

Theories of Economic Justice

Justice as Fairness

John Rawls

James Bryant Conant University
Professor Emeritus, Harvard University

The Main Idea of the Theory of Justice

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to

further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements: they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.

Thus we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principles of justice.

In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation

John Rawls, "Justice as Fairness." Excerpted from *A Theory of Justice* by John Rawls (Cambridge, MA: Belknap Press of Harvard University Press, 1971), pp. 11–15, 60–64, 100–104, 136–137, 140–143, 144–145. © 1971 by the President and Fellows of Harvard College. Reprinted with permission of the publisher.

Business Ethics: Readings and Cases in Corporate Morality, Fifth Edition.

Edited by W. Michael Hoffman, Robert E. Frederick, and Mark S. Schwartz.

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characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons, that is, as rational beings with their own ends and capable, I shall assume, of a sense of justice. The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair. This explains the propriety of the name "justice as fairness": it conveys the idea that the principles of justice are agreed to in an initial situation that is fair. The name does not mean that the concepts of justice and fairness are the same, any more than the phrase "poetry as metaphor" means that the concepts of poetry and metaphor are the same.

Justice as fairness begins, as I have said, with one of the most general of all choices which persons might make together, namely, with the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. Then, having chosen a conception of justice, we can suppose that they are to choose a constitution and a legislature to enact laws, and so on, all in accordance with the principles of justice initially agreed upon. Our social situation is just if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which defines it.

It may be observed that once the principles of justice are thought of as arising from an original agreement in a situation of equality, it is an open question whether the principle of utility would be

acknowledged. Offhand it hardly seems likely that persons who view themselves as equals, entitled to press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others. Since each desires to protect his interests, his capacity to advance his conception of the good, no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction. In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of its permanent effects on his own basic rights and interests. Thus it seems that the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage. It appears to be inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society. Or, at any rate, so I shall argue.

I shall maintain instead that the persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society. These principles rule out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate. It may be expedient but it is not just that some should have less in order that others may prosper. But there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved. The intuitive idea is that since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated. Yet this can be expected only if reasonable terms are proposed. The two principles mentioned seem to be a fair agreement on the basis of which those better endowed, or more fortunate in their social position, neither of which we can be said to deserve, could expect the willing cooperation of others when some workable scheme is a

necessary condition of the welfare of all.¹ Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in quest for political and economic advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.

The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.² The veil of ignorance enables us to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves. Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. The aim is to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the stand point of justice. For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle. To represent the desired restrictions one imagines a situation in which everyone is deprived of this sort of information. One excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices.

It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social

status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong. These broader restrictions on knowledge are appropriate in part because questions of social justice arise between generations as well as within them, for example, the question of the appropriate rate of capital saving and of the conservation of natural resources and the environment of nature. There is also, theoretically anyway, the question of a reasonable genetic policy. In these cases too, in order to carry through the idea of the original position, the parties must not know the contingencies that set them in opposition. They must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to. As far as possible, then, the only particular facts which the parties know is that their society is subject to the circumstances of justice and whatever this implies.

The restrictions on particular information in the original position are of fundamental importance. The veil of ignorance makes possible a unanimous choice of a particular conception of justice. Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated. Even if theoretically a solution were to exist, we would not, at present anyway, be able to determine it.

The rationality of the parties

I have assumed throughout that the persons in the original position are rational. In choosing between principles each tries as best he can to advance his interests. But I have also assumed that the parties do not know their conception of the good. This means that while they know that they have some rational plan of life, they do not know the details of this plan, the particular ends and interests which it is calculated

to promote. How, then, can they decide which conceptions of justice are most to their advantage? Or must we suppose that they are reduced to mere guessing? To meet this difficulty, I postulate that they would prefer more primary social goods rather than less (i.e., rights and liberties, powers and opportunities, income and wealth and self-respect). Of course, it may turn out, once the veil of ignorance is removed, that some of them for religious or other reasons may not, in fact, want more of these goods. But from the standpoint of the original position, it is rational for the parties to suppose that they do want a larger share, since in any case they are not compelled to accept more if they do not wish to nor does a person suffer from a greater liberty. Thus even though the parties are deprived of information about their particular ends, they have enough knowledge to rank the alternatives. They know that in general they must try to protect their liberties, widen their opportunities, and enlarge their means for promoting their aims whatever these are. Guided by the theory of the good and the general facts of moral psychology, their deliberations are no longer guesswork. They can make a rational decision in the ordinary sense.

The assumption of mutually disinterested rationality, then, comes to this: the persons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be. The parties do not seek to confer benefits or to impose injuries on one another; they are not moved by affection or rancor. Nor do they try to gain relative to each other; they are not envious or vain. Put in terms of a game, we might say: they strive for as high an absolute score as possible. They do not wish a high or a low score for their opponents, nor do they seek to maximize or minimize the difference between their successes and those of others. The idea of a game does not really apply, since the parties are not concerned to win but to get as many points as possible judged by their own system of ends.

I shall now state in a provisional form the two principles of justice that I believe would be chosen in the original position. The first statement of the two principles reads as follows.

- First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
- Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

By way of general comment, these principles primarily apply, as I have said, to the basic structure of society. They are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. As their formulation suggests, these principles presuppose that the social structure can be divided into two more or less distinct parts, the first principle applying to the one, the second to the other. They distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities. The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights.

The second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command. While the distribution of wealth and income need not be equal, it must be to everyone's advantage, and at the same time, positions of authority and offices of command must be accessible to all. One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits.

These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social

and economic advantages. The distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.

It is clear that these principles are rather specific in their content, and their acceptance rests on certain assumptions that I must eventually try to explain and justify. For the present, it should be observed that the two principles (and this holds for all formulations) are a special case of a more general conception of justice that can be expressed as follows.

All social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.

Injustice, then, is simply inequalities that are not to the benefit of all. Of course, this conception is extremely vague and requires interpretation.

As a first step, suppose that the basic structure of society distributes certain primary goods, that is, things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth. These are the social primary goods. Other primary goods such as health and vigor, intelligence and imagination, are natural goods; although their possession is influenced by the basic structure, they are not so directly under its control. Imagine, then, a hypothetical initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and organizational powers would make everyone better off than in this hypothetical starting situation, then they accord with the general conception.

Now it is possible, at least theoretically, that by giving up some of their fundamental liberties men are sufficiently compensated by the resulting social and economic gains. The general conception of justice imposes no restrictions on what sort of inequalities are permissible; it only requires that everyone's position be improved.

The second principle insists that each person benefit from permissible inequalities in the basic structure. This means that it must be reasonable for each relevant representative man defined by this structure, when he views it as a going concern, to prefer his prospects with the inequality to his prospects without it. One is not allowed to justify differences in income or organizational powers on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another. Much less can infringements of liberty be counterbalanced in this way. Applied to the basic structure, the principle of utility would have us maximize the sum of expectations of representative men (weighted by the number of persons they represent, on the classical view); and this would permit us to compensate for the losses of some by the gains of others. Instead, the two principles require that everyone benefit from economic and social inequalities.

The tendency to equality

I wish to conclude this discussion of the two principles by explaining the sense in which they express an egalitarian conception of justice. Also I should like to forestall the objection to the principle of fair opportunity that it leads to a callous meritocratic society. In order to prepare the way for doing this, I note several aspects of the conception of justice that I have set out.

First we may observe that the difference principle gives some weight to the considerations singled out by the principle of redress. This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for.³ Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality. In pursuit of this principle greater resources might be spent on the education of the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school.

Now the principle of redress has not to my knowledge been proposed as the sole criterion of justice, as the single aim of the social order. It is plausible as most

such principles are only as a *prima facie* principle, one that is to be weighed in the balance with others. For example, we are to weigh it against the principle to improve the average standard of life, or to advance the common good. But whatever other principles we hold, the claims of redress are to be taken into account. It is thought to represent one of the elements in our conception of justice. Now the difference principle is not of course the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race. But the difference principle would allocate resources in education, say, so as to improve the long-term expectation of the least favored. If this end is attained by giving more attention to the better endowed, it is permissible; otherwise not. And in making this decision, the value of education should not be assessed only in terms of economic efficiency and social welfare. Equally if not more important is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his own worth.

Thus although the difference principle is not the same as that of redress, it does achieve some of the intent of the latter principle. It transforms the aims of the basic structure so that the total scheme of institutions no longer emphasizes social efficiency and technocratic values. We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one

gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.

The natural distribution of talents is neither just nor unjust; nor is it unjust that men are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts. Aristocratic and caste societies are unjust because they make these contingencies the ascriptive basis for belonging to more or less enclosed and privileged social classes. The basic structure of these societies incorporates the arbitrariness found in nature. But there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action. In justice as fairness men agree to share one another's fate. In designing institutions they undertake to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit. The two principles are a fair way of meeting the arbitrariness of fortune; and while no doubt imperfect in other ways, the institutions which satisfy these principles are just.

There is a natural inclination to object that those better situated deserve their greater advantages whether or not they are to the benefit of others. At this point it is necessary to be clear about the notion of desert. It is perfectly true that given a just system of cooperation as a scheme of public rules and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces that it will reward are entitled to their advantages. In this sense the more fortunate have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them. But this sense of desert presupposes the existence of the cooperative scheme; it is irrelevant to the question whether in the first place the scheme is to be designed in accordance with the difference principle or some other criterion.

Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible. Because he is more worthy in this sense, he

deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social

circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases. Thus the more advantaged representative man cannot say that he deserves and therefore has a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others. There is no basis for his making this claim. From the standpoint of common sense, then, the difference principle appears to be acceptable both to the more advantaged and to the less advantaged individual.

Notes

- 1 For the formulation of this intuitive idea I am indebted to Allan Gibbard.
- 2 The veil of ignorance is so natural a condition that something like it must have occurred to many. The closest express statement of it known to me is found in J. C. Harsanyi, "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking," *Journal of Political Economy*, vol. 61 (1953). Harsanyi uses it to develop a utilitarian theory.
- 3 See Herbert Spiegelberg, "A Defense of Human Equality," *Philosophical Review*, vol. 53 (1944), pp. 101, 113–123; and D. D. Raphael, "Justice and Liberty," *Proceedings of the Aristotelian Society*, vol. 51 (1950–1951), p. 187f.

Distributive Justice

Robert Nozick

Pellegrino University Professor,
Harvard University

The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights. Yet many persons have put forth reasons purporting to justify a more extensive state. It is impossible within the compass of this book to examine all the reasons that have been put forth. Therefore, I shall focus upon those generally acknowledged to be most weighty and influential, to see precisely wherein they fail. In this paper we consider the claim that a more

extensive state is justified, because necessary (or the best instrument) to achieve distributive justice.

The term "distributive justice" is not a neutral one. Hearing the term "distribution," most people presume that some thing or mechanism uses some principle or criterion to give out a supply of things. Into this process of distributing shares some error may have crept. So it is an open question, at least, whether redistribution should take place; whether we should do again what has already been done once, though poorly. However, we are not in the position of children who have been given portions of pie by someone who now makes last minute adjustments to rectify careless cutting. There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out. What each person gets, he gets from others who give to him in exchange for something, or as a gift. In a free society, diverse persons control different resources, and new holdings arise out of the voluntary exchanges and actions of persons. There is no more a distributing or distribution of shares than there is a distributing of mates in a society in which persons choose whom they shall marry. The total result is the product of

Robert Nozick, "Distributive Justice." Excerpted from *Anarchy, State and Utopia* by Robert Nozick (New York: Basic Books, Inc., 1974). © 1974 Robert Nozick. Reprinted with permission of Perseus Books Group.

many individual decisions which the different individuals involved are entitled to make.

The Entitlement Theory

The subject of justice in holdings consists of three major topics. The first is the *original acquisition of holdings*, the appropriation of unheld things. This includes the issues of how unheld things may come to be held, the process, or processes, by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on. We shall refer to the complicated truth about this topic, which we shall not formulate here, as the principle of justice in acquisition. The second topic concerns the *transfer of holdings* from one person to another. By what processes may a person transfer holdings to another? How may a person acquire a holding from another who holds it? Under this topic come general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society. The complicated truth about this subject (with placeholders for conventional details) we shall call the principle of justice in transfer. (And we shall suppose it also includes principles governing how a person may divest himself of a holding, passing it into an unheld state.)

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.

The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution.

A distribution is just if it arises from another just distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate first “moves” are specified by the principle of justice in acquisition. Whatever arises from a just situation by just steps is itself just. The means of change specified by the principle of justice is transfer preserve justice. As correct rules of inference are truth-preserving, and any conclusion deduced via repeated application of such rules from only true premises is itself true, so the means of transition from one situation to another specified by the principle of justice in transfer are justice-preserving, and any situation actually arising from repeated transitions in accordance with the principle from a just situation is itself just. The parallel between justice-preserving transformations and truth-preserving transformations illuminates where it fails as well as where it holds. That a conclusion could have been deduced by truth-preserving means from premises that are true suffices to show its truth. That from a just situation a situation *could* have arisen via justice-preserving means does *not* suffice to show its justice. The fact that a thief’s victims voluntarily *could* have presented him with gifts does not entitle the thief to his ill-gotten gains. Justice in holdings is historical; it depends upon what actually has happened. We shall return to this point later.

Not all actual situations are generated in accordance with the two principles of justice in holdings: the principle of justice in acquisition and the principle of justice in transfer. Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges. None of these are permissible modes of transition from one situation to another. And some persons acquire holdings by means not sanctioned by the principle of justice in acquisition. The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings. If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices? What obligations do the

performers of injustice have toward those whose position is worse than it would have been had the injustice not been done? Or, that it would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but, for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? I do not know of a thorough or theoretically sophisticated treatment of such issues. Idealizing greatly, let us suppose theoretical investigation will produce a principle of rectification. This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.

The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice (as specified by the first two principles). If each person's holdings are just, then the total set (distribution) of holdings is just. To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here. (Locke's principle of justice in acquisition is discussed below.)

Historical Principles and End-Result Principles

The general outlines of the entitlement theory illuminate the nature and defects of other conceptions of distributive justice. The entitlement theory of justice in distribution is *historical*; whether a distribution is just depends upon how it came about. In contrast, *current time-slice principles* of justice hold that the justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural* principle(s) of just distribution. A utilitarian who judges between any two distributions by seeing which has the greater sum of utility and, if the sums tie, applies some fixed equality criterion to choose the more equal distribution, would hold a current time-slice principle of justice. As would someone who had a fixed schedule of trade-offs between the sum of happiness and equality. According to a current time-slice principle, all that needs to be looked at, in judging the justice of a distribution, is who ends up with what; in comparing any two distributions one need look only at the matrix presenting the distributions. No further information need be fed into a principle of justice. It is a consequence of such principles of justice that any two structurally identical distributions are equally just. (Two distributions are structurally identical if they present the same profile, but perhaps have different persons occupying the particular slots. My having ten and your having five, and my having five and your having ten are structurally identical distributions.) Welfare economics is the theory of current time-slice principles of justice. The subject is conceived as operating on matrices representing only current information about distribution. This, as well as some of the usual conditions (for example, the choice of distribution is invariant under relabeling of columns), guarantees that welfare economics will be a current time-slice theory, with all of its inadequacies.

Most persons do not accept current time-slice principles as constituting the whole story about distributive shares. They think it relevant in assessing the justice of a situation to consider not only the distribution it embodies, but also how that distribution came about. If some persons are in prison for murder or war crimes, we do not say that to assess the justice of the

distribution in the society we must look only at what this person has, and that person has, and that person has, . . . at the current time. We think it relevant to ask whether someone did something so that he *deserved* to be punished, deserved to have a lower share.

Patterning

The entitlement principles of justice in holdings that we have sketched are historical principles of justice. To better understand their precise character, we shall distinguish them from another subclass of the historical principles. Consider, as an example, the principle of distribution according to moral merit. This principle requires that total distributive shares vary directly with moral merit; no person should have a greater share than anyone whose moral merit is greater. Or consider the principle that results by substituting “usefulness to society” for “moral merit” in the previous principle. Or instead of “distribute according to moral merit,” or “distribute according to usefulness to society,” we might consider “distribute according to the weighted sum of moral merit, usefulness to society, and need,” with the weights of the different dimensions equal. Let us call a principle of distribution *patterened* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions. And let us say a distribution is patterned if it accords with some patterned principle. The principle of distribution in accordance with moral merit is a patterned historical principle, which specifies a patterned distribution. “Distribute according to I.Q.” is a patterned principle that looks to information not contained in distributional matrices. It is not historical, however, in that it does not look to any past actions creating differential entitlements to evaluate a distribution; it requires only distributional matrices whose columns are labeled by I.Q. scores. The distribution in a society, however, may be composed of such simple patterned distributions, without itself being simply patterned. Different sectors may operate different patterns, or some combination of patterns may operate in different proportions across a society. A distribution composed in this manner, from a small number of patterned distributions, we also shall term “patterned.” And we extend the use of

“pattern” to include the overall designs put forth by combinations of end-state principles.

Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the foregoing, and so on. The principle of entitlement we have sketched is *not* patterned. There is no one natural dimension or weighted sum or combination of a small number of natural dimensions that yields the distributions generated in accordance with the principle of entitlement. The set of holdings that results when some persons receive their marginal products, others win at gambling, others receive a share of their mate’s income, others receive gifts from foundations, others receive interest on loans, others receive gifts from admirers, others receive returns on investment, others make for themselves much of what they have, others find things, and so on, will not be patterned.

To think that the task of a theory of distributive justice is to fill in the blank in “to each according to his ___” is to be predisposed to search for a pattern; and the separate treatment of “from each according to his ___” treats production and distribution as two separate and independent issues. On an entitlement view these are *not* two separate questions. Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these cooperating factors), is entitled to it. The situation is *not* one of something’s getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them. From the point of view of the historical entitlement conception of justice in holdings, those who start afresh to complete “to each according to his ___” treat objects as if they appeared from nowhere, out of nothing. A complete theory of justice might cover this limited case as well; perhaps here is a use for the usual conceptions of distributive justice.

So entrenched are maxims of the usual form that perhaps we should present the entitlement conception as a competitor. Ignoring acquisition and rectification, we might say:

From each according to what he chooses to do, to each according to what he makes for himself (perhaps with

the contracted aid of others) and what others choose to do for him and choose to give him of what they've been given previously (under this maxim) and haven't yet expended or transferred.

This, the discerning reader will have noticed, has its defects as a slogan. So as a summary and great simplification (and not as a maxim with any independent meaning) we have:

From each as they choose, to each as they are chosen.

How Liberty Upsets Patterns

It is not clear how those holding alternative conceptions of distributive justice can reject the entitlement conception of justice in holdings. For suppose a distribution favored by one of these non-entitlement conceptions is realized. Let us suppose it is your favorite one and let us call this distribution D_1 ; perhaps everyone has an equal share, perhaps shares vary in accordance with some dimension you treasure. Now suppose that Wilt Chamberlain is greatly in demand by basketball teams, being a great gate attraction. (Also suppose contracts run only for a year, with players being free agents.) He signs the following sort of contract with a team: In each home game, twenty-five cents from the price of each ticket of admission goes to him. (We ignore the question of whether he is "gouging" the owners, letting them look out for themselves.) The season starts, and people cheerfully attend his team's games; they buy their tickets, each time dropping a separate twenty-five cents of their admission price into a special box with Chamberlain's name on it. They are excited about seeing him play; it is worth the total admission price to them. Let us suppose that in one season one million persons attend his home games, and Wilt Chamberlain winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this new distribution D_2 unjust? If so, why? There is *no* question about whether each of the people was entitled to the control over the resources they held in D_1 because that was the distribution (your favorite) that (for the purposes of argument) we assumed was acceptable. Each of these persons *chose* to

give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of *Dissent* magazine, or of *Monthly Review*. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. If D_1 was a just distribution, and people voluntarily moved from it to D_2 , transferring parts of their shares they were given under D_1 (what was it for if not to do something with?), isn't D_2 also just? If the people were entitled to dispose of the resources to which they were entitled (under D_1), didn't this include their being entitled to give it to, or exchange it with, Wilt Chamberlain? Can anyone else complain on grounds of justice? Each other person already has his legitimate share under D_1 . Under D_1 , there is nothing that anyone has that anyone else has a claim of justice against. After someone transfers something to Wilt Chamberlain, third parties *still* have their legitimate shares; *their* shares are not changed. By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer? To cut off objections irrelevant here, we might imagine the exchanges occurring in a socialist society, after hours. After playing whatever basketball he does in his daily work, or doing whatever other daily work he does, Wilt Chamberlain decides to put in *overtime* to earn additional money. (First his work quota is set; he works time over that.) Or imagine it is a skilled juggler people like to see, who puts on shows after hours.

The general point illustrated by the Wilt Chamberlain example and the example of the entrepreneur in a socialist society is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives. Any favored pattern would be transformed into one unfavored by the principle, by people choosing to act in various ways; for example, by people exchanging goods and services with other people, or giving things to other people, things the transferrers are entitled to under the favored distributional pattern. To maintain a pattern one must either continually interfere to stop people from transferring resources as they wish to, or continually (or

periodically) interfere to take from some persons resources that others for some reason chose to transfer to them.

Patterned principles of distributive justice necessitate *redistributive* activities. The likelihood is small that any actual freely-arrived-at set of holdings fit a given pattern; and the likelihood is nil that it will continue to fit the pattern as people exchange and give. From the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of people's rights. (An exception is those takings that fall under the principle of the rectification of injustices.) From other points of view, also, it is serious.

Taxation of earnings from labor is on a par with forced labor. Some persons find this claim obviously true: taking the earnings of n hours labor is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose. Others find the claim absurd. But even these, if they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy. But a system that takes five hours' wages in taxes does not seem to them like one that forces someone to work five hours, since it offers the person forced a wider range of choice in activities than does taxation in kind with the particular labor specified.

Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big *social pot* so that it's not clear what's coming from where and what's going where, patterned principles of distributive justice involve appropriating the actions of other persons. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it.

Locke's Theory of Acquisition

We must introduce an additional bit of complexity into the structure of the entitlement theory. This is best approached by considering Locke's attempt to specify a principle of justice in acquisition. Locke views property rights in an unowned object as originating through someone's mixing his labor with it. This gives rise to many questions. What are the boundaries of what labor is mixed with? If a private astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot? Which plot does an act bring under ownership?

Locke's proviso that there be "enough and as good left in common for others" is meant to ensure that the situation of others is not worsened. I assume that any adequate theory of justice in acquisition will contain a proviso similar to Locke's. A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened. It is important to specify *this* particular mode of worsening the situation of others, for the proviso does not encompass other modes. It does not include the worsening due to more limited opportunities to appropriate, and it does not include how I "worsen" a seller's position if I appropriate materials to make some of what he is selling, and then enter into competition with him. Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate these others, his appropriation will violate the proviso of the principle of justice in acquisition and will be an illegitimate one. A theory of appropriation incorporating this Lockean proviso will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.

A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. Some reflection of the proviso about appropriation constrains later actions. If my appropriating all of a certain

substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.) This proviso (almost?) never will come into effect; the more someone acquires of a scarce substance which others want, the higher the price of the rest will go, and the more difficult it will become for him to acquire it all. But still, we can imagine, at least, that something like this occurs: someone makes simultaneous secret bids to the separate owners of a substance, each of whom sells assuming he can easily purchase more from the other owners; or some natural catastrophe destroys all of the supply of something except that in one person's possession. The total supply could not be permissibly appropriated by one person at the beginning. His later acquisition of it all does not show that the original appropriation violated the proviso. Rather, it is the combination of the original appropriation *plus* all the later transfers and actions that violates the Lockean proviso.

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Similarly, an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso.

Notice that the theory does not say that owners do not have these rights, but that the rights are overridden to avoid some catastrophe. (Overridden rights do not disappear; they leave a trace of a sort absent in the cases under discussion.) There is no such external (and *ad hoc*?) overriding. Considerations internal to the theory of property itself, to its theory of acquisition and appropriation, provide the means for handling such cases.

I believe that the free operation of a market system will not actually run afoul of the Lockean proviso. If this is correct, the proviso will not provide a significant opportunity for future state action.

Distributive Justice and Utilitarianism

J. J. C. Smart

Center for Information Science Research,
The Australian National University

Introduction

In this paper I shall not be concerned with the defense of utilitarianism against other types of ethical theory. Indeed I hold that questions of ultimate ethical principle are not susceptible of proof, though something can be done to render them more acceptable by presenting them in a clear light and by clearing up certain confusions which (for some people) may get in the way of their acceptance. Ultimately the utilitarian appeals to the sentiment of generalized benevolence, and speaks to others who feel this sentiment too and for whom it is an over-riding feeling.¹ (This does not mean that he will always act from this over-riding

J. J. C. Smart, "Distributive Justice and Utilitarianism." Excerpted from "Distributive Justice and Utilitarianism," published in *Justice and Economic Distribution*, ed. John Arthur and William H. Shaw (Englewood Cliffs, NJ: Prentice Hall, 1978). © J. J. C. Smart. Reprinted with permission.

feeling. There can be backsliding and action may result from more particular feelings, just as an egoist may go against his own interests, and may regret this.) I shall be concerned here merely to investigate certain consequences of utilitarianism, as they relate to questions of distributive justice. The type of utilitarianism with which I am concerned is act utilitarianism.

The Place of Justice in Utilitarian Theory

The concept of justice as a fundamental ethical concept is really quite foreign to utilitarianism. A utilitarian would compromise his utilitarianism if he allowed principles of justice which might conflict with the maximization of happiness (or more generally of goodness, should he be an “ideal” utilitarian). He is concerned with the maximization of happiness² and not with the distribution of it. Nevertheless he may well deduce from his ethical principle that certain ways of distributing the means to happiness (e.g., money, food, housing) are more conducive to the general good than are others. He will be interested in justice in so far as it is a political or legal or quasi-legal concept. He will consider whether the legal institutions and customary sanctions which operate in particular societies are more or less conducive to the utilitarian end than are other possible institutions and customs. Even if the society consisted entirely of utilitarians (and of course no actual societies have thus consisted) it might still be important to have legal and customary sanctions relating to distribution of goods, because utilitarians might be tempted to backslide and favour non-optimistic distributions, perhaps because of bias in their own favour. They might be helped to act in a more nearly utilitarian way because of the presence of these sanctions.

As a utilitarian, therefore, I do not allow the concept of justice as a fundamental moral concept, but I am nevertheless interested in justice in a subordinate way, as a means to the utilitarian end. Thus even though I hold that it does not matter in what way happiness is distributed among different persons, provided that the total amount of happiness is maximized, I do of course hold that it can be of vital importance that the means to happiness should be distributed in some ways and

not in others. Suppose that I have the choice of two alternative actions as follows: I can either give \$500 to each of two needy men, Smith and Campbell, or else give \$1000 to Smith and nothing to Campbell. It is of course likely to produce the greatest happiness if I divide the money equally. For this reason utilitarianism can often emerge as a theory with egalitarian consequences. If it does so this is because of the empirical situation, and not because of any moral commitment to egalitarianism as such. Consider, for example, another empirical situation in which the \$500 was replaced by a half-dose of a life saving drug, in which case the utilitarian would advocate giving two half-doses to Smith or Campbell and none to the other. Indeed if Smith and Campbell each possessed a half-dose it would be right to take one of the half-doses and give it to the other. (I am assuming that a whole dose would preserve life and that a half-dose would not. I am also assuming a simplified situation: in some possible situations, especially in a society of nonutilitarians, the wide social ramifications of taking a half-dose from Smith and giving it to Campbell might conceivably outweigh the good results of saving Campbell's life.) However, it is probable that in most situations the equal distribution of the means to happiness will be the right utilitarian action, even though the utilitarian has no ultimate moral commitment to egalitarianism. If a utilitarian is given the choice of two actions, one of which will give 2 units of happiness to Smith and 2 to Campbell, and the other of which will give 1 unit of happiness to Smith and 9 to Campbell, he will choose the latter course.³ It may also be that I have the choice between two alternative actions, one of which gives -1 unit of happiness to Smith and +9 units to Campbell, and the other of which gives +2 to Smith and +2 to Campbell. As a utilitarian I will choose the former course, and here I will be in conflict with John Rawls' theory, whose maximin principle would rule out making Smith worse off.

Utilitarianism and Rawls' Theory

Rawls deduces his ethical principles from the contract which would be made by a group of rational egoists in an 'original position' in which they thought behind a 'veil of ignorance,' so that they would not know who

they were or even what generation they belonged to.⁴ Reasoning behind this veil of ignorance, they would apply the maximin principle. John Harsanyi earlier used the notion of a contract in such a position of ignorance, but used not the maximin principle but the principle of maximizing expected utility.⁵ Harsanyi's method leads to a form of rule utilitarianism. I see no great merit in this roundabout approach to ethics *via* a contrary to fact supposition, which involves the tricky notion of a social contract and which thus appears already to presuppose a moral position. The approach seems also too Hobbesian: it is anthropologically incorrect to suppose that we are all originally little egoists. I prefer to base ethics on a principle of generalized benevolence, to which some of those with whom I discuss ethics may immediately respond. Possibly it might show something interesting about our common moral notions if it could be proved that they follow from what would be contracted by rational egoists in an 'original position,' but as a utilitarian I am more concerned to advocate a normative theory which might replace our common moral notions than I am to explain these notions. Though some form of utilitarianism might be deducible (as by Harsanyi) from a contract or original position theory, I do not think that it either ought to be or need be defended in this sort of way.

Be that as it may, it is clear that utilitarian views about distribution of happiness do differ from Rawls' view. I have made a distinction between justice as a moral concept and justice as a legal or quasi-legal concept. The utilitarian has no room for the former, but he can have strong views about the latter, though *what* these views are will depend on empirical considerations. Thus whether he will prefer a political theory which advocates a completely socialist state, or whether he will prefer one which advocates a minimal state (as Robert Nozick's book does⁶), or whether again he will advocate something between the two, is something which depends on the facts of economics, sociology, and so on. As someone not expert in these fields I have no desire to dogmatize on these empirical matters. (My own private non-expert opinion is that probably neither extreme leads to maximization of happiness, though I have a liking for rather more socialism than exists in Australia or U.S.A. at present.) As a utilitarian my approach to political theory has to

be tentative and empirical. Not believing in moral rights as such I can not deduce theories about the best political arrangements by making deductions (as Nozick does) from propositions which purport to be about such basic rights.

Rawls deduces two principles of justice.⁷ The first of these is that 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others,' and the second one is that 'social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.' Though a utilitarian could (on empirical grounds) be very much in sympathy with both of these principles, he could not accept them as universal rules. Suppose that a society which had no danger of nuclear war could be achieved only by reducing the liberty of one percent of the world's population. Might it not be right to bring about such a state of affairs if it were in one's power? Indeed might it not be right greatly to reduce the liberty of 100% of the world's population if such a desirable outcome could be achieved? Perhaps the present generation would be pretty miserable and would hanker for their lost liberties. However we must also think about the countless future generations which might exist and be happy provided that mankind can avoid exterminating itself, and we must also think of all the pain, misery and genetic damage which would be brought about by nuclear war even if this did not lead to the total extermination of mankind.

Suppose that this loss of freedom prevented a war so devastating that the whole process of evolution on this planet would come to an end. At the cost of the loss of freedom, instead of the war and the end of evolution there might occur an evolutionary process which was not only long lived but also beneficial: in millions of years there might be creatures descended from *Homo sapiens* which had vastly increased talents and capacity for happiness. At least such considerations show that Rawls' first principle is far from obvious to the utilitarian, though in certain mundane contexts he might accede to it as a useful approximation. Indeed I do not believe that restriction of liberty, in our present society, could have beneficial results in helping to prevent nuclear war, though a case could be made for certain restrictions on the liberty of all present members of

society so as to enable the government to prevent nuclear blackmail by gangs of terrorists.

Perhaps in the past considerable restrictions on the personal liberties of a large proportion of citizens may have been justifiable on utilitarian grounds. In view of the glories of Athens and its contributions to civilization it is possible that the Athenian slave society was justifiable. In one part of his paper, 'Nature and Soundness of the Contract and Coherence Arguments',⁸ David Lyons has judiciously discussed the question of whether in certain circumstances a utilitarian would condone slavery. He says that it would be unlikely that a utilitarian could condone slavery as it has existed in modern times. However, he considers the possibility that less objectionable forms of slavery or near slavery have existed. The less objectionable these may have been, the more likely it is that utilitarianism would have condoned them. Lyons remarks that our judgments about the relative advantages of different societies must be very tentative because we do not know enough about human history to say what were the social alternatives at any juncture.⁹

Similar reflections naturally occur in connection with Rawls' second principle. Oligarchic societies, such as that of eighteenth century Britain, may well have been in fact better governed than they would have been if posts of responsibility had been available to all. Certainly to resolve this question we should have to go deeply into empirical investigations of the historical facts. (To prevent misunderstanding, I do think that in our present society utilitarianism would imply adherence to Rawls' second principle as a general rule.)

A utilitarian is concerned with maximizing total happiness (or goodness, if he is an ideal utilitarian). Rawls largely concerns himself with certain 'primary goods,' as he calls them. These include 'rights and liberties, powers and opportunities, income and wealth.'¹⁰ A utilitarian would regard these as mere means to the ultimate good. Nevertheless if he is proposing new laws or changes to social institutions the utilitarian will have to concern himself in practice with the distribution of these 'primary goods' (as Bentham did).¹¹ But if as an approximation we neglect this distinction, which may be justifiable to the extent that there is a correlation between happiness and the level of these 'primary goods,' we may say that according to Rawls

an action is right only if it is to the benefit of the least advantaged person. A utilitarian will hold that a redistribution of the means to happiness is right if it maximizes the general happiness, even though some persons, even the least advantaged ones, are made worse off. A position which is intermediate between the utilitarian position and Rawls' position would be one which held that one ought to maximize some sort of trade-off between total happiness and distribution of happiness. Such a position would imply that sometimes we should redistribute in such a way as to make some persons, even the least advantaged ones, worse off, but this would happen less often than it would according to the classical utilitarian theory.

Utilitarianism and Nozick's Theory

General adherence to Robert Nozick's theory (in his *Anarchy, State and Utopia*)¹² would be compatible with the existence of very great inequality indeed. This is because the whole theory is based quite explicitly on the notion of *rights*: in the very first sentence of the preface of his book we read 'Individuals have rights. . .'. The utilitarian would demur here. A utilitarian legislator might tax the rich in order to give aid to the poor, but a Nozickian legislator would not do so. A utilitarian legislator might impose a heavy tax on inherited wealth, whereas Nozick would allow the relatively fortunate to become even more fortunate, provided that they did not infringe the *rights* of the less fortunate. The utilitarian legislator would hope to increase the total happiness by equalizing things a bit. How far he should go in this direction would depend on empirical considerations. He would not want to equalize things too much if this led to too much weakening of the incentive to work, for example. Of course according to Nozick's system there would be no reason why members of society should not set up a utilitarian Utopia, and voluntarily equalize their wealth, and also give wealth to poorer communities outside. However, it is questionable whether such isolated Utopias could survive in a modern environment, but if they did survive, the conformity of the behaviour of their members to utilitarian theory, rather than the conformity to Nozick's theory, would be what would commend their societies to me.

Summary

In this article I have explained that the notion of justice is not a fundamental notion in utilitarianism, but that utilitarians will characteristically have certain views about such things as the distribution of wealth, savings for the benefit of future generations and for the third world countries and other practical matters.

Utilitarianism differs from John Rawls' theory in that it is ready to contemplate some sacrifice to certain individuals (or classes of individuals) for the sake of the greater good of all, and in particular may allow certain limitations of personal freedom which would be ruled out by Rawls' theory. *In practice*, however, the general tendency of utilitarianism may well be towards an egalitarian form of society.

Notes

- 1 In hoping that utilitarianism can be rendered acceptable to some people by presenting it in a clear light, I do not deny the possibility of the reverse happening. Thus I confess to a bit of a pull the other way when I consider Nozick's example of an 'experience machine.' See Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1975), pp. 42–45, though I am at least partially reassured by Peter Singer's remarks towards the end of his review of Nozick, *New York Review of Books*, March 6, 1975. Nozick's example of an experience machine is more worrying than the more familiar one of a pleasure inducing machine, because it seems to apply to ideal as well as to hedonistic utilitarianism.
- 2 In this paper I shall assume a hedonistic utilitarianism, though most of what I have to say will be applicable to ideal utilitarianism too.
- 3 There are of course difficult problems about the assignment of cardinal utilities to states of mind, but for the purposes of this paper I am assuming that we can intelligibly talk, as utilitarians do, about units of happiness.
- 4 John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).
- 5 John C. Harsanyi, 'Cardinal Utility in Welfare Economics and the Theory of Risk-Taking,' *Journal of Political Economy*, 61 (1953), 434–435, and 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility,' *ibid.*, 63 (1955), 309–321. Harsanyi has discussed Rawls' use of the maximin principle and has defended the principle of maximizing expected utility instead, in a paper 'Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory,' *The American Political Science Review*, 69 (1975), 594–606. These articles have been reprinted in John C. Harsanyi, *Essays on Ethics, Social Behavior, and Scientific Explanation* (Dordrecht, Holland: D. Reidel, 1976).
- 6 Robert Nozick, *Anarchy, State and Utopia*. (See note 1 above.)
- 7 Rawls, *A Theory of Justice*, p. 60.
- 8 In Norman Daniels (ed.), *Reading Rawls* (Oxford: Blackwell, 1975), pp. 141–167. See pp. 148–149.
- 9 Lyons, *op. cit.*, p. 149, near top.
- 10 Rawls, *op. cit.*, p. 62.
- 11 On this point see Brian Barry, *The Liberal Theory of Justice* (London: Oxford University Press, 1973), p. 55.
- 12 See note 1.

The "Invisible Hand"

Jan Narveson

Professor of Philosophy,
University of Waterloo

Jan Narveson, "The 'Invisible Hand,'" *Journal of Business Ethics*, 46(3), 2003, pp. 201–212. Reprinted with permission of Springer.

Why should we be enthusiastic about the market? The most famous argument supporting its social usefulness is the "Invisible Hand" idea, found in a single paragraph in Adam Smith's *Wealth of Nations*. Such arguments propose that desirable social outcomes will be promoted by people who are not acting intentionally to promote what they would describe as "social outcomes" at all. Reflection suggests that the argument, despite its one-liner status in Smith, is not quite so simple. To fill in such an argument, we need, I take it, to specify or explain 5 things:

1. the proposed outcome that is claimed to be desirable,
2. the assumed motivations of those whose actions are held to promote them in this way;
3. the institutional conditions necessary for this to take place;
4. the mechanism or feature of these nonintentional processes by which the promotion of these ends is made likely; and finally,
5. why people should care whether it is brought about or not.¹

At the outset, let me explain that the moral correctness of the principles on which the market is founded is not derived from the invisible hand. But the claim that it is the most desirable general social arrangement for economic affairs is not quite the same thing as the claim that the morality of the market is sound on basic moral grounds. The Invisible Hand argument offers frosting on what is already a cake. But I think it a good argument, and the frosting is a very rich affair.

Here is my sketch of how this works. In very brief:

1. The proposed outcome is that people do better.
2. The motivation imputed to the actors is simple self-interest, primarily.
3. The institutional conditions required are whatever it takes to enable people to rely on continued ownership of property and income got by free exchange with willing others.
4. The primary mechanism is what are now called Positive Externalities.
5. People should care because they stand to gain – individually, as well as collectively, and to gain almost no matter what their particular interests are.

The rest of this essay will flesh out these claims.

1. The Desired Outcome

The “desired social outcome” is that people are better off. The more people who are better off, and the better off they are, the better.

My apologies if this sounds trite. But then, if it does strike people as trite, that presumably is because

everyone regards it as obvious. We would then have the highly desirable feature that we are agreed about the fundamental aim of all this, and if we differ, it is regarding how to bring it about. But two important notes have to be made here.

First, and essential: the criteria for better-offness, on the view assumed here, are set by *them* – by the very people whose benefit is in question, *not* by the theorist. People have a range of values, of preferences, which can be more or less fulfilled. The object in question is that they be more rather than less fulfilled. The object, in short, is the best life for everyone, so far as each one is concerned.

It is easy to invoke extra criteria here. If you look at society from the perspective of some special religious or idealistic viewpoint, of course, arguments of the kind discussed here may be of little avail. The free market will not impose your favorite religion, or way of life, on everyone, and if you regard that as an objection to it, then it will be an irrefutable one. Of course, the upholders of the innumerable different views with which you disagree will not regard your option as the best one, or even as a good one – and then what? When you bear in mind the multiplicity of people we find in society, and try to produce an analysis that takes each of *them* into account, the rationale of using the liberal criterion is fairly obvious.

Second: We do need to ask, “best” relative to what? This, being ambiguous, calls for two answers. First, it could be better compared to *the status quo for each person*. Second, it could be better than *any alternatives*. Both are being claimed here.

But a third idea is definitely *not* fundamentally relevant: *better than others are doing*. It is, of course, logically impossible for everyone to do better than everyone else.

A much thornier related issue will be thought to be this: suppose P_1 makes one subset of people better off relative to the status quo, P_0 , whereas P_2 renders a different subset better off, so that some who are better off in P_1 are worse off than they would be in P_2 , and vice versa. What are we to say about this?

Here I provide an answer that will bother some people and not others: namely, that questions of this kind, by and large, do not, so far as social philosophy is concerned, matter. What does matter is that none are made better off by making others worse off, *than*

they were in the status quo – not worse off *than the others*, of course, but worse off *than they were before*.

The people whom this will “bother,” as I put it, are many and probably include most readers of this journal. The specific and intended implication of the above is that we are not to make someone better off by compelling someone else to help make him so. Helpfulness to others is a major virtue. Indeed, we should agree with Hume that benevolence is at the top of the list of virtues. But it is no longer a virtue when it is compelled, and compulsion is precisely what such interventions as state welfare systems substitute for benevolence. The person who professes such concern for the poor that she is all for compelling the rest to “contribute” to their betterment speaks from both sides of her mouth. And of course she will have great difficulty, should she address the matter, in explaining why it is only her fellow poor Americans or Canadians or Xians who are to be helped in this way, rather than the billions of far needier persons in other parts of the world. She will have even greater difficulty explaining how it is that compulsion for this purpose is morally legitimate in the first place. Most people object to theft, even though it too has the structure of compelling some people (the victims) to contribute to the welfare of some others (the thieves). Few actually try to explain this disparity between what they think about the behavior of their fellow men as privately acting people, and what they think about the behavior of governments which appear to do exactly the same thing. They seem to think it a fundamental moral postulate that we are to exercise compulsion over an arbitrarily selected group of people (fellow nationals of the same state) in order to provide certain goods for another arbitrarily selected group of persons (needy fellow residents of the same state). These “fundamental postulates,” we may well suspect, are a refuge of the dialectically bereft, and, in the process, a cloak to cover aspirations to power over one’s fellows.

In the previous paragraph, to be sure, I go out on a limb, and no doubt unnecessarily. For one can, and we in practice do, combine – if uneasily – a partially free enterprise system with a “safety net” of publicly supported welfare services. Probably few readers object to the mixed system we actually have, even if none of them can produce much of a justification for it. So let

us suppose that we have this safety net, at a fairly low level, with free enterprise prevailing above it. The virtues of the Invisible Hand will still be very much in evidence, and that is what is being argued for here. And probably not too many readers will even complain about the market’s indifference to “distribution” once you get above the “safety level.”

For various reasons, only some of which are developed below, I am quite willing to regard Gross Domestic Product *per capita*, with some qualifications, as a reasonably good measure of the general good we are interested in here, and I presume that most readers would accept this, on reflection – for there isn’t much else that we have to go by, at least at present. GDP is by no means perfect, however, partly for reasons that will be mentioned below. It is merely an available and fairly decent measure of what we are looking for.

One serious shortcoming of GDP, however, needs mention right away: it doesn’t tell us about the incomes of recipients of charity and other voluntary but noncommercial transfers. The income from which the charitable person makes the transfer is included, as it should be; but what he does with it may well not get registered as the income of the someone else who benefits, as it would when there is actual exchange of money for services or goods. One critic complains, “GDP only functions for those with something to exchange.”² But that is true only of the measuring device, not of the thing measured. Gross Domestic Product is a measure of production, as the name implies; but it is not a direct measure of distribution, in the sense of tracking what happens to the products in question. As a major relevant example: until at least the late 20th century, *most* personal income went to expenditures on persons other than the earner. Husbands, in particular, spent most of their money on their families. A wife not receiving income outside the home is not regarded as having an “income,” and yet, she typically commanded an array of goods and services for self and family. In most cases a quite substantial one, and usually more than half her husband’s reported income. Nowadays, when most women are employed outside as well as inside the home, the joint incomes of the parents go considerably, if not mostly, to their children, whose “incomes” in this respect are in turn not measured by GDP. Not measured by it, indeed: but it happens all the same,

and all the time – exemplifying, in fact, one of the respects in which the Invisible Hand is at work. Likewise the recipients of the immense amount of charitable and other noncommercial expenditure in a modern economy (notably the U.S., which is by far the most generous country in terms of personal charitable giving). The effect of this, of course, is to make the actual income in terms of command of goods and services of the people in a free market society very much more equal than it may appear if we confine ourselves to income-earners only. There is no easy way to keep track of all that in a measure such as GDP, but to ignore it would be to distort reality. It is *not* true that the only people who *receive* in a free market society are people who *earn* what they get (and in the case of “housewives”, as they used to be called, they also earn it, but it goes unrecorded as personal income.)

2. Motivations

What is assumed about motivations? A fundamental virtue of the market is that the answer to this question is – very little! People are assumed merely to be interested in various goals, personal or otherwise: which is virtually to say, that they have interests – which in turn is basically just to recognize that they are people. It is presumed – and there is overwhelming empirical evidence for this, if one supposes it to be a matter of “evidence” – that typical and prominent among those goals are ones that do *not* include broad-scale social ideals. Rather, they include things like a better house for oneself & one’s family, vacations, nice furniture, trips to the opera, the odd bottle of scotch, as well as support of churches, charities, and clubs – things like that. To say that they are interested in promoting their personal “wealth” is fair enough, though it is by no means necessary that this motive be either the *exclusive* motive or even the *predominant* motive of everybody or even anybody. All that is required is that an interest in expanding one’s real income be quite strong in by far the majority of normal people. What we assume most people are motivated by, in short, is, as the saying goes, that it is better to be healthy, happy, and rich than sick, miserable, and poor. Other things being equal, the richer the better – and other things are, very often, close enough to “equal” to do.

Is the pursuit of those goals *constrained* in some way? Of course it is. In market relations, it is constrained by the property and personal rights of others: each person’s pursuits are to be constrained against pursuing them *by* imposing costs, losses, harms to other persons. Thus, the Lockean version of the Law of Nature is operative: nobody is allowed to better himself by making others worse off than they would be absent the intervention. Note, however, two important points.

First: such pursuit is *not* constrained by any strictly *distributional* requirements, in particular. There is no insistence that the pattern of benefits issuing from any particular exchange show any particular configuration – equality with some reference group, for instance – so long as each party to it is acting under no misinformation supplied by the other as regards the activities and conditions under which the agreement is made. In a way, that is what is most distinctive about the market, and likely what most who object to it object to.

Second: note too – a matter of enormous importance – that we are not, of course, to be protected against “loss of market share” or loss of benefits that others have no duty to give us in the first place. If you stand to lose a job, you are protected only insofar as your contract protects you. Society doesn’t owe you a living, nor does your employer’s competition. And your employer owes you only what is specified in the employment agreement. Each, in general, must make his or her own way; none is to make it by theft or extortion or coercion of others.

If this seems a downside of the market, consider the alternative: a stagnant economy in which some few are fixed in high places and others in low, with no way to go forward. The free market, if genuinely free, doesn’t protect those who do badly, but on the other hand, by that very fact, it creates opportunities. The person who doesn’t make it at job x is likely to find another situation, y, and in the longer run it will be a better one than he had before.

Third: this motivational restriction is not taken to be a part of human nature. If it were, this whole question would look very different. The market constraint, to respect the persons and properties of others, is not a necessary part of the actors’ basic motivations themselves: it is not assumed that people are just naturally

born with these constraints operative. How people come to be constrained in these ways is an important question, and I take it be obvious that moral training by parents and peers has a great deal to do with it. However, in discussing how the market works in principle, what we are talking about is what would happen *if* the rule, and the only basic rule, of economic activity is that they are thus constrained, and not how they come to be so. Nor is it assumed that everyone is in fact always perfectly respectful of these rights of others – obviously they are not. We need not make any particular assumptions about which extra sources of reinforcement of such constraints would be most effective, or necessary. (And this will be discussed in the next section, on institutional conditions.) The point is only that to have a market situation rather than some other sort, we must have individuals in possession of various goods and services that can be transferred to others at will, and their possession must be secure enough so that individuals can deal with each other today regarding what they will do tomorrow and the next. Strictly speaking, we can only *trade* what we *have*, and when instead we steal, or cheat, or murder in order to get it, we no longer have a market, but rather a situation of something like war. The market, *as such*, is a peaceful institution, based on mutual recognition of rights over the goods and services the exchange of which is its purpose.

Many will have doubts about this, claiming that “it’s a jungle out there!” But the jungle consists of competitors, trying to make an even better offer to potential customers, with wares competitive to the ones that you are selling, and motivating you to respond by making your own better yet. The morality of the market does not, of course, allow dealing with the competition by shooting them, or by cheating. It allows only that you make a better pitch to the consumer, offering better goods or services or at a lower price.

There is, however – as Adam Smith was well aware even in his day, and we are even more so now – very much a question of you or your competitors resorting to the device of making the other guys’ activities *illegal*. See your local congressman or MP for details about government subsidies, restrictions, regulations, taxes, and other “benefits” designed to reduce the “threat” of the “jungle” – and thereby to reduce or eliminate the benefits of the free market. But again, this is the antithesis of the market, not its instantiation.

3. Institutional Conditions

As to the question of what “institutional conditions” are necessary, the short answer is – conceivably *none*. But that does depend on what you count: as an “institution,” and even more on what you mean by “necessary.” If it is government institutions that the questioner has in mind, then the point is that they are at least not *logically* necessary to the market. What is necessary, in any practical sense, is that the rules recognizing each others’ rightful possessions be adopted by the participants, and this in turn most likely will require that they be reinforced by the familiar methods of moral training and social reinforcement. Specifically, what is needed is the constraint mentioned above: people are to respect others’ persons and property. No force may be employed against others merely to enhance one’s own ends; it may be employed only in defense of persons and legitimately acquired property – that is, of the things people have acquired by finding, making, or being voluntarily given them by someone else, or, most essentially so far as the market is concerned, by trading with others on agreed terms. That, in brief, is the Morality of the Market. (Perhaps it is just Morality, period, or rather, that major part of Morality that treats of our enforceable duties toward others. There is nothing *special* about a morality telling you to refrain from getting your way by killing, assaulting, injuring, maiming, lying, or stealing.)

There is, of course, the matter of currency systems, roads and communications – “infrastructure.” It is not very surprising that all of these useful assists to market exchange should have fallen into the hands of governments, and indeed, most readers will never even have considered the possibility that they should be provided in any other way – even though every one of those things, and many more, such as education – were, in various places and for ages, privately provided. But we will, for present purposes, suppose that these items are provided somehow, whether by government (typically, nowadays) or not (frequent, especially in the past); and if by government, that they will be funded by taxation (likely much less efficiently than they could be).

At this point, it is perhaps worth mentioning a misunderstanding that has been more than a little

promoted by David Gauthier's important discussion in his influential book, *Morals by Agreement*.³ Gauthier there argues that the market is a "morally free zone," an area within which nothing is morally right or wrong. What makes his discussion misleading is that there is an assumption used to *define* the market in the sense he intends there, namely, that there are no *externalities*. Externalities include things like force and fraud – the very things that the morality of the market prohibits. More generally, negative externalities are the flipside of the invisible hand: unintended harms and evils inflicted on others in the course of intended innocent transactions. (There can also be positive externalities – unintended benefits to others. We'll discuss those in the next section, however.) In a market as stipulated by Gauthier's definition, each person gets exactly what he produces or what he agrees to receive for it, by exchange, and nothing else. But this is simply to define an abstract model. The claim that what goes on in what we call the market in the real world is "morally free" is not true; insofar as the condition is realized purely by stipulation, the question of what would have to go on in real life in order that such a model can be approximated is simply put to one side. But in the real world, people have to be somehow induced not to violate these constraints on occasions when it is possible to do so – as it very often is, obviously. It is those constraints that define the market, in real-world terms. Insofar as people are observing them, we have a market, and to the extent that they don't, we don't, strictly speaking, but something less, or something quite other.

Typically when people speak of "market society" they have in mind various real-world communities such as Switzerland or the United States. But to do so is to lump too much together. All contemporary states have very substantial "public sectors" in which economic activity is to some considerable extent controlled by a central government, deciding generally what is to be done with people's money, and the government's income is got by taxation. But that is not market activity as such, even though governments often, and wisely, proceed by putting out contracts for bidding by private companies, and of course always negotiate their wage contracts with individuals seeking their best employment option just as they would when dealing with a private company. Still, insofar as

a nation has public-sector activity, with the possible exception of the provision of a monetary system and of such legal apparatus as may be necessary to define property rights, it is to that extent not fully a market society. Moreover, insofar as activity in the society is prompted by criminal activity, we also have deviations from our market model.

It might be argued that the philosophy of market society actually *induces* people to commit crime – just as it might plausibly be argued that the very success of market society in providing so much wealth, ready to be stolen by energetic criminals, is what induces such crime. But obviously that is no part of the definition of market society, and it can only promote confusion to insist on building such deviations into the very heart of the notion. And as to the presence of potential for deviating, one does have to point out that all societies, inherently offer such potential. No society can make it literally impossible for people to kill, cheat, injure, and delude other people in pursuit of their various ends. Whether it is "more possible" in a market society is a fair, but difficult question – difficult because it is hard to see just how this would be measured. Pointing to fairly high crime rates in the U.K. and the U.S., for example, encounters the problem that those rates are extremely low in Hong Kong, Japan, and Switzerland, which are about as capitalist as, or perhaps more so than, the first set. It is clear that other cultural factors besides the functioning of markets are responsible for high crime rates. In the U.S., additionally; the crime rate is at least doubled, according to all responsible sources, by the prohibition of drugs – which is an anti-market measure, not a market feature. How much of the crime we find around us is due to the irresponsible laws that such crime builds on is a nice question, but certainly much of it is. And that is a point that cannot be laid to the door of the market, but rather, to the door of the politics of particular cultures such as our own.

Insofar as there are police forces, guards, and so on, market participants will be spending money on the sort of "overhead" that the existence of crime will create. If we want to call those measures "institutions," and if we assume that a certain amount of criminality is only to be expected, then we may accept that some institutional framework is necessary for real-world, functioning markets. In the ensuing discussion, this will be

assumed without further comment, except to remind the reader that what makes it necessary is deviation from the market idea, rather than instantiation of it.

4. What Makes it Work?

What reason is there to think that the envisaged actions of individuals will in fact redound to the advancement of the objective mentioned in (1), despite the fact that nobody is presumed to be aiming at it, as such? The answers to this most fundamental question for present purposes are, I think clear. I shall divide them into two parts. The first part is remarkably obvious; but in part it is, perhaps, something that could escape notice and apparently sometimes does – indeed, it must have done so, considering the ill repute into which the market has fallen among most of today’s intellectuals and academics. The second part is both subtler and more important.

First, the easy part. The moral (and, usually, legal) constraints that frame the market require us to refrain from force, theft, and fraud.⁴ No one, then, is to visit harms upon others, whether they are directly in one’s line of vision or not. That constraint is pretty easy to meet, generally speaking. We must, to be sure, allow that it is possible to visit inadvertent or unforeseen damages on persons well out of one’s “line of vision.” However, those persons have an interest in not having such harms visited upon them, and there is some reason to think that they would typically be aware of substantial ones, and ready to do something about them. Supposing this to be so, now consider the effects of transactions, dealings with other people who *are* “in one’s line of vision”: face-to-face dealings, as with friends or customers and employees. In all these cases, we may expect these relations to be, by and large, mutually advantageous. I deal with you because I suppose that my situation, on the whole, will be improved by doing so; and vice versa. And for the most part, that is a reasonable supposition and actually works out. There is no need to tot up sums and see how much one of us gains *as compared with* the other, that being a factor that is rarely relevant. Each of us does his or her homework, sizing up the opportunities before him, comparing their likely benefits with those of known alternatives, and perhaps sometimes being motivated to

look for further alternatives, which are then added to the list and duly appraised as well. When we act, we each suppose we are doing our best. Nobody forces us to choose the alternative we do, and yet we take it. There is a reasonable presumption that, by and large, we take that one because we have done our homework tolerably competently, and each of us will do reasonably well – better, almost always, than if we do nothing.

Here again, we must bear in mind that the measure of value is the individual’s own estimates of it, not the theorist’s or someone else’s. Of course some people think that almost all of our behavior is wrong; we should be spending all our time contemplating Allah, or our navels, or writing poetry. It cannot be too strongly emphasized that such judgments are not relevant here. Society consists of a large number of people, all different from each other, and they pursue their own ends, not ours or the Pope’s.

Now multiply that obvious point – that voluntary exchanges are made for mutual benefit – by some very huge number, and take into account that there is no special reason to expect significant negative side effects of our dealings with each other in most cases, and the result is that we can expect things to go generally fairly well. By and large, we will all enjoy a general improvement in our lots, barring calamities. Yet each need only intend to benefit himself, or (more usually) himself and some few others – family, friends, acquaintances, coworkers. Very often, to be sure, people *do* intend to benefit many others, but the point is that it doesn’t matter whether that is so, nor to what extent it is so, since the result emerges even if they have no such benevolent intentions. As Adam Smith notes in the famous quotation, the public good will be advanced in that way even if no one directly intends to advance it.

Second: this brings us to the less obvious but more important feature – the answer that is really the main one, the primary reason why we should agree with Adam Smith’s dictum. This answer stems from the fact that in our dealings with others, there are frequently, indeed typically, side effects of those dealings, viz., effects other than or in addition to the ones we are as such pursuing in the dealing in question, which can generally be expected to be for the good – effects that make somebody or other better off than he or she might otherwise have been, and make nobody worse

off than he or she might otherwise have been. These are what is known, accordingly, as “positive externalities”. It is the particular way in which these come about, and the overwhelming likelihood that they will do so in a free enterprise, market society – but not in anti-market societies – that attests to the plausibility of the Invisible Hand thesis.

When Jones builds a fine house on the corner, he brings pleasure to the eye of passersby even though that was likely not his main, and probably not any part of, his object in building the house. Moreover, the house keeps him healthier, enabling him to work more years, to the benefit of those with whom he works. When Linda buys a new clock from Sam’s hardware, a visitor later contemplates it during tea and realizes that she must leave now to make an urgent appointment; tinker Robinson buys tools or books, and ends up making a major invention that ultimately saves much labor for millions of people. The merchant who sells Mr. Robinson those items does not do so for the purpose of promoting those inventions (though Robinson’s investors, if he presses his invention to the point of commercial exploitation, of course do.) As usual, the merchant is simply trying to make a living. There is no end of unintended byproducts of exchanges which weren’t made for the purpose of promoting those particular objectives, but nevertheless, and unsurprisingly, do in fact promote them. As a result, all we need is to block, if we can, the intended and unintended *negative* externalities, the tendencies toward doing harm, toward making life worse for others, and then the several million flowers will bloom, variously, but very often, indeed overwhelmingly typically, to the benefit of others.

More generally, then: free exchanges are for mutual benefit, and usually achieve that; but the benefits thus obtained enable people, in turn, to do more good for more people. Merchants in pursuing profits make useful things that people are willing to buy – and the more money the merchant makes, the more people he must have benefited, provided that it is derived from honest trade rather than violence, fraud, or politically-extorted impositions. And each of these benefits provides a base for further ones down the line. Thus the utility of society is enhanced *over and above the sum of the good results which were aimed at* in the various interactions permitted by the market system. **That is the**

essence of the invisible hand. *Market transactions as defined above can be expected to produce not only direct benefits for those party to them, but predominantly positive externalities, thus leaving people better off than they are made strictly as a result of their own engaging in such activities.*

Of course, it may be agreed that these results *are* the intended, or at least the expected and certainly hoped-for results of the market *system*: What’s intended by adopting and promoting the market system is that people do well. People intend to do well anyway, of course, but they often enough resort to methods whose side effects – or even whose central effects – are quite inconsistent with the promotion, or even the maintenance, of the good of others. What we who advance the market cause say is that those are the wrongful means, the means which are to be blocked – prohibited in many cases, discouraged in others. And we say that provided this is done, the overall results will be even better than the sum of the particular expected or intended goods stemming from each individual interaction, insofar as we can reasonably talk about anything as fancy as a “sum.”

A further word should be added about the effects of competition. The consumer benefits whenever he buys anything voluntarily – he’s better off, in his view, for buying it than not buying it. But of course he’d like to get it cheaper, or get a better one for the same price. The free market system does not require anyone to do anything about this – indeed, there is no *requirement* that anyone go into business at all. But then, we do have millions of people interested in promoting their own well-being, and a prominent way of doing this is to have, hence to make, more money. You make more if you sell more at a profit, or in the case of one’s services, for a higher wage or salary. A higher profit per unit is fine, or more units, or any blend of the two. Accepting a lower profit per unit but selling a lot more units is one of the classic methods, and more likely to succeed than the alternative of seeking a higher profit per unit – the latter is done more often by way of politics than of market activity, seeing that competition awaits those who try to put up prices on their own. No one is required to compete, except in the sense that those who don’t take account of the competition are unlikely to survive in the business world. And again, the result of this continual request for higher net profits is continued improvement for

the consumer. And “the consumer,” don’t forget, is *everybody*.

At this point, we must take note of a prominent tendency among critics nowadays, to raise questions such as this: The world is awash in huge negative externalities, typically calling for massive doses of government deviance control to manage. Think of all the environmental legislation, the food and drug acts, counterfeiting laws, auto safety, toy safety. The history of capitalism is a history of firms and individuals passing costs on to someone else wherever it is possible.”⁵ Now, there’s no denying much of what the critic says. But notice that there are two claims here, not just one.

First, there is an implicit claim that it is part of the *very structure of the market* that negative externalities can be safely imposed on people with no recourse. And that is exactly false. In fact, the real-world problem is that the legal structure that would enable these people to respond to the problem are suppressed by their governments. Individuals cannot sue for redress from pollution – not because they have no case, but because their government has arrogated to itself the sole right of dealing with the problem. Thus the courts in the area of Sudbury ruled against local farmers seeking redress against large companies for defoliating their farms, holding that it was the “public interest” that the big companies be able to carry on, pollution and all.⁶

And second, it is assumed that government regulation, environmental restrictions (such as the notorious Kyoto Accords recently passed by the Canadian parliament), and innumerable interventions in the market are in fact both necessary and effective for their purpose. There is every reason to deny both. Much environmental regulation is not in the interests of the public, but rather of vested interests. Compulsory or public-supported “blue boxes,” for example, are anti-economic – a boon to the companies whose uneconomic services are thus subsidized by the taxpayer, but a nuisance and a detriment to the consumer and of no use whatever to the environment. Thus, for example, there simply is no case for requiring paper in Ontario to be recycled – no point in “saving trees,” which are grown at a faster rate than they are cut down. The requirement is by the government via ill-considered ideology, not by private individuals wanting to do better.⁷

So one must agree with the questioner that we see a great deal of passing of bucks to governmental

agencies, and a great deal of mishandling of the bucks thus passed – but it is a mistake to blame this on the market as such. It is not part of the philosophy of the market that people be able to injure their fellows with impunity: for that we must lay the blame on governments. Redressing the effects of, say, pollution is a tricky matter, but it is not one that is denied by the market philosophy – precisely the reverse. What’s wrong with pollution is, precisely, that it invades persons and their property.

5. Why Cheer?

Why could individuals be expected to applaud the goal in question – promotion of the public good, and specifically wealth – even while not as such aiming at it? This may sound like a self-answering question: *of course* – so one might say – the public is interested in the public well-being. But while the answer is remarkably easy, it is not actually pleonastic. One can be expected to applaud because one can expect to gain, no matter who one is, and so long as one has any capacity to produce results that are desirable in one’s own view. But why applaud when *others* prosper? To this there is a good answer: *you* are sure to be among those “others.” Looking down the road, as we must always do in moral matters, we can see that the tendency of people to confine themselves to activities that benefit some while harming none is one that will in innumerable ways redound to one’s own well-being as well.

It might of course be argued – to understate the case rather markedly, for it not only “might be” but certainly will be, and is, vociferously and typically asserted that *nonproducers* are in a very different boat from producers. The market system, after all, does not, *just as such*, supply anything to paraplegics, incompetents, or those with a very strong aversion to work and investment. And this is true, of course. The question is whether that fact provides any reason to deplore the market, *even from the point of view of those persons themselves*. The critic will turn this into a barb aimed at the market: “a market morality provides no motive for anyone to help the needy and in fact, provides a motive to do the reverse,”⁸ So it is said. But wrongly.

The answer to such critics is clear. First, it is of course true that the market does not “provide” the

motive to help those needing help – in this respect being identical with all other systems, no system “supplies” motivation – motives must come from within. Those who simply do not care about their fellows will not, of course, contribute to charity – though they will, by their profit-seeking activity, be *de facto* contributing to the means for assisting them utilized by others. (A friend suggests that Bill Gates has done far more for humanity, even apart from his extremely generous charitable activities, than Mother Theresa. He has a point.) But those, like the critic envisaged in the quotation, who talk of “providing motivation” mean *compulsion*. Their claim is that people won’t help other people unless *forced* to do so, by law – by the Taxman. It is interesting that they talk so, which suggests that supporters of welfare states and more are themselves devoid of human sympathy, as well as very short on perception of ordinary human behavior. For it is a matter of common observation that most of us are indeed disposed to help our fellows out, in innumerable ways.

What I want to urge is that, paradoxical though it may seem, paraplegics will benefit far *more* from a system *in which no one is compelled to help paraplegics* – just as able persons will gain much more from employment with profit-seekers than from welfare cheques. The same goes for countless other such cases. This is all, again, the result of the invisible hand, though it is also a direct function of the central features of the system. The first and most basic point here is that in a wealthy society, there is more for the non-producers to be able to acquire. The fact that it is much cheaper, as a result of the innumerable transactions between self-interested parties, helps a lot, for the charitable but less wealthy are then enabled to do more to help.

As an example: a few blocks from my house is a charming store called “Generations,” in which the castoff goods of many people are sold for ridiculous prices. No one, however poor, need go without decent clothing, assorted personal belongings, even furniture, in Waterloo, Ontario, when a serviceable sofa is available for \$15, suit coats for \$3, sweaters for \$1. But this is in no way a government institution. It is run entirely by volunteers and one paid employee, and runs at a profit, the profits going to overseas charity. This is but one of many, many establishments of a similar kind in this modest-sized and typical city.

Meanwhile, the Canadian Government by its program of restrictions and licenses on milk production, ensures that the poor pay more than twice what the market would entail for a litre of milk.

What the paraplegic needs is, of course, motivation on the part of those who own the resources they desire. But since those resources are much greater and much cheaper than they would be in any other form of human society, those who do have such motivation are more likely to be able to do something about it. Wealthy parents see to the care of their children, for example, and characteristically to many others as well, including, often enough, the poor as a class. Indeed, I propose that it is wholly reasonable to expect that *virtually every single person in this category* will be better off in a strongly market society than he or she would be in any other sort of society, given a reasonable period of time. Nor need the time be very long – a few years was all it took for free-enterprising Germany to rise from the ruins of World War II under the leadership of the economically savvy Ludwig Erhardt. And I would even venture to assert that, antecedently viewed, literally *every* person would expect to do so. (This does not mean that if you ask them, that’s what they’ll *say*. It means that if you look at his prospects objectively, in the light of what is known, those prospects are, in his own terms, better.)

Of course the argument of the welfare-state supporter presupposes that we all have a duty of justice to cater to the poor and the sick. It is not obvious where such a duty would come from, and those who employ the arguments never bother to provide them. (Nor do they explain why they do not think we should all be taxed to within an inch of our lives to support impoverished persons in Bangladesh, central China, and so on.) But there is only one source of support for those who cannot support themselves: human sympathy, which is indeed very widespread. Sympathy however, is a feeling, a sentiment, and the question is how such a thing can be a rational basis for imposing *compulsory* duties on the rest. Again, the most reasonable thing to say about that is that it cannot, and accordingly that charity should be voluntary, not compelled. It should be, because it must be. Nevertheless, in a free society, we can expect the previous result: the level of wealth available to sympathetic persons will be so great that the results for the unfortunate can be expected to be

better than they would be under a compulsory regime anyway. You *can* have it both ways. (And the history of wealthy societies makes this clear. Even in the 19th century, when we were far less wealthy than we are now, and when there were no laws compelling all to contribute, the very sick were cared for, starvation was rare to the point of nonexistence, and in general the consequences which contemporary pundits assert for free societies simply did not happen. Sweatshop labor, of course, did happen – but by the usual method of voluntary arrangements between worker and employer, not by the whip and the lash.)⁹

The general conclusion, then, is that the effects of the Invisible Hand reach very far and very deep. People doing the things that interest them, because they interest them, can be expected to do them better than people acting under compulsion. In the course of their pursuit of their various interests, they make free exchanges with others, whether like-minded or not, and the result is that society is continually improved. Even though I have no interest, myself, in most of the particular services that other people render each other, yet the indirect effect of their doing so is that I benefit anyway. As Bastiat pointed out, the work of thousands goes into the supplying of my ten-cent pencil, as well as my two-thousand-dollar computer; yet none of those concerned need have been acting with a view to my benefit, as such.¹⁰ Yet we can expect that many will benefit from the use I make of that pencil or computer, and in general that we all benefit from the best use that everyone makes of their various talents and resources. And all of this comes from people who do not, by and large, intend to benefit society as such. Smith's view, then, is amply confirmed upon analysis. The right way to organize society is to prohibit evil, not to inflict evils on some in order to compel them to do good to others. The promotion of good for others happens whether it is directly or indirectly intended by economic agents.

Probably the principal obstacle to the understanding of the free market is the contemporary inability to understand freedom itself. Freedom does not mean that you are compelled to seek your own benefit exclusively. The free market is the situation in which people are not compelled, rather than one in which they are: they are not compelled to maximize their incomes, any more than to contribute to worthy causes. Freedom means, rather, that you can do *what you want*, within the limits imposed by the like freedom of others. But what *do* you want? The multimillionaires of the late 19th and early 20th centuries, besides organizing highly productive factories and retail stores and the like, endowed museums, symphony orchestras, libraries, and universities as well as churches, hospitals, and assorted other amenities to their and others' communities. Nowadays government undercuts such efforts, pocketing their profits before they can accumulate to the point where people can afford such things – and we have, everywhere, underfunded hospitals and symphony orchestras, homeless people on the streets who prefer the streets to the public welfare services extended to them (and much prefer the services of churches and other charities), and innumerable other byproducts of the system in which we prefer compelling others to allowing them to act as they see fit.

Business is the fundamental wealth-producer in the "advanced" nations of the world. The point of this essay has been that it is no surprise that the societies in which business has flourished have also been, by and large, the ones in which more people are better off than in the dictatorships, would-be communes, or caste-bound societies of former times. The wealth comes largely from the efforts of ordinary people to do better for themselves. It is that which enables all to thrive – and would do so even more, if only we would continue to let them do so.¹¹

Notes

- 1 I am indebted to Alistair MacLeod's work for being motivated to work up this list. Professor MacLeod only lists three, however.
- 2 The thought was formed by Alex Michelos, editor of this Journal.
- 3 David Gauthier, *Morals by Agreement* (New York; Oxford University Press, 1986), Ch. IV, 83–112.
- 4 While I would argue that those all come to the same thing, I'll be content here with a list. I would argue, but not here, that all these are species of the same

genus: the unilateral imposition of costs or harms on others.

- 5 The question is framed by Alex Michalos.
- 6 See Elizabeth Brubaker, *Property Rights in the Defence of Nature* (1995, Earthscan, Toronto). The case began when Justice Middleton denied injunctive relief to farmers who had brought suit against the Sudbury smelters for damages to their crops. His reasoning was that the economic benefit from the smelters was worth more to the region than was the product of the farms. Donald Dewees and Michael Halewood (*U of T Law Journal*, 42 (1992): 1–21) demonstrated that the smelters were more than profitable enough to compensate the farmers for damages and still be viable. The next year, the Ontario legislature passed legislation that absolved Sudbury smelters from liability for trespass or nuisance from emissions. Part of the rationale, by the way, was that the smelters were needed for the war effort of that noblest of conflicts, World War I. [My thanks to Glenn Fox of the University of Guelph for this reference.]
- 7 The literature on such matters is immense. I refer the reader, for a brief treatment, to chapter 10, “Morals and the Environment,” in my own *Moral Matters* (Peterborough, Ont.: Broadview Press, 2nd edition, 1999). See the reading list in it for much more.
- 8 Again, this formulation is supplied by Michalos.
- 9 A useful recent source regarding voluntary institutional support of the needy is found in David T. Beito, *From Mutual Aid to the Welfare State* (Chapel Hill, N.C.: University of North Carolina Press, 2000). There is an immense literature on this and on the distortions of economic history in the U.S., England, and elsewhere that are commonly accepted by the unwary.
- 10 Frederick Bastiat, “Natural and Artificial Social Order,” in *Economic Harmonies* (Irvington-on-Hudson, NY, Foundation for Economic Education, 1996), p. 3.
- 11 I am greatly indebted to the editor of the *JOB* for lucidly expounding his extensive and clear disagreements with the first draft of this paper. Several alterations in this paper are due to that source, and hopefully make the position herein expressed clearer and perhaps more persuasive.

Corporate Ethics in a Devilish System

Kent Greenfield

Professor of Law, Boston College
Law School

When participating in discussions of corporate ethics, I am often struck by the narrowness of the discussion. Frequently, what many consider corporate ethics is an insistence on compliance with law and a focus on

various mechanisms for keeping companies within the straight and narrow of legal boundaries.¹ I believe this fixation on compliance with law is a constrained view of corporate ethics, and this Essay will set out some reasons why.

Legal compliance is important, of course. Corporations are immensely powerful economic entities, and management's respect for law is essential if companies are to be operated in a way that is consistent with social welfare.² Moreover, as artificial entities, corporations are not subject to the constraints of conscience and social norm that limit the behavior of natural persons³ As I have written before, “it is widely believed that corporate illegality and crime are ‘imperfectly regulated by social controls’ because corporations cannot be incarcerated, have no conscience, are typically very complex institutions, and are not subject to the same social controls and reputational constraints as individuals.”⁴

The emphasis on legal compliance is even more crucial because of the fact that a small but significant portion of the corporate law academy does not appear

Kent Greenfield, “Corporate Ethics in a Devilish System,” *Journal of Business and Technology Law* 3(2), 2008, pp. 427–435.
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to deem it important as a goal in and of itself. Judge Frank Easterbrook and Professor Daniel Fischel, for example, two of the leading scholars of the “nexus of contracts” movement within corporate law, made a splash a number of years ago when they suggested that the duty to obey the law is simply a constituent part of the duty to maximize the firm’s value.⁵ They argued, “if illegality will profit the company more than it will cost the company, the corporation should break the law.”⁶ Additionally, they wrote that “[m]anagers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm. . . .”⁷ They also argued that when a corporation determines whether illegality is likely to be profitable, the cost that should be considered is not the actual penalty or fine; rather, it is the *expected* penalty, fine, or other costs.⁸ In essence, a corporation should consider the cost of illegality as the penalty, fine, or other costs discounted by the chance of the exposure of the corporation’s illegality.⁹ The law, in other words, merely imposes a price for illegal behavior.¹⁰ If the corporation is willing to pay, then no problem with illegality exists.¹¹

Critics disapprove of this belief in the non-distinctiveness of illegal behavior, which is, thankfully, not the majority view within the academy¹² or in the courts.¹³ Without doubt, compliance with law is crucial, and those who make it their life’s work to ensure that corporations comply with the law deserve congratulations and support.

But a dedication to legality standing alone is hardly a robust sense of ethics, corporate or otherwise. If I were to teach my son that being ethical means simply to obey the rules, then I would be offering impoverished and limited guidance.¹⁴ Ethics means more than obeying the law.¹⁵ If that is so, why do so many discussions of corporate ethics begin and end in consideration of the law and how to ensure that corporations obey it? The reason is that it is difficult to expect businesses and the people within them to do more, given the legal framework we impose on them.

I should pause to admit an underlying assumption here: that situation more than disposition drives the behavior of most people.¹⁶ An individual’s motivations occur within a framework of incentives and disincentives, and individuals are affected by their

surroundings and by myriad influences.¹⁷ Despite our best intentions, and despite what many of us assume about our own behavior and by those around us, we make decisions less because of some inner compass than by the pushes and pulls of situation.

This is especially true of corporate executives (not to mention the corporations themselves). The “role morality” of executives, created by law and norm, creates for them the overarching and urgent goal of producing financial returns for shareholders, focused in the short term.¹⁸ That goal subordinates other matters.¹⁹ If executives wanted to act beyond that role in a way they thought their ethical system required, they might be able to on the edges.²⁰ For the most part, however, their obligations to their company and their shareholders, enforced by law and the market, keep them acting within narrow bounds.²¹

In this view, failures of corporate ethics are not matters of bad people acting within and through business. Rather they are failures of the system itself. Let me explain.

There are many views of what constitutes the substance of ethical or moral behavior.²² Whether one takes guidance from religious norms or from Rawls, Kant, Aristotle or other philosophical thinkers, there are significant areas of agreement as to what amounts to ethical behavior. If my son asked me what ethics really means (and I try to tell him these things even when he does not ask), I would encourage him to think about the obligations of acting with due care for others, of taking responsibility for the effect of one’s actions, of being honest, of considering broadly one’s impacts, and of taking a long-term view, especially with regard to resource use.

Corporate law and financial markets operate to make these ethical obligations difficult to satisfy in a business setting. Limited liability, for example, the very cornerstone of corporate law,²³ is inconsistent with the ethical norm of taking responsibility for one’s own actions since it shields people from liability that arises from their wrongful conduct.²⁴ Limited liability is fundamental and indeed is a principal reason that businesses choose to incorporate.²⁵ Moreover, corporations create subsidiaries through which they can perform risky operations, in part because the parent can shield assets from any potential liability.²⁶ There may be strong reasons to support limited liability in

order to incentivize business creation and capital formation. Certainly, however, this has ethical implications and should be subject to an ethical critique, especially if it allows companies to shield themselves from taking financial responsibility for harms they cause.²⁷

The expectations for corporate executives also contradict the ethical obligation of honesty. To be sure, there is a massive legal framework built up to protect shareholders from fraud, and consumer and creditor protections also exist.²⁸ But employees are not protected by anti-fraud law on the federal or state level.²⁹ If the CEO goes to a shareholder meeting and lies about financial projections, it can be a federal crime.³⁰ If she then appears in the employee lunchroom and utters the same lie, not only is it *not* a violation of law, it may in fact be consistent with (or required by) her fiduciary duty to maximize shareholder value.³¹

The imperative that corporate managers take a narrow and short-term view of their obligations is also ethically problematic. Those executives who think broadly about their obligations or want to offer fair and proportionate “returns” to stakeholders other than equity investors are routinely punished by the market – they suffer criticism by Wall Street, sometimes suits by the plaintiffs bar, and sometimes takeover.³² An executive that causes the company to act in the long term, to take into consideration the interests of stakeholders other than shareholders, or willingly to accept lower profit in order to avoid imposing costly externalities on society at large will appear, from the viewpoint of shareholders and their Wall Street protectors, to be under-performing.³³ To the extent that ethics imposes costs or lengthens the time horizon – something that ethics by its own terms is bound to do – it is unsustainable unless we change the system in which we ask corporate executives to work. We would need to adjust the obligations of their roles to include, at least, the possibility and, more appropriately, the obligation to act in an ethically robust way.

I recognize that short-termism is an evil that many have started to speak out against, including representatives of corporate management such as the Chamber of Commerce and the Business Roundtable.³⁴ Sarbanes-Oxley plays into this opposition, in fact, since it is now more difficult for managers to use accounting manipulation to hide efforts on their part

to manage for the long term.³⁵ In other words, to satisfy short-term Wall Street expectations, managers were formerly able to manipulate more easily the financial disclosures from quarter to quarter without actually managing for the short term.³⁶ It is a very real possibility that one of the unintended consequences of Sarbanes-Oxley’s stricter reporting standards is that now in order to *appear* to manage in the short term, one must *actually* manage for the short term.

Many have argued that the responsibilities of Sarbanes-Oxley should be relaxed.³⁷ There may be some merit to this argument with regard to specific provisions, but a general trend toward fewer responsibilities is not one that I would applaud. On the contrary, I believe we ought to impose more rather than fewer responsibilities on management and use the law to make our ethical norms real and impactful. If the corporations, as institutions, are indeed without consciences – the prototypical Holmesian “Bad Man”³⁸ – and corporate managers are limited by their role morality, then the way to make corporate ethics more than a public relations gimmick is to embody them in law.

What would such an ethical system of corporate law look like? If ethics is taking responsibility for one’s actions, considering broadly one’s actions, being honest, and taking the long-term view, then we could change corporate law in realistic and meaningful ways to make those norms more realizable in the corporate context. We could change corporate governance to give those contributors to the firm who do not own stock – employees, communities, other stakeholders – some ability to have their views heard and considered within the governance of the firm. Bringing the views of non-shareholder stakeholders into the governance of the firm would not only make it more likely that the corporation will consider broadly the impacts of its decisions, it also will – because shareholders tend to have a very short time horizon³⁹ – necessarily cause the firm to take a longer-term view of its decisions and strategies. Such inclusion will also cause corporations to internalize more of the costs of their decisions. In addition, the law should require corporations to tell the truth not only to shareholders and consumers, but to employees as well.

The market, by itself, will not cause companies to act this way. Of course, some companies do try to take

into account the long-term interests of a broader group of stakeholders, to beneficial effect.⁴⁰ But most do not for several reasons. The long-term benefits are either not recognized, not deemed important, or not internalized into the decision-making of the firm.⁴¹ Shareholders elect boards, and the law makes shareholders supreme.⁴² Few directors or managers have the incentive to push their firms to take what must seem a huge short-term risk – reallocating more decision-making power to non-equity investors – for gains that seem abstract or beyond the time horizon for shareholders.⁴³ The law must overcome this “stickiness” of the status quo.

One concern often expressed is that a more robust system of stakeholder governance will impose large and unsustainable costs on the United States economy, especially in an increasingly globalized world economy.⁴⁴ The answer to this concern begins with the notion that employee (and stakeholder) involvement in management is compatible with business success. As I have discussed at length elsewhere, as employees feel more “ownership” in their firm, they will work harder, contribute more ideas, improve their productivity, malingering less, and obey company rules more.⁴⁵ This will tend to improve company profitability over time. The more difficult competitiveness critique to answer is not that individual firms will fail if they take into account the interests of stakeholders, but that capital (i.e., shareholders) will flee U.S. markets if a stakeholder governance framework is established.⁴⁶ It is true that recognizing a stakeholder framework might bring about a reallocation of the

corporate surplus away from shareholders and toward other stakeholders. That is part of the objective of such a framework. But as the stakeholder model creates gains for the corporation as a whole, then the slice of the pie going to shareholders may grow in an absolute sense, even if it is not as large in a comparative sense.

The judgment of capital is always a relative one – “will I make more if I invest here or elsewhere?” – so a stakeholder corporate governance regime will only cause capital to flee if it can find a better risk/return mix elsewhere. Given the power and stability of U.S. markets, there are very few places likely to offer a better risk/return ratio. Europe’s current corporate governance framework is more protective of stakeholders than any regime the U.S. is likely to enact, making it unlikely that capital will flee to Europe.⁴⁷ Indeed, the fact that Europe has such a robust system of stakeholder protection while maintaining healthy and competitive capital markets is an indication that there is little reason to worry that capital will abandon ship if the U.S. adopts a similar model.⁴⁸

All of this is to say that if we, collectively, desire corporations and their management to behave more ethically in any genuine sense, we have the tools at our disposal to bring that about. Those tools are *legal* tools, changing the nature of the obligations of the firm and of its management. The current corporate governance framework constrains management to act in ways that we would deem unethical if conducted in other areas of life. We cannot expect people to act as Saints in a devilish system.

Notes

- 1 See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. Rev. 1265, 1375 (1998) (noting that with regard to corporate social responsibility, prominent scholars and practitioners have emphasized the duty of corporate directors and officers to ensure legal compliance).
- 2 Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 201(a) of the American Law Institute’s Principles of Corporate Governance*, 66 WASH. L. Rev. 413, 417, 430–31 (1991).
- 3 *Id.* at 423–29 (arguing that corporations are complex organizations of various individuals whose specialization and incomplete knowledge make it more likely that the organization will behave unlawfully); see also WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006).
- 4 Kent Greenfield, *Ultra Viess Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1289–90 (2001) (quoting Ryan, *supra* note 2, at 417).
- 5 See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155,

- 1177 (1982) (“Corporations are not privileges; a corporation is no more than a convenient name for a nexus of contractual relationships among people.... When the corporation is properly seen as a summary of a set of contractual relationships, it becomes difficult, probably impossible, to say that the agents (managers) may take it on themselves to define the responsibility of the firm.”)
- 6 *Id.* at 1168 n.36.
- 7 *Id.* at 1168 n.36, 1177 n.57 (“[M]anagers not only may but also should violate the rules when it is profitable to do so.”).
- 8 *See id.* at 1158.
- 9 *See id.* For an excellent discussion, see Williams, *supra* note 1, at 1279–80.
- 10 *See* Easterbrook & Fischel, *supra* note 5, at 1158.
- 11 *See id.*
- 12 For a review of the literature on point and an extensive critique of the Easterbrook & Fischel view, see Greenfield, *Ultra Vires Lives!*, *supra* note 4; Williams, *supra* note 1. For a more recent discussion of mechanisms to control corporate illegality, see Adam Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN’S L. REV. 929 (2005).
- 13 *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006)) (discussing the obligation to obey the law as a component of the duty of good faith); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (discussing the obligation of management to erect an internal reporting system to aid management in ensuring that the company is complying with applicable laws).
- 14 And even this guidance occasionally would be wrong because some rules should be disobeyed, as a matter of ethics. *See* Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), available at <http://www.stanford.edu/group/King/frequentdoes/birmingham.pdf> (“[O]ne has a moral responsibility to disobey unjust laws.”).
- 15 Merriam-Webster defines “ethics” as “the discipline dealing with what is good and bad and with moral duty and obligation.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/ethics> (last visited Feb. 15, 2008); *see also* Note, *Finding Strategic Corporate Citizenship: A New Game Theoretic View*, 117 HARV. L. REV. 1957, 1958 (2004) (“The words ‘ethics’ and ‘responsibility’ connote selflessness and altruism, internalizing a concept of charity without expectation of payback.”)
- 16 For accessible and persuasive treatments of the dispositionalist-situationist debate, see Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004); Jon Hanson & Kathleen Hanson, *The Blame Frame Justifying (Racial) Injustice in America*, 41 HARV. C. R.—C-L. L. REV. 413 (2006); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; JON Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004). Also very helpful is the blog The Situationist, <http://thesituationist.wordpress.com/> (last visited Mar. 10, 2008) (created by Jon Hanson and Michael McCann).
- 17 *See* Hanson & Yosifon, *The Situation*, *supra* note 16, at 136–38.
- 18 *See* Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 501 (1995) (discussing the role morality of corporate executives).
- 19 *Id.*
- 20 *Id.* at 522. The business judgment rule provides deference to the decisions of company directors. This deference offers flexibility to the executives to make decisions in a more ethically robust way, as long as they rationally can claim that their actions are in the long-term interests of the company. *See*, e.g., Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (giving deference to management’s decision not to install lights at the Chicago Cubs park, even though every other Major League Baseball franchise had done so, for the putative reason that neighborhood decay brought about by nighttime games would hurt the team in the long run). John Nilson and I have argued that the business judgment rule is a necessary ameliorative to the single-minded demand to maximize profit. *See* Kent Greenfield & John E. Nilson, *Gradgrind’s Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799, 842 (1997).
- 21 Mitchell, *supra* note 18, at 522. For an analysis of the limitations of the business judgment rule in offering freedom to corporate executives, *see* Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL’Y REV. 1 (2008) [hereinafter Greenfield, *Gilded Age*].

- 22 For a sampling of the many views on the substance of ethical or moral behavior, consult religious writings such as the Bible, the Qu'ran, the Talmud, and the Veda. See also ARISTOTLE, *THE NICOMACHEAN ETHICS OF ARISTOTLE* (Sir David Ross trans., Oxford Univ. Press 1975) (1925) (focusing on the development of a balanced moral character and one's affirmative choice to engage in consistent virtuous conduct); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed. and trans., Yale Univ. Press 2002) (reasoning that moral behavior is such only if it is motivated exclusively by good will); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (invoking social contract theory to argue that moral behavior on the societal level is achieved through a recognition of inviolable basic liberties and equality of opportunity).
- 23 Nina A. Mendelson, *A Controller-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1208–09 (2002).
- 24 See *id.* at 1204.
- 25 *Id.* at 1208–09.
- 26 Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L. J. 1413, 1427 (1998) (“Limiting liability is widely understood to be the principal reason for the separate incorporation of subsidiaries.”).
- 27 The scholarship on limited liability and its implications is extensive. For a taste, see LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY; AMERICA'S NEWEST EXPORT* (2001) (describing the moral hazards arising from limited liability); Theresa Gabaldon, *Experiencing Limited Liability: On Insularity and Inbreeding on Corporate Law*, in *PROGRESSIVE CORPORATE LAW* 111–37 (Lawrence E. Mitchell ed., 1995); Mendelson, *supra* note 23. But see Steven Bainbridge, *Abolishing Veil Piercing* 26 J. CORP. L. 479 (2001) (providing an argument to justify limited liability regimes while suggesting that corporate veil piercing should be constrained); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879 (1991).
- 28 See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) the purpose of the Sarbanes-Oxley Act is to protect shareholders by improving corporate disclosure regulations. For a more substantive discussion of the Sarbanes-Oxley Act's protective provisions, see J. Brent Wilkins, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. ILL. U. L. J. 339 (2005).
- 29 See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* (2006) [hereinafter GREENFIELD, *FAILURE*] (arguing for federal fraud protection for employees); Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L. J. 715 (1997) (suggesting a potential federal statutory scheme to protect the labor market in the same way that federal anti-fraud regulation protects the capital markets).
- 30 Various cases have been brought against corporate directors alleging violations of federal securities laws when the corporation lies or conceals financial projections to shareholders. See, e.g., *Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997); *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996) (“A [financial] projection is a ‘factual’ misstatement [actionable under securities law] ‘if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.’”); *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir. 1986) (noting that allegations of misrepresentation or failure to disclose specific items, including, financial projections, from tender offer documents sufficiently stated a claim for violations of federal law).
- 31 See Robert C. Clark, *Major Changes Lead Us Back to Basics (A Response to the Symposium on My Treatise)*, 31 J. CORP. L. 591, 596–97 (2006) (explaining the fiduciary duty to maximize shareholder value).
- 32 See *Shimko v. E. States Corp.*, 146 A.2d 851, 892 (Md. 1958) (addressing suit by shareholders to compel the corporation to pay dividends when there was a two million dollar surplus, and the corporation claimed it would use it as part of a long-term recapitalization plan). See generally *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919) (awarding payment of dividends to shareholders on the grounds that withholding payment to increase the welfare of the general public was not in the best interests of the corporation and shareholders).
- 33 See *Dodge*, 170 N.W. at 679, 683, 685 (explaining how Ford Motor Co.'s non-payment policy was viewed to be under-performing).
- 34 See Lee Drutman, *The Long-Term Value Moment*, AM. PROSPECT, July 9, 2007, http://www.prospect.org/cs/articles?article=the_longterm_value_moment (cataloging various studies pointing out the pathologies of short-termism in the business strategy).
- 35 Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, §§ 101–09, 116 Stat. 745, 750–71 (codified as amended at 15 U.S.C. §§ 7201–19 (Supp.V 2006)).
- 36 See Drutman, *supra* note 34.
- 37 See Peter K.M. Chan, *Breaking the Market's Dependence on Independence: An Alternative to the “Independent”*

- Outside Auditor*, 9 FORDHAM J. CORP. & FIN. L. 347, 349 (2004) (arguing that the auditing restrictions in Sarbanes-Oxley should be relaxed); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1602 (2005) (arguing that because of the haste under which Sarbanes-Oxley was enacted, the Act does not appropriately serve the corporate world's needs and should be relaxed); Stephen Labaton, *Investors' Suits Face Higher Bar, Justices Rule*, N.Y. TIMES, June 22, 2007, at A1 (reporting that industry groups and allies in academia have urged the Bush Administration and Congress to make it more difficult for investors to bring lawsuits against corporations and to relax some of the provisions of the Sarbanes-Oxley Act of 2002).
- 38 Oliver W. Holmes, Jr., Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Remarks at the Dedication of the new hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences.").
- 39 The average stock turnover for Fortune 500 companies is over 100% a year, and is even greater for smaller companies. LAWRENCE E. MITCHELL, *THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY* 277-78 (2007).
- 40 See generally RAJENDRA S. SISODIA ET AL., *FIRMS OF ENDEARMENT: HOW WORLD CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* (2007) (arguing that stakeholder management results in market successes).
- 41 But see Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 46-48 (2004) (discussing the "shareholder primacy" theory of the corporation where if one takes a long-term view of shareholders' interests, advancing the concerns of other corporate constituents may serve to enhance shareholder value); David Locasio, Comment, *The Dilemma of the Double Derivative Suit*, 83 NW. U. L. REV. 729, 758 (1989) (explaining that, under Delaware law, the business judgment rule affords corporate directors broad discretion in their decision-making that enables them to consider the long-term interests of shareholders (citing *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979))).
- 42 See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985) (discussing the benefits of a corporate model where the shareholders elect the members of the board: "If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out").
- 43 There are many factors that have led companies to focus on equity-driven investors and short-term gains instead of allocating decisions based on long-term growth and giving power to non-equity investors. See, e.g., Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 205-13 (1991) (discussing how competition among institutional investors can lead corporations to focus on short-term gains which can threaten the long-term health of a company). Because of this, the long-term interests of the shareholders might actually be weakened. Thomas Lee Hazen, *The Short-Term/long-term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law*, 70 N.C. L. REV. 137, 179 (1991) ("Although not all observers agree, many have suggested that corporate managers' obsession with short-term shareholder wealth maximization has, in many cases, diverted their attention away from the efficient operation of their companies.").
- 44 See Ethan S. Burger, *Who Is the Corporation's Lawyer?*, 107 W.VA. L. REV. 711, 741-42 (2005) (explaining the two common theories of stakeholder governance and noting that the stakeholder model results in difficulty in sustaining competitiveness because of the increasing globalization of the economy).
- 45 See GREENFIELD, *FAILURE*, *supra* note 29, For a broad overview of the debate on the effectiveness of employee ownership, see generally Henry Hansmann, *When Does Worker Ownership Work? ESOPS, Law Firms, Codetermination, and Economic Dependency*, 99 YALE L.J. 1749 (1990) (describing employee ownership in various employment contexts and its benefits and costs).
- 46 See John C. Coffee, Jr., *The Future As History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999) (examining the various types of stakeholder governance both in the United States and abroad, and discussing the implications of each, the reasons for the disparity between countries in governance standards, and how adopting various forms of stakeholder governance specifically could impact the United States).
- 47 See Luca Enriques, *Bad Apples, Bad Oranges: A Comment From Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911 (2003) (discussing European corporate governance and stakeholder protection in the context of the Enron collapse).
- 48 For a more extensive answer to this critique, see Greenfield, *Gilded Age*, *supra* note 21.

Questions for Discussion

1. Rawls argues that just principles would be chosen by rational, self-interested people behind a “veil of ignorance.” What is the purpose of the “veil of ignorance”? Do you think that people placed behind such a veil would choose the principles Rawls proposes? Can you imagine another set of principles they might choose instead?
2. Nozick rejects any system that tries to ensure a particular distribution of income or wealth, e.g. an equal distribution, because he believes such a system would interfere with people’s liberty. However, he grants that under some circumstances forced redistribution might be permissible. What are those circumstances? What principle of redistribution might he agree to?
3. Why does Smart believe that the general tendency of utilitarianism is toward equality? Under what conditions might there be an exception to this tendency? What would Rawls and Nozick have to say about Smart’s theory of justice?
4. Narveson argues that free-market capitalism has “positive externalities,” i.e. social benefits such as entrepreneurial creativity, even though such benefits are not intended by individual market participants. But he notes that there are negative externalities as well, industrial pollution, for example. Might there be circumstances in which the costs of negative externalities outweigh the benefits of positive externalities? What would Narveson advise in this situation?
5. Greenfield believes that the way to reform corporate ethical behavior is to pass laws that encourage good corporate ethics and discourage bad corporate ethics. But is it really possible to capture anything more than the bare essentials of ethical behavior in legal terms? Is that good enough? And what if business conditions change too fast for the law to keep pace?