Global Justice in Healthcare: Developing Drugs for the Developing World*

*William W. Fisher*** & *Talha Syed****

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** Hale and Dorr Professor of Intellectual Property Law, Harvard Law School.
*** S.J.D. (Doctoral) Candidate, Harvard Law School.

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INTRODUCTION

Each year, roughly nine million people in the developing world die from infectious diseases.[1] The large proportion of those deaths could be prevented, either by making existing drugs available at low prices in developing countries, or by augmenting the resources devoted to the creation of new vaccines and treatments for the diseases in question. Several legal and social circumstances contribute to this outrage. In this Article, we focus on two. First, the majority of the most effective drugs are covered by patents, and the patentees typically pursue pricing strategies designed to maximize their profits. Second, pharmaceutical firms concentrate their research and development ("R & D") resources on diseases prevalent in Europe, the United States, and Japan — areas from which they receive 90-95% of their revenues — and most of the diseases that afflict developing countries are uncommon in those regions.

In a forthcoming book,[2] we substantiate the foregoing assertions — some of which are controversial — and then consider several ways in which the legal system might be modified to overcome the two obstacles and thus help alleviate the crisis. Some of the possible reforms we examine involve providing pharmaceutical firms financial incentives to modify their pricing practices or R & D policies; others would use various legal levers to force the firms to modify their behavior; still others would increase the roles of governments in the development and distribution of pharmaceutical products. We then attempt to identify a politically palatable package of reforms that would both result in lower prices in developing countries for existing drugs and accelerate the production of new drugs that address the health crises in those areas.

Our analysis gives rise to an ethical problem: most of the legal reforms we consider would increase the already significant extent to which the cost of developing new drugs — including some whose

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[1] By comparison, the same diseases claim 200,000 lives in the developed world, a region containing one quarter as many people. In other words, the mortality rate from infectious diseases is over ten times higher in the developing world than in the developed world. These figures are derived from WORLD HEALTH ORGANIZATION, WORLD HEALTH REPORT: CHANGING HISTORY 2004 (2004), *available at* http://www.who.int/whr/2004/en/. Throughout this Article we will adopt the World Health Organization's ("WHO") usage and use the terms "developed" and "developing" countries or worlds, which are roughly synonymous with "North" and "South," "First World" and "Third World," and "the West" and "the Rest." Each pair of terms has its drawbacks.

[2] WILLIAM W. FISHER & TALHA SYED, DRUGS, LAW, AND THE HEALTH CRISIS IN THE DEVELOPING WORLD (forthcoming) (manuscript on file with authors).

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principal function is to alleviate suffering in the developing world — is borne by the residents of the developed world, either as consumers purchasing patent-protected drugs or as taxpayers. Why should the law be organized in this fashion? The goal of this Article is to answer that question.

The analysis proceeds in two stages. In Part I, we consider several possible reasons why developed country residents should help alleviate the health crisis in the developing world. We begin by canvassing, briefly, considerations from national self-interest. Finding these implausible and unattractive, we then consider several arguments grounded in considerations of justice, or in sentiments of mutual concern and well-wishing, that extend beyond national borders. These include arguments from historical equity, social utility, and deontological and teleological theories of distributive justice. We show that each of these frameworks or perspectives provides support for our proposals. Further, we contend that, not only do the arguments individually support our goals, but, suitably qualified, each tends to reinforce, or at least converge or "overlap" with, the others.[3]

In the course of our analysis in Part I, we address several criticisms that have been or might be made of particular arguments we offer in support of our proposals. In Part II, we confront the following more sweeping objections to our approach: that full acceptance of the commitments we identify would impose intolerable moral burdens on the citizens of developed countries; that questions of distributive justice are properly limited to the level of individual polities; that

[3] We mean to invoke, loosely, the concept of "overlapping consensus" developed by John Rawls in *Political Liberalism*. JOHN RAWLS, POLITICAL LIBERALISM 385-95 (expanded ed., Columbia Univ. Press 2005) (1993). Rawls offered the concept as a solution to the problem of disagreements between "comprehensive doctrines" or worldviews. *Id.* at 385-86. It seemed unlikely to him that reason could solve such disagreements. *Id.* at 387. Consequently, as a "political" solution to this "fact of reasonable pluralism" in the realm of moral metaphysics, he urged that, when debating core issues of public life, efforts be made to find an "overlapping consensus" about the fair terms of social cooperation. *Id.* at 390-91. This entails framing arguments in a shared vocabulary of "public reason," so that adherents to different "reasonable" comprehensive doctrines can recognize the arguments of others as congruent with, or even representing in altered form, their own deeper commitments. *Id.* at 392. Without committing ourselves to the assumptions underpinning Rawls's overall enterprise, we point out that a rough parallel exists between his concept and our attempt here to accommodate current disagreements (although in our case the disagreements are not between worldviews but between rival political philosophies, and they do not concern Rawls's "constitutional essentials" so much as "legislative" questions of social policy).

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recognition of the insights of communitarianism requires privileging the claims of the nation over the claims of the globe; that adoption of our proposals would disrupt the operation of the patent system and prevent us from achieving the important objectives it serves; and that interference with the free market in pharmaceutical products is either illegitimate or likely to do more harm than good. We contend that none of the objections, closely examined, holds up.

I. REASONS

The impacts of the principal diseases with which we are concerned are set forth in Table 1, below.[4] The first three columns document losses during 2002 from each disease in the form of suffering and years of life lost because of premature death.[5] The index used to measure such things is the Disability Adjusted Life Year ("DALY"). One lost DALY can be thought of as "one lost year of healthy life."[6] The fourth, fifth, and sixth columns are self-explanatory.

At least three things are noteworthy about these figures. First and foremost, the sheer numbers are staggering. The fourth column is the most appalling; people are dying in droves from infectious diseases. Second, very large numbers of people continue to suffer from diseases that one might have thought were "solved" decades ago. 611,000 deaths per year from measles; 1,778,000 from diarrhea; 155,000 from syphilis — these are shocking statistics. The scourge of AIDS, horrific

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[4] On the right side of the chart, we have identified several commonly identified subsets of the set of developing country diseases. These labels are not always used consistently in the literature on this subject, but most commentators would accept the following definitions: "Neglected diseases" refers to all developing region diseases except for HIV/AIDS — on the theory that only HIV/AIDS has thus far attracted significant research and development. "Tropical diseases" refers to the set of ailments especially common in tropical regions. "Priority diseases" refers to that subset of neglected diseases that a joint roundtable of the WHO and the International Federation of Pharmaceutical Manufacturers Associations (IFMPA) has identified as most in need of additional research. Finally, "childhood diseases" are those that most severely affect children. For sources using these terms — although not always identically — see, for example, Patrice Trouiller et al., *Drug Development for Neglected Diseases: A Deficient Market and a Public-Health Policy Failure*, 359 LANCET 2188 (2002); WORLD HEALTH ORGANIZATION, WORLD HEALTH REPORT 2003: SHAPING THE FUTURE (2003), *available at* http://www.who.int/whr/2003/en/; European Federation of Pharmaceutical Industries and Associations, Research & Development (R & D) and Diseases Prevalent in Developing Countries, http://www.efpia.org/4_pos/access/RDdevecountries.pdf (last visited Feb 1, 2007).

[5] The 2002 figures are drawn from WORLD HEALTH ORGANIZATION, *supra* note 1, 120 tbls.2-3. These are the most recent such figures published by the WHO.

[6] For a more detailed examination of the DALY index, see *infra* Part I.C.4.

as it is, causes less than one-third of the total number of deaths. Finally, as the third and sixth columns show, the burdens of these diseases are concentrated very heavily in developing countries.

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Table 1. Developing-Region Diseases: 2002 Burdens

	Global DALYs (thousands)	DALYs in Developing Countries (thousands)	Percentage of Global DALYs	Global Deaths (thousands)	Deaths in Developing Countries (thousands)	Percentage of Global Deaths
HIV/AIDS	84,397	82,546	97.8%	2,775	2,725	98.2%
Tuberculosis	34,710	33,146	95.4%	1,566	1,491	95.2%
Malaria	46,455	46,434	99.9%	1,272	1,272	100.0%
Trypanosomiasis	1,523	1,523	100.0%	48	48	100.0%
Chagas	662	654	98.8%	14	14	100.0%
Leishmaniasis	2,089	2,082	99.7%	51	51	100.0%
Schistosomiasis	1,696	1,696	100.0%	15	15	100.0%
Lymphatic Filariasis	5,774	5,773	99.9%	0	0	-
Onchocerciasis	482	482	100.0%	0	0	-
Diarrhoeal Diseases	61,926	61,082	98.6%	1,797	1,778	98.9%
Pertussis	12,587	12,354	98.1%	293	293	100.0%
Diphtheria	185	182	98.4%	5	5	100.0%
Polio	152	147	96.7%	1	1	100.0%
Measles	21,463	21,265	99.1%	611	605	99.0%
Tetanus	7,069	7,067	99.9%	213	213	100.0%
Syphilis	4,200	4,183	99.6%	155	155	100.0%
Leprosy	197	197	100.0%	6	6	100.0%
Dengue	616	616	100.0%	19	19	100.0%
Japanese Encephalitis	709	709	100.0%	13	13	100.0%
Trachoma	2,318	2,318	100.0%	0	0	-
Ascariasis	1,813	1,812	99.9%	3	3	100.0%
Trichuriasis	1,006	1,004	99.8%	2	2	100.0%
Hookworm	58	58	100.0%	3	3	100.0%
Total	292,087	287,330	98.4%	8,862	8,712	98.3%

"Priority Diseases"
"Tropical Diseases"
"Childhood Diseases"
"Neglected Diseases"

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Extraordinary suffering is latent in these numbers. Many of the diseases are horrifically painful. Many of the victims, aware that the chances of cure are remote, must endure the psychological trauma of anticipating imminent death. The victims' families commonly suffer material deprivation, empathic suffering, and helpless by-standing, all of which the afflicted must witness or know, in a further cruelty visited upon them. Where, as is often the case, disease breaks out in concentrated epidemics, whole communities frequently implode, fraying the larger cultures of which they are a part.

Suffering of this magnitude is appalling, to be sure. But why exactly is it incumbent upon the residents of developed countries to alleviate it? And how much of what sorts of aid should they lend? Considered below are various possible answers to those questions.

Before proceeding, we should anticipate and try to prevent one possible misunderstanding: we are not interested here in the morality of individual choice, but in the responsibilities of institutions. In other words, the forthcoming arguments are not aimed at motivating increased individual donations to charity (although, if effective outlets were found, we would hardly object). Our subject, rather, is the set of normative considerations that should inform the policies of governments and international agencies with respect to patent and related laws and aggregate health expenditures. A focus on personal choice risks individualizing what are properly social-institutional issues, as well as moral fatigue.

A. National Self-Interest

Reforming the pharmaceutical innovation systems of the developed world so as to address the developing world's health crisis may have some beneficial effects for the health, economic prosperity, and perhaps even security of residents in the developed world.

The first of these considerations — the concern of developed country residents for their own health — is the most obvious, stemming from the fact that all of the developing region diseases at issue are infectious diseases. As such, the prevalence of such diseases not only harms the afflicted individuals (and their families and friends), but also presents an ongoing danger to anyone who may come into contact with them. As the frequency of international travel increases, the likelihood that contagion will spread from the South to the North grows.

In the language of economics, such infectious diseases exhibit a "negative externality," meaning a harm extending beyond the individual(s) directly involved. The harm is that each time any one

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individual is afflicted, everyone else, to varying degrees, faces an increase in his or her future probability of contracting the illness. This fact has led some observers to frame the issue of contagious disease outbreaks as an example of a global "public goods" problem, requiring supra-national collective action.[7] This consideration arises most often in discussions of HIV/AIDS, but malaria and tuberculosis have also been singled out as diseases common in developing regions that pose ongoing threats to those in the developed world, especially as new strains emerge that render older inoculations or treatments ineffective.[8]

To be sure, the "global public goods" argument has force only with respect to vaccines and those drug treatments that reduce rates of transmission. However, this is not an insignificant category. Within it, the argument provides some grounds for increasing the amount of resources developed countries devote to eliminating or reducing contagious diseases in the developing world.

A second way in which, by helping to solve the health crisis in developing countries, developed-country residents could help themselves can be gleaned from the general literature on trade and economic development. One justification commonly advanced for promoting trade liberalization runs roughly as follows: the static efficiency gains from trade will facilitate the dynamic development of the South, which will not only benefit citizens in the South but will also be economically beneficial to those in the North, by providing them more productive trading partners and affluent consumer markets.[9] It is increasingly well-accepted that there are strong links between improving the basic health of a country's people and improving its developmental prospects.[10] Consequently, measures

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[7] *See* WORKING GROUP 2 OF THE COMM'N ON MACROECONOMICS AND HEALTH, WORLD HEALTH ORG., GLOBAL PUBLIC GOODS FOR HEALTH 4-11, 47-57 (2002); GLOBAL PUBLIC GOODS FOR HEALTH: HEALTH ECONOMIC AND PUBLIC HEALTH PERSPECTIVES 3-93 (Richard Smith et al. eds., 2003). This is seen as a "public goods" problem because the negative externality is a form of market failure, like pollution, that requires collective action to address. Alternatively, the "good" a healthy individual presents to others can be seen as a positive externality that is both non-rivalrous (enjoyment of its benefit by one does not derogate from its enjoyment by another) and not excludable or privately appropriable (it is difficult to provide to some while denying to others the benefit from an individual's health).

[8] *See* WORKING GROUP 2 OF THE COMM'N ON MACROECONOMICS AND HEALTH, *supra* note 7, at 48-49, 50 tbl.3.1.

[9] *See* Vivek Arora & Athanasios Vamvakidis, *How Much Do Trading Partners Matter for Economic Growth?* (Int'l Monetary Fund, Working Paper No. 04/26, 2004), *available at* http://www.imf.org/external/pubs/ft/wp/2004/wp0426.pdf.

[10] *See* COMM'N ON MACROECONOMICS & HEALTH, WORLD HEALTH ORG.,

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along the lines we propose may increase the potential for future economic gains for citizens of developed countries.

A third argument in the same family is that not only will increased prosperity in the South have economic benefits for the North, it may also go some distance toward addressing a prominent social issue: immigration. Reducing misery in the South would likely ease immigration pressures on the countries of the North.

Finally, eliminating one of the causes of underdevelopment in the South might reduce the threats that the residents of the North face either from spreading regional instabilities or from terrorism. The former concern, flagged by the World Health Organization's ("WHO") Commission on Macroeconomics and Health,[11] appears to have underlain then-Secretary of State Colin Powell's declaration in 2001 that the AIDS crisis in Africa "is a national security problem" for the United States.[12] Regarding the latter, although poverty is plainly not sufficient to cause terrorism, it may increase its incidence. In the formulation of economist Branko Milanovic, if it is the case that "resentment breeds terrorism," then we should be concerned about impoverishment, which may breed resentment.[13]

Arguments of this type have frequently figured in the debate over global health policy and will likely continue to do so in the future. It must be admitted, however, that none is especially powerful. Northerners who wish merely to protect their own health in the most cost-effective way should probably adopt quarantine systems or requirements that visitors or immigrants to their own countries show that they have received appropriate vaccines and are not infected with any of the diseases in question. More harshly, self-interest might argue *against* providing life-sustaining treatments (e.g., anti-retroviral drugs for AIDS) to developing country residents on the ground that keeping infected and contagious people alive only increases the hazard to "us." And the causal connections on which each of the other considerations rests are admittedly speculative. For meaningful

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MACROECONOMICS AND HEALTH: INVESTING IN HEALTH FOR ECONOMIC DEVELOPMENT 21-40 (2001).

[11] *Id.* at 28.

[12] *This Week* (ABC-Television News broadcast Feb. 4, 2001) (interviewing Colin Powell). We thank Derek Bambauer for drawing our attention to this statement.

[13] Quoted in Larry Elliott & Charlotte Denny, *Top 1% Earn as Much as the Poorest 57%*, GUARDIAN (London), Jan. 18, 2002, at 21. Milanovic's full statement was: "Should [rising global inequality] be of concern to the rich? Perhaps, if we believe that wide income gaps lead to immigration and resentment breeds terrorism. For ultimately, the rich may have to live in gated communities while the poor roam the world outside those few enclaves." *Id.*

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support for the reforms we are considering, we must look elsewhere — to theories that acknowledge that moral obligations or sentiments of "mutual well-wishing and concern"[14] might extend beyond national borders. The remainder of this Part explores theories of that sort.

B. Historical Equity

Arguably, the developed world has obligations to the developing world rooted in the history of relations between the two regions. From this perspective, the duty of developed country residents to subsidize healthcare in developing countries derives not (merely) from considerations of global social welfare, distributive justice, or a duty to assist (themes we will consider shortly), but also from the fact that the present impoverishment of the developing world (which makes it particularly ill-equipped to address its health crisis) is in part the result of its history of interactions with developed countries.

The normative principle that underlies this argument is a variant of corrective justice. It finds expression in many settings. In popular parlance, it is manifested in a widely recognized obligation to return "ill-gotten gains." In law, it is embodied in several doctrines: the common law cause of action for "unjust enrichment";[15] the duty recognized in tort and criminal law to rescue a person whose peril one has caused;[16] and the obligation, recognized in a growing number of jurisdictions, to return or repatriate works of art or cultural artifacts wrongly taken from their original owners, even if the current possessors both are innocent and were ignorant of the original wrongdoing.[17] In moral philosophy, it receives its most crisp

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[14] This is Richard Miller's encapsulation of the commitment to fellow-feeling or sociality that is central to the socialist tradition and which he suggests, we think correctly, is an attractive notion for the majority of residents in contemporary societies. *See* RICHARD MILLER, ANALYZING MARX: MORALITY, POWER, AND HISTORY 19 (1984). Compare Mill's remarks on the "social feelings of mankind" as a significant motivational force for most people. *See* JOHN STUART MILL, UTILITARIANISM 32-35 (George Sher ed., Hackett Publishing 1979) (1861).

[15] *See, e.g.*, Callano v. Oakwood Park Homes Corp., 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966); G. PALMER, THE LAW OF RESTITUTION (1978).

[16] *See, e.g.*, Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 558 (1988).

[17] *See, e.g.*, Native American Graves Protection and Repatriation Act, Pub. L. No. 101-60, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (2006) and 18 U.S.C. § 1170 (2006); Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Art*, 64 FORDHAM L. REV. 49, 50 (1995); William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW

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elaboration in Robert Nozick's "principle of rectification," which requires, roughly, the remedy of any injustices carried out in the past that yield effects traceable to present holdings.[18]

What, then, is the character of the historical injustice that, when read against this normative principle, would give rise to a duty on the part of current Northerners to assist current Southerners? Any of many cognate claims concerning world history might be inserted here,[19] but the one that seems to us both most defensible and most germane to the problem before us runs as follows: the poverty of most Southern countries today is traceable in substantial measure (although not entirely, of course) to two major periods of modern history: (1) the period of encounter, coerced trade, conquest, imperial rule, and colonization by European countries with respect to much of the rest of the world, from, roughly, 1500 to the early 1900s;[20] and (2) the post-

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& POL'Y INT'L BUS. 123 (1996).

[18] Our rough paraphrase abstracts from the specifics of Nozick's own theory of what constitutes wrongdoing or injustice (which revolves around two principles: "justice in acquisition" and "justice in transfer") and of how violations of those principles should be identified and corrected. His own statement of his proposed "principle of rectification" is as follows:

> 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.

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152-53 (1974). Nozick goes on to suggest that if more than one possible description of just holdings is yielded, the choice between them may be affected by considerations of distributive justice and equality that he otherwise argues against. *Id.*

[19] One such claim would be that the past five centuries have witnessed major acts of unjustified violence and prolonged episodes of coercion, extraction, domination, and exploitation that, even if they cannot explain the impoverishment of developing countries today, nevertheless justify reparations of some sort. Although descriptively uncontroversial, normatively this assertion is fraught with highly contentious premises.

[20] To avoid misunderstanding, we wish to emphasize that in this subsection we are not taking (and need not take) any stand on a number of major historiographic controversies that are often conflated with, but are in fact separable from, our topic. These include:

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World War II era of decolonization marked by an international system of unequal political, economic, and military relations, in which Western dominance has been anchored in the power of the United States.

Not all historians would agree with this claim. David Landes and Mathias Risse, for example, dismiss it as the lament of "a dwindling group of Marxist historians."[21] Nevertheless, we contend, three different lines of analysis, when combined, lend it considerable plausibility. The first focuses on suggestive indicators and correlations. Here is one: in 1500, the gap in wealth between today's developed and developing regions was 1.3 to 1; in 1820, 2 to 1; and today, 7 to 1.[22] Another is the remarkable (although not total) overlap

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(1) What causal factors were behind the "rise of the West" during this period, and when exactly did the West become ascendant (e.g., 1500s or 1800s)?

(2) To what extent were imperial and colonial spoils and relations necessary or strongly beneficial to the development/industrialization of the West?

(3) What were the driving factors behind Western imperialism and colonialism?

For contrasting major treatments of the first set of questions, see generally DOUGLASS C. NORTH & R.P. THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973); Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 PAST & PRESENT 30 (1976); THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE (T.H. Aston & C.H.E. Philpin eds., 1985) (1976); CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992 (1990); JARED DIAMOND, GUNS, GERMS, AND STEEL (1997); DAVID LANDES, THE WEALTH AND POVERTY OF NATIONS (1998); KENNETH POMERANZ, THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD-ECONOMY (2000). For a variety of answers to the second question, see generally IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974); Immanuel Wallerstein, *The West, Capitalism, and The Modern World-System*, 15 REVIEW 561 (1992); Robert Brenner, *The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism*, 104 NEW LEFT REV. 25 (1977) [hereinafter Brenner, *Origins of Capitalist Development*]; Patrick O'Brien, *Imperialism and the Rise and Decline of the British Economy, 1688-1989*, 238 NEW LEFT. REV. 48 (1999); POMERANZ, *supra*. For responses to the third question, compare TONY SMITH, THE PATTERN OF IMPERIALISM: THE UNITED STATES, GREAT BRITAIN AND THE LATE-INDUSTRIALIZING WORLD SINCE 1815 (1981); Keith Griffin & John Gurley, *Radical Analyses of Imperialism, the Third World, and the Transition to Socialism: A Survey Article*, 23 J. ECON. LIT. 1089, 1091-1103 (1985); Patrick Wolfe, *Imperialism and History: A Century of Theory, from Marx to Postcolonialism*, 102 AM. HIST. REV. 388, 418 (1997).

[21] LANDES, *supra* note 20, at 381, cited with approval in Mathias Risse, *Response to* World Poverty and Human Rights: *Do We Owe the Global Poor Assistance or Rectification?*, 19 ETHICS & INT'L. AFF. 9, 13 n.9 (2005).

[22] ANGUS MADDISON, THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE 46 tbl.1-9b (2001). Comparing the richest and poorest regions within the developed and developing worlds (respectively, Western Europe and its offshoots, and Africa), the

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between the developed countries of the world today and countries that were either colonial powers or settler colonies of such powers, and between developing countries today and areas that were subject to non-settler colonial relations with the West.[23] To be sure, correlation is not causation, and other factors (politics, culture, tropical climates, etc.) might be marshaled to explain these patterns.[24] But they are sufficient, in our view, to create a prima facie case in support of the claim.

The second line of analysis distills from histories of many countries and regions the following generalizations: underdevelopment in several (though not all) peripheral countries is strongly linked to four manifestations of imperial and colonial coercion and post-colonial relations of power.[25] Early on there occurred: (1) the extraction of wealth in the form of resources and cheap labor; and (2) the retardation of local industry so as not to compete with the domestic output of the dominant country, either for the international or for the local market. Later on there occurred: (3) the prevention of semi-autonomous national developmental efforts, and the sustenance of client regimes, often through military intervention or threat; and (4)

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gaps are two to one in 1500, three to one in 1820, and nineteen to one today. *Id.* at 126 tbl.3-1b. In 1000 A.D., Western Europe was among the poorest regions in the world. *Id.*

[23] The major counter-examples to the first correlation are the East Asian late developers, which were neither colonial powers nor settler colonies of Japan. The major counter-examples to the second correlation are Latin American developing countries, which are settler colonies but nevertheless remain poor. For an explanation of the latter in terms of internal factors (namely, qualitative differences in initial resource endowments leading to alternative socio-political pathways that vary in their efficacy for dynamic economic growth), see Kenneth L. Sokoloff & Stanley L. Engerman, *History Lessons: Institutions, Factor Endowments, and Paths of Development in the New World*, 14 J. ECON. PERSP. 217 (2000). Analyses that attend more to the role of the external factors at issue here are cited *infra* note 26.

[24] *See, e.g.*, Brenner, *Origins of Capitalist Development*, *supra* note 20; LANDES, *supra* note 20; MADDISON, *supra* note 22; Jeffrey Sachs, *Tropical Underdevelopment* (Nat'l Bureau of Econ. Research, Working Paper No. 8119, 2001). For a more detailed consideration of these alternative explanations, see *infra* note 30 and accompanying text.

[25] The extent to which the pattern defined by these four developments was inexorable does not affect its moral implications and thus need not detain us. For contrasting views on this score, compare Andre Gunder Frank, *The Development of Underdevelopment*, 18 MONTHLY REV. 17 (1966), with PETER EVANS, DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE, AND LOCAL CAPITAL IN BRAZIL (1979), and FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (1979).

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integration into a global economy on unfavorable terms of trade and debt.[26] Also significant on some accounts was the imposition upon

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[26] This sentence summarizes (rather brutally) more subtle arguments developed in AMIYA BAGCHI, THE POLITICAL ECONOMY OF UNDERDEVELOPMENT (1982) (providing general study and integrating cases across periods and regions); Irfan Habib, *Colonization of the Indian Economy, 1757-1900*, 32 SOC. SCI. 23 (1975); Bipan Chandra, *The Colonial Legacy*, *in* THE INDIAN ECONOMY: PROBLEMS AND PROSPECTS 1 (Bimal Jalan ed., 1992). For a synthetic summary of the colonial period, see JAMES CYPHER & JAMES DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 66-100 (2004). For case studies of the post-colonial period, see generally CARDOSO & FALETTO, *supra* note 25; EVANS, *supra* note 25.

For reviews of relevant aspects of trade and debt, and international financial relations and institutions more generally, see generally OXFAM, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALIZATION AND THE FIGHT AGAINST POVERTY (2002); CYPHER & DIETZ, *supra*, 471-532; BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY 61-81 (2005) [hereinafter MILANOVIC, WORLDS APART]; Robert Wade, *Choking the South: World Finance and Underdevelopment*, 38 NEW LEFT REV. 115, 122-27 (2006).

There also exist a number of aggregate level, structural theories that advance different accounts for why unequal exchange or uneven development is, more or less, built into the very logic of international economic transactions given the existing differences in stages of development between "core" and "periphery" countries. Much of the work centers on terms of trade, and in particular on the "Prebisch-Singer Thesis" regarding declining terms for primary versus manufactured goods. *See* ECON. COMM'N FOR LATIN AM., UNITED NATIONS, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPAL PROBLEMS (1950); Hans Singer, *The Distribution of Gains Between Investing and Borrowing Countries*, 40 AM. ECON. REV. 473 (1950). For recent assessments of the extent to which variations of the thesis have been borne out, see United Nations Conference on Trade and Development, *Evolution in the Terms of Trade and Its Impact on Developing Countries* [hereinafter UNCTAD], *in* TRADE AND DEVELOPMENT REPORT 85, 85-114 (2005); CYPHER & DIETZ, *supra*, at 159-70. (Note, the discussion of distribution in UNCTAD, *supra*, at 105-14, evinces a shift in emphasis away from a pure economic logic and toward socio-political factors as well, bringing it closer to the type of analysis advanced in the sources cited in the previous paragraph). For alternative structural accounts, see generally SAMIR AMIN, 1 ACCUMULATION ON A WORLD SCALE (Brian Pearce trans., 1974); ARGHIRI EMMANUEL, UNEQUAL EXCHANGE (1972); Anwar Shaikh, *On the Laws of International Exchange*, *in* GROWTH, PROFITS AND PROPERTY 204 (Edward J. Nell ed., 1980). Note, assuming *arguendo* their plausibility, for these accounts to be relevant to the argument we are presenting in this section, they would have to be supplemented by an argument regarding the normative implications of leaving these economic logics politically unchecked.

A number of empirical studies have attempted to assess the claims of the foregoing bodies of work by examining, at an aggregate level, long term trends in inequality between nations. For studies corroborating the existence of ongoing or even increasing gaps, see generally Charles Ragin & York Radshaw, *International Economic Dependence and Human Misery, 1938-1980: A Global Perspective*, 35 SOC. PERSP. 217, 217 (1992); Lant Pritchett, *Divergence, Big Time*, 11 J. ECON. PERSP. 3, 4-8 (1997); Roberto Korzeniewicz & Timothy Moran, *World-Economic Trends in the Distribution of*

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subordinate peoples of the socio-cultural formation and perspective of "modernity" itself. From this angle, the consciousness of "underdevelopment," understood as an inadequate stage of industrial economic growth, was itself part of a sequence or trajectory pressed upon cultures that, whatever path they were on, were now forced to conform to that of the West.[27] As several scholars have emphasized, this account does not deny that corruption, collaboration, and mismanagement by elites within the developing countries contributed importantly to their impoverishment. On the contrary, in "imperialist" relations, it is common for the "center within the center" (i.e., elites in developed countries) to establish links or alliances with the "center within the periphery" (elites in developing countries), an arrangement that severely disadvantages the "periphery in the periphery" (masses in developing countries) and has indeterminate (i.e., case specific) impacts on the "periphery within the center" (the masses in developed countries).[28] Once again, however, it must be emphasized that imperial and colonial relations of this sort cannot plausibly account for all aspects of the distribution of wealth within the world today. The skill of each country's own government in managing or mismanaging aspects of the development process always plays some role and sometimes plays a decisive role in determining its economic fate.[29]

Income, 1965-1992, 102 AM. J. SOC. 1000 (1997); Arthur Alderson & Francois Nielsen, *Income Inequality, Development, and Dependence: A Reconsideration*, 64 AM. SOC. REV. 606 (1999); Linda Beer & Terry Boswell, *The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975-1995*, 8 J. WORLD-SYSTEMS RES. 30 (2002). For a dissenting study, see Glenn Firebaugh, *Empirics of World Income Inequality*, 104 AM. J. SOC. 1597, 1603-06 (1999) (arguing that, when population size differentials are factored in [so that, e.g., China and India are given greater weight], "there is little net change in inequality from 1960 to 1989"). Firebaugh's interpretation, even if sound, is not incompatible with the claim that there have been forces at work that hamper development in the South or obstruct the equitable distribution of the benefits of global efficiency gains (since, given the stark inequality between the respective countries, one might expect that overall global growth would be accompanied not by a leveling off in inter-nation inequality but rather by significant closing of the gap).

[27] *See* BJÖRN HETTNE, DEVELOPMENT THEORY AND THE THREE WORLDS: TOWARD AN INTERNATIONAL POLITICAL ECONOMY OF DEVELOPMENT 21-66 (2d ed. 1995); DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 27-113 (Sherry B. Ortner et al. eds., 2000). We thank Arneulf Becker for drawing our attention to Chakrabarty's study.

[28] *See* Johan Galtung, *A Structural Theory of Imperialism*, 8 J. PEACE RES. 81 (1971).

[29] For case studies (one of success, the other of failure) illustrating the central role played by domestic policies, see, for example, ALICE AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989); PRANAB BARDHAN, POVERTY,

The third line of analysis seeks to explain the impoverishment of developing countries, not in terms of what was done to them, but in terms of what they lacked. It asks, in other words, what conditions necessary to consistent long term economic growth were absent in these nations. The pertinent literature debates the relative importance of three main candidates for the missing element: (1) favorable geographic conditions; (2) greater integration into the global trading system, with its concomitant benefits from increased international specialization; and (3) political and legal economic institutions that reflect and foster stable, transparent, and responsive governments and that enable and stimulate some version of market transactions.[30]

AGRARIAN STRUCTURE AND POLITICAL ECONOMY IN INDIA: SELECTED ESSAYS (2003). Broader studies developing the same argument are ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990); PETER EVANS, EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION (1995).

[30] For accounts emphasizing geography, see, for example, Sachs, *supra* note 24; John Luke Gallup et al., *Geography and Economic Growth* (Apr. 1998), *available at* http://www.worldbank.org/html/rad/abcde/sachs.pdf. An account emphasizing lack of access to the global trading system is Anne Krueger, *Trade Policy and Economic Development: How We Learn*, 87 AM. ECON. REV. 1 (1997). Accounts emphasizing the absence of favorable political and legal institutions include DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990); Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2004). A variant of this third view emphasizes, in contrast to the mainstream economic approach, the necessity of deeper social-institutional transformations in order to fully entrench (or simulate a version of) the dynamic-growth logic that marks specifically capitalist, as opposed to merely "commercial," economies (i.e., the logic of harnessing savings for industry, intensive exploitation of labor and other production inputs, technological innovation, and reinvestment for expansion). On this view, what is needed is not simply the unleashing of natural human propensities to "truck, barter, and exchange" through the removal of social encumbrances to trade and finance, but rather deep-cutting changes to the institutional environment that shapes the motivations of producers and investors. These transformations include the creation of a labor force that both needs and is able to hire itself out for wages (by, for example, dispossessing the peasantry of both land and traditional obligations, eliminating alternatives for independent subsistence, and fostering consumerism), and the institutional entrenchment of the mindset of profit-maximization and reinvestment for growth for its own sake (through, for example, cultural changes in the markers and privileges of social success, institutionalization of competitive compulsion, and the removal of social barriers to the commodification of goods and their equation with market exchange-values rather than notions of "use-value," "just price," or "natural price"). For a succinct distillation of some central themes in this literature, which include works by Marx, Weber, Karl Polanyi, and Barrington Moore, see Paul Kennedy, *Political Barriers to African Capitalism*, 32 J. MOD. AFR. STUD. 191, 193-200 (1994); see also Brenner, *Origins of Capitalist Development*, *supra* note 20, at 33-37.

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Theses grouped under point (3), institutions, seem to be gaining ascendance in these debates.[31] Because defects in political and legal institutions tend to be part of the legacy of colonialism, this third line of analysis increasingly converges with the second. For example, a number of historians of political institutions in Africa have insisted on the colonial past's significant causal role in handing down a disfiguring legacy of barriers to the development of political institutions that are well-suited to the ethnocultural, geographic, and factional contexts of many jerry-built African "nation-states."[32]

A particularly dramatic confirmation of this convergence is provided by an empirical investigation conducted by economists Daron Acemoglu and his colleagues into "the colonial origins of comparative development."[33] The authors set out to test how strongly differences between the colonization strategies adopted by European colonizers in different colonies, in terms of types of settlements and forms of institutions established (themselves partly the result of the disease environments faced by the early Europeans), can explain the current forms of institutions and, as a result, the current economic performance of the modern day successor nation-states. They conclude that there was a spectrum of types of colonial institutions. At one extreme were "extractive states" (such as the Belgian setup in the Congo): institutions that "did not introduce much protection for private property" or "provide checks and balances against government appropriation" and the main purpose of which was "to transfer as much of the resources of the colony to the colonizer, with the minimum amount of investment possible."[34] At the other extreme were settlement colonies or "Neo-Europes," such as those of Australia, New Zealand, Canada, and the United States. In those areas, the settlers, attempting to replicate European institutions, put "great

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[31] *See* Karla Hoff & Joseph Stiglitz, *Modern Economic Theory and Development*, *in* FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE IN PERSPECTIVE 389 (G.M. Meier & J.E. Stiglitz eds., 2001); Mathias Risse, *What We Owe to the Global Poor*, 9 J. ETHICS 81, 84-94 (2005).

[32] *See, e.g.*, BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE (1992); PAUL KENNEDY, AFRICAN CAPITALISM: THE STRUGGLE FOR ASCENDENCY (1988); MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996); J. Lonsdale, *State and Social Processes in Africa: A Historical Study*, 24 AFR. STUD. REV. 139 (1981).

[33] Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation* (Nat'l Bureau of Econ. Research Working Paper No. 7771, 2000); *see also* Karla Hoff, *Paths of Institutional Development: A View from Economic History*, 18 WORLD BANK RES. OBSERVER 205 (2003).

[34] Acemoglu et al., *supra* note 33, at 2.

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emphasis on private property and checks against government power."[35] Acemoglu and his colleagues hypothesized that the choice of colonization strategy was heavily affected by the mortality rates faced by early Europeans, and that those colonization strategies, in turn, have had myriad repercussions through the present. Those hypotheses, they found, were borne out by the evidence:

> We document empirically that (potential) settler mortality rates were a major determinant of settlements; that settlements were a major determinant of early institutions (in practice, institutions in 1900); that there is a strong correlation between early institutions and institutions today; and finally that current institutions have a first-order effect on current performance.[36]

Four aspects of their results are worth highlighting. First, they found that "approximately three-quarters of the cross-country income differences we observe can be explained by differences in institutions." Second, the results were not altered by excluding outliers on either end (i.e., Australia, New Zealand, Canada, and the United States at one extreme and Africa at the other). Third, once the effect of institutions is controlled for, "neither distance from the equator (latitude) nor the dummy for Africa is significant." (In short, "Africa is poorer than the rest of the world not because of pure geographic or cultural factors, but because of worse institutions.") Fourth, the authors considered and found empirically unsupported an alternative explanation for their findings — namely, that the "early European settlers might have brought a 'culture' conducive to economic progress."[37]

The debate concerning why some parts of the world are rich and others are poor will undoubtedly continue for some time. It is neither possible nor necessary for us to settle the controversy here. Sufficient for our purposes is a rough generalization, supported by all three of the approaches we have just summarized: a significant portion of the poverty of developing countries today results from the manner in

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[35] *Id.* The authors borrow the label "Neo-Europes" from historian Alfred Crosby.

[36] *Id.* at 3.

[37] *Id.* at 3-4. The authors addressed this possibility by testing for whether settler mortality rates (and hence presence or absence of Europeans) had an effect independent of their role in determining the types of institutions established and found that they did not. *Id.* at 28. Unlike culture, the following other potential complicating variables could be and were directly controlled for and found not to overturn the finding of a strong effect due to institutions: "climate, geography, religion, legal origin, main colonizer, natural resources, and soil quality." *Id.* at 4.

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which those countries were treated by countries that today are prosperous.[38]

From this point forward, the argument seems straightforward. We need merely to combine the foregoing rough generalization with the principle of corrective justice outlined at the start of this section, and we have a sound basis for an obligation on the part of the residents of developed countries to help the residents of developing countries solve "their" health crisis. Unfortunately, things prove less simple. One complication concerns which countries owe duties to which other countries. If we tracked the relationships between former colonizers and former colonies, we would likely conclude that Spain and the United States owe strong obligations to Latin American countries and the Philippines but fewer to African countries; Portugal owes strong duties to Brazil (though complicated by the facts that Brazil assumed the dominant position for a portion of their intertwined histories and has now in some ways surpassed its former master economically) and to many African nations; Japan's obligations are limited to China, Korea, and other east and southeast Asian countries; England's to the Indian subcontinent and, with France, to parts of Africa, southeast Asia, and the Middle East; and countries such as Australia and Singapore get off scot-free. If we opted for a broader approach that took account of post-colonial "neo-imperial" relations, the web of duties would become even more complex. If we went still further and recognized that all prosperous nations likely have benefited to some degree from operating within a common network of commercial relations, then the job of determining who owes what to whom seems hopeless.

A loosely related difficulty arises out of the fact that those responsible for the bulk of the devastation wrought upon the former colonies and imperial peripheries have long since deceased. The force of the corrective justice principle seems strongest when it pertains to wrongs committed by living persons. As the rules and customs pertaining to cultural artifacts suggest, the principle does not lose all of its bite when the wrongs were committed by prior generations, but it is weaker. The attenuating effects of the passage of time might be

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[38] Even scholars generally skeptical of explanations emphasizing colonialism and imperialism tend to agree with this broad generalization. *See, e.g.*, MILANOVIC, WORLDS APART, *supra* note 26, at 157 (asking "can one seriously believe that colonization, or, more recently, the Cold War had nothing to do with furthering civil wars and adding to the misery of the poor countries?"); Sachs, *supra* note 24, at 11 (conceding that he has "little doubt that the colonial interlude was adverse for economic development in the tropics").

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offset by a demonstration that the colonial and imperial relations of yesteryear are strongly linked not only to current developing world poverty, but also to current developed world prosperity. Such a showing would provide some basis for the normative claim that present-day residents of developed countries enjoy the fruits of past injustice, and hence retain some responsibility for corrective action. But, leaving aside the difficulty of making the demonstration in question, the normative conclusion we might erect upon it is subject to two significant objections of its own: (1) the current residents of developed countries were never given an ethically significant option to "opt out" of such benefits;[39] and (2) there are no specifically identifiable spoils they might disgorge.

Now, perhaps each of these problems is surmountable, and maybe for each there are plausible responses and reasonable compromises. Nevertheless, it does seem to us that these difficulties point to two general problems associated with trying to map a corrective justice approach onto the history of social relations between and across countries: it inappropriately imports that approach's assumptions of individuated responsibility into an arena of complex relations marked by often unchosen structures of political authority and economic interaction and vast unintended consequences; and it remains too fixated on a backward-looking perspective on justice. Does this then mean that there is no ethical significance to this historical record? No; but, for our purposes, the main lesson of this line of analysis is that the developed and developing worlds have long been intertwined. That lesson, in turn, creates a strong prima facie case against arguments — of which we will see several shortly — that seek to limit the responsibilities of developed country governments to their own residents or citizens.

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[39] From a communitarian perspective, this fact of involuntariness would be of less significance, since communitarianism places considerable ethical weight on ties and histories (and obligations deriving therefrom) that one simply inherits as part of one's given social identity. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE 220-21 (2d ed. 1984) ("I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. . . . What I am, therefore, is in key part what I inherit, a specific past that is present to some degree in my present. I find myself part of a history and that is generally to say, whether I like it or not, whether I recognize it or not, one of the bearers of a tradition."). We return to this point *infra* at note 190 and accompanying text.

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C. Social Utility

The theory we just canvassed is retrospective; it seeks to remedy injustice done in the past. We turn now to a set of approaches less concerned with righting moral balances tipped years ago and more concerned with the shape of the world today or in the future. The first and best known of these is utilitarianism.[40] It urges lawmakers to choose the course of action that is most likely to produce the highest net social welfare, understood as "the greatest happiness of the

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[40] Utilitarianism is itself one variant of a broader framework, sometimes known as "welfarism," which takes the view that judgments of social policy should be based purely on the subjective utilities of individuals (as opposed to utility-independent notions such as fairness, liberty, objective well-being, perfectionist ideals, or communal values). *See* Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 463-64, 468, 471 (1979). Two other well-known criteria within the same family are (a) Pareto superiority, which justifies changes that make one or more people better off and no one worse off, and (b) "Kaldor-Hicks" efficiency (also known as potential Pareto superiority), which justifies changes that benefit some people enough that they could, from their gains, fully compensate the losers and still be better off themselves. We eschew both of these alternative criteria here for reasons well-developed in the pertinent literature: Pareto superiority is untenable as a guide to real world policy choices, which typically involve tradeoffs that violate its commitment to making no one worse off. *See, e.g.*, Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1212, 1218-19 (1991). The Kaldor-Hicks metric, though more often workable, is nevertheless frequently indeterminate and, more importantly, by taking as given existing distributions of wealth, income, and legal entitlements, is indefensibly conservative. *See, e.g.*, C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1670 & n.62 (1998). To be sure, the utilitarian metric also faces criticisms, which we consider below. However, as we hope to show, those criticisms are fewer and, in the present context, less persuasive.

A final introductory note: some scholars dispute the characterization of welfare-based theories as being rooted solely in subjective utility, urging that they be seen instead as simply synonymous with a kind of consequentialism that is capable of accommodating notions of well-being beyond those based in subjective individual preferences or end-states. *See* Partha Dasgupta, *What Do Economists Analyze and Why: Values or Facts?*, 21 ECON. & PHIL. 221, 227, 231-32, 233 (2005). This terminological debate does not, however, affect our analysis here, which is premised on three points: (1) economists' welfarist approaches have tended to focus primarily on the subjective utilities of individuals, usually in terms of preference-satisfaction as revealed in consumption choices; (2) among subjectivist welfare theories, a restricted and qualified utilitarianism is the most attractive; and (3) alternatives based on non-subjectivist consequentialist theories are discussed below, *infra* at notes 68-75 and accompanying text.

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greatest number."[41] This guideline has well-known implications for distributive justice. In brief, when combined with weak and plausible assumptions of diminishing marginal utility and randomized distribution of utility functions, it tends toward a rough egalitarianism, at least with respect to the distribution of basic resources or goods.[42] An apparent implication of that tendency is that the residents of countries that currently enjoy a disproportionate share of the world's income, wealth, and other social goods should

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[41] For the *locus classicus*, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1789) [hereinafter BENTHAM, MORALS AND LEGISLATION]. For other classic treatments, see generally MILL, *supra* note 14; HENRY SIDGWICK, THE METHODS OF ETHICS 411-509 (7th ed. 1907). The "greatest happiness of the greatest number" formulation was Bentham's early version of the principle, one which Bentham seems to have adopted from Beccaria, although he himself sometimes attributed it, seemingly mistakenly, to Joseph Priestley. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1823), *reprinted in* COLLECTED WORKS OF JEREMY BENTHAM: A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT, at 393 (J.H. Burns & H.L.A. Hart eds., 1977); *see* W.R. Sorely, *Bentham and the Early Utilitarians*, *in* 11 THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE: THE PERIOD OF THE FRENCH REVOLUTION 63, 63-85 (A.W. Ward & A.R. Waller eds., 1914); Robert Shackleton, *The Greatest Happiness of the Greatest Number: The History of Bentham's Phrase*, 90 STUD. ON VOLTAIRE & EIGHTEENTH CENT. 1461, 1462-63 (1972). We should note that John Rawls has suggested that ultimate credit should likely go to Frances Hutcheson for being the first, in 1725, "to state clearly the principle of utility," which Hutcheson framed as requiring the "the greatest happiness for the greatest numbers." *See* JOHN RAWLS, A THEORY OF JUSTICE § 5, at 20 n.9 (revised ed., Belknap Press 1999) (1971) [hereinafter RAWLS, THEORY OF JUSTICE]. Although Bentham himself later adopted a simpler "greatest happiness principle," (see Sorely, *supra*) we use the earlier formulation here to highlight the fact that the application of utilitarian reasoning we deploy focuses on achieving a wide distribution of utility among individuals, rather than simply a large aggregate total. This version, in our view, most faithfully tracks the intuition that gives utilitarianism much of its power — the idea that, everything else being equal, numbers do matter in ethical deliberation — without lapsing into the error of pursuing the maximization of an aggregate utility total as a goal in itself, which would be senseless given that there is no agent that experiences the pleasure from any such maximized total. *Cf.* RAWLS, THEORY OF JUSTICE, *supra*, § 5, at 20-24.

[42] *See* R.M. Hare, *Justice and Equality*, *in* JUSTICE AND ECONOMIC DISTRIBUTION 118, 126-27 (J. Arthur & W. Shaw eds., 2d ed. 1991) (1978); RICHARD D. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 311 (1979). Of course, this conclusion must be qualified by the possibility that there are incentive-based reasons for departing from a statically maximizing egalitarian distribution, whereby permitting inequality would lead to higher overall output and hence possibly greater dynamic aggregate welfare. Leaving aside the IP-specific version of this static-dynamic tradeoff, it is highly implausible that any of the forms of redistribution that we contemplate here will have a dynamic disincentive effect of any appreciable magnitude, and certainly not one that will cancel out the static gains. The tradeoff specific to IP policy is something we attend to throughout our analysis of reform options.

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contribute disproportionately to the cost of creating and distributing drugs that would prevent, cure, or manage the infectious diseases that afflict the poorer nations. That implication is, however, subject to a host of objections, complications, and refinements. We take them up in the following stages: In section 1, we flesh out the basic utilitarian argument. In section 2, we consider how it bears on the question of who should pay for healthcare R & D. In section 3, we consider how it bears on the questions of how much money should be spent on R & D and how it should be allocated. In section 4, we discuss the advantages and limitations of the DALY metric, which figures heavily in the utilitarian calculus and which will also play a role in subsequent portions of our analysis. Finally, in section 5, we flag some important limitations on the utilitarian approach in general.

1. The Basic Reasoning

An essential, and relatively uncontroversial, component of the standard utilitarian argument for egalitarianism is the principle of diminishing marginal utility, which supposes that the less an individual has of a given good, the more benefit she derives from obtaining an additional amount (and vice versa), at least in general and for most goods, including income-wealth.[43] If we could further assume that all individuals have the same utility function, then we could be sure that wealth transfers from the rich to the poor would, *ceteris paribus*, augment aggregate utility.[44] But it is precisely this

[43] The first clear statement of the principle is in Daniel Bernoulli, *Exposition of a New Theory on the Measurement of Risk*, 22 ECONOMETRICA 23 (Louise Sommer trans., 1954) (1738). A few economists argue that the utility curves of some people do not conform in all respects to the principle of diminishing marginal utility of wealth. Specifically, they suggest that, in their upper reaches, some utility curves are "ogive shape." *See, e.g.*, F.M. Scherer, *The Innovation Lottery*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 3-22 (Rochelle Cooper Dreyfuss et al., eds., 2001). If this were correct, it would complicate considerably the general utilitarian case for egalitarianism. We will not pursue the issue here, because, even if this hypothesis were broadly true, the overwhelming majority of the beneficiaries of the reforms we advocate are very poor and thus are located at places on their utility curves where the slope is quite steep — steeper than the slopes of the curves where even the most affluent of the people our reforms would adversely affect are currently located.

[44] This was Bentham's own view with respect to the static effects of egalitarian redistribution. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 102-09 (C.K. Ogden ed., 1987) (1789). Bentham did of course go on to attend to dynamic considerations, and argued for the need to check egalitarian redistributions against the potentially damaging "future" effects they may cause by eroding people's "security" and, thus, their incentives to produce. *Id.* at 96-97, 109-20.

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further assumption that opponents of such wealth transfers dispute. The opponents argue that, given the likelihood that individuals vary, perhaps significantly, in their utility curves, and given that we do not have sufficient knowledge to make interpersonal comparisons of utility, there exists no "theoretical basis for the conclusion that . . . a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's utilities."[45] However, this overlooks the point forcefully made by Abba Lerner: all that is needed to justify redistribution on utilitarian grounds is that we be able to assume, in addition to the general principle of diminishing marginal utility, that specific utility curves are distributed randomly.[46] If this is so, then, despite the fact that individual utilities cannot be compared, we know that equalizing holdings will, as a statistical matter, maximize probable utility. This is because for any specific individual utility curve, while there is an equal chance that a person with that curve will lose or gain the wealth from the equalizing transfer, the harm of a loss (to a well-off person with that utility function) will be outweighed by the benefit (to a worse-off person with that curve).

There are only two cases in which the assumption of random distribution is not plausible. The first, which rarely obtains, is where we actually have enough knowledge of individuals' specific utility curves so as to tailor distribution more precisely (by equalizing everyone's marginal utility, which may lead to widely divergent total utilities). The second is where, although we do not have detailed knowledge of individuals' curves, there are plausible grounds for believing that there exists a particular correlation between people's holdings and their utility functions. If, for example, we thought that "the rich are inherently better able to derive satisfaction from wealth than are other people," we should tolerate or even (depending on the degree to which the rich are superior utility generators) increase the existing inequality of wealth.[47] Although there has been some

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[45] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 216 (1st ed. 1972); *see also* Allan Feldman, *Pareto Optimality*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 5 (Peter Newman ed., 1998).

[46] ABBA PTACHYA LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS 20-40 (Augustus M. Kelley Publishers 1970) (1944). Our discussion draws on Ed Baker's explication and extension of Lerner's argument in response to the objection in POSNER, *supra* note 45, at 215-17. *See* Baker, *supra* note 40, at 27-32.

[47] Baker, *supra* note 40, at 30 (internal footnote omitted). As Baker points out, to justify deviations from the egalitarian principle, it is necessary that the differences in utility-generating powers be inherent. It would not suffice, in other words, if people in developed countries today were more dependent on material goods for happiness or had a more highly developed awareness of the pleasures that could be provided by

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speculation along those lines among utilitarian theorists, none of those ruminations is empirically grounded. Until such evidence is forthcoming, the basic utilitarian argument seems strong.

2. Distribution of the Cost-Burden for Global R & D

We now apply the foregoing reasoning to the case of global distribution of resources for health. Consider first the issue of justifying policy measures whereby the vast majority of the cost-burden of global pharmaceutical R & D would fall on the shoulders of residents in the developed world. The argument for these measures is roughly analogous to the utilitarian case for a progressive income tax, both being applications of the preceding reasoning: residents of developed countries (like those at higher income levels) should bear the greater share of the R & D (tax) burden because, on average, they suffer less marginal disutility from each additional payment than those in poorer countries (at lower income levels). In support of this proposition, Table 2 displays the current distribution of income by region across the planet.[48]

goods above a basic minimum. This is because "[i]f it is not an inherent ability, then presumably increasing the wealth of the poor would increase their ability to derive satisfaction from wealth; at most, if the capacity is not inherent but acquired through experience, we have an argument for equalizing income gradually." *Id.* at 30. This last consideration, if relevant at all, would only apply to redistribution of substantially greater income and wealth of the developed world, and for substantially less pressing needs of the developing, than is the case for our aims. Hence we leave it aside.

[48] We rely here on the World Bank, whose figures are broken down by three regions: low income, middle income, and high income countries. These correspond quite closely to the regional divisions we have been using throughout our analysis for the breakdown of disease burdens and pharmaceutical markets, i.e., the WHO's taxonomy of high mortality developing countries, low mortality developing countries, and developed countries. The Bank provides figures for 208 countries, of which 55 are classified as "high income" and 153 are classified as "low and middle income." The respective population shares of the two groups are 16% and 84%. World Bank Group, World Development Indicators 2006: The World by Income, http://devdata.worldbank.org/wdi2006/contents/income.htm (last visited Jan. 30, 2007). The WHO provides figures for 192 countries, of which 60 are classified as "developed" and 132 are classified as "developing." The respective population shares of the two groups are 19% and 81%. WORLD HEALTH ORGANIZATION, *supra* note 1, at 156-57. Maps showing the alignment of the two schemes are available at the following website: http://www.tfisher.org/countries.htm.

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Table 2. Gross National Income by Region (2004)

	Per Capita GNI (Exchange Rate)[49]	Total GNI (Exchange Rate) (billions)	Population (billions)	Per Capita GNI (PPP)[50]	Total GNI (PPPs) (billions)
Developing Region	$1,502	$8,051 (20%)	5.36 (84%)	$4,726	$25,334 (45%)
Low income countries	$507	$1,188 (3%)	2.34 (37%)	$2,258	$5,291 (10%)
Middle income countries	$2,274	$6,863 (17%)	3.02 (47%)	$6,644	$20,051 (35%)
Developed Region	**$32,112**	**$32,245 (80%)**	**1.00 (16%)**	**$31,009**	**$31,138 (55%)**
Global Figures[51]	$6,329	$40,282	6.36	$8,844	$56,289

Source: World Bank, World Development Indicators 2006, Table 1.1.

Table 2 provides two sets of figures for per capita and total GNI by region: those calculated using currency market exchange rates and those using rates based on purchasing power parity ("PPP"). The former are a measure of a currency's international purchasing power and are believed by many scholars to overestimate inequality, by failing to register the fact that the prices for many goods are cheaper in developing countries than in developed countries and, hence, the domestic buying power of their currencies is greater than their international exchange rate would suggest. (For example, forty-five rupees buys more food in India than could be obtained in the United States for its rough exchange equivalent of one U.S. dollar.) This is why many analysts now use PPP dollars, which attempt to factor in purchasing power differentials. However, the methodology used to

[49] GNI stands for "gross national income," which is defined as "the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad." WORLD BANK, WORLD DEVELOPMENT INDICATORS 2006: WORLD VIEW tbl.1.1, *available at* http://devdata.worldbank.org/wdi2006/contents/Table1_1.htm. The figures in this and the next column are in U.S. dollars.

[50] The figures in this and the next column are in "international dollars" where one international dollar "has the same purchasing power over GNI as a U.S. dollar has in the United States." *Id.*

[51] Presumably due to rounding errors, the World Bank's global figures are slightly less than the sums of the figures provided for low, middle, and high income countries.

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derive these has come in for sharp criticism recently; it is now generally recognized that, for a number of reasons, the current PPP approach is likely to underestimate inequality substantially.[52] Consequently, we provide both metrics as poles. By either measure, we can see that the inequality between developing and developed worlds is stark: residents of developed countries enjoy on average an annual income anywhere from 6.6 to 21 times as large of those in the developing world; although developed country residents comprise only 16% of the global population, they receive between 55% and 80% of the world's annual income.

In fact, these figures understate the actual extent of global inequality (irrespective of whether exchange rate or PPP dollars are used), because they only compare inequalities across countries. Mean per capita GWI figures ignore how each country's total income is distributed among its population. In many developing countries, that stratification is severe.

The foregoing observation points toward a powerful potential objection to the nation-based approach that we have thus far been assuming: why should we assess global distribution in terms of countries; should we not instead focus on inequality among individuals or households across all countries? While determining the latter has long been difficult (because it cannot be surmised from aggregate GDP data), recent work by Branko Milanovic and his

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[52] For the most searching criticisms, see Sanjay G. Reddy & Thomas W. Pogge, *How* Not *to Count the Poor* (Apr. 21, 2003) (unpublished paper), *available at* http://www.columbia.edu/cu/economics/ReddyPoggeCUSem.pdf; see also MILANOVIC, WORLDS APART, *supra* note 26, 12-19. Reddy and Pogge point out, among other things, that basic goods are, in comparison to various services, comparatively more expensive in developing countries than in developed countries (due to differences in service-sector wages). Hence, the World Bank's method of calculating PPPs, which places in the basket of reference goods a proportion of such non-basic items that is much higher than what is actually consumed by the poor, has the effect of exaggerating the real world buying power of many developing country currencies with respect to the goods usually purchased by the poor. Reddy & Pogge, *supra*, at 13-14. Milanovic, points to a further problem: the Geary-Kramis PPP calculation method upon which World Bank figures are usually based calculates "average international prices" through a weighted average which, by taking into account the quantities consumed of various goods, results in an "'international' price structure [that is] closer to that which obtains in rich countries than in poor countries." MILANOVIC, WORLDS APART, *supra* note 26, at 13. Thus, the resulting basket of goods has a higher total "international" price than it does in developing countries, which inflates the real world buying power of developing countries' currencies: "if people in a poor country were really faced by the price structure of a rich country, they would have changed their consumption and consumed more of relatively cheaper products and less of relatively expensive products." *Id.*

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colleagues (based on data from household income surveys) has begun to fill the gap.[53] Some significant differences between the per capita and household measures are revealed by Table 3, which sets out the results of Milanovic's most comprehensive and recent analysis of global income distribution (based on 1998 survey data from 122 countries).

Table 3. Global Inequality — Comparing Distribution Across Countries Versus Across Individuals (1998)

Income Level[54]	**Mean Per Capita Income** (% of world population living in countries at this average per capita income level)	**Actual Individual Income** (% of world's individuals at this per capita income level)
Poor (Below PPP $3,987)	70.1%	77.4%
Middle class (PPP $3,987 – $6,060)	13.9%	6.7%
Rich (Above PPP $6,060)	16.0%	15.9%
(Share taken by North Atlantic & Oceania)	13.0%	10.0%
Total	100.0%	100.0%

Source: Adapted from Table 10.1 in BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY (2005).

[53] *See* Branko Milanovic, *True World Income Distribution, 1988 and 1993: First Calculation Based on Household Surveys Alone*, 112 ECON. J. 51-92 (2002) [hereinafter Milanovic, *True World Income Distribution*]; MILANOVIC, WORLDS APART, *supra* note 26, at 3.

[54] The income level categories were set as follows: (1) the boundary between "poor" and "middle class" was set at just below the mean income in Brazil, which approximates the poverty line in Western countries; (2) "middle class" refers to income levels ranging between the Brazilian average and that of Portugal, a standard reference country for the lowest-end of the developed world; and (3) qualifying as "rich" were all incomes above the Portuguese mean. The "North Atlantic and Oceania" are the twenty-three richest countries of Western Europe, North America, and Oceania, what Milanovic refers to as "basically the club of rich countries." MILANOVIC, WORLDS APART, *supra* note 26, at 41. Japan is a notable omission from this last group.

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Three differences between the two columns stand out. First, while 70% of the world's population lives in countries with an average income below the Western poverty line, the actual number of poor individuals in the world is 10% higher. In other words, there are substantially more poor people in the middle and higher income countries than there are middle class and rich people in the poor countries. Second, there is really only a tiny global "middle class," the size of which is exaggerated by inter-country comparisons (which themselves only suggest a modest middle). Finally, while the rich North Atlantic and Oceanic countries comprise roughly 80% of the population proportion of countries with a high average income, the number of their residents actually enjoying such an income comprises roughly 63% of the total number in the world, suggesting the existence of a nontrivial wealthy strata in the developing world. The overall lesson: a measure of global inequality that focuses solely on inter-country differences will obscure the fact that there are many poor people in the North and rich people in the South, as well as very few people in between.

These observations have important implications for the utilitarian argument we have developed thus far. If the root of the case for egalitarianism is the principle of the diminishing marginal utility of wealth, then it would seem that responsibility for bearing a portion of global pharmaceutical R & D costs should vary by individual or household — or, less precisely, perhaps by income-wealth deciles across the world. This would better fit facts such as that the richest 1% of the world (50 million people) receive as much income as the bottom 57% (2.7 billion), or that the top 10% of the U.S. population (25 million) has an aggregate income equal to that of the poorest 43% of the world (just under 2 billion).[55] Reorienting our argument along these lines might even have some political advantages, on the hypothesis that a scheme that factored in distributive considerations internal to a country like the United States might have more supporters than one that ignores the current ferment against high drug costs for the domestic U.S. population.

However, four considerations combine to counsel against this approach and in favor of pursuing reforms that have the effect of allocating burdens by country or region. First, some of the reforms we commend (such as legal changes that facilitate price discrimination)

[55] Milanovic, *True World Income Distribution*, *supra* note 53, at 88-89. These figures are extrapolated from 1988 and 1993 data from household income surveys of 91 countries covering 84% of the world's population. *Id.* at 57, 59.

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are much easier to implement through segmentation of markets geographically than through segmentation by income. Second, many of our other proposals require government expenditures. Because the money for such expenditures is most often (in developed countries) raised through progressive taxation systems, the net effect of adoption of our proposals would be the allocation of burdens roughly in proportion to household income. Third, some reforms premised on geographic segmentation can be undertaken by developing country governments acting alone or in unison, requiring little assistance from the developed world, making these options substantially more likely to enjoy the necessary political will. Finally and most importantly, notwithstanding the fact of intra-country inequality, it remains the case that the vast bulk of global inequality among individuals is rooted in differences between countries. One salient fact in this regard is that the average income of someone in the bottom decile of the United States is higher than that of two-thirds of the world's people.[56] Thus, the second-best here is in fact a rather good approximation of the ideal.

3. Allocation of Global R & D Resources

The preceding section addressed the issue of who should pay for pharmaceutical R & D. A related issue is how much money should be spent, globally, on pharmaceutical R & D. That issue, in turn, can be broken down into a series of nested questions, each fraught with difficulty: How much of the planet's resources should be devoted to health interventions? What percentage of that amount should be devoted to medical interventions — as opposed, for example, to nutrition and sanitation?[57] What percentage of the amount spent on medical interventions should be devoted to medicinal interventions — as opposed, for example, to the training and deployment of healthcare professionals? Such matters are central to health policy. The literature pertaining to each is large, and the answers are far from clear. It is beyond our capacity, at least in this Article, to settle those debates. For present purposes, we will assume that the amount currently being spent on pharmaceutical research is appropriate. In

[56] *Id.* at 89.

[57] *Cf.* Daniel Reidpath et al., *Measuring Health in a Vacuum: Examining the Disability Weight of the DALY*, 18 HEALTH POL'Y & PLAN. 351, 355 (2003) (discussing various biases in current public policy toward medical interventions and against other initiatives designed either to prevent disease or to alleviate suffering of sick).

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the United States, this comes roughly to fifty billion dollars annually.[58] The U.S. market is almost exactly half of the world's, so a rough approximation of the global total is one hundred billion dollars.[59]

This leaves for our consideration a much narrower, but still important question: how much of the one hundred billion dollars should be spent developing vaccines or cures for the diseases that afflict developing countries? The utilitarian answer to that question is, in principle, straightforward: R & D dollars should of course be allocated in the manner that will produce the greatest good of the greatest number. If we assume for the moment that research devoted to every disease is (1) equally likely to result in scientific discoveries that (2) lead to equally effective treatments, then the application of that principle is also straightforward: we should devote to each ailment a percentage of our total R & D budget equal to the proportion of the world's total disease burden attributable to that ailment. From the DALY data compiled by the WHO,[60] we know that neglected diseases account for 16.4% of the global disease burden.[61] Yet, the portion of global R & D expenditures that is comprised of research directed at those diseases is in the range of 2-3%.[62] (Why the discrepancy? That question is considered in detail in Chapter 4 of our forthcoming book, but the most important factor is simple enough: only 1.5% of the 16.4%, or 0.25%, of the total global burden takes place in the developed world, where the pharmaceutical firms earn roughly 95% of their revenue.) To correct the imbalance, plainly we would need to increase R & D spending on neglected diseases sharply, either by devoting extra resources to those diseases[63] or by shifting to

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[58] Detailed figures are provided in FISHER & SYED, *supra* note 2, at 7 n.17.

[59] *Id.*

[60] We will return shortly to the question of whether use of the WHO's DALY data for this purpose is defensible.

[61] We will explain the WHO's measure momentarily. For the figures, see FISHER & SYED, *supra* note 2, at 26-28.

[62] This estimate is based on a combination of the following sources: Bernard Pecoul et al., *Access to Essential Drugs in Poor Countries: A Lost Battle?*, 281 J. AM. MED. ASS'N. 361, 364-65 (1999); Patrice Trouiller et al., *Drug Development for Neglected Diseases: A Deficient Market and a Public-Health Policy Failure*, 359 LANCET 2188, 2189 (2002); FISHER & SYED, *supra* note 2, ch. 1 at 10-11 & n.32-33.

[63] The amount necessary would be roughly $16.6 billion, calculated as follows: divide the neglected, disease share of the global burden (16.4%) by the non-neglected disease share (83.6%) and multiply the quotient (19.6%) by the current level of R & D on non-neglected diseases ($97.5 billion, or 97.5%, of $100 billion) to arrive at target amount of $19.12 billion, from which current amount ($2.5 billion, or 2.5%, of $100 billion) is subtracted.

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them some of the money currently spent on non-neglected diseases.[64] (Which of these courses is preferable depends upon whether we are currently spending too much, too little, or the right amount on pharmaceutical research in general — a matter on which, as indicated above, we express no opinion.)

Most likely, however, both of the assumptions central to these recommendations are inaccurate. Because more R & D resources have for many years been devoted to diseases common in developed countries than to developing countries diseases, it is likely that the efficacy, measured by DALYs saved, of each dollar devoted to the latter is now higher. Until the "low-hanging fruit" of relatively cheap innovations has been plucked, then, the utilitarian criterion would require us to shift even larger portions of our resources to research on developing country diseases.

4. The Value of DALYs

Throughout this section — and, indeed, at several points elsewhere in this Article — we have been using the WHO's DALY index to calculate the losses associated with diseases. The importance of the metric to our analysis suggests that we should discuss briefly its origins, merits, and demerits.

The WHO (together with the World Bank) commissioned the development of the DALY index in an effort to measure the losses caused by a particular disease in terms of both premature deaths and disabilities, rather than simply lost lives or even lost years of life. One DALY can be thought of as "one lost year of 'healthy' life," and the DALY burden of disease "as a measurement of the gap between the current health of a population and an ideal situation in which everyone in the population lives into old age in full health."[65] The DALY has been the subject of much scholarly debate, and a detailed evaluation of the manifold issues it raises is unnecessary for our

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[64] The amount necessary would be roughly $14.2 billion, calculated as follows: subtract the current neglected-disease portion of total R & D (2.5%) from the ideal (16.4%), divide the difference (13.9%) by the portion of R & D taken by non-neglected diseases (97.5%), and multiply the quotient (14.2%) by the current level of aggregate R & D ($100 billion).

[65] WORLD HEALTH ORGANIZATION, *supra* note 4, at 137, *available at* http://www.who.int/whr/2003/en/AnnexNotes.pdf. See also the following explanatory papers by the researcher commissioned to develop the index: C.J.L. Murray, *Quantifying the Burden of Disease: The Technical Basis for Disability-Adjusted Life Years*, 72 BULL. WORLD HEALTH ORG. 429, 429-31 (1994); Christopher J.L. Murray & Arnab K. Acharya, *Understanding DALYs*, 16 J. HEALTH ECON. 703, 703-04 (1997).

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purposes.[66] Here we address the two features that arguably make it vulnerable from a utilitarian standpoint, and in the appropriate sections below, we briefly identify and address potential criticisms that derive from the other normative perspectives we discuss in this Article.[67]

The first criticism from a utilitarian standpoint is that the DALY uses a quasi-objective measure for the well-being provided by a drug or vaccine rather than relying, as many utilitarians prefer, on each individual's own subjective assessment of pleasure and pain as revealed in her or his consumer choices.[68] While this objection is initially troubling, three considerations should ultimately make the use of DALYs acceptable to utilitarians. First, we need some measure of the welfare of those who cannot, absent a radical redistribution of global wealth, make their preferences heard on the market. Second, even for consumers with ability to pay for healthcare, there are numerous reasons (explored in Part II.C) to doubt the extent to which drug consumption in the healthcare market reflects well-informed personal choice, reasons enough to unsettle the default presumption of equating consumption patterns with people's considered preferences. Third, health insurance makes people insensitive to price. Thus, the purchasing decisions even of well-informed and wealthy consumers are poor indicators of the value they place on healthcare.[69] As a result, there is a general consensus that some criterion of cost-effectiveness going beyond individual consumer

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[66] To get a sense of the debate, compare Murray, *supra* note 65, and Murray & Acharya, *supra* note 65, with Sudhir Anand & Kara Hanson, *DALYs: Efficiency versus Equity*, 26 WORLD DEV. 307 (1998), and Sudhir Anand & Kara Hanson, *Disability-Adjusted Life Years: A Critical Review*, 16 J. HEALTH ECON. 685 (1997) [hereinafter Anand & Hanson, *Critical Review*].

[67] In our forthcoming book, we provide a more in-depth treatment of the normative issues raised by the DALY metric in the course of evaluating particular reform proposals. FISHER & SYED, *supra* note 2.

[68] We recognize, and briefly take up below, the fact that many non-economist utilitarian theorists do not interpret utility as "desire-fulfillment" (the satisfaction of individuals' existing consumer preferences or even their other preferences [for example as citizens]), but rather look to "pleasure" (hedonic end-states), reflectively grounded experiences of happiness, or notions of objectively valuable goods. *See infra* note 74 and accompanying text.

[69] *See* Arti Kaur Rai, *Rationing Through Choice: A New Approach to Cost-Effectiveness Analysis in Health Care*, 72 IND. L.J. 1015, 1015-19 (1997) (emphasizing role of health insurance in undermining usual ways society makes economic tradeoffs [i.e., market decisions made under budgetary constraints], and thereby necessitating collective action to enable effective social rationing in health sector, while still preserving individual choice).

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choice is indispensable for evaluating health expenditures, and there are ongoing efforts to devise and refine acceptable approaches.[70]

The utilitarian desideratum of any criterion is that it elicit and then reflect as effectively as possible people's own preference rankings between different states of health and the "amounts" at which they would make tradeoffs between them. Measured by this standard, the process by which the DALY index assesses disease burdens and corresponding health benefits seems as or more robust than any of the competing approaches. (It also has the advantage of being well-crafted for our purposes, having been devised explicitly with the global, rather than national, disease setting in mind.) Three features of the process are worth highlighting. First, not one but two methods were used, in order to derive both ordinal preferences and cardinal rankings. Each method (rating scales and person tradeoffs) compares favorably with the alternatives, as well as providing a good check on the other.[71]

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[70] *See, e.g., id.*; ALAN J. KRUPNICK, VALUING HEALTH OUTCOMES: POLICY CHOICES AND TECHNICAL ISSUES 37-59 (2004); Jason N. Doctor et al., *A New and More Robust Test of QALYs*, 23 J. HEALTH ECON. 353 (2004).

[71] There are five methods available: (1) rating scales (respondents numerically rank-order options); (2) magnitude estimation (respondents compare, using ratios, each case to a standard); (3) standard gambles (death/perfect health risk combinations are varied against the status quo of a disability state until respondents are indifferent); (4) time tradeoffs (lengths of time living in perfect health versus in disability states are varied until respondents are indifferent); and (5) person tradeoffs (numbers of people being helped in different conditions are traded off until respondents are indifferent). *See* Robert M. Kaplan, *Utility Assessment for Estimating Quality-Adjusted Life Years*, *in* VALUING HEALTH CARE: COSTS, BENEFITS AND EFFECTIVENESS OF PHARMACEUTICAL AND OTHER MEDICAL TECHNOLOGIES 31, 37-41 (Frank Sloan ed., 1995). The DALY valuation used person tradeoffs (5) and rating scales (1). Murray & Acharya, *supra* note 65, at 714-15. Regarding the three methods not used, magnitude estimation is, according to Kaplan's review, generally considered unreliable, Kaplan, *supra*, at 39, 41, and while standard gambles and time tradeoffs are economists' preferred methods (since they conform to the risk and utility axioms of standard modern theory), *id.* at 44, both are widely recognized not to work well given that "[h]uman information processors do poorly at integrating complex probability information when making decisions that involve risk." *Id.* at 60. Consequently, psychologists by and large prefer rating scales, which are much easier to process, but these are considered problematic from the perspective of standard economic theory (since at best they are thought to reveal ordinal rankings, which cannot be numerically compared or aggregated). *Id.* at 46-47, 59-60. However, as Kaplan observes, empirical studies have shown that many of the problems with rating scales can be controlled and hence "the evidence indicates that rating scales provide an appropriate method for utility assessment." *Id.* at 60. Further, the use to which ratings were put in the DALY process (as a check against person tradeoffs) seems particularly apt. Regarding the main method used in DALYs, person tradeoffs, these presumably are subject to some of the same framing problems as standard gambles and time tradeoffs, a fact that was taken into account in the DALY process. *See infra* note 72. However, they may have

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Second, the exercises through which the methods were deployed were aimed to be maximally reflective, in order to ensure that well-known "framing" biases were minimized. Finally, the process was also deliberative, involving not only individual reflection on tradeoffs and their implications, but also group discussion and feedback, although reserving to each participant the final say over their own orderings.[72] The one drawback of the process was that the range of people consulted, health professionals gathered from different regions of the world, was arguably insufficiently inclusive.[73]

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one benefit over these others in certain contexts; as Kaplan states "[f]rom a policy perspective, the person tradeoff directly seeks information similar to that required as the basis for policy decision." Kaplan, *supra*, at 41. Murray and Acharya advance a similar argument in favor of the person tradeoff method: "It can be argued that for burden of disease analyses and cost-effectiveness analyses that are intended to inform social choices, a method that directly measures social preferences for health states would be more appropriate than one that measures individual preferences, such as a time trade-off." Murray & Acharya, *supra* note 65, at 713.

[72] The valuation process involved a number of iterations, with opportunities for respondents to reevaluate earlier assessments in light of later ones and after consultations with each other. The details are as follows. The participants were asked: (1) to tradeoff life extension of healthy individuals with life extension of individuals suffering different disability conditions; (2) then to tradeoff curing a number of individuals suffering from a particular condition with extending a number of healthy lives; (3) then to reconcile internal inconsistencies in valuations arising from these different tradeoffs; (4) then to discuss with others their newly reconciled individual tradeoff values, exchanging reasons, and then to revise if necessary their individual tradeoffs in light of those discussions; (5) then to undertake an ordinal ranking of the 22 conditions in terms of severity; (6) then to compare and reconcile their individual ordinal rankings with the cardinal weights derived from their tradeoffs; and (7) finally, to share the revised individual cardinal weights in a group discussion, with a final opportunity for reassessments. Murray and Acharya, *supra* note 65, at 714-15. The authors' characterize the process as follows: "Participants are challenged with the implications of their valuations, pushed to make valuations from different perspectives and forced to reconcile the differences that emerge from different framings. As the ultimate purpose is to achieve a consensus, the process is a group exercise which allows for substantial exchange and revision." *Id.* at 714. They report that this protocol was deployed in nine group settings in addition to the one used for devising the Global Burden of Disease Study and that both the ordinal and cardinal rankings were highly correlated across all nine studies for all 22 representative disability conditions. *Id.* at 715.

[73] Murray and Acharya emphasize that health experts or professionals were used not because they were assumed to have better "judgment," but rather "[t]o speed up the already demanding process" by taking advantage of their existing detailed knowledge about disability conditions: "Non-health care providers could be used but much more time would be required to educate them about each indicator condition." *Id.* at 715. Nevertheless, it would have been preferable to have had a larger and more diverse group of interviewees, including, perhaps, advisory groups for gender or disability issues. *See* WORLD HEALTH ORGANIZATION, DALYs AND REPRODUCTIVE

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Before leaving this issue, it is worth recalling that departing from purely subjective choices or experiences rooted in unreflective current preferences or tastes is not entirely foreign to the utilitarian tradition. Predecessors include Mill's "eudaimonistic utilitarianism" and G.E. Moore's "ideal utilitarianism."[74] The devising and use of the DALY is best seen as an application of, to coin a term, "deliberative utilitarianism."[75]

We are not done yet, however. Utilitarians have a second concern: the DALY metric is based on an "average social milieu of the world,"[76] and hence does not take into account differences in the situations and environments of those afflicted with the same disease. As a result, its measures are insensitive, for example, to ways in which being poor, living in a community that stigmatizes the disease, or in a society without adequate social or infrastructural services may exacerbate the suffering caused by a disease, and hence underestimate the increase in welfare associated with administering a treatment.[77]

HEALTH: REPORT OF AN INFORMAL CONSULTATION 24, 27, 28, 31 (1998) [hereinafter WHO, DALYs], *available at* http://www.who.int/reproductive-health/publications/RHT_98_28/dalys_and_reproductive_health.pdf.

[74] The spectrum of major classical variants is as follows: (1) the "hedonistic utilitarianism" of Bentham (all that matters is maximizing the quantity of net subjective welfare in terms of intensity and duration of end-state pleasures over pains); (2) the "eudaimonistic utilitarianism" of Mill (not pleasure, but happiness, is what is to be maximized, taking into account qualitatively different or "higher" and "lower" pleasures, as determined by those who have experienced both); (3) the "ideal utilitarianism" of Moore (not just happiness reflectively understood but a plurality of intrinsically valued and ostensibly objectively valuable goods, including friendship, love, aesthetic experiences and knowledge, ought to be maximized). *See* BENTHAM, MORALS AND LEGISLATION, *supra* note 41, at 11-33, 38-41; Mill, *supra* note 14, at 6-26; G.E. MOORE, PRINCIPIA ETHICA, 232-73 (Thomas Baldwin ed., rev. ed. 1993) (1903). Of these, our proposal is closest to Mill's.

[75] To recap, the method for deriving DALYs deviates from relying on current consumer preferences in four ways: (1) only a representative sample of people had their preferences elicited; (2) the preferences were not of individuals as consumers but of individuals as policymakers or citizens; (3) the preferences underwent considerable subjective reflection before being settled upon; and (4) the preferences underwent considerable inter-subjective deliberation before being settled upon. In our view, only the first deviation is cause for concern; there is little reason to view any of the latter three as inferior, from a utilitarian point of view, to reliance upon individual consumer choice.

[76] Murray & Acharya, *supra* note 65, at 713 ("When making their assessments, participants at the WHO meeting were asked to evaluate the average individual with the condition described taking into account the average social response or milieu for the world.").

[77] *See* Anand & Hanson, *Critical Review*, *supra* note 66, at 687-88, 701-02; Reidpath et al., *supra* note 69, at 355; WHO, DALYs, *supra* note 73, at 8.

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This is a serious objection, but it does not threaten our principal purposes in this Article. The reason is that, if the DALY metric were adjusted to offset this bias, the result would be to acknowledge that residents of developing countries suffer more from infirmities than their counterparts in developed countries[78] — and, thus, to strengthen rather than weaken the utilitarian case for redirecting R & D resources toward the diseases that disproportionately afflict the developing world. We would be happy to make the necessary adjustments, if they were practicable.[79] But the difficulty of gathering the necessary data and the fact that the unadjusted DALY numbers are more than sufficient to justify the comparatively modest policy changes we advocate suggest that we should leave the index well enough alone.

5. The Vulnerabilities of Utilitarianism

This concludes our application of utilitarianism. Our development of the utilitarian argument has attempted to save it from many of the criticisms often leveled against the theory.[80] Our aspiration has been

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[78] Five variables that affect the magnitude of the suffering of disease victims would have to be measured: (1) access to non-medicinal healthcare (e.g., wheelchairs); (2) cultural factors exacerbating the burden of illness (e.g., stigma, gender relations); (3) social-environmental "support infrastructure" (e.g., building codes, transport accommodation); (4) life expectancy deviation by region; and (5) life expectancy deviation by gender. Factor (4) argues for lowering the total health benefit associated with curing someone in the developing world while the first three will tend to move in the opposition direction. Factor (5) simply argues for valuing more highly treatments to women across all regions.

[79] In effect, we would be recognizing this context as one situation in which we do have enough information about the distribution of utility curves to depart from the assumption of randomness. *See supra* notes 43-47 and accompanying text.

[80] These include criticisms based on a misplaced pursuit of a meaningless aggregate, see *supra* note 40, and contentions that an exclusive focus on current subjective preferences or end-states fails to take seriously possible deficiencies in how these are formed, how they may contain internal conflicts between first- and higher-order preferences, and how they may diverge from people's well-being. The latter set of contentions are developed powerfully in the writings of, among others, Marx, Elster, and Sen. *See generally* Richard W. Miller, *Marx and Aristotle: A Kind of Consequentialism, in* MARX AND ARISTOTLE: NINETEENTH-CENTURY GERMAN SOCIAL THEORY AND CLASSICAL ANTIQUITY 275 (George McCarthy ed., 1992); JON ELSTER, SOUR GRAPES (1983); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169 (1985). They are addressed by the "deliberative utilitarian" approach to health outlined above at *supra* notes 71-75. Going further in an objectivist direction would unnecessarily, and probably deservedly, open us to the charge of misplaced paternalism.

Other criticisms of utilitarianism that are powerful in general but not so in this setting include the argument that utilitarianism's focus on pleasure and satiation fails

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both (1) to show why readers committed to utilitarianism ought to support a substantial increase in the amount that the residents of developed countries pay to support pharmaceutical research designed to benefit developing countries, and (2) to persuade readers skeptical of utilitarianism as a comprehensive ethical theory that, appropriately qualified and supplemented, it may nevertheless assist us in determining our ethical commitments in this area.[81] However, even this version of utilitarianism — the best we have been able to construct — remains vulnerable to criticism on three grounds.[82]

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to connect with our deeper understanding of what makes a human life worth living, see Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM: FOR AND AGAINST 77, 110-14 (J.J.C. Smart & Bernard Williams eds., 1973); NOZICK, *supra* note 18, at 42-45, and the claim that utilitarianism favors "utility monsters," people who either derive disproportionate pleasure from the suffering of others, see *id.* 41, or seek to indulge offensive (typically because anti-social) or otherwise inappropriate preferences, see RAWLS, THEORY OF JUSTICE, *supra* note 41, § 6, at 27; Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 198-204 (1981).

Finally, there remain some criticisms that are both applicable and powerful, but which we think the specific approach to DALYs that we are developing will be defensible against: (1) utilitarianism reflects the market's obliviousness to the fact that we have strong reasons for not treating all human goods as either comparable on a single scale or equally susceptible to calculations of exchange. *See* Karl Marx, *Economic and Philosophic Manuscripts of 1844*, *in* THE MARX-ENGELS READER 101-05 (Robert C. Tucker ed., 2d ed. 1978); Karl Marx, *On James Mill*, *in* KARL MARX: SELECTED WRITINGS 124-33 (David McLellan ed., 2d ed. 2000); MARGARET JANE RADIN, CONTESTED COMMODITIES 79-101, 118-20, 189-91 (1996); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1-16, 44-64 (1993); (2) utilitarianism risks sacrificing fundamental interests of an individual or minority for the sake of the group or greater good, in a manner that fails to register the morally significant separateness of persons: *see* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 5, at 23-24; and (3) the utilitarian attempt to avoid the flattening effect of a crude equal distribution (by using subjective utilities as its method of tailoring distribution to individual needs) fails because of its insensitivity to significant, utility-independent, "fundamental" dimensions or "needs" along which people vary, such "fundamental diversity" requiring different forms of tailored adjustments. Amartya Sen, *Equality of What?*, *in* 1 THE TANNER LECTURE ON HUMAN VALUES 195, 199-200, 202-05, 212-13, 215-16 (Popper et al. eds., 1980), *available at* http://www.tannerlectures.utah.edu/lectures/sen80.pdf. Part of our response to (1) lies in the "reflective and deliberative" aspects of the DALY, but a further refinement to address this fear is suggested. *See infra* note 142 and accompanying text. Point (2) has two relevant manifestations. *See infra* note 114 and accompanying text, and note 142 and accompanying text. Point (3) is taken up at *infra* p. 640.

[81] *Cf.* Jonathan Wolff, *Making the World Safe for Utilitarianism*, ROYAL INSTITUTE OF PHILOSOPHY LECTURES (forthcoming), *available at* http://www.homepages.ucl.ac.uk/~uctyjow/unpublished.htm.

[82] One commonly voiced, fundamental objection to utilitarianism does not seem to us to have much force. It is often alleged that a key difficulty facing utilitarianism is

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First, some critics contend that utilitarianism ultimately fails to capture what justice is about, either because its account of what impartiality requires fails, or because the form of justice in question is best thought of not in terms of impartiality but of, say, fairness, "fit," or basic rights.[83] In our view, this criticism is well taken. In the following subpart D, we will turn to a family of arguments whose conceptions of justice are ultimately more defensible.

The second objection is a variation on the first. Utilitarian reasoning, it is sometimes argued, is inattentive to the history of situations, oblivious to the fact that justice requires attending not only (if at all) to ends or outcomes but also (and perhaps only) to the sequence of events that led up to them.[84] In legal theory, this argument most often finds expression in the claim that some economic analyses — specifically, those that urge judges to make decisions based solely on forward-looking considerations of social

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trouble in getting the argument motivated from the start, since it does not posit any reason why people should care about overall social utility to begin with. In our judgment, however, so long as the argument is understood as one about impartiality, then utilitarianism enjoys a basis that is little different from contractarian or rights theories: appeals to what a rational agent would find persuasive on grounds of what reason, understood here as the consistent application of general norms, would require. That is, if rights arguments are premised on "what is a right for you as a rational agent must be a right for other rational agents," see generally ALAN GEWIRTH, REASON AND MORALITY (1978), and contractarian arguments are premised on "what general principles would you, as a reasonable and rational person, agree to be governed by with other reasonable and rational persons in a situation of equal information and non-coercion," see generally T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998), then the utilitarian argument is analogous: "what do you, as a rational person, think is right to accord others assuming that they are, in relevant respects, like you." While some argue that utilitarianism has deeper roots than the idea of justice-as-impartiality — namely, concerns of fellow-feeling or benevolence — the impartiality premise is all that is required here. For motives from fellow-feeling, see MILL, UTILITARIANISM, *supra* note 14, at 28-34. For the benevolence interpretation, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 76, 81-82 (1985); RAWLS, THEORY OF JUSTICE, *supra* note 41, § 29, at 155. We thank Roni Mann for drawing our attention to the Williams passages.

[83] *See, e.g.*, JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 14.50 (2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]. For Rawls, utilitarianism may be appropriate for "allocative justice," which refers to allocating among a group shares of some goods that the group has no connection with, or just happens upon (they "have not cooperated in any way to produce those commodities"). *Id.* Nevertheless, it cannot, Rawls argues, settle questions of "distributive justice," which deal with how to distribute the proceeds of a cooperative scheme: "Citizens are seen as cooperating to produce the social resources on which their claims are made." *Id.*

[84] This is, of course, one way of formulating the deontological complaint against consequentialism.

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welfare — are inappropriately insensitive to justice considerations arising out of parties' prior behavior (such as whether someone broke a promise in "bad faith," or whether a driver took reasonable care).[85] In philosophy, the argument has been made most powerfully by Friedrich Hayek and Nozick, both of whom contend that, as long as current economic holdings are legitimate in terms of the procedural history giving rise to them, there is no normative basis for a social intervention to alter their arrangement in order to achieve any desirable "patterned outcome."[86] In our judgment, this concern is frequently overstated. In particular, the contention that a transfer of wealth from *A* to *B* not justified by *A*'s misconduct in the past illegitimately interferes with *A*'s liberty, neglects the fact that the exercise of individual liberties, including many so-called "negative" ones,[87] is often socially enabled and negotiated, and is best preserved not by ignoring the constraints each person faces, but by confronting, evaluating, and then reforming or affirming them.[88] But we agree that

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[85] *See, e.g.*, Jules Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1240-53 (1988) (reviewing RICHARD POSNER & WILLIAM LANDES, THE ECONOMIC STRUCTURE OF TORT LAW (1987) and STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987)); Arthur Ripstein, *Critical Notice: Too Much Invested to Quit*, 20 ECON. & PHIL. 185, 186, 193-96 (2004) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002)).

[86] *See* 2 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 67-100 (1976); NOZICK, *supra* note 18, at 150-60.

[87] *See infra* note 161 (discussing conceptions of "negative" and "positive" rights and liberties).

[88] *See* 1 ARISTOTLE, THE POLITICS, Bk. I, ch. 2, at 35-38 (Carnes Lord ed. & trans., 1984) (stating that human development is inescapably social and political phenomenon); G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 111-19 (A.V. Miller trans., 1952) (1807) (stating that social recognition is fundamental element of one's self-understanding and personhood); G. W.F. HEGEL, PHILOSOPHY OF RIGHT §§ 34-40; 105-18 (T.M. Knox ed., 1952) (1821) (stating that real freedom begins with recognition of necessity); *see also infra* note 96 (noting that one ground for liberal-egalitarian departure from libertarianism is its acceptance of development of these Aristotelian and Hegelian themes by social theorists in line of Marx and Weber). We note that an attenuated version of this point was affirmed by Hayek, who recognized that preserving competitive liberty may require periodic government intervention in the market, and who accepted that assuring some basic provisions for livelihood and health may be a justified reinforcement of the fairness of the rules of the game. For the first point, see F.A. HAYEK, THE ROAD TO SERFDOM 39 (1944). *But cf.* 3 FRIEDERICK A. HAYEK, LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 65-97 (1979). The second point is made in the following passage:

> "There is no reason why in a society which has reached the general level of wealth that ours has attained, the first kind of security ["against severe physical privation, the certainty of a given minimum of sustenance for all"] should not be guaranteed to all without endangering general freedom. There

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the objection retains some force. Subpart B, above, which focused on the moral implications of the history of relations between developed and developing countries, was founded in part on a recognition of the power of the argument.

The third objection, and the most significant for our argument, is that the utilitarian indifference to national borders is an untenable normative position, one reflecting a more general flaw in the utilitarian outlook. In fact, our rather sanguine extension of the principles of social welfare beyond national borders, to recommend an increase or shift of roughly eight billion dollars in U.S. pharmaceutical spending directed to the needs of the developing world, may strike many as a perfect illustration of where utilitarian reasoning goes wrong. That recommendation ignores, it could be argued, the special and stronger force of particular claims, claims that cannot be sacrificed on the altar of a universalist ethos, and which derive from the concentric circles of family, friends, given and chosen communities, fellow nationals, and compatriots.

There are three distinguishable versions of this disquiet. The first simply states that utilitarianism is too ethically demanding; its ceaseless recognition of strangers' claims puts too high a "strain on our commitments."[89] The second is a more political-philosophical dissent,

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> are difficult questions about the precise standard which should thus be assured; . . . but there can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody. . . .
>
> Nor is there any reason why the state should not assist the individuals in providing for those common hazards of life against which, because of their uncertainty, few individuals can make adequate provision. Where, as in the case of sickness and accident, neither the desire to avoid such calamities nor the efforts to overcome their consequences are as a rule weakened by the provision of assistance, where, in short, we deal with genuinely insurable risks, the case for the state helping to organize a comprehensive system of social insurance is very strong. There are many points of detail . . . . But there is no incompatibility in principle between the state's providing greater security in this way and the preservation of individual freedom."

HAYEK, ROAD TO SERFDOM, *supra*, at 124-25 (internal footnote omitted).

[89] We borrow here Rawls's phrase, "strain of commitments," using it in a somewhat different sense than Rawls himself does in his own criticism of utilitarianism. RAWLS, THEORY OF JUSTICE, *supra* note 41, § 29, at 153-54. For Rawls, utilitarianism requires, on the part of those worse off, too much sympathetic identification with those better off (as compared to Rawls's difference principle. *See infra* notes 98-99 and accompanying text). *Id.* § 29, at 155. Our use is meant to capture the more general charge of simply requiring too much identification with, and commitment to, the good of others, period, along the lines advanced in CHARLES

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advanced by "political liberals" who argue that socio-economic justice is, by and large, a matter internal to the sovereign borders of a nation-state, due to the special nature of reciprocal obligations derived from membership in a polity and subjection to its laws.[90] The third is a communitarian critique, rooted in a commitment to give ethical priority to the obligations that derive from one's particular, and partly "constitutive," relations to a given family, clan, community association, profession, city, tribe, and nation.[91] The "particular social identity" formed by these relations is seen to reside at the core of one's personhood, "encumbering" oneself with ties and associations that provide much of life's meaning, making these obligations one's "moral starting point."[92]

These arguments present obvious impediments to our effort to strengthen the ethical commitments of developed country residents toward developing country residents and thus demand our attention. But because very similar arguments are commonly made in response to efforts to apply globally the implications of nonutilitarian theories of distributive justice, we will wait to confront them.

FRIED, RIGHT AND WRONG 13-14, 36-38 (1978).

[90] Different versions of this claim are advanced in JOHN RAWLS, LAW OF PEOPLES (1999); David Miller, *The Limits of Cosmopolitan Justice*, *in* *INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES* 164 (David R. Mapel & Terry Nardin eds., 1998); Michael Blake, *Distributive Justice, State Coercion and Autonomy*, 30 PHIL. & PUB. AFF. 257 (2001); Risse, *supra* note 31.

[91] A representative critique is MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 338-51 (1996) [hereinafter SANDEL, DEMOCRACY'S DISCONTENT]. The "constitutive" character of given, particular, and communal relations (and of the obligations deriving therefrom) is in MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 149-52, 172-73 (2d ed. 1998) [hereinafter SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE]. The latter part of the sentence in the text (beginning with "a given family") is paraphrased from MACINTYRE, *supra* note 39, at 220.

[92] *See* MACINTYRE, *supra* note 39, at 220 (referencing "particular social identity" and "moral starting points"); SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *supra* note 91, at 160-61, 172, 178-83 ("encumbered self"). This last criticism is distinguishable from each of the former two. Unlike the first, the argument is not that utilitarian impartiality, whatever its ideal appeal, is humanly unrealizable, but rather that it is simply an incorrect ethical ideal. Unlike the second, the argument is not limited to the fact of compatriotism (i.e., joint membership, somewhat chosen, in a polity), but explicitly embraces nationalism (i.e., joint belonging, somewhat given, to a cultural-linguistic-ethnic group).

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D. Distributive Justice in Healthcare

A host of nonutilitarian approaches bear on the questions of how the money necessary to support pharmaceutical research should be raised and how it should be spent. All of them, we will argue, support most of the policy reforms we advocate, although they differ slightly in the details of their implications and sharply in the ways in which they arrive at their conclusions. In this section, we canvass the various perspectives. For the purpose of this initial survey, we will ignore the potentially powerful objection just mentioned, namely, the claim that ethical commitments however derived stop at national borders. In other words, we will assume for the purposes of this subpart that all of the people in the world are citizens of a single nation. In subpart II.A, we will lift that assumption and consider the charge, leveled against both utilitarian and nonutilitarian theories, that the limits of ethical obligations correspond to the limits of polities.

1. Deontological Theories

Deontological political philosophies assert that "the right," or considerations of "justice," is prior to "the good," or considerations of human welfare or "excellence."[93] This means both that the content of justice is to be specified (as far as possible) independently of substantive conceptions of the good life or society, and that its claims

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[93] *See* JOHN RAWLS, THEORY OF JUSTICE, *supra* note 41, § 6, at 26-28 (advancing deontological theory in which "the concept of right is prior to that of the good"); Ronald Dworkin, *Liberalism*, *in* A MATTER OF PRINCIPLE 181, 191 (1985) ("[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."); Ronald Dworkin, *Philosophy and Politics: Dialogue with Ronald Dworkin*, *in* MEN OF IDEAS 240, 255 (Bryan Magee ed., 1978) ("[L]iberalism is the theory that makes the content of justice independent of any particular theory of human virtue or excellence."). This conception of deontology is somewhat distinct from one common in moral philosophy, where the emphasis is on a sharp contrast with "consequentialism," the former focusing solely, or at least primarily, on consequence-independent notions of right and wrong intrinsic to an act, and the latter concerned solely with outcomes or states of affairs. Both Rawls and Dworkin explicitly repudiate any commitment to a consequentially-neutral conception. *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 6, at 26 ("[D]eontological theories are defined . . . not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 294-330 (1977) (advancing account of rights where social costs *are* relevant to deciding what rights people have, although not, except in emergencies, justifying any compromise of those rights once they have been established).

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have ethical priority over the good.[94] These theories are rooted in a liberal commitment to two values: individual liberty to pursue different ways of life, which is best respected by government's neutrality (or maximal pluralism) toward conceptions of the good; and the essential dignity, or at least political inviolability, of individuals, whose fundamental interests are not to be sacrificed for the sake of groups or the greater good.[95] Finally, these theories are liberal in the further sense that they are committed, as a basic requirement of justice, to some conception of either moral or political equality among individuals.[96]

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[94] *See* SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *supra* note 91, at x, 16-18 (discussing Rawls); Michael Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 1, 1-7 (Michael Sandel ed., 1984) (discussing deontological or "Kantian" liberalism more generally). Samuel Freeman has pointed out that, strictly speaking, on Rawls's definitions a deontological approach is not the same as giving priority to the right over the good. Samuel Freeman, *Utilitarianism, Deontology, and the Priority of the Right*, 23 PHIL. & PUB. AFF. 313, 317-18, 335-40 (1994). For Rawls, deontological theories are defined in contrast to teleological ones, which in his view have the following two features: defining the good independently of the right and adopting as the ethical desideratum the maximization of the good. RAWLS, THEORY OF JUSTICE, *supra* note 41, § 6, at 26. However, as indicated *infra* at note 135, our usage of these terms departs somewhat from Rawls's. One reason we do so is to highlight the following two features as key distinguishing marks of a family of liberal-deontological theories along the lines of Rawls and Dworkin: (1) the liberal insistence on adopting, in matters of political philosophy, neutrality toward, or at most a "thin theory of," the good, for Dworkin, see references cited in *supra* note 93; for Rawls, see THEORY OF JUSTICE, *supra* note 41, § 60, at 347-50; for other examples of liberal neutrality, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 42-44 (1987); and (2) the deontological insistence on the independent significance of the right, as a constraint on the pursuit of the good. *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 6, at 27-28; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 93, at 272-78.

[95] Utilitarians' emphasis on subjective preferences or pleasures is their manifestation of the first commitment to neutrality/pluralism grounded in individual liberty, something uniting welfare theorists with deontological theorists as liberals. *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 76-88 (1975). Welfarists have tried to reflect the second commitment by using Pareto criteria (forbidding interpersonal tradeoffs) instead of utilitarian ones. The problem with that, as discussed *supra* at note 40, is that social tradeoffs are inevitable, and the advantage of deontological liberals is that, unlike Paretians, they recognize that what is at issue is whether "fundamental" interests are jeopardized or not.

[96] As we will soon see, disagreement among liberals concerning the content and entailments of the correct conception of equality is central to the topic of this Article. One point worth clarifying at the outset, however, is that their disagreement on this score does not reach to the issue of whether considerations of equality apply to spheres of economic and social life beyond the "political" narrowly conceived (or, to activities in the "market" and "civil society" rather than just "state action"). *See* Karl Marx, *On the Jewish Question*, *in* Deutsch-Franzosische Jahrbucher (1843), *reprinted in*

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The two most influential deontological theories, those of John Rawls and Ronald Dworkin, both advance an egalitarian conception of the distribution of income-wealth, whose implications with respect to healthcare largely overlap with those of the restricted and qualified utilitarianism that we have developed in the preceding section.[97] Rawls adopts a contractarian approach to determining what justice requires, asking what free and equal persons would agree to as the reasonable terms for a system of social cooperation.[98] He argues that

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THE MARX-ENGELS READER 26 (Robert Tucker ed., 2d ed. 1978). The following theories all accept some version of the critique of libertarianism that we summarize in Part II.C *infra*, and they take the view that liberal concerns must extend to those background socio-economic conditions that pervasively constrain or enable individual liberty and are so heavily shaped by government action as to make resulting outcomes a necessary subject of evaluation from the perspective of equality. *See infra* notes 255-57 and accompanying text (outlining normative and legal-realist critiques of libertarian adherence to strict state-market and public-private distinctions, and acceptance of some such critique by Rawls and Dworkin).

Note, Rawls also advances an additional reason for liberal justice to focus on background socio-economic conditions, one that is independent from those discussed at *infra* notes 255-57. On this argument, irrespective of the presence of state action, the fact that the "social world" has a "profound and pervasive influence" on "citizens' life-prospects" is its own reason for it to be the part of the subject of justice. RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 16.1, at 55; *see also* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 2, at 7, § 41, at 229. In the assessment of a leading theorist in this area, Rawls's "incorporation of this notion of social structure into his theory represents the coming of age of liberal political philosophy. For the first time, a major figure in the broadly individualist tradition has taken into account the legacy of Marx and Weber by recognizing explicitly that societies have patterns of inequality that persist over time and systematic ways of allocating people to positions within their hierarchies of power, status and money. It is depressing evidence of the social-scientific illiteracy of so many philosophers that someone like Nozick, who is in these terms the equivalent of a pre-Copernican astronomer, should ever have been taken so seriously." BRIAN BARRY, JUSTICE AS IMPARTIALITY 214 (1995).

[97] Strictly speaking, utilitarianism does not share the liberals' focus on distributive justice. *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 5, at 23 (stating that distributive concerns are instrumental, not intrinsic, to utilitarian perspective); Sen, *supra* note 80, at 201-02 (noting that utilitarian equality is accidental, not essential). However, as we have developed it here, when the utilitarian commitment to impartiality is combined with certain plausible assumptions, there is clearly a tendency toward equality, a point often made by defenders of the perspective. *See, e.g.*, Stephen Ball, *Economic Equality: Rawls Versus Utilitarianism*, 2 ECON. & PHIL. 225, 225 (1986).

[98] Persons are regarded, in their capacity as citizens, to be "free" in the sense (primarily and roughly) of possessing the moral power to determine and pursue their own personal conceptions of the good; and "equal" in the sense of being presumed to possess both the previous power and the moral power of the capacity for a sense of justice each "to the requisite minimum degree . . . that enables us to take part fully in the cooperative life of society." Thus conceived, persons as citizens are able to give,

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such persons, when properly motivated and informed (so as to adopt an impartial view marked by mutual respect), would affirm a conception of "justice as fairness," one that places heavy emphasis on reciprocity and that includes the following "difference principle" of distributive justice: inequalities of social and economic "primary goods" (income, wealth, positions of authority or responsibility, and the social bases of self-respect) are justified only if they work to the greatest benefit of the least-advantaged group in society.[99]

It seems clear that the neither of the inequalities with which we are concerned in this Article (namely, in access to existing medicines and in the allocation of resources for future drugs) meets Rawls's criterion.[100] With respect to the first issue, application of Rawls's difference principle to the issue of how the cost-burden of

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and are entitled to receive, reasonable arguments accessible to all regarding terms of social cooperation that are both mutually beneficial or rationally advantageous and fair. RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 7.3, at 20.

[99] RAWLS, THEORY OF JUSTICE, *supra* note 41, § 46, at 266, § 11, at 54-56; RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 13, at 42-43, 49, § 17, at 58-59. For a review of some of the reasons Rawls advances for this conclusion, see *infra* notes 241-43 and accompanying text. Rawls's other main arguments for this conclusion focus on what rational and reasonable people would choose in an "original position" behind the "veil of ignorance." *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 13, at 65-73, § 26, at 130-31; Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989).

[100] Rawls makes clear that healthcare may be included in "the index of primary goods" that is relevant to questions of distributive justice, falling under that part of income and wealth that is not private but rather consists of the package of "various personal goods and services to which we are entitled" as citizens to be provided by government. RAWLS, JUSTICE AS FAIRNESS, *supra* note 98, § 51.5, at 172. We leave aside two complications here. First, as emphasized by Rawls and others, the difference principle is not to be considered in isolation of the lexically prior principle of a scheme of fully adequate equal basic liberties and rights for all (and their fair political value) and the lexically prior requirement of fair equality of opportunity attaching to all offices and positions of political and socio-economic life. *See id.* § 13.5, at 46 n.10, 61; *cf.* Cohen, *supra* note 99, at 727-31 (emphasizing importance of evaluating difference principle as part of more general "'democratic conception' of equality"). We assume that there are no adverse effects on these other principles from the measures advanced here to pursue justice in health care. Second, for Rawls, ideally the principles of justice are not to be implemented piecemeal through specific acts of legislation or policy but rather are to structure and regulate the basic institutions of social life, setting up overarching public rules in light of which people are free to manage their affairs and accrue legitimate entitlements and expectations over the course of a life. Nevertheless, we follow a common practice in applied political philosophy of evaluating what the difference principle would require in a specific policy context. *Cf.* RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 5.1, at 13 ("[I]deal theory . . . should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct."); RAWLS, THEORY OF JUSTICE, *supra* note 41, § 46, at 267.

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pharmaceutical R & D should be distributed generates an egalitarian impulse identical to the one that we have argued is entailed by utilitarianism.[101] With respect to the second issue, Rawls's own brief remarks about how his two principles of justice would apply to healthcare seem to require something quite similar to the combination of egalitarian prioritization and political deliberation set out above, with one difference: whereas the utilitarian argument provides no clear guidance concerning whether fair treatment of the healthcare needs of the developing world should be achieved either by increasing R & D on neglected diseases while keeping the rest of our R & D budget constant or by reallocating funds from developed country diseases to neglected diseases, Rawls's argument seems to favor the former.[102] Another, less well-known aspect of Rawls's argument

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[101] As often observed, for the limited purposes of distribution of socio-economic goods, Rawls's theory may produce results quite close to an egalitarian version of utilitarianism of the sort we deployed in Part I.C. Both start with the presumption of an equal distribution and then allow for deviations that increase overall productivity. The key difference is that Rawls stipulates that such deviations are only justified if the gains from productivity redound to the greatest benefit of the least-advantaged group, whereas utilitarianism would allow any deviations that increased average utility (or, in its more stringent Paretian form, that did so without making anyone worse off). These differences are significant both in their distributive effects and in their meaning and justification. *See* RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, §§ 35-37, at 120-26; Cohen, *supra* note 99. However, they do not arise here because we assume that a progressive scheme for spreading the costs of pharmaceutical R & D will have little appreciable impact on overall social productivity, and hence there is little reason to depart from the egalitarian reasoning that undergirds it. *See supra* note 42.

[102] Focusing on the "likely medical needs" of the least-advantaged group, Rawls states: "Within the guidelines of the difference principle, provisions can be made for covering these needs up to the point where further provision would lower the expectations of the least advantaged." RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 51, at 173. He further observes that "what sets an upper bound to the fraction of the social product spent on medical and health needs are the other essential expenditures society must make," a balance to be struck at the legislative stage by political "representatives of citizens" implementing one of a number of possible interpretations of what the principles of justice constitutionally mandate. *Id.* at 173-74. Rawls takes care to clarify that the "provision of medical care is [not] merely to supplement the income of the least advantaged" for the sake of distributive justice according to the difference principle, but is also aimed at "meet[ing] the needs and requirements of citizens as free and equal," such that it is part of ensuring the fair value of the political liberties and fair equality of opportunity (both of which are lexically prior to the difference principle). *Id.* at 174. For further development of Rawls's theory in this area, see NORMAN DANIELS, JUST HEALTH CARE (1985); NORMAN DANIELS, JUST HEALTH: A POPULATION VIEW (forthcoming). When we add to these two considerations (of fair value of liberty and fair equality of opportunity) the argument founded on his "basic-needs" principle (see text following this note), we see that Rawls advances three different grounds for giving the provision of basic healthcare a priority among socio-

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reinforces these inferences: at one point, Rawls suggests that his first principle of equal basic liberties "may be preceded by a lexically prior principle requiring that basic needs be met, as least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties." [103] Arguably, health constitutes just such a "basic need"; if so, meeting that need for all citizens would assume even greater importance.

Dworkin's variant of liberalism is quite different, but, with respect to healthcare, at least, it terminates in very similar recommendations. Two aspects of his argument are germane. First, Dworkin contends that a government must show "equal concern" for the fate of all its citizens.[104] Second, governments must abide by what he calls the ethical "principle of equal importance: it is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from that objective point of view, for each human life."[105] (The distinction between these foundations will become relevant when we consider grounds for extending distributive justice beyond national borders.) In Dworkin's view, the best interpretation of what liberal equality requires is an "equality of resources," whereby people are provided with roughly

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economic goods to be distributed. It is for this reason that we contend that Rawlsian justice would, everything else being equal, push in favor of increased, rather than shifted, spending. As we suggest below, Rawls's argument might also be used to argue that each individual's interest in healthcare is sufficiently fundamental to be considered a "right." *See infra* note 156 and accompanying text.

[103] RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 13, at 44 n.7.

[104] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000) ("No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance."); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 93, at 180 ("[I]ndividuals have a right to equal concern and respect in the design and administration of the political institutions that govern them."); *id.* at 272-73 ("Government must not only treat people with concern and respect, but with equal concern and respect.").

[105] DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 5. Dworkin states that this is one of two "principles of ethical individualism" that are "fundamental to any . . . comprehensive liberal theory." (The other is the "principle of special responsibility" that each individual bears for her or his own life.) *Id.* Note, Dworkin's discussion of when the principle of equal importance may and may not require equal concern (that is, when it may be qualified and when it has force) suggests that, for our purposes, there may in fact be little difference for him between it and the political-liberal basis for liberal equality, since the more universalist principle of equal importance may be fully operative only in the context of "[a] political community that exercises dominion over its own citizens," making "[e]qual concern . . . the special and indispensable virtue of sovereigns." *Id.* at 6.

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equal, although suitably differentiated, means to pursue effectively their different life projects. He argues that equality of this sort retains individual responsibility for one's preferences, ambitions, and prudent management of one's affairs (unlike, say, equality of condition or welfare), but corrects for those circumstances and conditions that are reasonably understood to be beyond an individual's control, such as inequalities stemming from differences in how markets value one's innate and socially enabled capacities (unlike, say, equality of opportunity).[106]

Applying this conception to issues of justice in healthcare, Dworkin suggests that governments should seek to approximate the ideal allocation and distribution of resources that would result from the well-informed choices of individuals acting in the healthcare market against the background of a just distribution of general resources.[107] In our view, the qualified DALY method for determining aggregate R & D expenditures that we have already outlined satisfies Dworkin's requirement, even though it diverges from Dworkin's own insistence that, ideally, individual market choices should be the final arbiter of both the quantity of any single person's healthcare consumption and, through aggregation, the amount and composition of a society's total resource allocation for healthcare. Dworkin himself recognizes that, absent both a just background distribution of resources and

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[106] *See* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Dworkin, *supra* note 80, reprinted as chapters 2 and 1, respectively, *in* DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 65-119, 11-64. The method of determining what this requires is to imagine the outcome of a hypothetical auction whereby individuals, provided equal initial entitlements, bid against each other for resources (bids based on their assessments of what personal preferences are best to pursue given their respective costs, as determined by overall resource level and others' choices). Participants are also allowed to insure themselves against the possibility of being disadvantaged by factors outside their control (or the result of "brute luck"), such as illnesses, disabilities, or lack of marketable skills. The outcome of this process then serves as a "counterfactual guide" to assess, and adjust, real world distributions. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 68-99.

[107] *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 307-19. Dworkin's ideal situation aims to address three of the current market failures in healthcare that we discuss below (in the paragraph accompanying note 260): (1) that consumers are price insensitive due to subsidized insurance, (2) that consumers are often ill-informed regarding health risks and medical options, and (3) that absent a just distribution of background resources and entitlements, reliance on willingness and ability to pay is an unjustified metric of distributing healthcare. *Id.* at 310-12. We leave aside a further refinement that is tangential to our purpose: Dworkin's scenario also stipulates constraints designed to prevent health insurance firms from unjustly discriminating among purchasers. Unfortunately, those constraints create risks of moral hazard that Dworkin acknowledges but does not take up. *Id.* at 312, 491 n.4.

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appropriate conditions for individual reflection,[108] public agencies will be needed to correct for market failures and, in so doing, will have to substitute their judgments for those of individual consumers. He advises decisionmakers in these situations to employ a "prudent insurance test" — in other words, to seek to replicate whatever insurance package an imagined prudent individual, acting on her or his own specific preferences and ambitions but possessed of the knowledge of a good doctor, would choose to purchase for her or himself.[109]

With one significant caveat, the DALY scheme we have proposed seems to approximate this quite well, for reasons outlined above.[110] The caveat is that, in the exercises by which the DALY weights were derived, participants were asked to imagine themselves not as individuals afflicted with the different conditions, but as policymakers confronted with alternative people-disease-duration situations.[111] Dworkin would likely object to this procedure on the ground that ideal social outcomes are those resulting solely from the aggregation of budget-constrained individual consumer choices (well-informed, against a just background distribution), through a market-like process that allows individuals to adjust their preferences and choices in light of information about their social opportunity costs.[112] Whatever the merits of Dworkin's preferred deliberative procedure in general, it seems especially ill-suited to determining healthcare policies, because

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[108] Among the necessary conditions are that individuals be as well-informed as good doctors and that insurance be non-discriminatory. *Id.* at 311-12.

[109] *Id.* at 313.

[110] *See* discussion at *supra* notes 71-74 and accompanying text. The fact that the DALY's exercises promoted reflective and deliberative reconsideration of initial preferences is not a worry, since Dworkin's own illustrative discussion of how to apply his test to different examples leans heavily on the "prudence" and "well-informed" nature of the hypothetical individual judgments. DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 313. In addition, Dworkin proffers a "minor qualification" to his position for those cases where "some paternalistic interference might be necessary to protect people from imprudent insurance decisions, particularly when they are young." *Id.* at 492 n.6. A DALY-like approach also finds some support from the combination of Dworkin's view that in a just and well-informed system, individuals would quickly sort themselves into different preference-based insurance pools, *id.* at 312 & 492 n.5, and Arti Rai's argument that the most feasible and defensible approach to health insurance is individual choice, against a fair background system, between insurance schemes that compete based on the different preference-tailored menus they offer of health benefit maximization using "QALYs" (quality-adjusted life years), a domestic cost-effectiveness counterpart to the DALY. Rai, *supra* note 69, at 1030-77.

[111] *See supra* note 71 (describing use in DALY's exercises of person tradeoffs rather than time tradeoffs).

[112] *See* DWORKIN, *supra* note 104, at 66-71, 313.

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it fails to consider situations of market failure that would remain even if the distributional and informational concerns he identifies were to be addressed. Specifically, the negative and positive externalities associated with each individual's health, and the public goods features of drug research, all necessitate some political determination even with a just background distribution.[113] Consequently, we submit, in these circumstances it is entirely appropriate for those deliberating to place themselves in the shoes of cost-constrained policymakers, or citizens, rather than cost-constrained individual consumers.

In sum, the arguments of the two leading liberal distributive justice theorists — Rawls and Dworkin — point toward guidelines for healthcare policy that closely resemble the guidelines that issue from utilitarianism. To be sure, the convergence is not complete. Both Rawls and Dworkin place a high value on preventing the sacrifice of fundamental individual or minority interests to those of the majority or aggregate.[114] Accommodating this concern may perhaps require building in a check on the emphasis on aggregate health benefits in DALYs-minimization or reduction by implementing special provisions that attend to the health needs of small subsets of the population, perhaps along the lines of the federal Orphan Drug Act.

But we are far from finished. Not all theorists who affirm the importance of equal respect and who recognize the need to look at background conditions agree with Rawls, Dworkin, and others that liberal distributive justice should have a strongly egalitarian guiding

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[113] Taking into account such negative and positive externalities (i.e., seeing them as remediable instances of market failure) should be compatible with Dworkin's criticism of welfarist theories for factoring in, when evaluating market outcomes, people's "external preferences," or preferences regarding the goods or opportunities that others enjoy. On Dworkin's view, the role of the market (and the corresponding scope for remediable market failures) should be more circumscribed: it is a device for feeding individuals information about the social costs of their personal preferences and choices in light of other individuals' personal preferences and choices, where "personal preferences" are limited to one's own goods and opportunities and specifically exclude "external preferences." Nevertheless, it seems sensible to assume that individuals would have personal preferences regarding the chances of contracting illnesses from others that would make such chances part of the provisionally priced outputs that individuals ideally would receive information on and factor in when making their decisions.

[114] *See, e.g.*, RAWLS, THEORY OF JUSTICE, *supra* note 41, § 1, at 3-4, § 68, at 395; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 93, at xi, 90-91, 272-78. Rawlsian liberals may also be concerned with protecting certain fundamental individual interests from being over-ridden by other individual interests that are deemed less fundamental. We take up this concern *infra* at note 143 and accompanying text.

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principle.[115] One prominent line of criticism, advanced by Derek Parfit and Harry Frankfurt, urges that the egalitarian focus on comparisons between people's holdings (or relative well-being) is simply misplaced, and that instead the focus should be on the level of individuals' holdings in absolute terms.[116] For "prioritarians" such as Parfit, once this shift in perspective is adopted, many of the policies or forms of redistribution advocated by egalitarians may still be justified, but now on the "priority view" that states that "[b]enefiting people matters more the worse off these people are."[117] That is, while the underlying justification has changed, prioritarianism maintains that we still "might be especially concerned with those people who are worse off," but now "only because these people are at a lower *absolute*

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[115] For other prominent versions of strongly egalitarian conceptions of justice based on broadly liberal premises, see generally Richard J. Arneson, *Equality and Equal of Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFF. 146 (1993). These accounts differ from Rawls, Dworkin, and each other regarding, inter alia: what good(s) should be the focus for, or "space" or "currency" of, distribution (e.g., welfare, primary goods, resources); what should be the measure of an egalitarian distribution, and in particular what types of individual differences or other grounds justify deviations from an equal distribution (e.g., incentives, differences in ambitions or effort, differential needs/tastes); and what, if any, constraints should exist on such distribution due to individual rights or other normative considerations. Nevertheless, for our purposes, their recommendations largely converge.

[116] *See* Harry G. Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21 (1987); Derek Parfit, Lindley Lecture at the University of Kansas: Equality or Priority? (Nov. 21, 1991). Note, for Parfit, this criticism does not require ignoring that how people fare relative to others can be quite important to their self-respect and their experience of well-being generally. Where such relational aspects are present, then there is a case for concern with relative well-being, but in these cases equality serves an instrumental purpose, in pursuit of absolute well-being. Parfit's target the view that achieving equality in distribution is in itself important, i.e., that it has intrinsic value (even if only as one among other values). Parfit, *supra*, at 5-6. Frankfurt, on the other hand, is less sympathetic to this relational aspect of well-being. Part of his critique of equality as a goal in its own right is that it tends to focus people's attention on their circumstances and status relative to others. Frankfurt, *supra*, at 22-23.

[117] Parfit, *supra* note 116, at 19. Parfit's main concern is to show that the impulse of prioritizing the lot of those worse off can and should be disentangled from the principle often advanced to justify it, the "principle of equality" that states that "[i]t is in itself bad if some people are worse off than others." *Id.* at 4. In his judgment, this principle is subject to a forceful objection (one that the priority view escapes): it is committed to the view that leveling down the holdings of those who are better off, without in any way improving the lot of those who are worse off, does in itself have value (even if in many cases that value will be outweighed by other normative considerations).

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level," not because "these people are worse off *than others*."[118] This preference for the worse off can be upheld even in the face of greater utility benefits to be had for the better off, on the reasoning that there is a "law of diminishing moral goodness" according to which there is increasingly less moral (as opposed to hedonic) value in providing additional benefits to someone who is already at a high level of welfare.[119] Thus, for our purposes it suffices to observe that, while the variant of utilitarianism we set out above justifies redistribution on the assumption that greater marginal utility will be experienced by the worse off from the provision of additional units of the relevant goods, prioritarianism favors the worse off even in cases where the better off would experience more utility.[120] While the priority principle need not be absolute, the circumstances in which it would be modified do not arise for our case.[121] It also does not matter for our purposes what the exact form of implementation should be, i.e., whether an "absolute" or a "weighted" version of the principle is more appropriate.[122]

For "sufficientists" such as Frankfurt, the practical implications of this criticism of egalitarianism are more significant, leading to greater divergence from egalitarian prescriptions. The sufficientist view is that what matters from the point of view of the equal moral worth of persons is not that everyone should have roughly the same of something (whether it be resources, primary goods, welfare, or

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[118] *Id.* at 23.

[119] *Id.* at 24.

[120] "While Utilitarians claim that we should give [worse off] people priority when, and because, we can help them *more*, this [prioritarian] view claims that we should give them priority, even when we can help them *less*." And: "[f]or Utilitarians, the moral importance of each benefit depends only on how great this benefit would be. For *Prioritarians*, it also depends on how well off the person is to whom this benefit comes. We should not give equal weight to equal benefits, whoever receives them. Benefits to the worse off should be given more weight." *Id.* at 19-20.

[121] "[The prioritarian view] does not tell us how much priority we should give to those who are worse off. On this view, benefits to the worse off could be morally outweighed by sufficient benefits to the better off. To decide what would be sufficient, we must simply use our judgment." *Id.* at 20. In a later, abbreviated and revised, version of the essay, Parfit advances the following reformulation of this point: "The priority is not, however, absolute. On this view, benefits to the worse off could be morally outweighed by sufficiently great benefits to the better off. If we ask what would be sufficient, there may not always be a precise answer. But there would be many cases in which the answer would be clear." Derek Parfit, *Equality and Priority*, 10 RATIO 202, 213 (1997).

[122] For detailed exploration of these issues, see Campbell Brown, *Priority or Sufficiency . . . or Both?*, 21 ECON. & PHIL. 199 (2005).

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something else), but rather that everyone should have enough, the basics necessary for a minimally decent life; above this threshold, inequalities should not disturb us much or at all.[123] Sufficientists are not concerned with those who are relatively "worse off," only with those who are truly "badly off."[124] This narrowing of concern is balanced by an increase in the intensity of concern: people who fall below the "badly off" threshold get an "absolute priority" claim on the resources necessary to pull them above it.[125] The implications of this view for our problem seem straightforward: decent healthcare seems an essential component of the package of goods necessary to sustain a life that is "good enough" (whether understood in terms of freedom, dignity, preference-satisfaction, happiness, or flourishing).[126]

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[123] *See* Frankfurt, *supra* note 116, at 21 ("With respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have the same but that each should have enough. If everyone had enough, it would be of no moral consequence whether some had more than others."); Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 758 (2003) ("[A]bsolute priority is to be given to benefits to those below the threshold. . . . Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given."); *cf.* Brown, *supra* note 122, at 199 (advancing "hybrid" of prioritarianism and sufficientism, which he calls "threshold prioritarianism," where some concern for worse off exists even when they are above threshold).

[124] Frankfurt, *supra* note 116, at 35 n.19 ("The only morally compelling reason for trying to make the worse off better off is, in my judgment, that their lives are in some degree bad lives."); Parfit, *supra* note 116, at 19.

[125] *See* Crisp, *supra* note 123, at 758.

[126] Frankfurt does not specify what counts as a decent minimum, but does provide the following guideposts:

> To say that a person has enough money means that he is content, or that it is reasonable for him to be content, with having no more money that he has. And to say this is, in turn, to say something like the following: the person does not (or cannot reasonably) regard whatever (if anything) is unsatisfying or distressing about his life as due to his having too little money.

Frankfurt, *supra* note 116, at 37. "It is essential to understand that having enough money differs from merely having enough to get along or enough to make life marginally tolerable. People are not generally content with living on the brink." *Id.* at 38. Yet, at the same time, it is important to recognize that one could be reasonably content while still benefiting from more; the point is that in these cases, having more would not be an "*active interest*" but rather a sort of bonus, "*inessential* to his being satisfied with his life." *Id.* at 39. For Crisp, the level of the minimum is to be set by imagining what would be required by the sense of compassion of an impartial spectator. Crisp, *supra* note 123, at 756-63. For Thomas Pogge's more fully developed account of what counts as a decent minimum, see *infra* notes 157-60 and accompanying text. *Cf.* Hayek's remarks, in the passage cited above in *supra* note 88, regarding the compatibility of libertarianism with the assurance that everybody has "some minimum of food, shelter, and clothing, sufficient to preserve health and the

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One other liberal position, similar to but distinct from Frankfurt's sufficientism, bears mention. Elizabeth Anderson argues against "luck egalitarianism" and in favor of what she calls "democratic equality" as the best understanding of what liberal equality (namely, "equal respect and concern for all citizens") requires.[127] By "luck egalitarianism" she means the many variants of liberalism that seek to correct for all differences owing to circumstances and conditions that are morally arbitrary in the sense that they stem from factors for which the individual is not responsible.[128] Adducing a number of troubling aspects and implications of this approach,[129] Anderson argues that "[t]he proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed."[130] Further, liberal justice has a positive aim, that of ensuring that all individuals are equipped with "the social conditions of freedom," the freedom necessary for citizenship in a community of (moral) equals.[131]

Anderson's account of how to satisfy these aims is, like Frankfurt's sufficientism, quite compatible with our proposed reforms, because it includes a threshold level of basic health goods similar to that advocated by the other theorists we canvass.[132] However, her

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capacity to work."

[127] Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 289 (1999).

[128] Examples of luck egalitarianism include the theories of Dworkin and the other egalitarians mentioned *supra* in note 115. On some interpretations, the egalitarian version of the "capabilities" approach of Sen and Nussbaum may also fit the label. *See infra* notes 144-47 and accompanying text. While many might also include Rawls's theory in this group, Anderson does not, and in fact seems to see her own conception of liberal "democratic equality" as, overall, compatible with Rawls's approach. *See* Anderson, *supra* note 127, at 312 n.71, 326 n.89, 330 n.94 and accompanying text.

[129] These include luck egalitarianism's harshness toward imprudent individuals (who, in the extreme case, must live with the consequences of earlier decisions no matter how dire), Anderson, *supra* note 148, at 295-96; its stigmatization of "unlucky" individuals (who are treated as pitiable characters needing state assistance), *id.* at 304-06; its tendency to reinforce unattractive feelings of condescension and charity (on the part of those deemed naturally better off) and of envy and inferiority (on the part of those deemed naturally worse off), *id.* at 306-07; and its detachment from the actual concerns of people and movements working for social justice (who are motivated less by various forms of "natural" ill-fortune than by forms of systemic political and social domination and oppression), *id.* at 288, 312-14.

[130] *Id.* at 288.

[131] *Id.* at 326-27.

[132] In filling out her account of effective freedoms, Anderson draws heavily on the framework of Amartya Sen, discussed *infra* at notes 144-47 and accompanying text, which identifies "capabilities" that individuals must be equipped with in order to

emphasis on democracy and a shared moral community as the basis of liberal equality can be and has been taken as support for restricting — more sharply than is suggested by most of the foregoing liberal theories — considerations of distributive justice to the domestic setting of a national polity.[133] We will address political-liberal arguments along these lines in the following section. Here, we simply wish to identify how Anderson's theory, while developing a strong social-relational dimension to moral equality that is prized by political liberals, nevertheless differs from many of them with regard to the question of supra-national distributive justice. The difference is rooted in her characterization of the economy "as a system of cooperative, joint production" between people as workers, not as citizens. The shift from citizens to workers is significant, she argues, because the "moral implications" of the economy (i.e., whatever is entailed by the requirement of equal participation in a cooperative venture) may "cross international boundaries" to the extent that "the economy becomes global."[134]

2. Teleological Theories

Teleological approaches to political philosophy differ from the deontological by emphasizing the specific "ends" or purposes that it is the aim of politics to secure or pursue.[135] There are two main variants

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achieve desired "functionings." She points to the following dimensions along which an individual ought to be capable of effective functioning: as a human being with needs of biology, rational agency, and moral-psychological selfhood; as a member of civil society and participant in an economy; and as a citizen in the polity. Her list of goods under the first dimension includes "effective access to . . . food, shelter, clothing, medical care." Anderson, *supra* note 127, at 16-18. The account, then, has much in common with those of Nussbaum, see *infra* notes 145-49 and 156 and accompanying text, and Pogge see *infra* notes 157-60 and accompanying text.

[133] *See* Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is there Magic in the Pronoun "My"?*, 110 ETHICS 537, 546-47 (2000).

[134] Anderson, *supra* note 127, at 321 n.78.

[135] Our use of "teleological" departs from Rawls's conception, which groups under a single umbrella of goal-driven conceptions all variants of utilitarianism, along with Aristotelian and Nietzschean perfectionist theories. RAWLS, THEORY OF JUSTICE, *supra* note 41, § 5, at 22-23. All these terms are somewhat controverted in the literature. We adopt for the purposes of this essay the following usage: (1) "deontological" theories are concerned with the right, as prior to the good; (2) "consequentialist" theories are concerned with maximizing the good as constituting the right; (3) "welfarist" theories, the main subset of consequentialist theories, adopt a subjectivist conception of the good; and (4) "teleological" theories are concerned with achieving the right "ends," which may depart from consequentialism in either of the following ways: (a) given the importance of virtues as human ends for many teleological

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relevant to our focus, each having roots in the writings of Aristotle. In the first, distributive justice entails ensuring that the distribution of the relevant goods "fits" the most appropriate or honorable purpose of the relevant practice or institution.[136] How that purpose is to be determined varies, but a common and influential approach is to adopt an interpretive perspective and ask what is required by the "best reading" of the institution in light of the overall norms, customs, and practices of one's "constitutive" community, while at the same time striving to avoid mere conventionalism.[137] The second approach asks what are the essential attributes or components of a flourishing human life, and then tries to determine the distribution of goods and services that would make such a life universally available.[138]

The first approach is best illustrated by the "spheres of justice" account of communitarian theorist Michael Walzer. Walzer adopts a purposive pluralism, arguing that sharply different principles of justice do and should shape different realms of activity in American society.[139] The sphere of healthcare, he contends, is and should be governed by needs-based regulative criteria.[140]

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theorists, the focus may be not just on the results or consequences, but also on the character of actions and institutions; or (b) the ends themselves not only go beyond current subjective utilities (and hence beyond the welfarist variants of consequentialism), but typically are irreducibly plural, with category distinctions drawn between types of intrinsically valuable goods, making maximization along a single scale incoherent. Teleological accounts of virtues and goods are typically anchored either in values organic to a historically evolving community (communitarianism), or in appeals to notions of human flourishing (eudaimonism) or perfectionist ideals. According to this usage, the approach of Nussbaum and Sen as outlined in this section is best understood as "pluralist" rather than strictly teleological, as they combine teleological considerations of human flourishing with a deontological emphasis on the intrinsic or independent significance of equality.

[136] *See* 3 ARISTOTLE, *supra* note 88, 103-04.

[137] *See generally* MICHAEL WALZER, SPHERES OF JUSTICE (1983) [hereinafter WALZER, SPHERES OF JUSTICE] (exemplifying this mode); SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *supra* note 91, at 147-52 (emphasizing "constitutive" conception of community as distinct from "instrumental" and "sentimental" conceptions). For discussion of the problem of conventionalism, see SANDEL, *Preface to the Second Edition* of SANDEL, *supra* note 91, at ix-xi, and the exchange between Ronald Dworkin and Michael Walzer: Ronald Dworkin, *To Each His Own*, N.Y. REV. BOOKS, Apr. 14, 1983, at 4; Michael Walzer, *"Spheres of Justice": An Exchange*, N.Y. REV. BOOKS, July 21, 1983, at 43 [hereinafter Walzer, *"Spheres of Justice": An Exchange*].

[138] *See, e.g.*, Martha Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992).

[139] WALZER, SPHERES OF JUSTICE, *supra* note 137, at 3-4.

[140] *Id.* at 86-91.

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Walzer's approach, though promising, leaves important questions unanswered. In the face of potentially bottomless health needs, given modern technological options, we need a way of prioritizing between health and other social claims and, within health needs, among states of ill-health and among individuals.[141] The DALY approach, with refinements of the sort we have suggested, seems particularly well-suited to that task.

Walzer's approach helpfully highlights one concern to which we have thus far devoted little attention: what he refers to as "incommensurability," by which he means qualitative differences between various sphere-specific goods, and the potential of money-based markets, with their universalized medium of exchange, to run roughshod over these goods (a potential reflected in the utilitarian calculus).[142] To address this concern, we may want to add a further check on the DALY's utilitarian quantitative tendencies, specifically by adding "lexical" hierarchies, or category distinctions, among types of ill-health, making resources non-transferable from one category to another (so that, for example, no number of headaches cured could substitute for the development of an effective cancer treatment).[143]

The most prominent version of the second approach has been developed by Amartya Sen and Martha Nussbaum, who argue roughly as follows: first, we should determine what "functionings" are central to a flourishing human life; next, we should discern what "capabilities" are necessary to be able to attain those functionings; and, finally, we should identify and rectify those differences among

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[141] *See* Einer Elhauge, *Allocating Health Care Morally*, 82 CAL. L. REV. 1449, 1459 (1994) ("Most knowledgeable observers believe we could today easily spend 100% of our GNP on health care without running out of services that would provide some positive health benefit to some patient.").

[142] WALZER, SPHERES OF JUSTICE, *supra* note 137, at 95-103; *see also* Karl Marx & Friedrich Engels, *The German Ideology*, *in* KARL MARX: SELECTED WRITINGS, *supra* note 80, at 175, 201-05 (advancing linked critiques of money, market, and utilitarianism); MILL, *supra* note 14, at 6-26 (amending Benthamite utilitarianism to account for qualitative differences).

[143] Such lexical hierarchies were famously proposed by Rawls as a way to ensure that certain fundamental individual interests (in basic liberties and opportunities) were protected not only from aggregate interests but also from other, non-fundamental, individual interests (e.g., material prosperity). *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 8, at 37-38 n.23 and accompanying text. Thus, there might be a need on Rawlsian liberal grounds to impose lexical distinctions among any use of DALY categories that touch on those aspects of access to healthcare that, for a Rawlsian liberal, go beyond issues of distributive justice in social and economic goods and into concerns of basic liberties and opportunities. *See* text accompanying *supra* note 103.

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people's natural and social situations that create important deviations from an egalitarian ideal of "universal basic capability."[144] In Nussbaum's[145] version of this approach (one that is "open-ended and subject to ongoing revision and rethinking"),[146] the first two essential capabilities that emerge from the process of reflection are those for "life" and "basic health"; justice, she argues, requires that all persons be effectively equipped to have these.[147] As with the sufficientist approach to liberal justice, a plausible account of the public policies necessary to satisfy this requirement would justify the majority of the reforms we propose.

Among the contributions of Nussbaum's and Sen's approach is sensitivity to the potential for utilitarianism and its cousins to be inattentive to interpersonal differences of capability, and specifically to the possibility of discrimination toward those with disabilities.[148] Addressing this concern might require subtle adjustments in the DALY approach. For example, when measuring the health benefits of a vaccine or therapy that either prevents or cures a particular disability, it would be appropriate, for reasons we have already considered, to take into account the diminution in quality of life suffered by those subject to the disability. By contrast, when measuring the health benefits of a treatment that either extends the life of a disabled person or deals with an unrelated disability, we may wish to ignore the diminished quality of life of the disabled beneficiaries. Otherwise, we risk channeling resources away from research that benefits diabetics, the blind, and so forth, and toward research that benefits the able-bodied.

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[144] *See generally* AMARTYA SEN, INEQUALITY REEXAMINED (1992); MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2002). The phrase "universal basic capability" is taken from G.A. Cohen, who persuasively offers it as a more precise rendering of Sen's aim than Sen's own "basic capability equality." G.A. Cohen, *Amartya Sen's Unequal World*, 203 NEW LEFT REV. 117, 118 n.4 (1994). As stated in *supra* note 135, given the independent significance of a conception of equality in their theories, Sen and Nussbaum are perhaps best understood as pluralists rather than strictly teleological theorists.

[145] We emphasize that this is Nussbaum's account alone, as Sen has been reluctant to commit to any single account of what the basic capabilities required by justice are. *See* Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 40-50 (2003).

[146] *Id.* at 42.

[147] "Life" means "[b]eing able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living," and "bodily health" means "[b]eing able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter." *Id.* at 41.

[148] *See, e.g.*, Sen, *Equality of What*, *supra* note 80, at 203-04, 217-18.

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3. A "Right to Health"

The claim that there is a universal "human right to health" is often advanced by scholars and activists working in the field of health policy.[149] It is also enshrined in numerous international agreements, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.[150] What, if anything, does the language of "rights" add to the analyses we have considered thus far?

To answer that question we need first to consider the potential sources of a "right to health." Some of its advocates make a straightforward, absolutist claim: certain norms are simply given by the commands of reason (or nature or God) and are so fundamental that their abrogation is a violation of the sanctity of reason (or of nature or divine will). A right to health (like many other human rights) is thus self-evident, needing little by way of explicit justification or formulation.[151] This position, though undoubtedly compelling to its proponents, has no grip for those (like us) who lack the faith upon which it rests. We therefore put it to one side.

Another common approach emphasizes the *legal* status of the right to health. Its proponents point out that, as indicated above, such a

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[149] *See generally Economic and Social Rights and the Right to Health*, Interdisciplinary Discussion at Harvard Law School (1993) (remarks of, inter alia, Henry Steiner, Troyen Brennan, Paul Farmer, Martha Minow, Ken Anderson, Martha Nussbaum, Roberto Unger, and Albie Sachs.) This way of framing the normative issue has been frequently advanced at health policy-related workshops and conferences attended by the authors.

[150] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III), at 76, U.N. Doc. A/RES/217A(III) (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for . . . health and well-being of himself and his family, including food, clothing, housing, medical care and the right to security in the event of . . . sickness, disability . . . . Motherhood and childhood are entitled to special care and assistance."); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 51, U.N. Doc. A/RES/2200A (Dec. 16, 1966) ("The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."). A helpful compendium of provisions in international treaties, conventions and agreements making declarations of, or related to, a human right to health has been prepared by Professor Vernellia R. Randall. Vernellia R. Randall, The Human Right to Health, http://academic.udayton.edu/health/07HumanRights/health.htm (last visited Feb 1, 2007).

[151] *Cf.* ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE 381 (2000) (contrasting "rights-based" approach to one that "regard(s) rights-principles as something that must be argued to, using the method of wide reflective equilibrium and in such a way as to emphasize the importance of rights as protectors for certain crucial interests").

right has been recognized in positive international law and then argue that its enforcement has whatever normative justification one thinks any (international) legal entitlement deserves simply by virtue of fidelity to existing (international) legal rules. For our purposes, this approach has two main weaknesses. First, by tying a right to health strictly to what is recognized in legal documents the analysis limits its scope of protection to claims against governments acting within their own sovereign territories (and, perhaps, only to certain types of "negative" claims).[152] Second, implementing the right requires knowing what its substantive requirements should be and how tradeoffs with other rights or priorities are to be made, and to answer those questions adequately we need to draw on extra-legal normative considerations.

An altogether different approach views the language of rights as simply a terminological convenience. From this standpoint, to say that a person has a "right" is simply a shorthand way of identifying a normative claim that one thinks should be recognized as compelling; for the justification, interpretation, and application of the right, one must look elsewhere. If we adopted this approach, we would likely root a right to health in one or more of three arguments already reviewed: the argument that the equal respect and concern owed to all persons requires some form of egalitarian distribution, such as "equality of resources"; the argument that justice in health is needs-based; or the argument that effective capability for health is a basic requirement of human flourishing.[153] This of course raises the further question: is there any benefit to framing a normative claim derived on other grounds as a "right"? An affirmative answer would point to two potential advantages: First, encasing complex normative claims within the familiar and influential language of rights may increase

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[152] *See* G.A. Res. 2200 (XXI), *supra* note 150, at 51; Comm. on Econ., Soc. & Cultural Rts., *General Comment 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Art. 12)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). We emphasize that such possible limitations would derive from specific, positive legal provisions, not from any necessary feature of rights as being only claims against domestic government intervention. As we discuss below, in order effectively to realize morally grounded rights it may be justified to require government assistance, as well as to evaluate the relations between rights-bearers and non-state actors. It is also important to note that not all international legal declarations are so limited. Article 28 of the Universal Declaration of Human Rights, for example, explicitly states that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." G.A. Res. 217 (III), *supra* note 150, at 76.

[153] *See supra* notes 104-14, 139-43, 144-47, and accompanying text.

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their effectiveness for the purposes of legal and political argument. Second, the trappings of rights may give such claims an air of heightened normative status, by "import[ing]," as Nussbaum has put it, from rights discourse the idea of an "urgent claim based on justice."[154] However, those benefits would arise by smuggling through the back door precisely those features of rights that this line of analysis eschews. In our view, therefore, it has little to recommend it.

The last and, in our judgment, most defensible of the approaches conceives of rights as protecting certain especially fundamental individual interests, the establishment of which may involve consideration of various social costs and benefits, but which, once established, cannot be abrogated except in extreme circumstances. On this understanding, a right enjoys a higher status than other, non-rights-based human interests or goals (even if the original justification for the right were goal-based), and it works as a "side-constraint" on, or "trump" over, these other interests.[155] Three of the arguments considered previously in this section could provide justification for an individual right to health along these lines: the claim that some level of basic capability for health is among the most fundamental of capabilities essential to human flourishing, one enjoying a category priority over many others; the sufficientist argument regarding the absolute priority to be given the provision of basic goods to anyone whose possession of them is below the threshold necessary for a decent life; and the Rawlsian argument for a higher priority accorded to healthcare when it is necessary for the effective enjoyment of basic liberties and opportunities that are lexically prior to social and

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[154] Nussbaum, *supra* note 145, at 39. A more fully developed treatment of these issues can be found in Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 295-96 (1997).

[155] For rights as side-constraints, see NOZICK, *supra* note 18, at 28-33; as trumps, see Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153-67 (Jeremy Waldron ed., 1984). For an argument that the two conceptions, while "associated with rather different normative theories" nevertheless "amount to one and the same analytical thesis," see Philip Pettit, *Rights, Constraints and Trumps*, 47 ANALYSIS 8 (1987). The formulation in the text aims to be neutral between Dworkin's own theory of rights, which is that they work to block certain types of illiberal reasons from influencing government action, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 93, at 277, and a divergent theory commonly associated with his terminology of "trumps," which sees rights "as rendering certain individual interests as such impervious to considerations of the general good." Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEG. STUD. 301, 303 (2000). Nussbaum has endorsed the rights-as-side-constraints conception as appropriate for the status of capabilities that are deemed rights. Nussbaum, *supra* note 154, at 297-300.

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economic well-being in general.[156] Each of these arguments derives authority, not merely from considerations of distributive justice, but rather from more fundamental aspects of political justice. However, because any effective implementation of such a right will raise questions of distribution, we will treat it as a special claim under the broad umbrella of distributive justice.

A prominent version of this last approach to rights has been developed by Thomas Pogge, who combines elements of sufficientist and flourishing justifications to advance three central claims culminating in the assertion of a set of basic and universal human rights. Pogge's argument begins with the observation that a "broad range of plausible conceptions of human flourishing" identify the following as "elementary basic goods" of which a "minimally adequate" share is necessary for a "minimally worthwhile life": basic personal liberties (of thought and association) and rights of political participation; physical integrity; subsistence supplies of food, drink, clothing, shelter, and basic healthcare; freedom of movement and action; basic education; and economic participation.[157] Individuals' interests in such goods, he then argues, make a "weighty moral demand," one that "should normally trump or outweigh other moral and nonmoral concerns and considerations"; in this sense access to each good should be deemed a "human right."[158] Finally, Pogge proposes an institutional understanding of human rights whereby "the

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[156] *See supra* notes 144-47, 123-26, and 102-03, and accompanying text. Note, Nussbaum does not clearly assert that the capability for health (which is listed second out of ten) is more fundamental than the others in the sense outlined in the text. And while the capability argument does not, strictly speaking, require that claim, without it all the essential capabilities would need to be conceived as rights. And while this may be correct, there are some difficulties in subsuming Nussbaum's overall approach within a rights-based framework. In favor of that tack is the fact that Nussbaum does claim that her entire list of "central capabilities" essential to human flourishing is meant to provide the basis for what should be fundamental human entitlements that are to enjoy a "central and non-negotiable" status (even if the list itself is revisable). Nussbaum, *supra* note 145, at 40, 43. And, further, she does indicate that "one way of using" her approach is "as a basis for constitutional accounts of fundamental entitlements of all citizens." *Id.* at 57 n.6. Nevertheless, her account of the essential capabilities includes many for which there is no clear set of corresponding "fundamental" entitlements or rights (e.g., play and interaction with other species), and in general, her account seems too rich, complex, and proactive to serve in its entirety as the basis of a list of basic rights that constrain or trump other concerns. *Id.* at 5, 10, 14. A thinner and more minimalist conception, more compatible with the rights framework, is advanced by Pogge. *See generally* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2002).

[157] POGGE, *supra* note 156, at 48-49.

[158] *Id.* at 54.

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postulate of a human right to X is tantamount to the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X."[159] The conclusion he draws from these claims is that the following comprises "an internationally acceptable core criterion of basic justice":

> The preeminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education and health care.[160]

Assume that, through one or another of these routes, one were able to establish to one's satisfaction a fundamental "right to health." In what, more precisely, would such a right consist? Presumably, it would have both "negative" and "positive" dimensions — roughly, "freedom from" coercion and "freedom to" effectively pursue one's ends, respectively.[161] The negative dimension means that, just as

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[159] *Id.* at 45-46. Pogge insists that the "security" in "secure access" is "always understood as especially sensitive to persons' risk of being denied X or deprived of X officially: by the government or its agents or officials." *Id.* at 64.

[160] *Id.* at 50-51.

[161] The terms "negative" and "positive" can be a source of confusion, partly because they can modify either "rights" or "freedoms/liberties," and partly because the terms are sometimes used inconsistently in the political-philosophical literature to track not one but two distinctions: first, the distinction between, roughly, rights/freedoms enabled by the absence of coercive interference ("negative rights") versus the rights/freedoms enabled by the presence of the means for effective agency ("positive rights"); and, second, the distinction between, roughly, freedom as voluntariness and agency ("negative liberty") and freedom as self-determination ("positive liberty"). Thus, Isaiah Berlin's classic discussion of these topics is often interpreted to refer to the first distinction while in fact it primarily concerns the second. *See* ISAIAH BERLIN, *Two Concepts of Liberty* (1958), *reprinted in* LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY, at 166 (Henry Hardy ed., 2d ed. 2002). As pointed out by Berlin and acknowledged by other non-libertarian liberal theorists, once we recognize the pervasive role of the state in structuring the "background conditions" of the private sphere, the conceptual and normative significance of the distinction between the government respecting so-called negative rights and enabling so-called positive rights is dramatically reduced. *See id.* at 170-72; BUCHANAN ET AL., *supra* note 151, at 380-81; RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, § 52.1, at 177. Nevertheless, there remains for many theorists a significant difference between the "negative liberty" that such rights together comprise and a notion of "positive liberty" that entails that one's ends be one's own in a deep sense, or self-determined in the sense of being reflectively adopted. The modern roots of the latter notion lie in Rousseauan-Kantian conceptions of moral freedom as rational self-legislation (for Rousseau, "moral liberty" as distinct from "natural" and "civil" liberties; for Kant, "autonomy" as opposed to "heteronomy"). These conceptions were developed further

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government is under an obligation to refrain from violating people's right to free speech, so it is obligated to ensure that the various legal entitlements and requirements that it enforces (e.g., of patent rights over drugs, property rights over income and wealth, and taxation laws) do not obstruct exercise of the right to health.[162] The positive dimension means that government is under an obligation to ensure that all persons have the "affirmative material and institutional support" necessary for the effective exercise of this right.[163] Spelling out the content of the positive component requires attending to the fact that its fulfillment entails expending substantial social resources, raising questions of social tradeoffs. In adjudicating these, reliance on the DALY-based qualified utilitarian scheme developed above seems sensible.

Advocates of a right to health sometimes embellish their claims with two intuitions, either of which, if persuasive, would point toward a modification of the DALY approach. First, there exists, it is sometimes argued, a qualitative difference between saving a life and easing the burden from disease. Second, there exists, it is sometimes argued, a fundamental ethical difference between the "statistical extension of life" (through, for example, regular mammograms or effective

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by Hegel, Marx, and T.H. Green into notions of "real freedom" and "self-determination" that begin to shade into conceptions of objective well-being along lines of neo-Aristotelian flourishing. *See* Justin Schwartz, *What's Wrong with Exploitation?*, 29 NOÛS 158, 169-76 (1995) (discussing Rousseau, Kant, Hegel, and Marx); BERLIN, *supra*, at 180 n.1 (discussing T.H. Green). While a self-determination interpretation of positive liberty remains compatible with some liberal conceptions of autonomy, see RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 72; BUCHANAN ET AL., *supra* note 151, at 381, a notion relying on objective conceptions of well-being is less so. This is not a worry here, since the right to health is primarily a form of negative liberty. While some positive liberty aspects do arise (e.g., where there enter reflective and deliberative elements in determining what "health" requires), for our purposes the role of any quasi-objective aspects, which is primarily what trouble liberal theorists, is limited to what is necessitated by practical considerations of implementing the right under some reforms.

[162] In American law, the recognition of this equivalence is typically associated with one specific moment, the 1948 case of *Shelley v. Kraemer*, in which the U.S. Supreme Court, influenced by the legal-realist critique of the public/private distinction, accepted that judicial enforcement of a racially restrictive covenant constituted state action. Shelley v. Kraemer, 334 U.S. 1, 19-21 (1948). The Court reasoned that although the seller's own actions were private and thus did not trigger the Fourteenth Amendment's requirement of "equal protection," for a court to enforce the restrictive covenant would constitute public or state action sufficient to raise constitutional questions. *Id.* The case since then has been contained in its impact in numerous ways, but its reasoning remains powerful. *See, e.g.*, Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004).

[163] Nussbaum, *supra* note 145, at 38.

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HIV/AIDS prevention programs) and the saving of identifiable lives (through, for example, emergency surgery or the provision of anti-retroviral drugs). The first argument casts doubt on the version of the DALY metric we have proposed, which places death on a continuum with other adverse health states. The second would likely require modification of the DALY approach in order to take into account the greater weight that should be accorded the preservation of identifiable lives. Our own view is that neither intuition survives critical reflective deliberation. The first expresses an unattractive moral absolutism about life. The second makes reference to morally indefensible cognitive biases in an effort to resolve social tradeoffs.[164] We will therefore not pursue either further.

II. OBJECTIONS

To review, we have examined four families of arguments that might justify increasing the extent to which the residents of developed countries pay for initiatives that would help alleviate the healthcare crisis in developing countries. Arguments from national self-interest, we concluded, provide weak and unreliable support for reforms of the sort we are considering. Arguments that seek to rectify the injustice that characterized past relations between developed and developing countries provide more substantial support, but also have serious weaknesses. Utilitarianism, by contrast, tilts quite strongly in favor of our recommendations, and provides us a metric, centered on a modified version of the WHO's DALY criterion, by which those recommendations might be tuned and balanced. Finally, a wide variety of nonutilitarian theories of distributive justice also lend strong prima facie support for our proposals, while also suggesting additional refinements of the DALY-based metric.

We now turn our attention to three general objections to the composite argument we have developed thus far. The first asserts that the ethical obligations with respect to healthcare that we have argued can be derived from either utilitarianism or nonutilitarian theories of distributive justice do not extend beyond national boundaries. The second contends that tampering with the patent system (as applied to pharmaceutical products) would be both counterproductive and

[164] *Cf.* Elhauge, *supra* note 141, at 1464 (lamenting destructive effects of moral absolutism on deliberations regarding health policy); DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 309-10 (criticizing widely held "rescue principle" of justice in medicine).

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illegitimate. The third warns us against interference in the private healthcare market.

A. The Limits of Ethical Commitments

Recall that, at the conclusion of our discussion of utilitarianism, we acknowledged that the normative implications we derived from that outlook were vulnerable to three serious criticisms: (1) they are too ethically demanding; (2) they exceed what is required internationally by liberal justice; and (3) they are ethically incorrect in light of, or incompatible with, our more sure-footed, particular commitments. Variants of the same three objections are also deployed by those who oppose internationalizing the considerations of justice that we have shown grow out of nonutilitarian theories of distributive justice.[165] In particular, the second objection stands as a barrier to attempts to extend Rawlsian egalitarian and rights theories to the international arena, the third objection impedes efforts to apply internationally the communitarian variant of the teleological argument, and the first objection opposes universalizing the argument from flourishing based on essential capabilities. For the non-Rawlsian theories of liberal equality or rights, there should be, prima facie, little difficulty in extending their considerations beyond national borders (given their bases in universalist ethics); however, versions of the second and third objections may still be invoked to limit their scope. These obstacles are formidable, but the three arguments set forth below are capable, in our view, of overcoming them.

[165] The articulation of internationalist or cosmopolitan values in the policy of Western nation-states is sometimes denounced on two other grounds, which we can dispense with quickly. First, it is sometimes said that recognizing international claims of justice (such as those based in human rights) opens the door to repeated violations of the sovereignty of weaker nations. Some critics contend that interventions in other states' affairs, no matter how well meant, are inherently deplorable; others think that ostensibly benign motives will all too often be mere covers for more selfish agendas. Neither ground for resistance applies here, as none of our reforms entails any violation of sovereignty. Second, it is sometimes argued that pursuit of cosmopolitan aims is ill-advised or inefficacious, because all too often the institutions charged with implementing the relevant policies lack sufficient local knowledge and sensitivities. Most of the reforms we contemplate will be free from this concern, and administration of the few variations that might entail it will simply have to attend carefully to this worry.

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1. Obligations to the Needy

Each of us has a duty to assist those in dire need, regardless of the cause of that need. This obligation may be seen as a component of what justice requires (in addition to, say, fairness, reciprocity, or fit), rooted in a positive moral duty to prevent severe harm or to alleviate severe suffering that is within one's sphere of influence; or it can be seen as stemming from an independent ethical obligation of beneficence.

A prominent version of this argument, explicitly oriented toward global issues, has been developed by Peter Singer,[166] and recently has been applied by Mpho Selemogo to the AIDS crisis in Africa.[167] Singer argues that acceptance of two plausible principles justifies transfer of resources from the affluent to the impoverished: (1) suffering and death from lack of food, shelter, and medical care are bad; and (2) if we can prevent something bad without sacrificing something of comparable moral significance then we should do it. We should refrain from extending aid only if (a) doing so would cause something else comparably bad; (b) the nature of our act would constitute a wrong in itself; or (c) we would thereby fail to promote some other good, comparable in significance to the bad thing we can prevent.

This argument, if persuasive, generates a powerful response to isolationism with regard to healthcare. There is little question that millions of people are suffering and dying from contagious diseases in developing countries and that the residents of developed countries could alleviate that suffering with relative ease. Singer contends that inaction under such circumstances can be justified only on three grounds. The second of those grounds — specifically, the contention that adoption of the reforms we propose would violate property rights — we will consider in subpart II.C.[168] Putting that possibility to one side for the time being, Singer's framework would seem to leave us only two excuses — that our action would result in an equally serious negative side effect, or that we would disable ourselves from achieving some comparably important moral good. Assessment of those

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[166] Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972). Singer's argument is not dependent on his somewhat notorious brand of utilitarian consequentialism; analogous arguments, applied similarly to the global setting, have been developed within a duty-based or deontic framework. *See generally* Onora Nell, *Lifeboat Earth*, 4 PHIL. & PUB. AFF. 273 (1975).

[167] Mpho Selemogo, *The African AIDS Crisis and International Indifference*, 66 HUMANIST 24 (2006).

[168] *See* John Arthur, *Rights and Duty to Bring Aid*, *in* WORLD HUNGER AND MORALITY 39 (William Aiken & Hugh Lafollette eds., 1996).

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possibilities requires a review of the costs and benefits of our proposals.

Let's first define the baseline. The global pharmaceutical R & D bill currently comes to roughly $100 billion per year. That bill is paid almost entirely by the one billion people living in developed countries.[169] The mean per capita income in those countries is $32,683. Each person's share of the R & D bill is thus, on average, $100 — 0.3% of his or her income.[170] As we have seen, the vast majority (roughly 97.5%) of the research supported by this budget goes to develop drugs aimed at diseases that are common in developed countries. In other words, almost all of the money spent by residents of prosperous countries on drug research helps themselves.

We pause to consider an important subsidiary issue: as noted above, the residents of developing countries currently pay only a tiny portion of the global R & D bill. In part this is because their governments lack the money to support expensive publicly funded research ventures. In part it is because they purchase relatively few drugs at market prices. But they do reap *some* benefit from the research. For reasons explained in our book, a growing (albeit still small) number of patented drugs are made available at low prices in developing countries, either voluntarily by their manufacturers or through compulsory licensing systems. And patent protection for all drugs eventually ceases, at which point inexpensive generic versions of them can and typically are distributed in developing countries. In reaping these benefits without paying for them, are the residents of developing countries behaving badly? In our judgment, no. As indicated above, most of the diseases targeted by current pharmaceutical research occur in both developed and developing countries. The benefit the research provides to the residents of the developing world is thus most plausibly characterized as a positive externality — analogous to the benefit reaped by the neighbors of a landowner who installs for his own enjoyment a lovely sculpture on his front lawn. Ordinarily, one would not think that the neighbors are behaving immorally when they gaze at the sculpture. Similarly, it would be difficult to argue that the residents of developing countries

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[169] Half of the bill is paid by residents of the United States. *See supra* note 58.

[170] All income and population figures pertain to the year 2004 and are drawn from WORLD BANK, WORLD DEVELOPMENT INDICATORS 2006, *supra* note 48, at tbl.2. (We use currency-exchange-rate dollars, not PPP dollars, because the analysis is based on R & D figures in U.S. dollars unadjusted for PPP differentials.) We are simplifying for present purposes by assuming, contrary to fact, that the drug R & D bill is proportionately divided among the developed countries.

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are behaving immorally when they consume drugs for whose development they have paid little or nothing, when those drugs would have been developed anyway. Not impossible, perhaps. Conceivably, their "free-riding" might be characterized as unethical, and we should be looking for legal reforms that would stop it. But such an argument seems sufficiently far-fetched that we will not pursue it, and will focus instead on the issue raised by the reforms we ourselves have proposed, which would require the residents of developed countries to pay for research from which they receive little or no benefit but that saves lives and alleviates suffering in the developed world.

Somewhat more specifically, we have recommended either adding roughly $15 billion to the global R & D bill or reapportioning that amount from the sum currently spent on global diseases. Using the former option for simplicity, adoption of our recommendation would cost each resident of the developed world an average of $15 per year — roughly .045% of his or her income. The benefits generated by this expenditure would be large. For reasons we have sketched (and that are explored in more detail in our book), the new research would likely, within a few years, reduce the annual death toll in developing countries from contagious diseases by several million. That is a very large gain for a relatively small outlay.

But does this launch us down a moral "slippery slope"? If we accept arguments of this general sort, can we ever draw a line and let residents of the developed world enjoy their lives (and affluence) with some peace of mind?[171] Objections of this sort are often advanced against arguments like Singer's, but we suggest that they have little weight in the situation before us. Although Singer himself often focuses heavily on the moral duties of individuals to give to charities, our own approach is much less taxing on individuals' consciences, as we are interested in reforming governments' health innovation policies (something that also, likely, will be much more effective than individual level donations). Further, the situation we are addressing involves especially (perhaps uniquely) strong reasons for intervention: at stake is a fundamental human interest (basic health needs); the pain it would avoid is enormous; and burdens that "we" would have to bear are very modest.

The argument deployed above seems sufficient to meet the objection, which can be made from several of the philosophical

[171] *Cf.* FRIED, RIGHT AND WRONG, *supra* note 89, at 13 ("[C]onsequentialist systems like utilitarianism . . . are oppressive in the totality of the claim they make on moral agents.").

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perspectives we have surveyed, that the reforms we advocate are too ethically demanding. The argument can be incorporated especially easily within liberal theories of distributive justice, most proponents of which already explicitly acknowledge a "duty to aid" across national boundaries, at least when the disproportion between benefits and costs is large.[172] Even communitarians should find the argument telling for two reasons. First, the communitarian proposition that one's given particular identities are one's moral starting points does not mean that they are necessarily one's ending points. As Michael Sandel has argued, communitarians can recognize obligations extending beyond national borders, even if they are of less force than those raised by one's fellow nationals.[173] The situation before us would seem to present a paradigm case of such an ancillary obligation. Second, recognizing an obligation to assist the desperately ill in developing countries seems congruent with the method of ethical deliberation advocated by many communitarians: ascertaining, and then selecting from, developing and affirming, the values inhering in a culture's institutions, practices, and norms, interpreted in a manner that best fits the culture as a whole and renders it most "excellent" or worthy of honoring.[174] The outpouring of concern and assistance witnessed

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[172] *See, e.g.*, RAWLS, LAW OF PEOPLES, *supra* note 90, at 106 (recognizing existence of duty on part of "well-ordered" peoples to assist "burdened" societies); Miller, *supra* note 90, at 171, 179 (arguing that while "*comparative* principles of justice operate only within national boundaries," nevertheless "noncomparative principles may operate across them," and that there is "general obligation to support and aid other human beings regardless of political or cultural boundaries"); Anderson, *supra* note 127, at 321 n.78 (developing social-relational account of liberal equality that nevertheless recognizes "global humanitarian obligations to everyone, considered simply as human beings — to relieve famine and disease, avoid fomenting or facilitating aggressive warfare, and the like"); Blake, *supra* note 90, at 259, 294 (arguing that while liberal commitments to moral equality and individual autonomy do not require extending concern with distributive justice or "relative deprivation" beyond the domestic arena, they nevertheless do require "concern with absolute deprivation in the international arena," so as to ensure that no one falls below a "threshold [of] decent human functioning" such that would jeopardize his autonomy, concern that would "mandate a surprising degree of international reorganization and reform, given the current degree of economic destitution in the world").

[173] SANDEL, DEMOCRACY'S DISCONTENT, *supra* note 91, at 343 ("To affirm as morally relevant the particular communities that locate us in the world, from neighborhoods to nations, is not to claim that we owe nothing to persons as persons, as fellow human beings . . . . The cosmopolitan ethic is wrong, not for asserting that we have certain obligations to humanity as a whole but rather for insisting that the more universal communities that we inhabit must always take precedence over more particular ones.").

[174] For general accounts of the method, see WALZER, SPHERES OF JUSTICE, *supra* note

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during the Asian tsunami disaster of 2004-2005 is only the latest demonstration that people in developed countries recognize the pull of such a call to assist.[175]

2. International Distributive Justice

Do general principles of distributive justice apply among nations? Rawls, influentially, says no. Upon a properly conceived political conception of liberalism, he argues, considerations of distributive justice only arise in the context of a scheme of social cooperation that involves reciprocal benefits and burdens or mutual coercion, and no such scheme currently exists at the international level. At present, consequently, nations only owe to each other three modest duties: (1) to abide by international law and custom (primarily, principles of non-aggression and self-defense and obligations under conventions, treaties, and other agreements), (2) to fulfill some modest additional duties of mutual aid and of assistance to "burdened states," and, (3) possibly to intervene in the internal affairs of non-"decent" peoples to protect human rights.[176]

137, at 3-10; Walzer, *"Spheres of Justice": An Exchange*, *supra* note 137; MACINTYRE, *supra* note 39, at 186-203, 220-25. For a specific discussion coming to a conclusion similar to ours, see SANDEL, DEMOCRACY'S DISCONTENT, *supra* note 91, at 385 ("At their best, local solidarities gesture beyond themselves toward broader horizons of moral concern, including the horizon of our common humanity.").

[175] This argument will dissatisfy some readers on one of two related grounds. First, it roots the case for helping to alleviate the health crisis in the developing world in a duty of assistance, one of "charity" rather than "justice," or, if of justice, then of an altruistic conception of it. Second, it encases the sentiment of benevolence within the language of "duty," conjuring images of self-abnegating altruism that some argue is an unpleasant feature of much modern, post-Kantian, moral philosophy. *See, e.g.*, WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY, *supra* note 82, at 174-96. We are untroubled, because we see benevolence as the expression of an expanded sense of self, as part of an ethical vision in which mutual concern and fellow-feeling have a prominent place. But those readers who are will, we hope, find the arguments of subsections (b) and (c) below more congenial.

[176] *See* RAWLS, THE LAW OF PEOPLES, *supra* note 90, at 37, 93-94 n.6; Blake, *supra* note 90, at 257-58, 265-73, 280-85; David Reidy, *Rawls on International Justice: A Defense*, 32 POL. THEORY 291, 291-92 (2004); Risse, *supra* note 31, at 94-108. Political-liberal opposition to strong claims for global distributive justice can be framed in two different forms. The first argues that the grounds for applying considerations of distributive justice to social and economic arrangements simply do not extend from the domestic to international settings, because the factors that operate to trigger distributive justice claims (social cooperation or mutual coercion) are not present in the latter case. This is the argument we take up in this section. The second recognizes that there are grounds for claims of international or global distributive justice, but that these are sharply delimited by the greater weight to be

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Two theorists, Charles Beitz and Thomas Pogge, have developed what we find to be compelling responses to Rawls's stance.[177] Because of the force and prestige of Rawls's argument, we feel obliged to spell out Beitz's and Pogge's positions in some detail, indicating along the way the implications of their positions for the problem before us.

Beitz advances two claims within a Rawlsian contractarian framework and a third that, while perhaps not strictly within the contractarian framework, nevertheless draws on considerations relevant to a Rawlsian approach.[178] First, at an absolute minimum, any theory of a just international order of nation-states must take into account the arbitrariness of a division of the world's resources according to the contingences of territorial sovereignty.[179] Because no

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given domestic claims rooted in, *inter alia*, reciprocal obligations and coercion. We take this argument up in the following section.

[177] *See generally* Charles Beitz, *Justice and International Relations*, 4 PHIL. & PUB. AFF. 360 (1975) [hereinafter Beitz, *Justice and International Relations*]; CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 198-214 (1999) [hereinafter BEITZ, POLITICAL THEORY]; Charles Beitz, *Rawls's* Law of Peoples, 110 ETHICS 669 (2000) [hereinafter Beitz, *Rawls's Law of Peoples*]; THOMAS POGGE, REALIZING RAWLS (1989); Thomas Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195 (1994); THOMAS POGGE, *supra* note 156.

[178] The claims are not all developed within a single argument. The first two are advanced in Beitz, *Justice and International Relations*, *supra* note 177; the third is most clearly articulated in Beitz, *Rawls's Law of Peoples*, *supra* note 177. Note, Beitz himself does not make any sharp distinction between the second and third arguments, but we think they are distinguishable. Some support for our reading is found in Beitz's remark that the following three elements, which roughly track the three different arguments, are "independently significant" factors that lie somewhat beyond a country's autonomous control but which nevertheless affect its welfare and hence pose the issue of international or global distributive justice: "resource endowments," "degree of reliance on international trade," and "patterns of international investment." *Id.* at 693 n.34. In general, there are parallels between these three arguments and the following three reasons that, as we suggest in other parts of this paper, Rawls can be seen to advance in favor of taking domestic socioeconomic arrangements as a proper subject for liberal justice: (1) the argument against the normative persuasiveness of the justifications advanced for the ostensibly minimalist or natural entitlements the enforcement of which libertarians argue state action relating to justice should be limited to, see *infra* note 256 and accompanying text; (2) the legal realist argument of the pervasiveness of continued state action in the so-called "private" sphere beyond the enforcement of minimalist entitlements, see *infra* notes 255-57 and accompanying text; and (3) the argument from social theory, registering the omnipresent shaping effect of the structures of the social world on individuals' life chances, see *supra* notes 88 and 96 and accompanying text.

[179] Beitz, *Justice and International Relations*, *supra* note 177, at 367-68. Beitz also points out that neither of two considerations apply here that arguably work to curb the force of arbitrariness in the context of allotments of genetically based talents: (1) the *prima facie* "it's mine" argument from the inextricable entanglement of talents

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state party to an original position for negotiating the rules of international political order would agree to let natural resources lie where they fall, there must be some principle of equitable distribution of such resources, even if we otherwise assume monadic national self-sufficiency.[180] This argument parallels one of the reasons why Rawls and other liberals accept the need to evaluate the outcomes generated by "the basic structure" of background socio-economic conditions: a rejection of the persuasiveness of justifications advanced by libertarians for their set of minimalist "natural" entitlements.[181]

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with one's physical self (and the self-dominion that has powerful force as an ethical primitive); and (2) the argument from personal identity along the lines that freely choosing how to develop one's talents is part of how one shapes one's personhood. *Id.* at 368-69. It may be objected that Beitz's argument is premised on a more positive, or at least straightforward, correlation between resource distribution and socio-economic development than can be sustained in light of the literature on the "resource curse." One response is that while a strong domestic resource base may not always be necessary, sufficient, or even positive for development, there is little doubt that it can be very beneficial (e.g., United States, Canada), and, in any case, access to foreign resources on favorable terms seems close to indispensable (e.g., England, Japan). Further, Pogge argues that the significance of resources to the global economy is drastically understated by a reliance on the share of aggregate global GDP or international trade volume taken by resource sales when these are measured by their current market prices, since these reflect "a negative externality that the corrupt elites of resource-rich developing countries and the heavy consumers of resources together manage to impose upon the populations of those developing countries as well as on future generations, for whom such resources will be considerably less plentiful and more expensive." POGGE, WORLD POVERTY, *supra* note 157, at 247 n.264. Finally, if "resources" are understood not narrowly as raw material inputs but more broadly as favorable geographic circumstances, then the case of their importance is strengthened. *See* Sachs, *supra* note 30; DIAMOND, *supra* note 20. Extending Beitz's argument by so broadening the interpretation of "resources" should be acceptable as long as knowledge of the relation between geographic circumstances to development can be imputed to participants in the original position, which seems not unreasonable on Rawlsian stipulations regarding what real world knowledge participants can draw upon behind the veil of ignorance.

[180] What exactly this principle should require is, Beitz acknowledges, somewhat unclear, although something along the following lines may be right: distribution of resources in proportion to each nation's population, adjusted by taking into account differences of effort undertaken in extracting resources, and, ideally, some recognition of the variation in the needs of communities with different cultures, economies, and geographies. In any event, Beitz states that the "underlying principle is that each person has an equal prima facie claim to a share of the total available resources," with departures from this standard needing to be justified, "analogously to the operation of the difference principle" (i.e., socioeconomic inequalities must be to the greatest benefit of the least-advantaged group). Beitz, *Justice and International Relations*, *supra* note 177, at 370-71.

[181] *See infra* note 256 and accompanying text.

Beitz's second argument parallels another reason why liberalism takes seriously the basic structure in domestic settings, namely, that there exists a scheme of interchange between nations that is shaped and backed by coercive rules, rules going well beyond the enforcement of minimalist entitlements.[182] In this vein, Beitz challenges the assumption of national self-sufficiency that was accepted arguendo under his first argument. This assumption, argues Beitz, is false at the very least in the weak sense that there is already enough international interdependence that the parties (states) have to some extent taken on burdens of compliance with international institutions and rules of interchange, burdens that require justification by principles of fairness for the scheme.[183] The primary examples of such international rules and institutions would be those regulating global and regional trade and investment (World Trade Organization ("WTO") and bi- and multilateral trade and investment agreements) and finance (the World Bank and the International Monetary Fund).[184] The existence of such a scheme is relevant, Beitz claims, even if a wealthy country could be self-sufficient "in the sense that its income from trade is marginal compared with total national income," as long as it "still participates in economic relations with less developed countries which impose great burdens on the latter."[185] Beitz, however, argues for an even stronger position: that the degree of inter-nation political and economic interdependence is in fact quite a bit higher than marginal, involving "a pattern of relationships which are largely nonvoluntary from the point of view of the worse-off participants."[186] The result is that by now there exists a global cooperative scheme where, at

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[182] *See infra* notes 255-57 and accompanying text.

[183] Drawing on arguments of the sort summarized in Part I.B, Beitz asserts that "the system of interdependence imposes burdens on poor and economically weak countries that they cannot practically avoid." Beitz, *Justice and International Relations*, *supra* note 177, at 374.

[184] MILANOVIC, WORLDS APART, *supra* note 26, at 149-50 (referring to this state of affairs as "plutocracy" and remarking that "[i]t has become almost commonplace to point out that the rules of the game in all important international organizations are disproportionately influenced by the rich world, and among them by specific interest groups"). For analysis of the interests, ideologies, operations, and impacts of the World Bank and International Monetary Fund ("IMF"), see generally JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 199-207 (2004). For an analysis of the different ways in which the overall "international framework" has been tilted in its effects in favor of the United States and its G-7 partners, see generally Robert Wade, *The Invisible Hand of the American Empire*, 17 ETHICS & INT'L. AFF. 77 (2003).

[185] Beitz, *Justice and International Relations*, *supra* note 177, at 375 n.17.

[186] *Id.* at 374.

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minimum, "some societies are able to increase their level of well-being via global trade and investment while others with whom they have economic relations continue to exist at low levels of development."[187]

Beitz concludes that these considerations justify either of two positions.[188] The "weak thesis" is that relations among nations, because of their resemblance to the basic structure of domestic society, are subject to some requirement of distributive justice. The "strong thesis" is that the applicable requirement regulating this interchange should be Rawls's difference principle.[189] The implication of this claim for our purposes is that, until the rules and institutions structuring interchange between nations, such as those relating to terms of trade, labor and capital mobility, currency bailouts, and debt financing, are subject to scrutiny by some defensible norms of distributive justice, the sorts of reforms that we are suggesting for the sake of international justice in health are justifiable interim measures. This argument should prove persuasive not only to political liberals, but also to communitarians, since the relevant subject here is the justness of relations between nations, not between people across national borders.[190]

Finally, Beitz advances a third consideration, one that suggests an even more thorough-going supra-national application of principles of distributive justice. The preceding argument centered on the existence of specific institutions at the international level that regulate certain aspects of economic interchange between nations. However, as Beitz suggests, given the following circumstances it may not be

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[187] *Id.* at 375. Beitz suggests that an even stronger view is perhaps "more plausible," which is that "poor countries' economic relations with the rich have actually worsened economic conditions among the poor." *Id.* at 375 n.18.

[188] Beitz himself suggests that the foregoing considerations justify going even further than these two positions — all the way to a strong cosmopolitanism, in which national boundaries as not taken "as having fundamental moral significance," and instead principles of distributive justice are applied without respect to citizenship or residency "to the world as a whole." *Id.* at 376. This conclusion, it seems to us, can be supported more effectively by the third claim that Beitz advances, which we discuss next.

[189] Beitz, *Afterword* to POLITICAL THEORY AND INTERNATIONAL RELATIONS, *supra* note 177, at 185, 198-99.

[190] Bolstering this argument would be the claim advanced in Part II.B for corrective justice in light of the history that has transpired between national communities from the developed and developing world. That argument should have especial weight for communitarians, in light of their explicit embrace of the ethical significance of an inherited history that comes with a situated self's particular social location (its "debts, inheritances, rightful expectations and obligations"). *See* MACINTYRE, *supra* note 39, at 220.

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possible to distinguish intelligibly between the domestic and international influences on the economies of "contemporary developing societies which are enmeshed in a global division of labor":

> [A] society's integration into the world economy, reflected in its trade relations, dependence on foreign capital markets, and vulnerability to the policies of international financial institutions, can have deep and lasting consequences for the domestic economic and political structure.[191]

More generally, an excessive focus on a few salient international institutions risks obscuring a set of wider and deeper "background" political and economic interactions and relations that take place not only between but also across nations.[192] The most relevant of these interactions are those anchored in the production and finance investment decisions of multinational (and increasingly transnational) firms (commonly originating from one or another developed country), working in conjunction with political and economic elites in developing countries within a framework of rules, policies, and relationships that, while increasingly cross-national, also remain heavily structured by the distribution of geopolitical power among nations and economic power among regions. While such supra- and infra-national relations are hardly novel (as indicated by the historical literature reviewed in subpart II.B above), many observers suggest that they now penetrate more deeply than ever into domestic societies, and are accompanied by a qualitatively new level of transnational outlook among elite business and political decision-makers. Studying these arrangements and developments is the province of the nascent fields of international political economy and global sociology.[193] Studies in

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[191] Beitz, *Rawls's Law of Peoples*, *supra* note 177, at 690.

[192] *Cf.* Robert Wade, *Choking the South: World Finance and Underdevelopment*, 38 NEW LEFT REV. 115, 115 (2006) (observing, and correcting for, fact that too often focus "on the role of the international institutions — IMF, WTO, World Bank" has come at expense of attention to equally, if not more, significant factor in developing countries' prospects: "the world financial system itself").

[193] For international political economy, the pioneer has been Susan Strange. *See generally* Susan Strange, *The Global Political Economy, 1959-1984*, 39 INT'L. J. 267 (1984); SUSAN STRANGE, STATES AND MARKETS: AN INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY (1988); JOHN M. STOPFORD & SUSAN STRANGE, RIVAL STATES, RIVAL FIRMS: COMPETITION FOR WORLD MARKET SHARES (1991); Susan Strange, *Political Economy and International Relations*, *in* INTERNATIONAL RELATIONS THEORY TODAY 154 (Ken Booth & Steve Smith eds., 1995); SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996). For key works of global sociology in this vein, see WILLIAM I. ROBINSON, A THEORY OF GLOBAL CAPITALISM (2004); SASKIA SASSEN, THE GLOBAL CITY: NEW YORK, LONDON, TOKYO (2001); SASKIA

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those fields stress the need to take seriously the existence of cross-national social structures that, just as in the domestic setting, heavily shape individual life chances but that may be only indirectly the result of government power.[194] If Rawls's earlier recognition of a "social world" that shapes citizens' life chances was an important advance for liberal-individualist political philosophy (incorporating for purposes of domestic justice the existence of a social structure elaborated by social theorists), it now seems necessary to register the existence of a global "basic structure" of background social and economic arrangements. Otherwise, political philosophy risks lapsing into what Brian Barry called, in the domestic context, "social-scientific illiteracy."[195]

Pogge develops similar arguments,[196] but then goes substantially further. The basis for his non-Rawlsian theory is the duty of governments and people to refrain from doing harm — in particular, to refrain from violating people's basic human rights. As we saw in the preceding section, Pogge claims that all people have rights to minimum levels of basic goods, including subsistence material goods and healthcare, that are essential to a decent life, and therefore all "coercive social institutions" must be so arranged as not to jeopardize secure access to such goods.[197] Pogge argues that there are two major ways in which the current institutional arrangements and policies of the international political-economic system (and, derivatively, developed country governments and citizens) do cause harm to developing country populations that amounts to violations of their human rights.

First, Pogge argues that the "global economic order" instituted by the 1995 establishment of the WTO has been "causally implicated in the reproduction of massive poverty."[198] This admittedly controversial claim rests on the followings assertions. First, several of the

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SASSEN, LOSING CONTROL? SOVEREIGNTY IN THE AGE OF GLOBALIZATION (1996).

[194] *Cf.* Anderson, *supra* note 127, at 321 n.78 ("As the economy becomes global, we are all implicated in an international division of labor subject to assessment from an egalitarian point of view. We have obligations not only to the citizens of our country but to our fellow workers, who are now found in virtually every part of the globe.").

[195] Barry, *supra* note 96, at 214; *see also* Kieran Healy, *The Contribution of Sociology, in* CONTEMPORARY POLITICAL PHILOSOPHY (Robert E. Goodin, Philip Pettit & Thomas Pogge eds.) (forthcoming 2007) (manuscript at 13-26, on file with the author).

[196] For Pogge's Rawlsian arguments, see REALIZING RAWLS, *supra* note 177, at 240-80, and *An Egalitarian Law of Peoples*, *supra* note 177.

[197] *See supra* notes 157-60 and accompanying text.

[198] Thomas Pogge, *Symposium: World Poverty and Human Rights*, 19 ETHICS & INT'L. AFF. 1, 4, 5 (2005).

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provisions of the General Agreements on Tariffs and Trade ("GATT") successfully sought by developed-country governments, such as protectionist measures relating to agriculture, textile, and clothing, have been particularly disadvantageous and burdensome for developing countries, with their combined effects resulting in the impoverishment and deaths of millions.[199] Second, these effects were foreseeable and hence responsibility is assignable to the governments that used their "crushing advantage in bargaining power and expertise" to press for maximally advantageous, rather than fair, terms.[200] Finally, it would be no defense to argue (even if it were true) that were it not for the Uruguay Round agreements, there would have been even more poverty and poverty-related deaths in the developing world. While these considerations are relevant to assessing the choices faced by the developing country signatories, they do not bear on evaluating the decisions made by the developed countries; the latter bear responsibility for whatever suffering and deaths were caused by the imposition of terms more onerous than would have been just and politically feasible.[201] Finally, the citizens of developed countries, Pogge insists, bear a significant measure of responsibility "for the global institutional arrangements their governments have negotiated in their names."[202]

Pogge's second argument takes up a likely objection to a heavy emphasis on international factors in explaining developing-world poverty: such an account overlooks "the incompetence, corruption, and tyranny entrenched in the governments, social institutions, and cultures of many developing countries."[203] In reply, Pogge acknowledges that such local factors are causally significant, but insists that they are not so easily delinked from the international system and that, in particular, authoritarian regimes are often encouraged or at least sustained by two key ways that international agencies, Western governments, and other foreign institutional actors cooperate with them: by recognizing the authority of such regimes both to sell the country's natural resources and to borrow funds

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[199] POGGE, WORLD POVERTY, *supra* note 156, at 18. Pogge's main support for this claim is that the estimated magnitude of the effect of such protectionist measures is $700 billion in lost export sales for developing countries, amounting to 11% of the developing world's total annual GNI, a gargantuan amount against the backdrop of "hundreds of millions undernourished and barely surviving." *Id.*

[200] *Id.* at 20.

[201] *Id.* at 17-19.

[202] Pogge, *supra* note 198, at 5.

[203] POGGE, WORLD POVERTY, *supra* note 156, at 21.

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(against, of course, future promises to repay).[204] These two "international privileges" not only fail to discourage but actively encourage coups and authoritarian regimes by rewarding "any group controlling a preponderance of the means of coercion within a country" with international legitimacy, "regardless of how this group came to power, how it exercises power, and the extent to which it may be supported or opposed by the population it rules."[205]

The overall thrust of Pogge's position is to challenge two linked assumptions that he thinks are widespread and help rationalize inaction by residents of the developed world in the face of massive global poverty: that the severe poverty facing roughly three billion people in the developing world is "due exclusively to local causes"; and that the one billion residents of the affluent countries are morally entitled to eighty percent of the global product in the face of such poverty elsewhere.[206] One of his chief aims is to shift thinking in this area away from notions of positive aid or charity ("we must stop thinking about world poverty in terms of helping the poor") and toward conceptions of avoiding harm and doing justice (the poor "need help only because of the terrible injustices they are being subjected to.") For residents of developed countries, the key task is to stop "the imposition, by our governments in our name, of a coercive global order that perpetuates severe poverty for many who cannot resist this imposition."[207]

Pogge makes two sweeping proposals designed to alleviate the injustice he identifies: reducing "the expected reward of coups d'etat" through reforms that will curb the two "international privileges" of illegitimate resource sales and loans;[208] and a "global resources dividend" whereby "the global poor own an inalienable stake in all limited natural resources," a stake that confers no decisional power

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[204] *Id.* at 22, 112-16.

[205] *Id.* at 22, 112. Pogge also mentions in passing the role played by "our governments" in "instigat[ing] the violent installation of many oppressive rules in the developing world" and in selling "juntas and autocrats the weapons they need to stay in power." Others might give this consideration more weight, given the historical literature reviewed in Part I.B, *supra*, and the oft-noted tensions that recur in American foreign policy between the pursuit of geopolitical and material interests through pliant regimes and efforts to promote democracies. *Compare* EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA (Abraham Lowenthal ed., 1991), *with* WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION AND HEGEMONY (1996).

[206] Pogge, *supra* note 198, at 1, 2.

[207] POGGE, WORLD POVERTY, *supra* note 156, at 23.

[208] *Id.* at 152.

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but does entitle its holders to a small share of the economic value of whatever use the resource is put, with proceeds "to be used toward ensuring that all human beings can meet their own basic needs with dignity."[209] To justify the reforms we advocate, one need not go nearly so far. Sufficient for our purposes are two more modest propositions that follow directly from Pogge's diagnosis: First, international institutions, such as the WTO — and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") in particular — must be reformed so as to eliminate their complicity in unjustifiable harms to the residents of developing countries. Second, Northerners' obligation to help alleviate the health crisis in the South derives strength, not merely from a general duty to help others in need, but also from a duty to address injustices arising from a global system of interdependence for which the Northerners are to a large extent responsible.[210]

The empirical assertions underlying Beitz's three arguments — that the distribution of natural resources among jurisdictions is arbitrary; that both the relations among nations and the welfare of the residents of each nation are powerfully affected by treaties and institutions in shaping which developed countries had the upper hand; and that cross-national socioeconomic structures powerfully affect the welfare of all people — would be difficult to contest. The principal empirical assertion underlying Pogge's arguments — that the WTO has helped cause massive poverty in the developing world — is subject to

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[209] *Id.* at 196. We should note that to provide an effective justification for the resource-dividend proposal, one would need to show more than that certain harms have been caused directly by the WTO system. Pogge points to three justifications, any of which, he argues, would be sufficient to support his proposal: (1) widespread poverty is the effect of a shared institutional order, one shaped and imposed by the better off upon the worse off, *id.*; *cf.* discussion *supra* notes 182-90, 191-92, and accompanying text; (2) there is no plausible justification for the affluent having much larger entitlements over natural resources than the poor, *cf.* discussion *supra* notes 179-181, and accompanying text; and (3) the "social starting positions of the worse-off and the better-off have emerged from a single historical process that was pervaded by massive, grievous wrongs." POGGE, WORLD POVERTY, *supra* note 156, at 198-99, 203; *cf.* discussion *supra* Part I.B.

Pogge also advances a far-reaching proposal for "gradual global institutional reform" that would disperse "political authority over nested territorial units" so as to "decrease the intensity of the struggle for power and wealth within and among states, thereby reducing the incidence of war, poverty, and oppression." *Id.* at 168. This, however, would be a very ambitious interpretation of what his human rights and negative duties arguments have established and, in any event, goes beyond our purposes here.

[210] The argument differs from the one from historical equity because, in Pogge's view, the harmful relations are ongoing rather than in the past.

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considerably more dispute. It is beyond our capacity to resolve that dispute in this paper. Suffice it to say for the time being that even a reader who gets off the bus before Pogge's stop should find Beitz's argument compelling. For us, that is plenty.

3. Robust Cosmopolitanism

Beitz's observation that global socioeconomic structures are rapidly becoming more important determinants of people's welfare than the decisions of national governments has implications that go beyond the recognition of moral duties among nations. Taken to its limit, it would require us to cease treating "national boundaries as having fundamental moral significance," and thus would require the full application of principles of distributive justice on a global scale.[211] If we followed this route, we would arrive at a theory sometimes known as "robust cosmopolitanism."

One sweeping version of robust cosmopolitanism is that advanced by Professor Kai Nielsen.[212] Nielsen's argument centers on three principles: that all human beings have equal moral worth ("ethical universalism"); that this equal worth mandates equal consideration for all from the perspective of distributive justice ("distributive ethical universalism");[213] and that the proper interpretation of equal

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[211] Beitz, *Justice and International Relations*, *supra* note 177, at 376. Beitz himself concedes that other considerations might argue against ignoring national boundaries completely when applying principles of distributive justice. In particular, sentimental attachment to the institutions of a nation-state may remain sufficiently strong to justify allowing a portion of the wealth of rich countries to be set aside for intra-national redistribution "once a threshold level of international redistributive obligations has been met." *Id.* at 384. His own view is that this argument has little relevance "to the large modern state," but he acknowledges the possibility that it retains some force. *Id.* at 382-83.

[212] *See* KAI NIELSEN, GLOBALIZATION AND JUSTICE 225-95 (2003).

[213] All the theorists of distributive justice that we canvassed in subpart D likely would accept some form of ethical universalism, but a number might resist *distributive* ethical universalism. Those clearly rejecting the latter would include Rawls and Walzer (whose political-liberal and communitarian arguments for distributive justice are explicitly not based on basic principles of ethical universalism). By contrast, Parfit, Frankfurt, and Nussbaum would all endorse some version of it. Parfit and Frankfurt both present their arguments and examples in the form of abstract ethical considerations regarding what people are owed *qua* persons, without linking their considerations in any way to specific socio-political obligations or institutions. Nussbaum has been at the forefront of strong cosmopolitanism. *See generally* MARTHA C. NUSSBAUM ET AL., FOR LOVE OF COUNTRY? (Joshua Cohen & Joel Rogers eds., 1996). The case of Dworkin is uncertain, as he advances both political-liberal and more universalist justifications for his egalitarianism. *See supra* notes 104-05 and

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consideration for the purposes of distributive justice is some form of strong egalitarianism.[214]

More moderate versions of robust cosmopolitanism might replace strong egalitarianism with prioritarianism or sufficientism as the principle required by distributive ethical universalism. But common to all versions of this perspective is the contention that achievement of distributive justice requires attention, not (just) to the claims of nations, but to the claims of individuals — Diogenes' "citizens of the world."[215]

An argument this radical in its implications discomfits many liberal theorists.[216] They resist it — and argue for the continued priority of national or domestic distributive claims — on five related grounds. First, they emphasize "relational facts": residents of a polity are bound together in tight, unchosen relations of cooperation and coercion, and so long as this remains the case, they are justified in treating their obligations to each other as particularly strong, stronger than their duties to the residents of other polities.[217] Second, only a national level state can efficiently manage a territory, its resources, and its residents (at least without building the intolerable levels of

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accompanying text. Elizabeth Anderson's position is also somewhat uncertain, although likely it would stop at a social cosmopolitanism (a cosmopolitan community with nations, not individuals, as the unit of membership), with some additional humanitarian considerations. *See supra* notes 130-31, 133-34, and accompanying text; *see also supra* note 172.

[214] *See* NIELSEN, *supra* note 212, at 232-41. Nielsen's own egalitarianism is an avowedly "eclectic" mix of different interpretations as to what type of distribution a commitment to equality requires (e.g., equality of condition, the difference principle, equality of resources, universal basic capability) and as to what good(s) are to be so distributed (e.g., utility, primary goods, resources, capabilities). *See id.* at 183-86. For our purposes, any of the parenthetical examples, as we have developed them here, would suffice. (Cosmopolitan views raise a range of issues besides those of socio-economic justice, such as those of political organization, which we leave aside.)

[215] Diogenes' purpose in deploying this phrase carries was to urge people to adopt a cosmopolitan or universalist outlook free from strong nationalist or related group loyalties or attachments. Our focus is instead on the policies governing and implemented by social institutions, not the ethics of individual outlook or choice.

[216] Richard Arneson states: "Global egalitarianism strikes many of us as satisfying from the standpoint of principle but counterintuitive in its policy implications. Philosophers have tried to bolster this intuitive sense of unease with principled arguments." Richard J. Arneson, *Do Patriotic Ties Limit Global Justice Duties?*, 9 J. ETHICS 127, 127 (2005).

[217] The phrase, "relational facts," comes from David Miller and is helpfully developed in this context by Christopher Wellman. *See* Wellman, *supra* note 133, at 537 n.2; *see also* Blake, *supra* note 90, at 257-58, 265-73, 280-85; Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 PHIL. & PUB. AFF. 202, 210-15 (1998).

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concentration of power that would be entailed by a world government), and the health of national governments depends upon the preservation of sentiments of compatriot fraternity or solidarity, which acceptance of robust cosmopolitanism would fray.[218] Third, the kinds of social justice goods provided by welfare states would not survive effacement of national boundaries for distributive purposes, since the social cement needed to sustain such policies is provided by nationalist sentiments.[219] Fourth, national political units enable valuable diversity and experimentalism in ways of organizing social life.[220] Fifth and finally, the attachment of citizens to a national identity is a fine thing in the judgment of liberal theorists when it is based on the affirmation of a set of common civic and political values.[221] In fact, we could go somewhat further and recognize that simply because civic pride and patriotism are important to many people's identities, and justifiably so, we should resist reforms that would erode those bonds.

A version of the last argument also figures prominently in the work of communitarians, who typically oppose robust cosmopolitanism with even greater fervor. A meaningful life, they commonly contend, depends heavily on nourishing somewhat unchosen and inherited identities, constituted by communities sharing a common heritage of *particular* memories, values, and customs.[222] Robust cosmopolitanism, they claim, does the opposite. It both rests upon and would help to popularize a wholly unattractive conception of "radically deracinated" citizens.[223]

In our view, the first of these objections has little merit. As we have shown, at least as important as national-level "relational facts" of

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[218] *See* RAWLS, LAW OF PEOPLES, *supra* note 90, at 36, 38-39.

[219] This is our interpretation of an argument advanced by Kai Nielsen, which might be based more on the practical, rather than solidaritous, advantages for social welfare resulting from the proximity of fellow nationals. *See* Kai Nielsen, *Toward a Liberal Social Cosmopolitan Nationalism*, 11 INT'L J. PHIL. STUD. 437, 443-46 (2003).

[220] *See* RAWLS, LAW OF PEOPLES, *supra* note 90, at 11-12, 39 n. 48; Beitz, *Rawls' Law of Peoples*, *supra* note 177, at 671-72.

[221] *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 224-34; Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, *in* GLOBAL JUSTICE: NOMOS XLI, at 12, 53-60 (Ian Shapiro & Lea Brilmayer eds., 1999).

[222] *See* Alasdair MacIntyre, Lindley Lecture at the University of Kansas: Is Patriotism a Virtue?, (1984), *in* THEORIZING CITIZENSHIP 209, 212-15 (Ronald Beiner ed., 1995).

[223] *See* WALZER, SPHERES OF JUSTICE, *supra* note 137, at 39 (using phrase to criticize utilitarian impartiality in immigration context).

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cooperation and coercion are (and have been)[224] analogous relationships between people on opposite sides of national borders.[225] Each of the other objections, however, has some force. National governments may well have some advantages in terms of efficiently managing resources, providing safety nets, preserving political pluralism,[226] and sustaining "communities of memory." [227] Sensitivity to such concerns should make us leery of a theory that treats commitments to one's countrymen as no different from commitments to the residents of other countries. But most advocates of robust cosmopolitanism do not go to such extremes,[228] and we certainly do not need to in order to justify the comparatively modest reforms necessary to alleviate the health crisis in developing countries. Remember, we are suggesting changes in the law that would end up costing the residents of developed countries an average of $15 per year. Most of us already think of ourselves as simultaneously citizens of cities, states (or provinces), and nations. The arguments adduced in this subpart seem more than enough to warrant thinking of

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[224] *See supra* Part I.B.

[225] *See supra* Part II.B.2. Nielsen refers to these as "the facts of interdependence and dominance" marking the global political economy. Nielsen, *supra* note 214, at 285.

[226] *Cf.* Roberto Unger, *The Second Way*, Cambridge Boutwood Lectures: Lecture 2, at 3 (2002), *available at* http://www.law.harvard.edu/unger/english/docs/corpus2.doc ("The powers and possibilities of mankind develop, if they are to develop at all, in different directions, as unique forms of life, with distinct institutional embodiments."); ROBERTO M. UNGER, WHAT SHOULD THE LEFT PROPOSE? 134 (2006) ("The role of national differences in a world of democracies is to represent a form of moral specialization: humanity can develop its powers and possibilities only by developing them in different directions.").

[227] *See* William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1748-50 & nn.374-84 (1988). The particular version of this argument elaborated in Fisher, *supra* (and that we find persuasive), is that attachments to political community should be nourished because they can comprise a significant, if not necessary, form of the kinds of social identity that are integral to the good life. This is distinct from a view, often associated with communitarian theory, that places heavy emphasis on the value of given, as opposed to chosen, communal identities, an emphasis that we feel cuts too far into individual self-determination. In addition, the insistence of some communitarian theorists that, to be meaningful, such given communal identities must be thickly particularistic, veers too close to a troubling tribalism.

[228] Indeed, even Nielsen describes himself as a "liberal nationalist" "social cosmopolitan," who recognizes the instrumental value of compatriot priority (primarily in terms of its effectiveness in securing social welfare), while at the same time insisting that it should be given very limited or no scope as long as current conditions of global injustice obtain. *See* Nielsen, *supra* note 219, at 446-47; Nielsen, *supra* note 212, at 281-95.

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ourselves also (not instead) as citizens of the world — at least when the financial burden of that affiliation would be so minor.

B. Compromising the Patent System

Roughly speaking, legal rights of "intellectual property," such as patents and copyrights, entitle their holders (or "owners") to exclude others, for limited periods of time, from making, selling, or reproducing intellectual works without permission, on pain of sanction from the state.[229] Why should such rights be granted? The literature on intellectual property has advanced four main justifications (listed in order of influence): they are a tool for maximizing social utility by inducing or enabling innovators to create valuable works by providing them with monetary incentives in the form of limited monopolies over the manufacture and distribution of embodiments of their innovations; they enforce through law creators' natural rights to the fruits of their labor; they express and enforce moral rights to control the expressions of one's creative personality; and they help create social and economic conditions that, in turn, sustain a just and attractive culture.[230]

Advocates of strong patent protection for pharmaceuticals most often frame their arguments in the instrumental language associated with the first justification, that of providing the necessary incentives for inducing innovation.[231] On this view, drug patents are justified on the reasoning that the increase they provide in social welfare by inducing the creation of new medicines will outweigh the social

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[229] Somewhat more precisely: a patent gives the patentee the right to exclude others from making, using, selling, offering for sale, or importing an invention, see 35 U.S.C. § 154(a) (2006). The main incidents of copyright in the United States are the exclusive rights to reproduce an expressive work, to distribute copies of the work, to prepare derivative works, and to perform or display the work publicly, subject to various "fair use" exceptions and other limitations, see 17 U.S.C. §§ 106-122 (2006).

[230] The four theories are considered in detail in William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen R. Munzer ed., 2001).

[231] The prominence of the utilitarian argument is not surprising. It looms largest in most discussions of patent law by both academics and government officials. *See, e.g.*, ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 23 (1997) (describing patent law as "the classic example of an intellectual property regime modeled on the utilitarian framework"); William W. Fisher, *Reconstructing Fair Use*, 101 HARV. L. REV. 1661, 1688 (1988); Edward Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 36-37, 47 (1989) (surveying main theories advanced in favor of intellectual property and concluding that "strongest and most widely appealed to justification for intellectual property is a utilitarian argument based on providing incentives").

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welfare costs that result from protecting patentees' prices from competition. But they frequently supplement this primary claim with a variant of the second justification: the pharmaceutical firms deserve the financial returns made possible by strong patent protection because they have invested so much effort and money — and run such big risks — in producing their socially valuable products.

A good example of these intertwined arguments is the following statement by Gerald Mossinghoff, then-president of PhRMA:

> Effective patent protection at home and abroad is vitally important to the United States pharmaceutical industry. America's research-based pharmaceutical companies pour millions of dollars into the research and development of new technology every year. Whether this commitment can continue depends greatly upon the extent to which foreign governments allow innovators to be rewarded for their inventiveness, monetary investment, and intellectual labor. For the private sector pharmaceutical industry, which has been the primary source of new therapies for the past four decades, there is little incentive to provide an ever-increasing commitment to research unless there are reasonable expectations of financial return. Only effective patent protection provides the incentives necessary to enable pharmaceutical companies to commit the required resources.[232]

In short, respect for patent rights is essential both to preserve crucial incentives for innovation and to provide the innovators the "rewards" they are due. Do the adjustments to patent law that we have proposed run afoul of either of these two justifications?

Most of the potential objections to our proposals from the first, utilitarian standpoint we have already addressed. In subpart I.C, we argued that reforms of the patent system necessary to increase the availability in developing countries of drugs that address the

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[232] Gerald J. Mossinghoff, *Research-Based Pharmaceutical Companies: The Need for Improved Patent Protection Worldwide*, 2 J. L. & TECH. 307, 307 (1987). A similar mixture of arguments can be found in the following statement by Hans Friedrich Beseler, at the time the European Union's Director-General for Trade, in his foreword to a volume on the TRIPS Agreement: "It would probably be true to say that intellectual creations and related efforts would not be undertaken if there was little entitlement to reward." Hans Friedrich Beseler, *Foreword* to TRIPS AGREEMENT: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS 2 (M.C.E.J. Bronckers et al. eds., 2000).

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contagious diseases that are rampant there are not merely consistent with, but required by the maximization of welfare. But opponents will respond that we have missed one fundamental point: unless we permit the pharmaceutical firms to continue to earn reasonable profits, they will simply stop innovating altogether. The result: the residents of developing countries will be no better off, and the rest of us will be much worse off.

A serious response to that claim requires knowing two things: the magnitude of the profits currently being earned by the firms, and the extent to which those profits would be corroded by the reforms we advocate. Those numbers are hard to determine, partly because the firms jealousy guard their financial data. In our book, we use a variety of indirect methods to estimate both. The bottom line: despite recent setbacks, the firms are still making plenty of money, substantially more than comparable firms in other industries. And the reforms we advocate would cut only modestly into their profits.[233]

The second, subordinate theme in the conventional defense of strong pharmaceutical patents is somewhat harder to assess. The claim that the firms *deserve* to control (at least for some period of time) uses of the inventions in which they have invested so much is slippery, rooted in intuition more than logic. Getting a grip on it requires returning to its roots — specifically, the writings of John Locke, and determining which if any of its original aspects are germane to the modern pharmaceutical industry.

Three variants of the argument can be found in Locke's *Second Treatise*.[234] The first posits that we each "own" ourselves, hence our

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[233] *See* Fisher & Syed, *supra* note 2, at 31.

[234] JOHN LOCKE, *Second Treatise of Civil Government*, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1970) (1690). Actually, there are at least four distinguishable arguments for a right to private property that one can extract from Locke's text. The three that we explore in the text each seeks to establish an intrinsic right of some sort, *viz.*, a right to ownership based on mixing; a right to the value added by one's labor; or a right to a reward for expended labor. *See id.* §§ 27-28, 30, 34, 40-43, 44. By contrast, on the fourth reading Locke views property instrumentally. On this account, property rights are justified because (and when) private appropriation is necessary for carrying out certain purposes (such as the beneficial development of agricultural land), which purposes are themselves justified on grounds either of self-preservation, *id.* § 25, the innate goodness of industriousness as revealed by reason or divine command, *id.* §§ 32, 34, 35, or general, instrumental, benefits of resource use, *id.* §§ 26, 34. *See* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 143-54 (Stephen R. Munzer ed., 2001). On Shiffrin's reading, then, contrary to Robert Nozick and Justin Hughes, see Hughes, *infra* note 236, and accompanying text, the non-rivalrous nature of intellectual works actually

labor, and hence the fruits of our labor when such labor "mixes" with parts of the world that are either unowned or held in common, so long as "enough and as good" of the commons has been left for others' use.[235] Some modern theorists — most notably, Nozick and Justin Hughes — have suggested that this argument provides even stronger support for property rights in intellectual works than it does for property rights in land or moveable objects, because the latter, unlike the former, are typically "exhaustible" or rivalrous in consumption, making it harder to satisfy the requirement that "enough and as good" be left for others.[236] That may be so, but in our view application of this variant of Locke's theory to patent law founders on two more serious problems. First, the move from an intuitively plausible notion of self-possession, as a kind of ethical primitive, to the complicated legal conception of "ownership" over, say, one's creative thoughts or arm movements, conceals a rather large gap in argument. Filling out the latter conception entails choosing among many possible complex combinations of entitlements, justification of any one of which requires significantly more than a simple appeal to an ethical intuition about self-dominion.[237] Second, whatever rights one thinks that an individual should have over his ideas or movements, it remains, as Nozick points out, quite mysterious to extend, in a quasi-physical manner, their reach to whatever elements they mix with. For instance, asks Nozick, why don't we "lose" what we externalize rather than gain what we mix with?[238]

The second variant asserts that people are morally entitled to the value added by their labor to the preexisting commons,[239] and that that

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serves to restrict the applicability of Locke's theory to intellectual property, because it means that private appropriation is not needed to enable the sort of control over the commons that may be a prerequisite to effective exploitation of physical resources. *Id.* at 156-57. While Shriffrin's interpretation is plausible, it remains the case that the versions we discuss, whatever their fidelity to Locke's text, are now firmly established — in American legal and political theory in particular — as normative arguments in their own right.

[235] LOCKE, *supra* note 234, § 27.

[236] NOZICK, *supra* note 18, at 178-82; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 299-330 (1988).

[237] An example of the problems papered over by this move is that, for Locke, the liberty that an individual possesses in his person is inalienable, LOCKE, *supra* note 234, § 23, while the argument from self-dominion is often used to justify conceptions of legal ownership that include the right/power to alienate.

[238] NOZICK, *supra* note 18, at 174-75.

[239] For empirical work suggesting that the majority of contemporary Americans and Western Europeans adhere to some version of this view, see J. Stacy Adams & Sara Freedman, *Equity Theory Revisited: Comments and an Annotated Bibliography*, in 9

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value can be both measured and recouped by permitting the laborers to charge for access to their additions.[240] This argument fares no better. As political philosophers as far apart as Hayek and Rawls have acknowledged, the claim that market valuations fairly measure what workers deserve is undermined by three considerations.[241] First, the morally arbitrary allocation of genes, and the unchosen family and social background that contribute to shaping one's character and opportunities, go a long way toward determining whether one will possess and develop the capacities that enable one to engage in highly valued market activity.[242] Second, what is valued by the market at any one time is the function of supra-individual factors that seem unlikely to reflect moral worth, including historically contingent social consumption patterns and what skills or work others are able and willing to supply. Finally, the price a given good or service fetches on the market is not simply a function of developed traits and social tastes, but is also, to a significant extent, the result of numerous legal and institutional factors that shape the bargaining power of market agents but are irrelevant to the question of moral desert.[243] Further, one of these factors is the specific set of entitlements that comprise any property rights granted over the fruits of one's value-adding labor;

ADVANCES IN EXPERIMENTAL SOC. PSYCH. 43, 47-49 (L. Berkowitz & E. Walster eds., 1976). For the claim that it also finds support among the citizens of former Soviet-bloc countries, see generally Ellen S. Cohn et al., *Distributive and Procedural Justice in Seven Nations*, 24 LAW & HUM. BEHAV. 553 (2000). For indications that the view is or has been less widely held in other cultures or eras, see generally MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE 29, 164-79, 202-03 (1985); David Miller, *Distributive Justice: What the People Think*, 102 ETHICS 590 (1992). For a sympathetic philosophical presentation of the position (finding it theoretically plausible but practically intractable), see JOEL FEINBERG, SOCIAL PHILOSOPHY 114-16 (1973).

[240] Whether this is the version that Nozick settles on is unclear, as he is famously ambiguous on the question.

[241] *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 85-102 (1960); RAWLS, A THEORY OF JUSTICE, *supra* note 41, § 48, at 273.

[242] *See* HAYEK, *supra* note 241, at 94; RAWLS, THEORY OF JUSTICE, *supra* note 41, § 13, at 64; § 48, at 274.

[243] *See* Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases*, 27 U. MIAMI L. REV. 261, 340-44 (1973); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 328-41 (1991); Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 PHIL. & PUB. AFF. 226, 230-40 (1995). These authors are developing arguments pioneered by Robert Hale. *See generally* Robert Hale, *Bargaining, Duress and Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter Hale, *Coercion and Distribution*].

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the justification of such rights cannot, without circularity, be founded on the market value of that labor.[244]

The third variant of the Lockean argument is that it is only fair that a person who expends labor in a socially valued endeavor should receive a return commensurate with his or her effort. In Mill's formulation, this is "that equitable principle, of proportion between remuneration and exertion."[245] In our view, this argument holds up much better than its cousins.[246] To be sure, Rawls, among others, has been interpreted to question it, on the ground that one's ability and willingness to work hard, like one's capacity to create things valued on the market, is determined largely by circumstances over which one has no control.[247] But we agree with James Dick that this "pushes the doctrine of nonresponsibility too far."[248] Such strong determinism is inconsistent with deeply ingrained intuitions regarding personal agency that seem central to ethical deliberation, and that require more argument to dislodge than Rawls provides.[249] Thus, in our view

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[244] *See* MORTON J. HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 161-64 (1992) (detailing development of this argument by institutional economists and legal realists Gerard Henderson, John R. Commons, and Robert Hale). Note, it is this last point that is most responsive to Nozick's own argument, if indeed it is based on the value-added theory, since he disavows any reliance on notions of morally "deserving" the value of one's labor (thus ostensibly remaining clear of the previous objections). Instead, Nozick advances a thinner notion of morally justified property "entitlements." NOZICK, *supra* note 18, at 224-27. However, if the entitlements to be justified contribute to the value of the activity that is itself supposed to undergird their justification, we have a vicious circularity. How damaging this and the preceding arguments are to Nozick's, or others', libertarian or entitlement theories in general is taken up in Part II.C, *infra*.

[245] JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 5-24 (William J. Ashley ed., 7th ed. 1909), *available at* http://www.econlib.org/library/Mill/mlP14.html.

[246] Note, a further refinement would be for desert to correspond not merely to effort but also to "sacrifice," understood as laboring in endeavors that are above the social average in risk or drudgery. For a searching examination of different possible conceptions of justice-in-earned-income that settles on roughly the same conclusion, see James C. Dick, *How to Justify a Distribution of Earnings*, 4 PHIL. & PUB. AFF. 248 (1975).

[247] For this interpretation of Rawls, see, for example, NOZICK, *supra* note 18, at 214, and Hettinger, *supra* note 231, at 42. However, while Rawls does downgrade the role of individual responsibility in effort, and rejects any role for desert in matters of distributive justice, his position seems ultimately based not on a denial of *any* individual responsibility over effort, but rather on the view that it is simply too "impracticable" to disentangle the (likely small) role of responsibility from other factors. *See* RAWLS, THEORY OF JUSTICE, *supra* note 41, § 17, at 89, § 48, at 274.

[248] Dick, *supra* note 246, at 257.

[249] *Cf.* Hettinger, *supra* note 231, at 43 ("[I]f the ability to expend effort is taken to be entirely determined by factors outside a person's control [as Hettinger takes Rawls

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scientists, R & D managers, and others involved in the drug development process do *deserve* a fair reward for the labor they expend in creating medicinal innovations. Nevertheless, the arguments canvassed in the preceding paragraph have force here as well, raising intricate issues of how to solve the "proportionality" problem that has so long hobbled Lockean property theories. Fortunately, we need not resolve that difficulty here. The reason: the profits necessary to sustain incentives for pharmaceutical research — profits which, as indicated above, would still be reaped after adoption of our proposed reforms — seem more than adequate to supply the firms the "just deserts" to which they are entitled because of the effort their employees expend.

Two other aspects of the Lockean argument reinforce this conclusion. First, most of the proponents of this approach contend that, when two or more parties contribute to a socially valuable product, they deserve rewards commensurate with their respective contributions. A point often overlooked in the discussion of drug patents is the immense contribution to pharmaceutical innovation made by the publicly funded federal and university labs in which the majority of basic and midstream biomedical research is carried out.[250] This amounts to a substantial public subsidy of the industry.[251] Against this background, the firm's moral claim to strong patents over their products seems less strong than the analogous claims of firms in industries less dependent on taxpayer support.

Second, as Nozick points out, compliance with the requirement that "enough and as good" of the knowledge commons is left for others can be achieved only by limiting the duration of an inventor's exclusive rights to the time it would have taken another practitioner in the field

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to argue], the result is a determinism which makes meaningful moral evaluation impossible. If people are responsible for anything, they are responsible for how hard they try, what sacrifices they make, and how moral they are."); Cohen, *supra* note 115, at 915 (arguing that, given that Rawls does not deny any individual responsibility over effort, his actual argument, from impracticability, is insufficient basis for rejecting desert tout court).

[250] We detail the contributions of government funding, public-sector decisionmaking, and the "public-sector values" of academic scientific research in Chapter 3 of FISHER & SYED, *supra* note 2, at 4-7. Note, these considerations are reinforced when we take into account the role played by the largely publicly funded university training that individual scientists draw upon in making their contributions.

[251] *See* Rebecca Eisenberg, *Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research*, 82 VA. L. REV. 1663, 1667-68 (1996); Sheldon Krimsky, *The Profit of Scientific Discovery and Its Normative Implications*, 75 CHI-KENT L. REV. 15, 36-37 (1999).

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to have independently come up with the invention.[252] That this period would be on average considerably shorter than the twenty years (from application date) provided inventors by the current patent system[253] is suggested by the relatively common occurrence of independent simultaneous discoveries in science, and the frequent entrance of "me-too" drugs onto the pharmaceutical market only a few years after the pioneer, many of which seem to be the result not of imitative activity but of the independent efforts of the second-place finisher in the innovation race.[254] Both this and the previous consideration reveal the extent to which an exclusive focus on the first half of the Lockean story (i.e., of individual self-ownership and labor) tends to obscure the social contributions to, and conditioning of, individual acts of creative labor.

In sum, neither the primary, utilitarian theory on which the patent system as a whole is founded, nor the defensible variant of the secondary, labor-desert theory would be violated by increasing, along the lines we propose, the extent to which pharmaceutical firms must conduct research on diseases common in developing countries or by requiring the firms to make the fruits of that research available at low prices to the residents of those countries.

C. Interfering with the Market in Pharmaceutical Products

In addition to changes in the patent system, we advocate modifications to many other laws that govern the creation and distribution of medicines. Among our recommendations are increases in governmental control over the prices of drugs, increased governmental oversight of investment choices made by pharmaceutical firms, and increases in public funding of research and development. Some readers will likely regard all such proposals as illegitimate or unwise interferences with the freedom of the firms and their customers.

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[252] NOZICK, *supra* note 18, at 182.

[253] For reasons explained in FISHER & SYED, *supra* note 2, pharmaceutical patents ordinarily last for even longer periods.

[254] For science in general, see Robert Merton, *Singletons and Multiples in Scientific Discovery*, 105 PROCEEDINGS OF AM. PHIL. SOC'Y 470 (1961). For pharmaceutical innovation, see U.S. CONGRESS, OFF. OF TECH. ASSESSMENT, PHARMACEUTICAL R & D: RISKS AND REWARDS 7 (1993) ("[M]uch of the R & D on me-too drugs is not imitative but competitive. The race has one winner and often a field of followers. The R & D costs of those who lose the race but manage ultimately to produce a product may be as high or even higher than the costs of developing the pioneer compound.").

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Our first response to this objection is an old and, we hope, uncontroversial point: the shape of all markets, including the market in pharmaceutical products, is already heavily influenced by state action. Somewhat more specifically, all transactions within those markets take place within a legal-institutional framework enforced by government, a framework that shapes considerably the liberty and bargaining power of agents and the resultant distribution of goods.[255] The implication of this observation was emphasized long ago by the Legal Realists: it is circular to attempt to justify libertarian entitlements on values or outcomes that they partially create.

However, the game is far from over. Libertarian or entitlement theorists may evade the force of this response, by spelling out persuasive justifications for how to fix all initial entitlements enforceable by a minimalist state that meet three conditions:

(1) The justifications must avoid the type of circularity just described;

(2) The justifications must be grounded either

(a) in terms of the entitlement-receiver morally deserving the distributive outcome, or

(b) at least in powerful distribution-independent moral arguments that can be said plausibly to be innocent of any foreseeable distributional consequences of a defeatingly objectionable sort; and

(3) Even if they meet conditions (1) and (2), the justifications also must be determinate enough to structure the subsequent elaboration of the entitlements by lawmakers while continuing to stay free of the objections in (1) and (2).

Skepticism regarding the feasibility of (2) animates (rightly, in our view) the insistence of liberal theorists such as Rawls and Dworkin that liberal justice must engage with the background conditions of social life.[256] And skepticism regarding the feasibility of (3) derives

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[255] *See supra* note 243 and accompanying text.

[256] *See* RAWLS, JUSTICE AS FAIRNESS, *supra* note at 83, § 1, at 1, § 15, at 52-55 (rejecting normative persuasiveness of non-desert-based procedural defense of libertarian entitlements along lines of Locke and Nozick); RAWLS, THEORY OF JUSTICE, *supra* note 41, § 2, at 6-7, § 41, at 229 (stating that subject of liberal political justice must be "basic structure" of society, which includes not only its political institutions but also its principal social and economic arrangements, in part because "[s]ome decision concerning these background arrangements," which are "the cumulative effect of social and economic legislation," "cannot be avoided" and, further, that "deep inequalities" these arrangements often generate "cannot possibly be justified by an appeal to merit or desert"); DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 1-2 (stating that liberal equality before government must concern itself with conditions and outcomes of economic life, which are affected significantly by state rules); *id.* at

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(again, rightly, in our view) from the following arguments developed by legal realist and critical legal studies scholars in their critique of the public–private and state–market distinctions.[257] Even accepting a plausible moral basis for the initial fixing of entitlements (i.e., accepting (1) and (2) above):

(a) The legal concepts underpinning markets such as "property," "contract," "harm," and so forth, and the rules pertaining thereto, are in many concrete settings highly under-determinate (sometimes containing internal antinomies), and hence their elaboration requires a number of subsequent political-ethical choices in order to select which among many detailed entitlement packages the law should enforce;[258]

(b) Recourse, in settling these questions, to the higher-order premises supplied by the grounding political philosophy that purported to be distributively neutral is often inadequate to choose one package over the others; and

(c) In any case, these choices, being made once the system is up and running, often have some discernibly patterned distributive effects, for which the choosers must acknowledge responsibility.

Libertarian theorists have thus far failed to develop persuasive responses to these contentions. The chances that they will do so seem

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87-89, 110-12 (rejecting as normatively unpersuasive those interpretations of liberal justice that either are fully libertarian in mode of Locke and Nozick, or are attempts to mix libertarian or "laissez-faire" elements with those of initial, or formal, equality). Both Rawls's and Dworkin's discussions in these passages are somewhat ambiguous with respect to whether their positions aim solely at rejection of (2) (both (a) and (b)) or also presume the refutation of (3). The skepticism of many liberal theorists regarding (2)(a) is based in large part on the sorts of considerations adduced above regarding the moral arbitrariness of the extra-legal factors shaping market distribution. *See supra* notes 240-42 and accompanying text. For powerful criticisms of Nozick's efforts at meeting the requirements of (2), see generally G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY (1995).

[257] *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Hale, *Coercion and Distribution*, *supra* note 243; Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 29 (1927); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 493 (1988); Horwitz, *supra* note 244, at 163-66, 206-08 (1992); WILLIAM W. FISHER ET AL., AMERICAN LEGAL REALISM 8, 98-100 (1993); BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567-70, 616-41 (1982); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-5, 102-07 (1987).

[258] To the extent that a version of this point was acknowledged by Hayek (see Hayek references cited *supra* note 88 in relation to the "first point"), the challenge against him would emphasize points (2)(b) and the following points (b) and (c).

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especially slim when the entitlements at stake are not property and contract rights in general, but rather patent rights, the contours of which are so contestable and so obviously and heavily shaped by the state. How long should a patent last? How far should the scope of a product patent extend to functionally equivalent but structurally different compounds? Is a discovery that facilitates further research but has no immediate medical or industrial application sufficiently "useful" to warrant patent protection? By what standards should we determine whether a particular innovation was "nonobvious"? Questions of these sorts arise constantly, powerfully affect the fortunes of the actors in the healthcare market, and cannot be answered through application of a theory that meets condition (2), above.

Even if opponents of our proposals concede defeat on this fundamental issue, they are likely to continue to resist on more prudential grounds. It is unwise, they will probably argue, for governments to try to shape private firms' decisions concerning which lines of research to pursue or which markets to penetrate. Rather, social welfare will be maximized if firms make those decisions in response to the signals sent by individual consumers. Putting aside the problems associated with this argument in general, it is especially unconvincing in the context of pharmaceutical products, where so many circumstances render consumers' decisions uninformed. Among the more important: greatly asymmetric knowledge between firms and consumers regarding the benefits and risks of drugs; considerable asymmetries of information (and of the time needed to make evaluations) between firms and the doctors that prescribe the drugs to end-consumers; and the "capture" of some doctors and health insurance providers by patent-holding firms, prompting those intermediaries to steer patients toward certain medicinal options. These sources of distortion are compounded by advertising campaigns, whose effectiveness is increased by the fact that health insurance makes many consumers price insensitive, reinforcing the allure of well-promoted products.[259] Finally, in the healthcare sector more generally, such distortions exist alongside problems arising from the conflicting demands on healthcare providers (promoting maximum well-being versus cost-sensitivity) and issues of moral hazard and adverse selection for health insurance. The confluence of conditions of these sorts have led to a broad consensus in the health

[259] For further discussion, see FISHER & SYED, *supra* note 2, at 10-11 nn.29-31.

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policy literature that pervasive market failures necessitate the overt participation by governments in the allocation of healthcare dollars.[260]

Of course, particular examples or forms of governmental regulation of the pharmaceutical market or the healthcare market more generally may suffer from more specific infirmities. The information available to government officials in a particular context may be even worse than that available to private actors. Bureaucracies are bad at some tasks. Certain decision-making procedures by government agencies may invite "capture" by the regulated firms. And so forth. In our review of the various ways in which the law might be changed in order to alleviate the health crisis in the developing world, we take such hazards into account.[261] But, for the reasons outlined above, an objection to our proposals based on a general commitment to "laissez-faire" seems to us to have little force.

[260] For reviews of the literature, see Einer Elhauge, *supra* note 141, at 1452-57; Rai, *supra* note 69, at 1015-18. Elhauge identifies another troubling factor — a moral absolutism (roughly: you cannot put a price on human life and health) that pervades our society's discussions and decisions regarding health issues, making realistic cost tradeoffs especially difficult to administer, as well as creating a market environment that welcomes and is willing to pay for any advance in medical technology, no matter how small or expensive the improvement. Elhauge, *supra*, at 1459-61.

[261] *See* FISHER & SYED, *supra* note 2, at 3-13.

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