the poor.[2] Although it may turn out that some good justification is available, this paper suggests that there is ground for concern. This is an important conclusion for those who care about international economic justice. For, the World Bank is one of the largest aid donors and similar metrics guide many other development organizations' aid efforts (ADB 2009). Many countries, including the United Kingdom and Canada, also use similar metrics for distributing aid (Tarp 2006).

The IDA's aid allocation system is based largely on the Country Policy and Institutional Assessment (CPIA) index, a measure of "institutional quality" and its governance criteria, in particular (IDA 2009a). The IDA's metric also takes into account countries' gross national product per capita (GNIPC).[3] See the Appendix I for more information on the index.

The next section considers and rejects a few preliminary arguments the Bank gives in defense of its metric. Section 15.3 considers two different interpretations of what I believe is the IDA's most promising attempt to justify its metric. First, the Bank may be insisting that aid to countries with good institutions is good for the poor. This section argues that there are a host of conceptual and empirical problems with the evidence the IDA relies on to support this thesis. Second, the Bank may be insisting that aiding on the basis of poverty alone creates a moral hazard. It may argue, for instance, that if we aid on the basis of poverty alone, we create an incentive for rulers to keep their countries poor, so we should consider institutional quality in aiding poor countries. This paper suggests that one problem with this argument is that assumes the negative incentives aid creates will be efficacious. More generally, the chapter suggests, arguments based on incentives require empirical substantiation. Another problem with the Bank's argument is that even if the negative incentives aid creates are efficacious, we may be required to aid in some circumstances. Finally, even if the Bank should not aid on the basis of poverty alone, it does not follow that we should consider institutional quality in aiding poor countries. Rather, empirical evidence is necessary to support the contention that we would do better to consider institutional quality in aiding poor countries. The requisite evidence is, however, precisely the evidence necessary to support the first interpretation of the Bank's argument.

This inquiry is important for several reasons. First, it engages in the international debate, initiated by anti-globalization activists, over the World Bank's policies and

(if a loan, having a Grant Element (q.v.) of at least 25 per cent)." http://www.oecd.org/document/32/0,3746,en_2649_33721_42632800_1_1_1_1,00.html

[2] The IDA makes this claim in the IDA 14 and this paper considers the defense it offers in this document although subsequent notes deal with other arguments that the Bank has offered and might use in defense of this point (IDA, 2007a, b).

[3] Over time the CPIA has changed slightly. It used to contain 20 indicators, for instance (Kanbur 2005). Other changes to the formula include the fact that capital account convertibility and privatization are no longer included in the guidelines for good policy (Minson 2007).

whether they are poverty-focused enough. The paper comes down strongly on the side of the critics. Second, its arguments may indirectly challenge the relevance of a broad class of economic arguments about public policy. This paper suggests that theoretical arguments invoking potentially problematic incentive effects do not generally provide firm ground for public policy on their own. Third, this inquiry illustrates how philosophers can contribute to a largely neglected area of study. Most work in the philosophy of economics looks at the foundations of game theory and welfare economics. Philosophers have paid very little attention to public and development economics.[4] There are many important questions about development policy that urgently require analytic examination of the sort philosophers are well placed to offer.[5]

15.2 Moral Framework and Preliminary Arguments

This section considers a few ways the Bank (especially in the IDA 14) has responded to one criticism of its index for aid allocation: that one of the primary objectives of international development aid should be to help the poor and the IDA has failed to justify its metric in light of this objective.[6] This section will examine the Bank's response to this criticism on the assumption that aid's primary objective should be to help the poor.

The Bank might deny that aid's primary objective should be to help the poor. Its primary aim may just be to foster growth and good institutions. Nevertheless, the focus here is not about the ends of good development but about the best means of achieving this objective. It would be easy to argue that aid's primary objective should be to help the poor. A lot of the philosophical work on international development would support this contention (Crocker 2008; Pogge 2005; Nussbaum 2000; Sen 1999; O'Neill 1986; Singer 1972). There is good reason to believe the IDA is committed to this objective. The Bank describes itself as an institution deeply concerned about poverty and does not articulate or defend an alternate moral framework (World Bank 2010; IDA 2010).[7] The IDA also appears to hold that it is important to

[4] There are, of course, some exceptions. See, for instance: (Brock 2009; Wenar 2008; Hassoun 2012). For discussion of philosophical work in the public economics literature see, for instance: (Subramanian 2002).

[5] For examples, see: Ibid. More generally, I believe that many of the international institutions' arguments are like this one in relying essentially on inadequately articulated and defended moral principles as well as empirical evidence and greatly impacting many individuals' lives.

[6] See, for instance: (Minson 2007).

[7] The Bank says: "Our mission is to fight poverty with passion and professionalism for lasting results and to help people help themselves and their environment by providing resources, sharing knowledge, building capacity and forging partnerships in the public and private sectors" (World Bank 2010). The IDA website says: "The International Development Association (IDA) is the part of the World Bank that helps the world's poorest countries" (IDA 2010).

give preference at least to poor countries in allocating aid. It says that GNIPC is supposed to provide a proxy for poverty and the IDA gives less weight to GNIPC as it rises (each increment of income yields less aid) (Kanbar 2005, 11). Yet even with this weighting, the IDA acknowledges that GNIPC is an aggregate statistic that may not track poverty rates (IDA 2004a, 6). A country with many poor people and a few very rich people may be richer than a country where everyone fares equally and moderately well.

The IDA defends its use of GNIPC as a proxy for poverty, in several ways.[8] First, it says that "statistical studies suggest a high correlation between headcount poverty and per capita income for most countries" and aberrations may "arise from errors in the household surveys, which are in general less reliable than national accounts" implying that scaled GNIPC is better for measuring poverty, in at least some respects, than the headcount index (which relies on household data) (IDA 2004a, 6). The IDA also argues that "up-to-date direct poverty measures, such as headcount poverty or poverty gap, are difficult to obtain because they are based on household surveys which are conducted periodically – in some countries at 10-year intervals. Variations in the determination of the poverty line and in the methodology for poverty assessment also make the comparison of poverty levels among countries unreliable" (IDA 2004a, 6).

These responses are not sufficient to support the Bank's choice of scaled GNIPC as a proxy for poverty. First, the Bank might decide on a particular way of measuring poverty and collect more data about poverty rates (e.g. provide funding for better surveys). Second, if this proves too difficult, there are other widely-available proxies for poverty that would be better than GNIPC from at least 1980. Infant mortality rate is probably a better proxy for poverty, for instance, as most of the gains on this front accrue to the poor.

The IDA also considers, and rejects, another improvement that might help a bit: giving more weight to the poorest countries in their calculations. The IDA rejects

[8] One response this paper will not consider at length is that it is by including the PR in its metric, the IDA it is able to account for the needs of the poor. After all, the PR looks at how countries perform on many criteria. This paper's basic criticism should go through as long as there is little reason to think that this metric gives the right amount of weight to the needs of the poor. Few of the CPIA's indicators, for instance, consider poverty at all. In the African Development Bank's version of the metric, only two out of eleven indicators do so explicitly. They consider the poor in looking at the quality of financial and budgetary management and whether there is equity of public resource use but not even these indicators are primarily focused on how countries' policies actually impact poor people (the first only looks at whether poverty reduction policies receive budgetary support, the second looks at whether countries monitor poverty levels and expenditures align with poverty reduction goals) (ADB 2009). Finally, the Independent Evaluation Groups (IEG's) report which attempts to argue that the CIPA does track the determinants of poverty via a literature review (besides being terribly sketchy and unconvincing), has this same problem (IEG 2009, esp. 24–27). It falsely asserts that inequality neutral growth will reduce poverty to defend measuring growth as a proxy for poverty (IEG 2009, 24). Inequality can remain stable or even decline if the poor get poorer as long as the middle class gains more than the poor lose.

giving more weight to the poorest countries for two reasons. First, it says its aid allocation "system is the most poverty focused among development agencies" (IDA 2004a, 7) citing David Dollar and Victoria Levin's 2004 study "The Increasing Selectivity of Foreign Aid: 1984–2002 (IDA 2004a, 7) citing (Dollar and Levin 2004)." Second, to ensure that aid helps the poorest countries, the IDA says that it only helps countries with incomes of less than US$865 per capita (IDA 2004a, 6).

The IDA's rationale seems circular. It is precisely because the IDA only helps countries with incomes of less than US$865 per capita that it does so well in Dollar and Levin's study. When Dollar and Levin look at aid only to IDA eligible countries, the IDA is 12th, rather than 1st (out of 80 or so agencies) (Dollar and Levin 2004a, b, 10).[9] Moreover, Dollar and Levin's study only considers how aid agencies score on the components of the IDA's formula. Even the authors acknowledge that "it should not be surprising that the World Bank allocates a lot of assistance to the countries that it ranks highly in its annual CPIA rating exercise" (Dollar and Levin 2004a, b, 11). The circularity of IDA's logic continues: Dollar and Levin specify that they mean by "poverty-focused," aid that is focused on the log of GDP per capital (Dollar and Levin 2004a, b, 6). So, the fact that the IDA's metric is "poverty-focused" cannot count as a *justification* for using (scaled) national income as a measure of poverty!

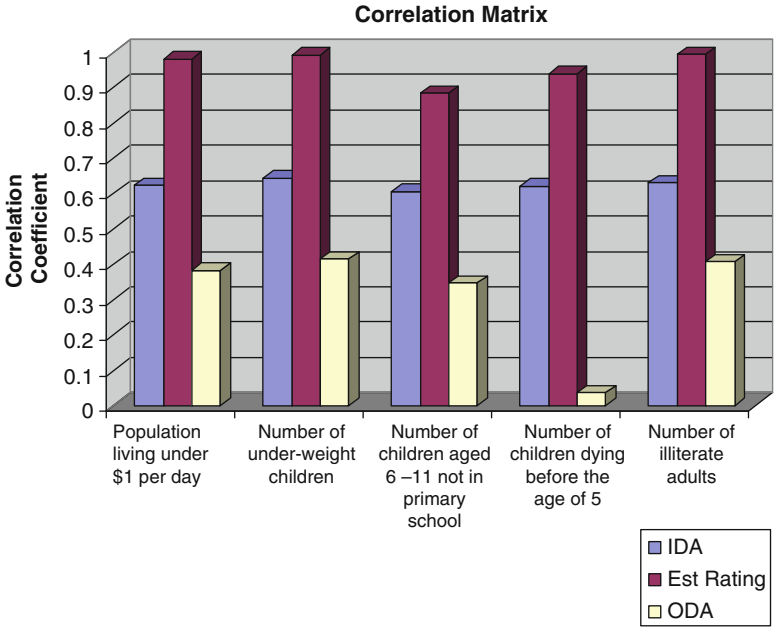
Perhaps the IDA could instead argue that its system is the *most* poverty focused on a better measure of poverty. Its allocation rule suggests giving aid in a way that is highly correlated with the amount of poverty in developing countries. In looking at a sample of 35 countries for which data was easily available, it is clear that estimated disbursements according to the IDA allocation rule would be highly correlated with poverty rates (as well as child mortality, malnutrition, lack of primary education, and adult illiteracy rates).[10]

Correlation matrix	Population living under $1 per day	Number of underweight children	Number of children aged 6–11 not in a primary school	Number of children dying before the age 5	Number of illiterate adults
Est. rating	0.980157	0.992005	0.884333	0.939063	0.993245

In fact, disbursements according to the allocation rule would be much more highly correlated with poverty (and related indicators like child malnutrition) than actual IDA allocations or official development assistance (ODA) in general.

[9] More interestingly, almost all selectivity falls out of the sample once this change is made, though bilateral aid seems to take policy into account (Dollar and Levin 2004a, b, 10).

[10] Author's calculations using the 2004 IDA disbursement formula and looking just at the subset of countries for which data was available from the following sources: (OECD 2010a b; Baluch 2004; Human Development Report 2010).



It is not clear, however, that the correlation between poverty (as well as related indicators) and disbursements according the IDA's allocation rule can justify the rule. Even if aid from the IDA is the most highly correlated with poverty, it may not be poverty focused *enough.*[11] Another way of giving aid may be more effective at reducing poverty. Taking into account the incentives aid creates, it may not be best to give aid in the way the IDA does. The next section will consider a few arguments along this line.

15.3 The Bank's Most Promising Argument

The IDA's most promising argument is that: "[I]ncreasing the poverty weight in the allocation among the poor countries would de facto reduce the weight put on the quality of policies and institutions. Management is of the view that this would lead to less effectiveness in fighting poverty" (IDA 2004a, 7). There are a few ways of understanding this claim.

One way of interpreting this is to view it as gesturing towards existing empirical evidence. The second way of understanding the claim that increasing the weight given to poorer countries in the formula will reduce aid's effectiveness in ameliorating

[11] Similarly, the fact that it only helps the poorest countries does not tell us whether or not it is sensitive enough to differences amongst these countries (Kanbur 2005).

poverty is as an appeal to the moral hazard argument. That is, if aid is allocated on the basis of poverty alone, aid creates incentives for rulers to keep their countries poor. The moral hazard argument suggests that aid should instead be allocated in other ways that will have good long-term effects, such as supporting good institutions. The next sub-section (a) considers the empirical evidence; the subsequent sub-section (b) considers the moral hazard argument.

(a) *The Empirical Evidence and Critique*

There is some reason to interpret the claim that increasing the weight given to poorer countries in the IDA's formula will reduce aid's effectiveness in ameliorating poverty as a gesture towards an existing body of empirical evidence. The IDA states:

> One research paper has estimated the allocation of aid that would have the maximum effect on poverty, under a certain set of assumptions. This 'poverty efficient' allocation actually rises with per capita GNI up to a level of about $800, because of the fore- mentioned increasing need for public investment and increasing ability to absorb aid. However, to implement this 'poverty efficient' allocation would require a complex formula. Still, it makes the useful point that the ability to absorb aid productively increases as GNI rises from an extremely low level. Beyond a certain level of per capita GNI, countries can turn to private markets and their own savings. The IDA approach roughly fits this pattern, with little distinction based on per capita GNI among the poorest countries, and then graduation to IBRD beyond a similar income level (currently $865) ((IDA 2004a, 7) citing (Collier and Dollar 2002)).[12]

However, it is not clear that the Bank should rely on this particular study To estimate their 'poverty efficient' allocation, Paul Collier and David Dollar assume that growth will reduce poverty by a certain amount and that there is a set budget for reducing poverty. Neither of these claims is well justified. It assumes, for instance, that the effect of aid is distributionally neutral. It also adopts an estimate for the poverty elasticity of growth given mean income based on just a few research papers (Collier and Dollar 2002, 17–18).

A more generous reading of the Bank's policy would be that it is not resting its case on one study but instead making a vague gesture towards a larger body of empirical evidence (Burnside and Dollar 2000, 2004; Dollar and Levin 2004a, b; Collier and Dollar 2002). The Collier and Dollar study cited by the Bank extends the Craig Burnside and Dollar results that received a lot of attention in development circles (Burnside and Dollar 2000, 2004). It may have been the basis for the IDA's statement that there is "broad consensus that among low-income countries, large-scale financial aid has more impact in an environment of sound institutions and policies" (IDA 2004a, 6). They suggest this is why the CPIA is "the dominant factor" in the formula (IDA 2004a, 6).

[12] The IDA also says the weight they give to need accords with donor preferences. It should become clear in what follows that, if this fact is not irrelevant, its link with something of moral significance requires defense. The IDA would have to argue, for instance, that if they changed the weighting they would do less good for the poor because donors would decrease the amount of aid they give.

Consider the empirical evidence that is supposed to support the Bank's argument. Perhaps the seminal article on the topic is "Aid, Policies, and Growth" (first put out as a working paper in 1997) by Burnside and Dollar. Their paper argues that aid works only in countries with "good policy" using a measure of policy that contains budget surplus, trade openness and inflation weighted by their correlation with growth rates (Burnside and Dollar 2000) and Collier and Dollar (2002). Burnside and Dollar (2004) extended this work using other measures of institutional quality including the CPIA index.[13] This research was also cited by the World Bank report *Assessing Aid* edited by Dollar and Prichett (1998). Moreover, Paul Collier and David Dollar have taken on leadership roles within the Bank's research department greatly influencing public opinion and probably economic policy (Easterly 2009).

Unfortunately, the Burnside and Dollar study has been roundly criticized and its successors suffer from many of the same problems (Lensink and White 1999; Dalgaard and Hansen 2000; Dalgaard et al. 2004).[14] Many researchers have had

[13] Since countries that maintain high enough growth rates tend to "graduate" from aid programs, it should not be surprising to find a negative correlation between aid and growth rates (Tarp 2006). It would be more interesting if aid to countries with good policies were correlated with growth, though it would be a bit difficult to interpret the significance of this result.

[14] Studies looking at the CPIA index are the most relevant since that is the index used in the IDA's formula for distributing aid. But there are many problems with this and the other measures of institutional quality researchers use. Perhaps studies showing that distributing aid to countries on the basis of CPIA ratings is an effective way to increase growth rates would provide reason to distribute aid in this way. Even so, they would not support the Bank's argument that institutional quality is the primary determinant of development. The problem is that the CPIA only measures investors' perceptions of institutional quality. Recall that the CPIA index is based on a questionnaire filled out by World Bank personnel. So domestic institutional quality just ends up being a way of talking about the opinions of foreign investors about what constitutes a good investment climate. In any case, the CPIA might be appropriate for arguing that investor's opinions are correlated with development. It is not clearly helpful for establishing that aid to countries with good institutional quality will be better for the poor. One could argue that World Bank personnel are good judges of institutional quality; that they are experts at measuring what matters for increasing growth and reducing poverty: a culture of trust, a reliable legal system, strong property rights etc. It is not clear, however, that foreign investors can reliably judge domestic institutional quality. There are both theoretical and empirical reasons to question this claim. World Bank personnel's judgments may be influenced by other features of the economic environment besides institutional quality. They may even have an ideological bias that encourages them to judge institutional quality well when, for instance, a country is abiding by the World Bank's proscriptions. Alternately, some argue that they give undue weight to certain institutional features (e.g. they may be unduly concerned about whether or not a country has embraced free market policies even if these do not ameliorate poverty). There is even some empirical evidence that the CPIA ratings may really be tracking growth rates rather than institutional quality (Dalgaard et al. 2004; Dalgaard et al. 2004, F210). In light of worries like these, researchers should provide the requisite empirical evidence to support the contention that the investors' judgments of institutional quality map on to anything other than potential growth rates. It may even be the case that countries grow because investors report positively on countries' prospects for growth (Rodrik 2004).There are, however, many more objective measures of components of institutional quality (e.g. researchers might use the Sachs-Warner index or similar measures to evaluate trade openness). This paper will return to questions about measurement below, but it will set aside any problems with the measures of institutional quality in the studies for now.

trouble replicating the results in Burnside and Dollar's study and its successors (Lensink and White 1999; Lu and Ram 2001). The results are at least quite fragile, they depend greatly on the particular theoretical assumptions (model specification) and data used (Lu and Ram 2001; Dalgaard and Hansen 2000). The measures of institutional quality used may well be endogenous and aid may not have a linear relationship to growth (though the studies suppose otherwise) (Dalgaard and Hansen 2000; Arndt et al. 2009). Some of the studies depend on a few crucial (country and year) observations (Easterly et al. 2003). Some suggest that good institutions are not a precondition for aid to work, though good institutions increase growth (Dalgaard and Hansen 2000). Some researchers argue that other features of countries besides their institutional quality may explain why aid works in some places but not others (Dalgaard et al. 2004) Some even find that good institutions may hinder aid's effectiveness (Dalgaard and Hansen 2000). These problems undermine the evidence that distributing aid to countries on the basis of CPIA ratings is an effective way to increase growth rates.

Both Burnside and Dollar (2004) and Dollar and Levin (2004a, b) try to defend the evidence in favor of aiding countries with good institutions. They point out that, "common to many of these criticisms is a change in specification, either in terms of estimation technique, or in terms of which variables are included in the regression that explains growth" (Dollar and Levin 2004a, b, 2; Burnside and Dollar 2004, 6). However, one of the major complaint about their studies was precisely that they use the wrong theoretical specification.

In relation to their data sources, Dollar and Levin concede that it was, for a long time, virtually impossible for other researchers to access their data. (What Dollar et al. does not mention is that this is because the Bank's research department, in which Dollar and Collier have both taken leadership positions, had not released it.) The best that most other researchers could do was to show that the evidence in favor of aiding countries with good institutions was not robust. Furthermore, even when researchers were eventually given access to the original data, they were unable to replicate the results (Dalgaard and Hansen 2000). So there is little reason to believe these studies' conclusions (Dollar and Levin 2004, 7).

An equally important critique, however, is that the main studies supporting Burnside and Dollar's results use GDP per capita as a measure of poverty, which means that they do not support the Bank's claim that it gives sufficient weight to *poverty*, as distinct from national income, in its metric. If the Bank wants to establish that it is helping poor people (or even poor countries) enough, these studies are of little use. At best there is a large gap between the studies' results and the Bank's justification for the weight it gives to the components of its index.[15]

[15] Furthermore, even if growth (especially amongst poor countries) is really the IDA's objective, perhaps it should reward countries directly for achieving this objective. If the IDA cannot defend this objective, perhaps it should follow others' recommendations to reward countries directly for promoting development of a more defensible sort (e.g. achieving the millennium development goals), directly "incorporating an assessment of development outcomes in performance-based aid allocation" (Kanbur 2005; Minson 2007, 5). Doing this would reduce any pressure generated by

Perhaps the Bank's best rationale for its funding metric is simply that good institutions are good for growth. After all, there is extensive evidence that this is so (Rodrik et al. 2002; Acemoglu et al. 2001).[16] The Bank might endorse a simple story about the causes of development – namely, that domestic institutional quality accounts for most, if not all, of the success in development.[17] Mathias Risse says, for instance, that the evidence suggests that:

> Growth and prosperity depend on the quality of institutions, such as stable property rights, rule of law, bureaucratic capacity, appropriate regulatory structures to curtail at least the worst forms of fraud, anti-competitive behavior, and graft, quality and independence of courts, but also cohesiveness of society, existence of trust and social cooperation, and thus overall quality of civil society.[18]

If the institutionalist thesis is correct, it may support the IDA's formula for distributing aid. If institutions are the primary determinant of development, there

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moral hazard arguments. For incentives would be more directly aligned with success. The IDA would probably object that these proposals "contain no model for how aid money would support development outcomes… Outcomes-based allocations seem to eschew a causal link between the aid resources and development outcome. Aid would thus lose its instrumentality in the development process. Moreover, without looking at policy, the sustainability of any outcome is unknown" (Minson 2007, 5). But, if the IDA has not "demonstrated a robust causal link between purported good policies and sustained development" maintaining the status quo does little better on this account (Minson 2007, 5).

[16] Again there are many measures of institutional quality in the literature. It seems almost undeniable that, on some definition, good institutions have an incredible impact on development. But, because almost everything can be fit under the label "institution" or "policy" researchers may not only be able to cherry-pick the data they want to demonstrate the results they desire, but they may repackage old results – e.g. about how trade openness influences development – and present them as new results. Further, there is little reason to think that there is a single plausible definition of 'institution' economists could use in the short term to establish that good institutions in general promote development. The existing definitions are often too general and broad and even if they are appropriately limited, there are probably too many kinds of institutions for the hypothesis that good institutions promote development to be testable in the short term. For an introduction to the literature see: ((North 1994; Glasser 2004; Greif 2006; Commons 1931) cited in (Davis, Forthcoming)). It is easy to see how the thesis is too broad when it can be used to provide a good deal of evidence for hypotheses that are key to almost diametrically opposed political perspectives – some argue that good institutions (that secure land tenure) increase growth ((De Soto 1989; Besley 1995; Alchian and Demsetz 1973) cited in (Davis, Forthcoming)). Others argue that good institutions that redistribute wealth increase growth ((Rodrik 2000) cited in (Davis, Forthcoming)). And so forth. (Davis, Forthcoming) makes this point clear in providing a nice over-view of the literature.

[17] One might worry that almost everything can be fit under the label "institution" or "policy." Because these terms are so vague and broad, there is no shared definition. Worse, because so many things might fit in these categories, one might worry that researchers can cherry-pick the data they want to demonstrate the results they desire. In any case, given the lack of convergence on a single definition of "institution" it is important to pay attention to the precise measures individual studies use.

[18] See (Risse 2005a). Risse does not distinguish clearly between the thesis that institutional quality is the primary determinant of development and the thesis that institutional quality is the sole determinant of development. He asserts both theses.

may be reason to ensure that countries have good institutions before giving them aid. Without these institutions, aid may not really impact development.[19]

There are several problems with this suggestion. First, the evidence that good institutions are good for poverty reduction is controversial (Rodrik 2004; Easterly et al. 2003). Even if it is correct, however, further evidence is necessary to establish that aiding countries with good institutions will thereby contribute to good institutions that ameliorate poverty. Some causes of institutional improvement may not contribute to poverty relief. Alternately, there are ample instances where aid catalyzes institutional corruption.[20] Risse says, for instance, that "the sources of wealth rest in [domestic] institutional quality… While foreigners can destroy institutions, they can often do little to help build them (Risse 2005b)."

The general form of argument – x reduces poverty so we should give to countries with x – is not a good one. Even if it were, there are many studies that show that other things besides good institutions contribute to poverty reduction.[21] In other

[19] Dani Rodrik, Arvind Subramanian, and Francesco Trebbi have tried to figure out how institutions impact growth by using instruments for institutional quality developed in Daron Acemoglu, Simon Johnson, and James Robinson's famous article "The Colonial Origins of Comparative Development: An Empirical Investigation" (Rodrik et al. 2002; Acemoglu et al. 2001). Acemoglu et al. assume that where the Europeans settled during colonial times they were likely to bring with them good institutions and they were likely to settle where they could survive. So they use settler mortality rates as an instrument for good institutions today (Rodrik et al., 2002). It seems, however, that more than a modicum of faith is necessary to accept arguments based on this instrument for institutional quality. Acemoglu et al.'s instrument might be good for colonialism (or successful colonialism) but it does not clearly capture any kind of institutional quality. It is notable that this instrument has been used for many kinds of 'institutional quality' that have little to do with the most plausible stories about what institutions might have persisted since colonial times and nothing to do with one another (e.g. settler mortality has been used as an instrument for strong legal systems and property rights protection). Settler mortality may even be a better instrument for geography than it is for institutions (especially since the fact that today many Westerners can survive in what were deadly environments in colonial times is probably due to their access to new anti-malarials). Note: this is not general skepticism about instrumentation. But instruments have to be chosen carefully to correspond to exactly what is at issue. Consider Rodrik's illustration of the distinction between an instrument and a causal factor (Rodrik 2004). He suggests that longitude can be used as an instrument for differences in property rights in West vs. East Germany. Most of those in the East (but not the West) were under communism, though longitude did not cause any resulting differences in incomes there. If we are trying to isolate causation, however, we have to instrument for the right thing. Other features of communism may explain the income differences between East and West Germany besides differences in property rights. So longitude is only an appropriate instrument for communism, not property rights regimes. For more recent papers on the institutionalist thesis see (Rajan and Subramanian 2007, 2008; Arndt et al. 2009).

[20] Aid may help countries with bad institutions improve their institutions and reduce poverty.

[21] Although I am skeptical of many of many of the relevant studies, many economists argue that free trade reduces poverty, for instance. For a critical review of this literature as well as the theoretical arguments supporting it see: (Hassoun 2008, 2009, 2011, 2011).

words, to achieve its goal of poverty reduction, the World Bank might do better to target aid in other ways.[22]

(b) The Moral Hazard Argument and Critique

The moral hazard argument suggests that increasing the weight given to poorer countries in the formula will reduce aid's effectiveness in ameliorating poverty. The Bank might suggest that if we give to countries that are poor, simply because they are poor, we create an incentive for their rulers to keep them poor so as to continue receiving aid. Corrupt rulers can extract more rents from aid by keeping their countries poor. A better strategy would be to give aid to poor countries that have good policies.

It is important to be clear here that the claim underling the moral hazard argument is not that if we aid on the basis of poverty alone, rulers *will* keep their countries poor. The claim is that if we aid on the basis of poverty alone, we create an *incentive* for rulers to keep their countries poor. An incentive, at least as most economists use the term, just provides a reason for action. An incentive is like a reward or penalty. Rewards or penalties may or may not be efficacious. Sometimes incentives do not work. Nevertheless, many incentives have motivational force. The version of the moral hazard argument above says that if we aid on the basis of poverty alone, we give rulers a reason to keep their countries poor so that they can get more aid. Instead, we should focus on the quality of their institutions.

There are different versions of the moral hazard argument that posit different mechanisms by which giving aid on the basis of poverty alone creates potentially counter-productive incentives. The IDA seems to embrace the following version of the moral hazard argument, for instance, when it says: "While it is natural to focus on how the allocation formula distributes aid across poor countries, it should be kept in mind that it also affects how poor countries are treated over time. The negative coefficient on per capita GNI is essentially a tax on growth" (IDA 2004a, 7).[23]

Nevertheless, this paper will consider the version of the moral hazard argument sketched above. For, the problem with the moral hazard argument is quite general – empirical evidence is necessary to support most claims about incentives. Further, the evidence necessary to support this version of the moral hazard argument is the woefully inadequate evidence examined in the previous section.

[22] Even if the institutionalist thesis is true, it is so vague as to be unhelpful. It is not clear what components of institutional quality as measured by the CPIA index, for instance, are contributing to aid's success (Rodrik 2004). Very different institutional systems can also receive high ratings on different indexes. Even a legal system based on private property is not necessary for high ratings (e.g. China seems to do pretty well on some ratings). Some commentators argue against having a single formula for aid disbursement at all - context matters, there is no one-sized fits all approach. Perhaps we should look for contingent correlations between local economic conditions and success (Rodrik 2004, 9). In any case, there should be a point to saying "institutions rule."

[23] This paper's criticism of the IDA's formula is not exhaustive. Some worry, for instance, that it is "not informed by any substantial consultation or input from the recipient countries, nor does the Bank justify its scores publicly" (Minson 2007, 4). Others argue that it is not sufficiently attentive to inter-country differences (Kanbur 2005).

Recall the version of the moral hazard argument at issue: If we give to countries that are poor, simply because they are poor, we create an incentive for their rulers to keep them poor because their corrupt rulers can extract more rents from aid. Instead, aid should be given to poor countries that have good policies.[24]

Consider an analogy that illustrates the problem with this argument – a variation of philosopher Peter Singer's famous pond case. Suppose that you see a small child is drowning in a pond and you can save the child by giving the child's mother 100 dollars. Even though it will cost you something to do so, if no one else can help the child and the child will otherwise drown, it is clear that you should save the child. Some have pointed out that if you save the child, you create incentives for mothers of small children to throw their children into ponds. For, a similar process might allow other mothers to get a hundred dollars from you to save their children. The proper reply to this kind of case is "so what!" That is a silly objection. There is no reason to think other mothers will throw their children in ponds for 100 dollars. Sometimes, we should (simply) aim to ameliorate poverty even if we create bad incentives in the process.

However, the moral hazard argument is not always silly. In some cases there may be reason to think many mothers will throw their children in ponds (or do other things to harm their children) if we create incentives for them to do so. After all, some parents probably do maim their children so as to make them better beggars. It is less clear that this is *because* people will help those who are maimed. Some mothers might maim their children only because they do not have a better means for helping their families survive.

In general, however, the claim that we should not create incentives for some to keep others in poverty requires defense. Consider an expansion of the (first part of the relevant version of) the moral hazard argument:

P1) If we give to countries that are poor, simply because they are poor, we create an incentive for their rulers to keep them poor. For, their (often bad) rulers can extract more rents from aid by keeping their countries poor.

P2) We should not create an incentive for rulers to keep their countries poor if we are concerned about poverty reduction.

C) We should not aid on the basis of poverty alone, we should instead give to poor countries that have good policies.

The complaint is that we need some reason to accept the second premise, for it is not always true. Bad rulers may not act on the incentive that aid creates for them to seek rents and perpetuate bad institutions. Giving to countries with good institutions may not decrease rent-seeking or spur poverty reduction. (Moreover, this paper will

[24] Some version of a moral hazard argument applies, any time we help poor people. For if we give the poor anything, they have an incentive to remain poor to get our assistance. Perhaps this is why some argue that "any performance-based allocation system, whether based on policies or results, will be inherently biased against low-performers or countries with exogenous constraints" (Minson 2007, 5).

suggest that the move from the second premise of the moral hazard argument to the conclusion – that we should take institutional quality into account – also requires defense.)

More generally, we may be wrong about any posited incentive effect. Other incentive effects may be present and counter the posited effect or the posited effect may fail to materialize. Consider an example from a different domain. Many people believe that decreasing what people are paid gives them an incentive to work less hard. Few seem to recognize, however, that decreasing what people are paid also gives them an incentive to work harder so as to make up for lost income. Additionally, if some people do not work for money – e.g. if they are sustenance farmers – then decreasing what they are paid may not influence their behavior at all.

Pointing to the existence of an incentive effect might give us reason to consider (empirically) whether or not the incentive will be efficacious, but then again it might not. Especially when we think the inquiry a waste of time because the incentive is *not* likely to be efficacious, there is little reason to alter our behavior to accommodate the incentive effect. The point here is that, though we may have reason to worry that giving aid on the basis of poverty alone will exacerbate poverty, the moral hazard argument does not always give us reason to worry. (It may be better to focus on addressing particular problems where we have reason to believe bad governments are, e.g., stealing aid from their people.)

There is another problem with many versions of the moral hazard argument. Even if aiding on the basis of poverty alone creates some efficacious incentives for poor rulers to keep their countries poor, we may still be required to aid in some circumstances. Suppose some countries will not escape poverty without aid and aid may do them very little good. Their leaders may keep them poor in order to receive more aid. Suppose, however, that there is no other way to send aid to that country. It may, for instance, be impossible to tell ex ante which countries will continue to support themselves after receiving aid and which will remain poor. Further, there may be very few countries that will remain poor and many that will escape poverty permanently. In this kind of case, it is not clearly acceptable on either evidentiary or moral grounds to stop giving aid. Aid may be required, notwithstanding that aid, in some circumstances, creates some efficacious incentives for some rulers to keep their countries poor.

Nevertheless, there may be something important underlying the moral hazard argument. Consider one revised version of this argument that avoids the problems outlined above. Giving on the basis of poverty alone creates an *efficacious* incentive for rulers to keep their countries poor. So, when we justifiably have some concern for how much poverty we alleviate, other criteria should enter into our decisions about how to aid.[25] This argument is much more promising than the original moral

[25] This may be so, for instance, if resources are so scarce that we are unable to eliminate poverty and do all of the other things that matter. This is not clearly the case in the actual world, however. For, (1) we give very little aid globally and (2) we know a lot about what makes aid work. In recent years, the IDA has given an average of US$14 billion a year (IDA 2009b). World GDP is US$ 69,697,642 million (World Bank, 2008). So, if we gave the average in recent years over all years, we would have collectively given only .0002% of our GDP in IDA aid. The US, the IDA's largest donor, has given about US$38 billion or 22% of IDA funds since its inception in 1960 (IDA 2009b).

hazard argument because it appeals only to *efficacious* incentive effects. Further, it does not rely on the controversial claim that we need never aid desperately poor countries when some will remain poor because of the incentives aid creates.

Even the revised version of the moral hazard argument gives nothing like the kind of justification necessary for the IDA's formula for distributing aid. For the *revised version* of the moral-hazard argument to be well-justified, the premise that aiding on the basis of poverty alone creates an efficacious incentive for rulers to keep their countries poor requires defense. (Though there may, of course, be other arguments that make use of something like moral hazard as well.)[26]

Finally, even if some of the negative incentives aid creates do drive behavior, it is still not clear what the right response should be. Even if giving aid to poor countries creates an efficacious incentive for their rulers to keep them poor, thus making it unclear whether poverty is really alleviated, it does not follow that a better alternative policy is to instead give aid only to those countries with good policies. It is possible that giving to countries with good institutional quality would be no better, or even worse, for the poor than giving on the basis of poverty alone. Rather *that* claim depends precisely on the evidence for the conclusion that it is best to aid to countries with good institutions criticized above.

15.4 Conclusion

This paper argued that the World Bank has failed to adequately justify its metric for distributing international aid to the poor. At best the moral hazard argument provides reason for empirical inquiry but it cannot, on its own, justify the IDA's aid allocation formula. The requisite empirical evidence is lacking. This is not to say

This is 3.08 billion a year on average (22% of 14 billion). US GDP was US$14,204,322 million in 2008 (World Bank, 2008). So, if the US gave in 2008, what it gives on average in a year, it would also have given .0002 % of its GDP to the IDA (IDA 2009b). Even considering that there are other sources of official development assistance (ODA) and other foreign aid, there is little reason to believe that we could not give more. Foreign aid given to multilateral organizations and developing countries was US$61.5 billion in 2002 ((OECD 2004, 14) cited in (Tarp 2006)). Still, few countries give even 0.7% of GDP in foreign aid (OECD 2008). On average, citizens in OECD-DAC countries gave US$68 in 2002 ((OECD, 2004) cited in (Tarp 2006, 14)). Furthermore, there is a lot of good evidence that some aid works. There are many experimental and quasi-experimental evaluations of health and education programs, for instance, that demonstrate their success (UNESCO 2006). There are also good examples of agricultural support, microfinance, school voucher, scholarship, and de-worming programs (Ashraf et al. 2006; Cassen 1986; Isbam et al. 1994; Kehler 2004; Duflo et al. 2007). Many of these programs have been successfully replicated and scaled up (Duflo et al. 2007; Zaman 1997; Morduch 1998; Pitt 1999; Center for Global Development 2005). Though it may not be easy to do so, it is clearly possible to create such programs.

[26] There may be other arguments for considering other factors besides development or poverty in aid allocation. We might be concerned, for instance, about how fast we can alleviate poverty. This paper will not explore other possibilities. See, however: (Chatterjee 2004, Jamieson 2005; Hassoun 2012).

the Bank's metric is unjustifiable. However, to the extent that the Bank remains committed to using aid primarily to relieve poverty, it must do more to justify its metric for aid allocation.

In arguing that the Bank has failed to justify its metric for distributing international aid to the poor, this paper illustrated how philosophers can contribute to a largely neglected area of study. Most work in the philosophy of economics looks at the foundations of game theory and welfare economics. Philosophers have paid very little attention to public and development economics.[27] There are many important policy arguments that desperately require analytic examination of the sort philosophers are well placed to offer.[28]

As one of the largest aid donors – that provides a model for many countries' and aid organizations' policies – the World Bank's aid metric is critical. That the World Bank has failed to adequately justify its metric for distributing international aid to the poor is deeply troubling, and this metric deserves intense scrutiny from economists and philosophers alike.

Appendix I

The IDA's Formula for Aid Allocation and the CPIA Index

Very roughly,[29] the IDA's Formula for Aid Allocation is this:

$$f\left(PR^{2.0},\ GNIPC^{-0.125}\right)$$

GNIPC stands for Gross National Product Per Capita. The IDA gives less weight to GNIPC as it rises so that each increment of income yields less aid (Kanbur 2005, 11).

PR stands for Performance Rating and the Country Policy and Institutional Assessment index (CPIA) index makes up 80% of the PR. The Annual Review of Portfolio Performance (ARPP), the Bank's rating of projects in a country, makes up the remaining 20%.[30] This sum is then scaled by a measure of countries' governance quality. This measure is taken from the six governance criteria in the CPIA and one in the ARPP (weighted equally, divided by 3.5[31] and raised to the power of 1.5).

[27] There are, of course, some exceptions. See, for instance: (Brock 2009; Wenar 2008; Author, With-held). For discussion of philosophical work in the public economics literature see, for instance: (Subramanian 2002).

[28] For examples, see: Ibid. More generally, I believe that many of the international institutions' arguments are like this one in relying essentially on inadequately articulated and defended moral principles as well as empirical evidence and greatly impacting many individuals' lives.

[29] The IDA's formula continues to evolve over time. See, for instance: (IDA 2007a, b).

[30] (Powell 2004).

[31] CPIA scores for each criteria are between 1(low) and 6 (high), 3.5 is the mid-point.

In effect, governance gets a lot of weight in the formula. There are also many exceptions.[32]

Although the exact formula changes over time, the IDA14 formula was:

Allocation Country i (3-year) = SDR3.3 million + Performance-Based Allocation i (PBA i)

where:

$$\text{PBA i} = \frac{(\text{IDA rating i})2 \times \text{Population i} \times (\text{GNI/cap i})^{-.125}}{\Sigma\, \text{i} = 1\text{-}81\ [(\text{IDA rating i})2 \times \text{Population i} \times (\text{GNI/cap i})^{-.125}]} \times \text{Envelope}$$

(i) IDA Rating Country i =(0.8 × CPIA i + 0.2 × ARPP i) × Govfact i
(ii) Governance Factor i = (average rating of 6 governance criteria i / 3.5)1.5
(iii) The Envelope = IDA 3-year envelope, after deduction of the otherwise determined blend allocations as well as the allocations to eligible post-conflict countries
(iv) The country allocation norm is subject to a maximum of $20 per capita per annum. (IDA 2004b)

The CPIA index is based on a questionnaire filled out by World Bank personnel. It contains 16 indicators in four equally weighted groups – structural policies, economic management, public management and institutions, and social inclusion/equity policies. CPIA scores for each criteria are between 1 (low) and 6 (high).

To come up with the ratings, evaluators rate a small number of countries in each region and provide narrative guidelines to country staff who then rate countries on each criterion. The scores are modified by the chief economists in the region. Sector experts review the new scores, and modifications are reviewed by the chief economists again. An arbitration panel resolves disputes. Below are the CPIA Index Rating Categories.

A. Economic management

1. Monetary and exchange rate policy
2. Fiscal policy
3. Debt policy

[32] Post conflict countries get some precedence for IDA assistance but this is not reflected in the formula itself. Since there is a cap on how much aid countries can receive, there is also a bias in favor of small countries not reflected in the formula. A few years ago the Bank reported that "sixty-two per cent of IDA 14 resources will be allocated using the formula; another 14 per cent go to the capped wealthier countries (India, Indonesia and Pakistan); 10 per cent go to post-conflict countries and 8 per cent go to 'special purposes' agreed during the replenishment process" (Brettonwoodsproject 2007). The fact that small countries get more than their proportionate share of assistance should probably be questioned, though this paper will not take on this task (Tarp 2006, 26).

B. Structural policies

4. Trade
5. Financial sector
6. Business environment

C. Policies for social inclusion

7. Gender
8. Equity of public resource use
9. Building human resources
10. Social protection and labour
11. Policies and institutions for environmental sustainability

D. Public sector management and institutions

12. Property rights and rule-based governance
13. Quality of budgetary and financial management
14. Efficiency and equity of revenue mobilisation
15. Quality of public administration
16. Transparency, accountability and corruption in the public sector Powell 2004

Here is some further information about CPIA "governance criteria" which receive a good deal of weight in WB analysis of countries' institutional quality:

1. Property rights and rules-based governance: a good score requires, inter alia, that property rights be protected in "practice as well as theory"; laws and regulations affecting businesses are "transparent and uniformly applied"; obtaining licences is a small share of the cost of doing business; police force functions well and is accountable.
2. Quality of budgetary and financial management: assesses extent to which budget is linked to policy priorities in national strategies; effective financial management; timely and accurate fiscal reporting; and clear and balanced assignment of expenditures and revenues to each level of government.
3. Efficiency of revenue mobilisation: a good score requires that "bulk of revenues" be generated from "low-distortion" taxes such as sales/VAT, property, etc.; low import tariffs; tax base is free from arbitrary exemptions.
4. Quality of public administration: assesses "policy coordination and responsiveness, service delivery and operational efficiency, merit and ethics, and pay adequacy and management of the wage bill".
5. Transparency, accountability and corruption: a good score requires accountability reinforced by audits, inspections and adverse publicity for performance failures; an independent, impartial judiciary; conflict of interest and ethics rules for public servants Powell 2004.

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Citations

Acemoglu, Daron, Simon Johnson, and James A. Robinson. 2001. "The colonial origins of comparative development: An empirical investigation. *The American Economic Review* 91(5): 1369–1401.

African Development Bank (ADB). 2009. Country policy and institutional assessment 2009 Questionnaire. Available at: http://www.afdb.org/en/documents/project-operations/country-performance-assessment-cpa/country-policy-and-institutional-assessment-cpia/.

Alchian and Demsetz 1973 and Commons, (1931). Human Development Report 2010 can be changed to Human Devel.opment Report 2009 which is cited. Let's update the world bank 2008 figure for world GDP to $69,971,507,754,454 2011 and cite this page http://data.worldbank.org/ We can cut the UN, 2006, BRAC 2005, UNDP 2009b, Deaton 2009, and Oxfam, 2005 references. The Dollar and Pritchett reference is here: http://www.longwoods.com/content/17601

Arndt, Channing, Sam, Jones, and Finn, Tarp. 2009. Aid and growth. UNU-WIDER Discussion Paper No. 2009/05. UNU-WIDER: Helsinki.

Ashraf, Nava, Dean Karlan, and Wesley Yin. 2006. Female empowerment: impact of a commitment savings product in the Philippines. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952784. Working Paper No. 106, Center for Global Development.

Brettonwoodsproject. 2007. Available at: <http://www.brettonwoodsproject.org/art-552223>.

Brock, Gillian. 2009. *Global justice: A cosmopolitan account*. Oxford: Oxford University Press.

Burnside, Craig, and David Dollar. 2000. Aid, policies, and growth. *American Economic Review* 90(4): 847–868.

Burnside, Craig and David Dollar. 2004. Aid, policies, and growth: Revisiting the evidence. World Bank, Policy Research Working Paper No. 2834

Cassen, Robert. 1986. *Does aid work?* Oxford: Clarendon.

Collier, Paul, and David Dollar. 2002. Aid allocation and poverty reduction. *European Economic Review* 46(8): 1475–1500.

Crocker, David. 2008. *The ethics of global development: Agency, capability, and deliberative democracy*. Cambridge: Cambridge University Press.

Dalgaard, Carl-Johan and Henrik Hansen. 2000. On aid, growth, and good policies. CREDIT Research Paper No. 00/17. Available at: http://www.nottingham.ac.uk/economics/credit/research/papers/cp.00.17.pdf Subsequently published as: Carl-Johan Dalgaard and Henrik Hansen. 2001. On aid, growth and good policies, *The Journal of Development Studies*, Vol. 37, No. 6: 17–41.

Dalgaard, Carl-Johan, Henrik Hansen, and Finn Tarp. 2004. On the empirics of foreign aid and growth. *The Economic Journal* 114: F191–F216.

Dollar, David and Victoria Levin. 2004. The changing quality of and quantity of aid, 1984–2002. Paper under preparation for the spring 2004 meeting of the Development Committee.

Dollar, David and Victoria Levin. 2004. Increasing selectivity of foreign aid, 1984–2002, policy research working paper series 3299, The World Bank: Washington D.C.

Duflo, Esther, Rachel Glennerster, and Michael Kremer. 2007. Using randomization in development economics research: a toolkit. Working Paper 6059, Center for Economic Policy Research.

Easterly, William. 2009. How the millennium development goals are unfair to Africa. *World Development* 37(1): 26–35.

Easterly, William , Ross Levine, and David Roodman. 2003. New data, new doubts: revisiting 'aid, policies, and growth. Working paper number 26. Center for Global Development: Washington D.C.

Hassoun, N. 2008. Free Trade, Poverty, and the Environment. *Public Affairs Quarterly*, 22(4): 353–380.

Hassoun, N. 2009. Free Trade and the Environment. *Environmental Ethics*, 31: 51–66.

Hassoun, N. 2011. Making Free Trade Fair. Thom Brooks ed. *New Waves in Moral Philosophy*.

Hassoun, N. 2011. Free Trade, Poverty, and Inequality. *The Journal of Moral Philosophy*.
Hassoun N. 2012. *Globalization and global justice: shrinking distance, expanding obligations.* Cambridge: Cambridge University Press.
Independent Evaluation Group. 2009. The World Bank's Country Policy Institutional Assessment Index: An evaluation. Available at: http://siteresources.worldbank.org/EXTCPIA/Resources/cpia_full.pdf
International Development Association (IDA). 2004a. IDA 14: IDA's performance based allocation." Available at: <http://siteresources.worldbank.org/IDA/Resources/PBAIDA14.pdf>.
International Development Association (IDA). 2004b. Summary of the performance-based allocation system for IDA14: Annex 1. Available at: http://siteresources.worldbank.org/IDA/Resources/ANNEX1CPIA.pdf
International Development Association (IDA). 2007a. IDA 15: IDA's performance based allocation. Available at http://siteresources.worldbank.org/IDA/Resources/Seminar%20PDFs/73449-1172525976405/3492866-1172527584498/PBAformula.pdf.
International Development Association (IDA). 2007b. IDA 15: Selectivity and performance. Available at: http://siteresources.worldbank.org/IDA/Resources/Seminar%20PDFs/73449-1172525976405/3492866-1172527584498/PBAEffectiveness.pdf
International Development Association (IDA). 2009a. What is IDA? Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.
International Development Association (IDA). 2009b. Cumulative IDA subscriptions and contributions as of June 30, 2008. Available at: <http://siteresources.worldbank.org/IDA/Resources/CUMIDA2008.pdf>.
International Development Association (IDA). 2010. What is IDA? Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.
Isbam, Jonathan, Deepa Narayan, and Lant Pritchett. 1994. Does participation improve project performance: project performance in the rural water supply projects establishing causality, Policy Research Working Paper 1357, World Bank.
Kehler, Al. 2004. Humanitarian exchange. Humanitarian Policy Group No. 27, Overseas Development Institute.
Lensink, Robert and Howard White. 1999. Are there negative returns to aid? Available at: <som.Eldoc.ub.rug.nl/FILES/reports/1995–1999/theme/1999/99E60/99e60.pdf>.
Lu, Shuans and Rati Ram. 2001. Foreign aid, government policies, and economic growth: Further evidence from cross-country panel data for 1970–1993. *International Economics* 54(1): 15–29.
Minson, C. Adam. 2007. Dialogue on the CPIA and aid allocation. April 5, 2007. The Initiative for Policy Dialogue. New York: Columbia University.
Nussbaum, Martha. 2000. *Women and human development: The capabilities approach*. Cambridge: Cambridge University Press.
O'Neill, Onora. 1986. *Faces of hunger: An essay on poverty justice and development*. London: Allen and Unwin.
OECD. 2008. "Development aid at its highest level ever in 2008." Available at: <http://www.oecd.org/document/35/0,3343,en_2649_34487_42458595_1_1_1_1,00.html>.
OECD. 2010. Aid statistics. Available at: <http://www.oecd.org/department/0,3355,en_2649_34447_1_1_1_1_1,00.html>.
Organization for Economic Cooperation and Development (OECD). 2010. These data are an excerpt from DAC2a ODA Disbursement. Accessed 8/11/2010 with the http://www.oecd.org/Query Wizard for International Development Statistics Available at: http://stats.oecd.org/qwids/.
Pogge, Thomas. 2005. Severe poverty as a human rights violation. In *Freedom from poverty as a human right: Who owes what to the very poor?* ed. Thomas Pogge. Oxford: Oxford University Press.
Powell, Jeff. 2004. The world bank policy scorecard: The new conditionality? Bretton Woods project. World Bank: Washington, D.C

Rajan, R., and A. Subramanian. 2007. Does aid affect governance? *AEA Papers and Proceedings* 97(2): 322–27.

Rajan, R., and A. Subramanian. 2008. Aid and growth: What does the cross country evidence really show? *The Review of Economics and Statistics* 90(4): 643–65.

Risse, Mathias. 2005a. How does the global order harm the poor? *Philosophy and Public Affairs* 33: 9–10.

Risse, Mathias. 2005b. Do we owe the poor assistance or rectification? *Ethics & International Affairs* 19: 9–18.

Rodrik, Dani, Arvind Subramanian, and Francesco Trebbi. 2002. Institutions rule: The primacy of institutions over geography and integration in economic development. Harvard University Working Paper. Available at: <http://www.hks.harvard.edu/fs/drodrik/institutionsrule,%205.0.pdf>.

Rodrik, Dani. 2004. Getting institutions right. Harvard University Working Paper. Available at: <http://www.hks.harvard.edu/fs/drodrik/ifo-institutions%20article%20_April%202004_.pdf>.

Sen, Amartya. 1999. *Development as freedom*. New York: Anchor Books.

Subramanian, Subbu. 2002. Counting the Poor: An elementary difficulty in the measurement of poverty. *Economics and Philosophy* 18: 277–285.

Singer, Peter. 1972. Famine affluence and morality. *Philosophy and Public Affairs* 1: 229–243.

Tarp, Finn. 2006. Aid and development. *Swedish Economic Policy Review* 13: 9–61.

Wenar, Leif. 2008. Property rights and the resource curse. *Philosophy & Public Affairs* 36(1): 2–32.

World Bank. 2010. "About US" Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>.

Zaman, Hassan. 1997. Poverty and BRAC's microcredit programme: exploring some linkages, Working Paper Number 18, BRAC. Center for Global Development. 2005. Making it pay to stay in school, Center for Global Development Notes. United Nations Educational Scientific and Cultural Organization. 2006. Education in India, UNESCO Institute for Statistics.

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H.M. Stacy and W.-C. Lee (eds.), *Economic Justice: Philosophical and Legal Perspectives*, AMINTAPHIL: The Philosophical Foundations of Law and Justice 4,
DOI 10.1007/978-94-007-4905-4,

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