WHY PARETIANS CAN'T PRESCRIBE: PREFERENCES, PRINCIPLES, AND IMPERATIVES IN LAW AND POLICY

Robert Hockett*

Recent years have brought two linked revivals to the legal academy. The first is renewed interest in the prospect of articulating some norma- tive "master principle" by which legal rules might be evaluated. The second is renewed interest in the prospect that some variant of Benthamite "utility" might serve as the requisite touchstone. One influ- ential such variant now making the rounds, logically entailed by the sev- eral Pareto criteria, is what the Article calls "Paretian welfarism."

This Article rejects Paretian welfarism and sets forth an alternative that it calls "fair welfare." It does so because Paretian welfarism is logi- cally inconsistent with all forms of ethical, social, and legal prescription, while fair welfare is what welfarists and others have been groping for all along. Guido Calabresi was more right than we knew when he pro- nounced that Pareto is "pointless." In fact it is anti-prescriptive.

The Article first explicates the nature of welfare and social welfare, then their relations to the sundry Pareto criteria. It observes that ethi- cal, social and legal prescription alike always draw a cut between bona fide welfare — permissible satisfaction—on the one hand, and pro- scribed satisfaction on the other. They do so, moreover, on grounds of precisely those always potentially preference-overriding, normative dis- tributional principles that Paretian criteria, when applied generally, can in turn always "veto."

The Article next explicates the logical form of social and legal pre-scription. It shows that all forms of action-guiding prescription, as distinguished from merely agency-commandeering conscription, are underwritten by the same kinds of preference-overriding distributional principles as draw the cut between bona fide welfare and impermissible satisfactions. These impartial principles sound in forms of logical generality that the Article shows to imply norms of "agent equality," and are rendered explicit whenever imperatives are expressly justified by normative reference to reasons.

The Article then analyzes the idiom of Bergson-Samuelson social welfare functions (SWFs) in which Paretian welfarist legal theorists frame putative prescriptions. It shows that SWFs must be formally supplemented in a manner that registers the potentially preference-trumping nature of normative distributional principles, if they are to be suitable for those purposes of prescriptive "completeness" that we generally lay out for them.

The Article next draws the foregoing analyses together in two simple discursive proofs, counterparts to formal results the author presents elsewhere. The first shows the impossibility of strict "welfarist" prescription. The second shows Paretianism's cognate impossibility. These results generalize well-known theorems of Arrow and Sen.

The Article then sketches the fair welfare alternative. The true "Grundnorm" for legal theory is an equal opportunity norm that is the material counterpart to that agent equality found earlier in the Article to underlie all preference-trumping norms of distributive propriety. Because these norms lie at the core of social prescription itself, conformity with the fair welfare ideal is the appropriate form for our legal prescribing to take.

Introduction: Lawyers Are Looking for "New Foundations"

Recent years have witnessed two related "revivals" in some quarters of the legal academy. The first, more generic revival is renewed interest in the prospect of articulating some normative "master principle" pursuant to which law and policy might be critiqued and improved.[1] The second, narrower revival is renewed interest in the prospect that some variant of the venerable Benthamite "principle of utility" might serve as the requisite touchstone. One Benthamite variant now making the rounds turns up under the misleading name "welfarism."[2] Proponents advocate this position, which would more precisely be named "*strict welfarism*," on grounds of a likewise inaptly named "Pareto Principle."[3]

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[1] And hence, pursuant to which legislative, judicial, and ultimately citizen action might be guided. For evidence of the revival, see, e.g., Matthew D. Adler & Eric A. Posner, New Foundations of Cost-Benefit Analysis (2006); Matthew D. Adler, Social Welfare, Lifetime Well-Being, and Equity: A New Framework for Policy Analysis (forthcoming 2009, book manuscript on file with the author). *See also* Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009); Eduardo Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009).
For full elaboration of the sense in which normative principles pursuant to which law and policy are critiqued are principles pursuant to which legislative, judicial, and ultimately citizen action are guided, see *infra* Part II. Attention to individual and collective action and agency will figure prominently in the discussion to come, precisely because law, policy, and the critique thereof are at bottom concerned with the guidance of action.

[2] *See, e.g.*, Adler & Posner, *supra* note 1; Adler, *supra* note 1; *see also* Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002); Eric Posner, *International Law: A Welfarist Approach*, 73 U. Chi. L. Rev. 487 (2006); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. Legal Stud. 331 (2003) [hereinafter Kaplow & Shavell, *Notes on the Pareto Principle*]; Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* [hereinafter Kaplow & Shavell, *Fairness*], 114 Harv. L. Rev. 961 (2001); Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. Pol. Econ. 281 (2001) [hereinafter Kaplow & Shavell, *Non-Welfarist Method*].
Two recent discussions sympathetic to but not uncritical of Paretian welfarism are Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. Pa. L. Rev. 179 (2007), and Matthew D. Adler, Well-being, Inequality, and Time: The Time-Slice Problem and Its Policy Implications (2007) (unpublished manuscript, on file with the author). A more formal treatment of my own is Robert Hockett, Pareto Versus Welfare (unpublished manuscript, on file with the author) [hereinafter Hocket, Pareto Versus Welfare]. *See also* Robert Hockett, *Taking Distribution Seriously*, N.Y.U. J.L. & Lib. (forthcoming 2009) [hereinafter Hockett, *Distribution*]. A compelling critique from the angle of Rawlsian "public reason" is Lawrence B. Solum, *Public Legal Reason*, 92 Va. L. Rev. 1449 (2006).
The equivocation involved in the term "welfarism" to which I allude is as between the view that individual preference satisfactions are "inputs" to something called "social welfare" on the one hand, and the view that they are the sole such determinants on the other. I shall sometimes accordingly refer to the latter view, whose prescriptive sterility engages me here, as "strict welfarism," or better yet "strict preference-regard." I shall also refer to it as "Paretian welfarism" for reasons I shall presently explain. *See infra* notes 3, 15.

[3] For why "strict welfarism" is more apt, see *supra* note 2. For the sense in which Paretian considerations "ground" strict welfarism, see *infra* this Introduction, and Parts I.B and IV. The short-playing version is this: All of the several Pareto criteria, more on which in the

Both of the developments to which I refer are in a way understandable. With a once influential "wealth-maximization" norm now in decline,[4] it is not surprising that a Pareto-inspired cry of the "back to Bentham!" sort might ring attractive to erstwhile exponents of the economic analysis of law. There is precedent, after all, for this very fallback in the lawyer-admired discipline of welfare economics itself. Practitioners of the latter long ago, after Scitovsky's "paradox" had cast doubt on the Kaldor-Hicks "compensation" criterion—which was both the source of the wealth-maximization norm and was conceived from the start as a moral improvement on Benthamism—fell back on a counterpart move "back to Pareto."[5]

Notwithstanding the appreciable force of the wish that must prompt them, however, this Article argues that the two linked temptations "back to Bentham," "back to Pareto"—must be rejected. They must be rejected not merely by normative legal and policy analysts, but by all who would think carefully about what it is to prescribe, hence to adjudge or evaluate, law and policy. The reason, in a nutshell, is that today's form of Benthamism, and the Paretian commitments that formally entail it,[6] are at odds with the logical structure of legal and policy prescription itself.

In fact, I shall show, it is mistaken to think terms like "Pareto Principle," or the Benthamites' "Principle of Utility," name normative "principles" at all.[7] They name, rather, forms of *abstention* from principled

following paragraph, if cashed out in terms of preferences as they generally are, demonstrably entail strict welfarism, as will be demonstrated.

As for "Pareto Principle," the unhelpfulness to which I allude stems from this: Some proponents evidently intend by this phrase to refer to the so-called "Pareto Indifference" criterion, while others intend the so-called "Weak Pareto" criterion. Both of these have been familiar, along with the so-called "Strong Pareto" and "Full Pareto" criteria, to welfare economists for just over a century now, and it simply muddies the waters to introduce a new, less precise term to designate any of them.

Further muddling matters is the fact that "Pareto Principle" is commonly employed by non-welfare-economists to refer to the so-called "80-20 Rule," and empirical regularity as to wealth distributions in developed economies that Pareto observed in his "second life" as a sociologist. Finally, for reasons that will emerge presently, neither any of the Pareto criteria familiar to welfare economists nor the empirical regularity also known as the "80-20 Rule" can plausibly be characterized as a normative *principle*. I shall accordingly dispense with the misbegotten name "Pareto Principle" entirely.

[4] *See, e.g.*, RICHARD POSNER, FRONTIERS OF LEGAL THEORY 179–202 (2003) (accounting for the decline and fall of normative economics of law judiciously).

[5] *See* John Hicks, *The Valuation of Social Income*, 7 ECONOMICA 105 (1940); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939); Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941); *see also* Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

[6] The sense in which Paretianism entails Benthamite welfarism is noted *supra* note 3, and demonstrated more fully *infra* Part IV.

[7] Normative *principles*, as explicated *infra* Part II, are reasons for judgment and action bearing one or more of three forms of logical generality—what I call "situational," "recipient,"

judging—hence from normatively prescribing in respect of—any demands for satisfaction that individuals might issue. And yet such demands are precisely what all law and policy must employ normative and hence preference-overriding principles to adjudicate among, hence potentially trump, when ever we formulate law and policy.[8] Thus today's strict Paretian rendition of Benthamism, which rubberstamps individual preferences while effectively vetoing any consistently applicable normative principle that might cabin those preferences,[9] deprives lawyers and policy analysts of precisely those standards they require to formulate, legislate, amend or evaluate law and policy at all.

The Article proceeds as follows. Part I first fixes a few terms that figure foundationally both in the Paretian welfarist literature and in my own argument. It shows in particular that the concepts of "welfare," "social welfare," and "welfarism," as now employed by advocates and opponents of Paretian welfarism alike, carry conceptual commitments at odds with normativity. It also elaborates and interprets the familiar Pareto criteria that figure essentially both in the welfare economic and Paretian welfarist legal literatures, highlighting their conceptual linkages to so-called "welfarism."

We draw a cut, Part I argues, whenever we prescribe at all, between proscribed and permitted satisfactions. And only the latter, in turn, will be legally, socially, or otherwise normatively cognizable as welfare.[10] Proscribed satisfactions, by contrast, are like "thieves' satisfactions"— the sorts that society cannot coherently condone, as one would do in saying that those who enjoy them "fare well." Systematic conceptual clarity in our normative theorizing thus always requires a vocabulary possessed of two names for the two classes of satisfaction—permitted

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and "beneficiary" generality. My claims here generalize an insight originally exposited by R. M. Hare, Freedom and Reason (1963). *See infra* note 26 and accompanying text.

[8] To say, as I sometimes shall say, that normative principles are "incumbent" upon preferences is to say that principles bind and in that sense can trump preferences. It is accordingly also to say that preferences are to be honored, and indeed even formed, only insofar as they are in conformity to the normative principles that bind them. *See generally infra* Part II.

[9] Normative principles "cabin"—or as I also shall say, "bind," "bound," "trump," or "delegitimate"—preferences in the sense noted *supra* note 8 and elaborated *infra* Part II. The idea is that normative principles determine which preferences are to be satisfied, and which are to be renounced or repudiated as contrary to our ethical, social, or legal norms. Any system of social norms or laws, by dint of its bestowal of distributed entitlements upon persons, inherently imports some such "trumping," hence partitions the class of all possible satisfactions that an individual might have into distributively legitimate and illegitimate such satisfactions.

[10] As the inherently normative term "well," adverbial form of the word "good," embedded in the term "welfare," of course immediately suggests.

The "cognizability" in play here, for its part, is familiar to lawyers. A complaint is "cognizable," "states a claim," or underwrites a "cause of action" only when it sounds in some legally vindicated principle. The same, I maintain, holds of claims to preference satisfaction more generally, of which a plaintiff's "demand for satisfaction" following pleadings is but a special case.

and proscribed satisfactions. Paretian welfarists, however, employ only one term for the two disjoint classes, and in consequence run the two classes together. This foundational conflation, the source of the "strict" in what I call their "strict welfarism," proves later in the Article to be of a piece with Paretians' prescriptive sterility.

After Part I clarifies what is meant, and what can coherently *be* meant, by the foundational terms "welfare," "social welfare," "welfarism," "Pareto principle," and familiar variations thereon, Part II turns to clarifying what it is to prescribe or guide action. It does so with a view ultimately to explicating what normative legal and policy prescription must be.[11] This meta-legal, meta-policy, and indeed meta-normative question, like that of what welfare can be, has gone curiously unexamined in the Paretian welfarist literature, notwithstanding its centrality to welfarists' enterprise.

Part II first distills the linguistic-performative properties of prescriptive communication,[12] which is at bottom what normative legal theorists and policy analysts engage in. Part II then systematically narrows its focus, moving from "external" performative aspect to the more "internal," *logical* properties of prescriptive communication. In effect, it seeks to distill those "general-applicability" attributes of would-be action-guiding prescriptions by virtue of which those who issue them are able to justify them. Often, it turns out, these justifying properties are only implicitly embedded in the imperatives they underwrite.[13] The task for an analysis of legal prescription is accordingly to render the role played by such principles, along with these principles' logical properties, explicit.[14]

Part II discharges this task in an intuitively natural sequence of steps. It first distinguishes what it calls "reasoned" imperatives—imperatives underwritten by reasons—from merely arbitrary commands. It next distinguishes what it calls "principled" imperatives from merely reasoned ones. It does this by reference to what it calls the "situational

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[11] *See supra* note 1 on the centrality of action and agency to any account of ethical, legal, or policy prescription.

[12] "Imperatival communication" is communication involving the issuance of imperatives—i.e., commands—which is accordingly couched in mandatory language. A pioneering work on the analysis of imperatival communication is RICHARD M. HARE, THE LANGUAGE OF MORALS (1952).

[13] My claims here are elaborated through and supported by a series of illustrative examples *infra* Part II. For the present, consider, for example, this admonition: "Kevin, give Bobby his share." Implicit in this mandate is an antecedently accepted distributional—a "sharing"—norm. Else "his share" is obscure.

[14] The task is accordingly akin to that claimed by Robert Brandom for logic, which Brandom characterizes as explicitly codifying the inferential commitments implicit in our assertions. *See* ROBERT BRANDOM, ARTICULATING REASONS: AN INTRODUCTION TO INFERENTIALISM (2000) [hereinafter BRANDOM, ARTICULATING REASON]; ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT (1994) [hereinafter BRANDOM, MAKING IT EXPLICIT].

generality"—the capacity to be implicated in multiple circumstances—of those reasons that underwrite imperatives of the former class.

Part II then moves to a final distinction between what it calls "ethical" prescriptions on the one hand, and non-ethical ones on the other. It draws this distinction by reference to two additional forms of generality. These are what Part II calls "recipient" and "beneficiary" generality.[15] "Recipient generality" refers to the size of the class of persons who are subject to a given prescription. "Beneficiary generality" refers to the size of the class of persons who stand to benefit by others' acting in conformity with the prescription. These forms of generality enable ethical principles to figure as shared reasons—the kind of reasons suited to underwrite collective intentions of the sort given expression in social and legal prescriptions.[16]

It emerges by the end of Part II that the distinctions between bona fide principled prescription and mere brute command on the one hand, and bona fide welfare and mere "thieves' satisfactions" on the other, are internally related. For one agent's issuing an imperative to another agent is always, among other things, an *expression of preference* in respect of that other agent's actions. And naturally some such expressions of preference—those that Part II characterizes as prescriptions—can be legitimated by reference to generally applicable reasons, while others—those that Part II characterizes as attempted conscriptions—cannot.[17] Since welfare, per Part I, just is the satisfaction of preferences that can be legit-

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[15] Hare canonically distinguished between what he called the "generality" and "universality" of ethical principles, and bemoaned ever after a continuing tendency among thinkers to conflate the two properties. *See* HARE, FREEDOM AND REASON, *supra* note 7. Hare's distinction more or less tracks that which I posit between recipient and beneficiary generality. Hare does not appear to have countenanced a category of what I call "situational" generality, however, hence does not single out that which is characteristic of principles *qua* principles. Because all three forms of generality that I single out are indeed forms of generality, differing only in respect of dimension along which generality varies, I think my taxonomy more thorough, perspicuous, and ultimately helpful than Hare's. One is less apt to miss or confound forms of generality once one has means both of expressly acknowledging that all three are indeed forms of generality, and of expressly designating the distinct dimensions along which they generalize.

[16] When a brigand instructs you to hand over your belongings, he in all likelihood has reasons of his own for issuing the command, and you might have reasons of your own for complying. Your two sets of reasons will not, though, coincide, and this is one sign that the brigand has engaged in a form of conscription as distinguished from prescription. Commands become prescriptions as reasons for issuance come to coincide with reasons for compliance—i.e., as reasons come to be shared.

[17] An example of a legitimate expression of preference in respect of another's actions—i.e., a bona fide prescription: "Take two aspirin for your headache and phone me in the morning." An example of an illegitimate expression of preference in respect of another's action—i.e., an attempted conscription: "Stick 'em up," or "Stand and deliver." The links between bona fide welfare and bona fide prescription on the one hand, merely illegitimate satisfaction and mere conscription on the other, are further borne out by reflection on the fact that conscription itself is a form of theft—in general, the theft of another's agency itself.

imated, while other satisfactions remain merely illegitimate satisfactions, the link between bona fide welfare and legitimate prescription, as well as that between impermissible satisfaction and attempted conscription, is rendered transparent.

Part III serves as a formally oriented complement to the more discursively oriented Parts I and II. It addresses in detail a regrettably seldom-posed question: that of precisely what sort of linguistic entity the Bergson-Samuelson social welfare function (SWF) favored by Paretian welfarist legal theorists is.[18] Part III analyzes what at bottom we are aiming to do in constructing these mathematical objects,[19] what we "say" with their help once constructed, how they help say it, and how the answers to these questions mesh with the constitutive elements of legal and policy prescription distilled in Part II. The aim is to gain something largely lacking in much of the "welfarist" literature: comprehensive conceptual clarity about the contents ("semantics"), structures ("syntax"), and available uses ("pragmatics") of these artifacts that figure so prominently in our practices of legal and policy prescription, with a view to how well they map onto those practices given their formal properties as presently constituted.[20]

The principal upshot of Part III's inquiry is that the currently dominant apparatus of SWFs maps "almost well" onto the constitutive properties of social and legal prescription as explicated in Part II. But it does not map as closely as it must if we would employ SWFs to prescribe with completeness and coherence per the original Bergsonian program, which first introduced them for precisely that purpose.[21] The reason is that the

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[18] "Linguistic" here means suitability to communicative purposes. Analysts purport to "say" things with SWFs. In fact they purport to prescribe with them. This places formal constraints upon SWFs to which I believe we have been insufficiently attentive. Part III in this sense maps onto Part II. It is its formal counterpart.

[19] Functions are mathematical—or set-theoretic, or logical—"objects" in the sense that they are special cases of logical relations—ordering relations—which in turn are special cases of what mathematicians and logicians call "classes." (A function, extensionally speaking, is simply a class of ordered pairs.) A foundational feature of modern mathematics is that it treats all mathematical entities as ultimately reducible to—or definable in terms of—classes or categories, which in consequence function as foundational mathematical objects. *See infra* Part III; *see also* Robert Hockett, *Reflective Intensions: Two Foundational Decision-Points in Mathematics, Law, and Economics*, 29 CARDOZO L. REV. 1967 (2008) [hereinafter Hockett, *Reflective Intentions*].

[20] Among the comparatively rare treatments rendered with clarity are ADLER, *supra* note 1, Adler & Sanchirico, *supra* note 2, and Solum, *supra* note 2. *See also* Hockett, *Distribution*, *supra* note 2; Hockett, Pareto Versus Welfare, *supra* note 2. The terms in parentheses, incidentally, are the linguistic terms of art for the concepts designated by the words before parentheses. Part III proceeds in this listed order.

[21] Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q. J. ECON. 310 (1938); *see also* PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947). Its aim is to render explicit all value judgments in virtue of which we might deem some states of the world as better than other such states.

formal properties of functions and other ordering relations as laid out in Part III,[22] which constrain how and what these strings of symbols are able to "mean," require that at least *one* crucial component of prescriptive action as elaborated in Part II be given a *particular mode of expression*. It is a component that corresponds to the incumbency of normative principles upon preferences as discussed in Parts I and II.

A prescriptively complete SWF must value possible worlds in a manner responsive to the pursuit and ascertainment, in those worlds, of that normative inquiry and those normative principles pursuant to which the SWF itself is constructed.[23] All else being equal, it must deem a world better by dint of its own discovery, construction, and use in that world. It must thus mirror in its own structure that form of self-reference in which we ourselves engage as self-conscious, self-critical, self-prescribing and in that sense self-improving human agents, whenever we elect first to engage in a normative practice involving reflection upon what we should do and then do it.[24] Absent such valuing of its own incumbency, no SWF can give full expression to a veritably normative position. Nor, therefore, can it be employed to prescribe, rather than merely describe, distributions of entitlements effected by law or policy.[25]

Unfortunately, no SWF of the kind presently employed by Paretian welfarist theorists includes an explicit variable of the sort mentioned for the value of its own normative incumbency. And this is no accident. For

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[22] As mentioned *supra* note 19, mathematical functions are special cases of the more general category of relations—in particular, ordering relations. Many results derived by welfare economists in respect of functions are strengthened by being shown to carry over to broader classes of ordering relation beyond functional ones. *See, e.g.*, Hockett, *Reflective Intensions*, *supra* note 19; *see also* Robert Hockett, *Justice in Time*, GEO. WASH. L. REV. (forthcoming 2009) [hereinafter Hockett, *Justice in Time*].

[23] Theorists employing the apparatus of SWFs assign values or "betterness" rankings to possible worlds in response to variable features of those worlds. The guiding intuition is, roughly speaking, that such features varyingly "add value" to such worlds. *See infra* Part III. The claim I have just made is accordingly the claim that normatively prescriptive SWFs will treat the seeking and finding of the right or best SWF as itself a value-adding feature of possible worlds. All else being equal, it will deem a world better for its having people in it who have sought and found this SWF itself.

[24] The self-reference involved in normativity figures prominently in the work of such moral philosophers as Robert Dunn, Harry Frankfurt, and Kristine Korsgaard, among others. The self-reference involved in intentional action figures importantly in the work of such action theorists as Michael Bratman, Gilbert Harman, Michael Thompson, and David Velleman. It is also implicit in the work of Elizabeth Anscombe and Donald Davidson, as well as Kant, Aquinas, and Aristotle before them. *See generally* Hockett, *Reflective Intensions*, *supra* note 19. The works of these scholars accordingly figure into the discussion *infra* Parts II and III.

[25] Because the prescriptive SWF's valuing its own discovery is connected in this sense to the normative incumbency, upon individual preferences, of the normative principles pursuant to which the prescriptive SWF itself is constructed, I shall generally call this form of self-valuing the SWF's own form of incumbency. The SWF's own incumbency in a particular possible world derives from—or supervenes on—the incumbency upon individual preferences of those normative principles to which the chosen gives expression.

the lacuna both stems from, and works to perpetuate, these theorists' failure to distinguish between those things Part I and Part II show to be partitioned by any form of prescription itself. Those are, again, positive preferences and their satisfactions on the one hand, and preference-trumping normative principles of the sort that can underwrite bona fide welfare and social prescription on the other.

It is ultimately this same fundamental conflation—that between normative principle and positive preference, "ought" and "is," or, dare we say, "fairness" and (Paretian) "welfare"—which leaves Paretian welfarist SWFs incapable of prescriptive employment. For the collapsing of preference-trumping normative principle into mere positive preference, hence of bona fide principle-bounded welfare into mere unbounded satisfaction, just is the collapsing of legal command into private demand, and social prescription into arbitrary conscription. The Paretian welfarist SWF's gap in respect of its own normative incumbency, formally speaking, just is the gap in respect of its prescriptivity, analytically speaking.

Part IV provides a concise demonstration of these truths in two discursive proofs. It thus joins the distinct but analytically parallel analyses of Parts I, II and III together in a dénouement of sorts. The proofs are "plain English" counterparts to two formal proofs I have derived elsewhere.[26] The first shows the flat impossibility of present day "welfarist" legal and policy prescription. The second proof then shows the impossibility of Paretian legal and policy prescription, which proves to be rooted in the internal linkage between "welfarism" and the sundry Pareto criteria.

Part IV's proofs generalize, and reveal as ultimately unsurprising, two celebrated impossibility results familiar to legal theorists: Arrow's "General Possibility Theorem" and Sen's "Impossible Paretian Liberal."[27] The reason that results with Part IV's degree of transparency have not been derived before, moreover, appears plain in the wake of the analyses conducted in Parts I through III. It is that the dominant "language" of Paretian welfarist SWFs simply has not given explicit expression to that preference-trumping capacity of normativity which all of us

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[26] *See* Hockett, Pareto Versus Welfare, *supra* note 2. The proofs employ a strategy reminiscent of that found in the proofs mentioned *supra* note 13.

[27] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970). The Arrow results, as is well known, do not go through absent a Pareto assumption. Sen's "liberalism" for its part readily generalizes to any distribution-cognizant normative principle. The proofs derived *infra* Part IV also, incidentally, reveal as unsurprising two other well known impossibility results familiar to theorists of inter-generational equity—those of Koopmans and Diamond—not to mention many other results strengthening the Arrow, Sen, Koopmans, and Diamond theorems. *See* Hockett, *Justice in Time*, *supra* note 22.

implicitly acknowledge whenever "we" socially and legally prescribe, in our collective capacity, to ourselves in our individual capacities.

The proofs in Part IV also, I suspect, might induce the same sequenced pair of reactions in the reader as they did in the author. First, surprise. And second, surprise that the results should have occasioned surprise. Part IV accordingly works likewise to diagnose the cause of the first surprise, with a view to dissipating the second surprise. This effort produces some collateral casualties. One is the surprise that continues to greet the Arrow and Sen results when first taught. These enduring objects of fascination and dread come to look predictable in light of what emerges here—though, understandably, not until it emerges.

Another collateral casualty of Part IV's diagnosis is the shopworn distinction between "deontology" and "consequentialism" as deployed by Paretian welfarists.[28] Whatever the merits of the distinction for purposes of individual ethics, we find by the end of Part IV that all normative *legal* theory, in presuming to guide actions undertaken by lawmakers who act in the world—with this latter in turn meant to guide *individuals'* actions taken in the world—is *both* "deontic" and "consequentialist" in the only senses relevant to normative legal theory.[29] Today's recourse to the venerable "deontology" versus "consequentialism" divide among Paretian welfarists proves to be simply the mislocated reassertion of that lost distinction between normative principle and positive preference whose loss proves in Parts I through III to account for the prescriptive sterility of Paretian welfarism in the first place.[30]

The results reached in this Article are not meant to be merely negative, however. My aim is to determine not simply what we and Paretian welfarists cannot do, but what we can and ought do. We find by the end of Part IV that our aim must be first to bring normative distributional principle and positive individual preference—that is, "fairness" and

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[28] The claim is not that there is no distinction between ethicists currently calling themselves "deontologists" and those calling themselves "consequentialists." It is that the dichotomy between deontology and consequentialism, which is at bottom a dichotomy between speaking to obligations in respect of action on the one hand, and speaking to events issuing from actions on the other, does not capture what interestingly separates legal theorists. For all legal theorists purport to lay down obligations for law and policy makers; and all legal theorists look to those consequences, which are the actions of those legislated to and thus governed by law in *determining and elaborating* the obligations to which law and policy makers are subject. Thanks to Brian Bix, Mike Dorf, and Matti Eklund for recommending that this cautionary point be made here.

[29] "Deontology" means the logic or structure—"logos"—of obligation—"deontos." *See* C. D. BROAD, FIVE TYPES OF ETHICAL THEORY 46 (1929). I claim that all who traffic in "ought" or "should," including self-described "consequentialists," purport to lay down obligations. *See* G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958) (originating the term "consequentialism"). Some Paretians do not appear to have understood the term as Anscombe intended it.

[30] *See supra* notes 9, 29 and accompanying text.

"welfare"—back into analytically proper relation, then trace the theoretical upshot. This proves in Part V to yield the true "Grundnorm" or "master principle" for which I believe we have been groping all along.[31]

The Grundnorm is what might attractively be called "fair welfare"—or, more strictly speaking, "*true* welfare," that which Part I first suggests is none other than fair satisfaction.[32] Part V briefly elaborates this true master principle pursuant to which law and policy ought to be, and to a substantial degree unselfconsciously already are, formulated and interpreted in constitutional-democratic republics. In that sense it sets the stage for this Article's sequel, which traces the broader theoretic and programmatic consequences of giving this Grundnorm its due.[33] The requisite materials for this elaboration turn out to lie ready to hand: They are none other than the results of the inquiry conducted over Parts I through III, as brought into forward-looking focus in Part IV.

Legal and policy evaluation conducted pursuant to the fair welfare ideal quickly produces prescriptions for law, legislation, and legal interpretation that are of deep normative import. The contrast with old-style "wealth-maximization's" global prescriptive indeterminacy, and latter-day Paretian welfarism's complete prescriptive sterility, could not be more stark. Legal and policy analysis conducted per the fair welfare ideal also, accordingly, affords the current flowering of empirical methods in the legal academy more purpose than old-style economic analysis of law or new-style Paretian "welfarism" ever could hope. On that note the Article concludes.

I.   FIRST TO FIX TERMS: FORGOTTEN FUNDAMENTS AND PARETIAN PROBLEMATICS

Our aim is first to show self-styled "welfarist" and Paretian claims unfit to found social and legal prescription, and then to present a better foundation. This Part commences the first of these efforts. Because

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[31] I do not mean "Grundnorm" in what I take to be the classic Kelsenian sense. *See* HANS KELSEN, PURE THEORY OF LAW (1934). Rather than a foundational source of positive law, I mean here a sort of "founding principle," or "foundational ideal" by reference to which we might formulate, critique, or improve law and policy. Thanks to Trevor Morrison for the cautionary note on Kelsen.

[32] I employ the name "fair welfare" here notwithstanding the greater accuracy of the other expressions for several reasons. One is that it rings more pithily and gracefully than do "fairly derived satisfaction" and the other more perspicuous terms. Another is that so many have come to take the term "welfare" for a virtual *synonym* of "satisfaction" that "fair welfare" for many will simply *mean* "fair satisfaction." And finally another is that this locution rings nicely counter in a direct, pointed way to the unfortunate and indeed incoherent locution "fairness versus welfare" mentioned *supra* note 2. But "true welfare" or "fair satisfaction" would be more strictly accurate because, as noted above, welfare just *is* fairly derived satisfaction. There is no bona fide welfare, as distinguished from generic satisfaction, that is *not* fairly derived. "Fair welfare" accordingly involves a redundancy akin to that found in "baby kitten."

[33] *See* Hockett, *Distribution*, *supra* note 2.

Paretian welfarist claims traffic in certain terms of art whose meanings at times tend to shift, our opening task is to fix a few terms.

"Fix" here I mean both in the defining and in the refining senses. The reason for defining key terms is presumably obvious. The reason for refining them might be less so. It is that the particular foundational terms in question here, which might ring familiar, are apt to ring *too* familiar. I think we have grown numb to them. And this accounts in part for the errors I hope to dispel.

A. *Welfare and Variations*

We shall begin with "welfare," then proceed to two terms of art that import it—"social welfare" and "welfarism." The relations between these and the misnamed "Pareto Principle" then find treatment in B.

1. Preference and "Welfare"

Etymologically, "welfare" and its connotation stem from the phrase and the notion of "faring well."[34] One fares or "does" well when she can truthfully reply to the usual variants of the familiar query "how are you doing?" with some such reply as "I'm well." The better you are faring in such cases, the greater your "welfare." But why employ a *substantive* term[35] in such contexts, rather than contenting ourselves with the verb form? And what *is* it, in any event, to fare well?

The substantive expression "welfare" probably emerged from the notion of faring well in response to two developments. The first is observed variability in replies to the "how are you faring?" question. Some people seem to fare better than others, and each of us seems to fare better on some occasions than others. Such variability does not require, but does lend itself to, the notion of something that there can be more or less *of* across cases. That something has come to be called "welfare." It could as well be called "wellness," "well-being," or "flourishing." And sometimes it is.

The second source of the emergence of a substantive term was presumably more decisive than the first.[36] I refer to a developing conviction that somebody—a parent, a prince, a government or some other agent charged with the care of beneficiaries—ought to ensure that the mentioned variations tend generally in the favorable direction. It seems no

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34 "Faring" of course sharing a root in Old French with the modern French "faire," meaning to do or to make. *See* 5 OXFORD ENGLISH DICTIONARY 730, 732 (2d ed. 1989) (defining "faring").

35 "Substantive" here meant in its grammatical sense—denoting a class of expressions which designate persons, things, substances, and so forth. 17 OXFORD ENGLISH DICTIONARY 69 (2d ed. 1989) (defining "substantive").

36 The first source enabled the nominalization of well-faring. This source would positively have encouraged it.

accident that such broadly applicable substantive wellness terms as "commonweal," "welfare," "utility" and the like first appear in treatises on the duties of princes, legislatures, and other ministries of state.[37] These uses would have found precedent in cognate expressions employed earlier in structurally similar contexts: those in which shepherds were charged with "the good" of their flocks, for example.

It is convenient in such multiple beneficiary-involving, duty-charged contexts to have a substantive term at hand: something that designates a salient indicator which "rises" and "falls" as the person discharging the office works more, or less, effectively. We then have a metric of sorts for evaluating the trustee's performance. It is also just more economical to *say*, in these contexts, "maximize well-faring," or "welfare," than it is to say "maximize the number of occasions on which, and the degree to which, beneficiaries fare well rather than ill."

So we got substantive terms such as "the good," derived from that adjective—"good"—to which "well" was adverbial counterpart in the first place. And we got "welfare" and various cognates, perhaps perceived to be more closely bound up with the individual beneficiaries whose good was to be sought not only jointly, but severally.("The" good for you is "your" welfare.) Counterpart observations are apt in respect of such familiar terms as "wellness," "well-being," even "wealth." All three in fact share a common etymology.[38]

Now to the "what *is* it to fare well?" question. I take it to be a commonplace that, however one replies to the "how are you faring?" query on a given occasion, she might on some such occasions be mistaken. She might be mistaken in any of several distinct ways.

One might be in the dark as to her underlying physiological state, for example, even while "feeling" fleetingly well at the surface of consciousness. Or she might be unaware of the longterm effects wrought by protracted engagement in an initially pleasurable, but concededly in the end harmful, behavior. Or she might suffer akrasia, craving at one moment what she knows to be harmful and accordingly wishes at other, more reflective moments not to crave.[39] Or, finally for present purposes, she might crave something and be pleased to keep craving it—perhaps

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[37] *See, e.g.*, Marcus Tullius Cicero, De Legibus (James E.G. Zetzel ed., 1999) ("The welfare of the people is the ultimate law.").

[38] "Well," like "wealth," derives from the Old English "weal," as in "common weal." *See* 20 OXFORD ENGLISH DICTIONARY 39–40 (2d ed. 1989) (discussing the origins and variations of "weal"). "Weal," "wealth," "wellness," "well-being," "well-faring," "welfare"—all of these idiomatically vary on one substantive theme. *See id.*

[39] She will have what Frankfurt calls "second order desires." See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 1 (1971); *see also infra* Parts II–IV.

even proudly identifying herself, Timothy Leary style,[40] with the craving—while those devoted to her care and welfare nonetheless plan "interventions" to free her of the addiction.

These and related prospects often are taken to license a distinction: One draws a cut between "fully informed," *veritable* wellbeing or welfare, "*true* happiness," health or human flourishing on the one hand, and merely fleeting, ill-informed, "unenlightened" preference-satisfaction on the other.[41] Where such contrasts are drawn it is common, though not universal, to conscript erstwhile synonyms in the service of finer-grained distinction: One might employ the terms "good," "well-being," or "wellness" to designate only the perceivedly veritable, "objectively" healthy states, for example. She might then reserve the term "welfare," or "utility," or perhaps "satisfaction," to designate the "merely subjectively" preferred states.[42] There are of course many options, as consultation of a thesaurus will verify.

Notwithstanding the many terminological possibilities available here, the general tendency among legal theorists and policy analysts is to accord individuals plenary "sovereignty" in adjudging their own good and ill, hence their own welfare, well-being, and so forth. Most who prescribe or critique law and policy accordingly do so more with "subjective" welfare in view than with some species of "true happiness," "objective well-being" or any so-called "perfectionist" telos in view.[43] "Welfare" is thus treated as uncensored preference-satisfaction. Persons fare well as their preferences are satisfied.

Various reasons—some of them fatuous, others not—are offered for this "consumer sovereignty" take on welfare. Some are moral-political, others are epistemic, still others are mixed cases of such reasons.[44] It is thought that most people generally, even if not always, know best what is good for them, for example. One then concludes that we ought in general, rule of thumb fashion, to defer to their judgments. Or it is thought that respect for autonomy counsels we at least resolve doubtful cases in

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[40] Timothy Leary—champion of psychotropic drug use in the 1950s, '60s, and '70s. Best known for recommending we "turn on, tune in and drop out." *See* TIMOTHY LEARY, TURN ON, TUNE IN, DROP OUT (1999).

[41] A counterpart distinction appears to underwrite such locutions as "enlightened self-interest."

[42] *See, e.g.*, JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE (1986).

[43] Those who depart from this tendency are commonly labeled "perfectionists." *See, e.g.*, THOMAS HURKA, PERFECTIONISM (1996); JOHN RAWLS, A THEORY OF JUSTICE 56 (1971) [hereinafter RAWLS, THEORY]; Richard Arneson, *Primary Goods Reconsidered*, 24 NOUS 429 (1990).

[44] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM (1993); *see also* Robert Hockett, Noncomparabilities and Nonstandard Logics (2009) (unpublished manuscript, on file with author) [hereinafter Hockett, Noncomparabilities].

favor of choice. Or it is thought that the same respect for autonomy requires we abstain from choosing or judging for others at all.[45] Again, there are multiple possible justifications.

My own tendencies are in sympathy with the mentioned trend. And my reasons are of the kind just adduced. "Perfectionism," I think, is best left a private affair. I've little doubt that a clinical masochist is in some sense unhealthy and in need of help. But I also have little doubt that "we" probably ought not, through law in the name of the state, prescribe for this fellow. That sort of prescription is best left to the doctors, whose help one seeks voluntarily. The Lord—and I hope "we" as a polity— will help those who seek help for themselves. But let them first say they are seeking, rather than publicly labeling them "sick."

Our aim here, however, is not to praise or to bury epistemic humility or liberal autonomy about welfare in legal prescription. It is rather to call attention to one distinct and avoidable, yet oft-unavoided, conceptual danger attending the reduction of welfare to preference-satisfaction.

Let us call it the "baby out with the bathwater" concern: It is one thing to abstain from judging whether somebody's preferred object "really" is good for her.[46] It is another to abstain from judging whether her preferred object is, if attained, good for others. And it is yet another thing still to abstain from judging whether her preferred object, if indeed harmful to others, is on that account to be deemed needful of banning or bounding. If we conflate these three things by abstaining from the last in the name of the first, we effectively abstain from prescription itself.

Today's Paretian welfarists fall prey to precisely this danger. The way they define and understand "welfare" leads self-described "welfarists" to collapse the distinctions, hence effectively to commit to the third form of abstention. The cost is prescriptive sterility: The baby of what we shall call "minimal" principles of distributive propriety, hence legal and policy prescription itself, goes out with the discarded bathwater of objectively construed, "perfectionist" good. Here is latter-day "welfarism's" Original Sin.

The word "welfare" carries an air of legitimacy, or at any rate non-illegitimacy. It retains that much residual "moral objectivity," as distinguished from the mere "subjectivity" of preference-satisfaction alone. "Welfarists" surely are at least vaguely aware of this. Why else adopt so august and "good"-rooted a term for purposes of legal and policy prescription? It would be just as easy, and "scientifically" more sound, to content ourselves with the less stately and ethically resonant, yet per-

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[45] *See* Hockett, Noncomparabilities, *supra* note 44.
[46] That is, abstention from "perfectionism." *See supra* note 43 and accompanying text.

fectly serviceable, dispassionate, and more strictly accurate "preference-satisfaction."

Why do I say "welfare" retains moral residue? The reason is that even when "we" first person plurally decline to pass judgment on victimless satisfactions, no "we" coherently prescribing through law can decline to judge victimizing satisfactions. Hence we require two terms for the two kinds of satisfaction: "Welfare" serves well for the victimless, permissible satisfactions. The less rosy and unadorned "satisfaction" suits the impermissible ones. Satisfaction is genus to welfare's species—just as complaints are a genus to legally cognizable causes of action's species.

Why do Paretians and self-described "welfarists," who equate "welfare" with satisfaction of all kinds in the name of "refusing to judge" any such satisfactions at all, miss this? It is because they make the conflation identified above. They incorrectly suppose that any restriction upon what satisfactions count as "welfare" must be what I called "perfectionist." They suppose that all bounding of such satisfactions as can be legally cognizable as welfare must be like criminalizing "victimless crimes." This supposition is of course mistaken.

What do "we" first person plurally do in laying down law with one voice, in one name—"the name of the law"—so far as welfare is concerned? Simple: We draw a cut between permissible "victimless" and impermissible "victimizing" satisfactions.[47] But once we do this, if we would avoid systematic conflation and keep our thoughts clear, we must employ distinct terms of art for the prescriptively distinct satisfactions. "Welfare," in view of its "good"-derived ethical resonance, is best reserved for the legitimate, victimless ones. The more neutral generic term "satisfaction" then suffices for the others.

These observations find intuitive support in the following thought-experiment: Say to yourself, of a thief or the head of a "white slavery" ring, that "his welfare improves" when he steals more goods or abducts more "slaves." Do you really believe that? And can society, its lawyers, its policy analysts and legal theorists coherently speak in this way if they proscribe nonconsensual taking and commandeering? What will they

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[47] The point should not be assimilated too quickly, as Paretian "welfarists" are wont to do, with the objectionable preferences concern over unfiltered welfare. The claim is not that society *ought to judge* some preferences as distasteful or as excludable because they are those of somebody who has accommodated her preferences to objectionable circumstance. Concerns of this sort, some of them associated with the influential writings of Gerald Cohen and Amartya Sen, are deservedly often discussed but are not identical to the claim made here. The claim here is that, insofar as we prescribe or distribute entitlements ethically or legally, we have already judged. The task is then to notice that in doing so we have drawn a cut between satisfactions that add and satisfactions that do not add to "social" welfare.

call the licit satisfactions to distinguish them from these illicit ones, which do not in any way render "society" better off?

The answer is that we already have an answer: We say that the thief and the slaver are "more satisfied"—illicitly so—not that "they're faring more well." They have preferences, sure, just like the rest of us. But their preferences are "out of bounds": They are contrary to ethical, social, and legal prescription, and to the preference-incumbent normative principles to which these give expression. And just as their preferences are outside the bounds of ethically, socially, and legally permitted action, so are their satisfactions outside the bounds of ethically, socially, and legally cognizable welfare.

If our preference-incumbent normative principles draw a cut, so must our terms if we would avoid unrelenting conceptual muddling. We are at liberty to use whatever pairs we prefer in distinguishing: We can say "Laurel" and "Hardy" or "Astaire" and "Rogers" if we please. But we've already got words—venerable and, until recently, well-understood words—for these things. "Welfare" connotes social and legal legitimacy and ethically cognizable good. "Satisfaction" is neutral between victimless and victimizing pleasures. Let the first name the one, then, and the second the other.

Clear-thinking economists draw terminological cuts of this kind: Their "externalities" and "third party effects" connote social undesirability sounding in distributive-ethical propriety. They are accordingly treated not as adding to, but as a drag upon, that social wealth aggregate with which we are said to be concerned.[48] I side with the economists on this one. In the remainder of this Article, "welfare" will denote satisfaction, but only distributively legitimate satisfaction: satisfaction not derived from taking from others what is ethically or legally—in a word, "properly"—theirs.[49] "Satisfaction" will serve as the generic term applicable prior to prescription's drawing a principled cut between "proper" and "improper."

Now note that we've just caught a glimmer of something that will emerge more and more fully, layer upon layer, as we proceed: In view of the unavoidability of drawing a cut between permitted and prohibited satisfactions, satisfaction begins to look as though it might be what could be called the "substance," or "stuff," of welfare. Ethical, social, or legal prescription and the distributive propriety immediately entailed by it—

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[48] We are not really concerned with this, normatively speaking, see *supra* note 5, but that is another matter.

[49] The shared Latin root, "proprio," pertaining both to selfhood and to rectitude or rightness, is suggestive. Property, appropriateness, aptness, aptitude, propriety, properness, and so forth—all of these are paradigmatically prescriptive concepts. *See* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667 (1999).

that is, fairness—is its form. The "form" alluded to here links to "distributive structure" when we turn, next, to social welfare. We shall find that it also connects to the "logical form"—a trio of forms of logical generality that jointly entail a form of impartiality—which Part II finds to characterize principles that underwrite explicitly justified ethical, social, and legal prescriptions. These are imperatives we take to be more normatively compelling than "thieves' demands." The latter are not prescriptions, but attempted conscriptions.

> 2.   Preference Aggregation, Distributive Principles, and "Social Welfare"

Understood by reference to the etymology of "welfare," "social welfare" might be expected to refer simply to a *society's* faring well. And so it does. But since societies as such do not reply to the "how are you faring?" query, what can it be for a society to fare well?

Suppose arguendo that societies were mere heaps of biological humanity, fully reducible to their member-organisms alone. Suppose, that is, we could fully describe them without reference to their internal structures as manifest in the web of relations subsisting between members. Suppose also, then, a fortiori, that there were no normative determinants of "good" or "bad," "rightful" or "wrongful" such structures or relations. There would be no moral or legal category like "theft," for example. No structure, no right or wrong structure, no good or bad structure.

In such case defining "social welfare" would be simple indeed. Social welfare would be reducible to members' unweighted summed welfares.[50] Society would be no more than a heap of humanity, "its" welfare accordingly no more than its humans' heaped welfares. Familiar difficulties attending the quantification and comparison of differing welfare "amounts" or "levels," both intra- and inter-personally, still would face anyone hoping to measure with precision. But at least we would know what we wished to be able to measure, provided we had a conception of addable individual welfare. Our challenges would be more technological than technical.

But of course it is incoherent to suggest that societies just are their members considered as heaped organisms—"piles of bodies," as it were. To attend to "society" is to attend also, at minimum, to the society-structuring and often ethically assessable relations subsisting among members. Among such relations are what people do to one another: promising, touching, talking to and about, etc.—much of this the stuff of

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[50] "Unweighted" means each person's welfare would be counted in the same manner as everyone else's in summing to a social aggregate. The moment we become deliberate about weighting, we become cognizant of structure—that which I am supposing for the moment not to be salient.

contract and tort. Among them also are relations imminent in each person's command over portions of the society's scarce resource aggregate: buying, selling, owning, etc.—much of this the stuff of property.[51] Many of these relations are fraught with normative significance. That's why they fall subject to ethical and, often, legal prescription.[52] We prescribe relational form. We prescribe an inherently distributive social, economic, political, and indeed legal structure.[53]

The fact that societies are in critical part constituted—"formed"—by inherently distributive structuring relations bears one particularly important consequence for present purposes. It means we are implicitly committed to the following claim about "social welfare": Any intelligible reply to the "how is society faring?" question rides not only upon the satisfactions of the society's members, but upon the normative satisfactoriness of those members' inherently distributive relations. That is to say, in any society with more than one member there is literally *no answer* to the "how is society faring" query that does not speak, in addition to satisfactions, to the distribution of those satisfactions.[54]

A "society's" welfare, then, is constituted as fully by the satisfaction-distributive relations subsisting among its members as it is by the satisfactions of those members. The first is the "form" of its welfare, the second the "substance" thereof. Absent a conception of normatively "appropriate" distributive relations among a society's members, it follows, there is literally no conception of social welfare for the society in question.[55] And this is in essence simply an instance of the more general conceptual truth that there is no defined content without a form (the "defining" is what *states* the form[56]), just as there is no non-empty form without a content.

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[51] The contract-tort-property distinction is of course artificial at the margins. For example, tort law appears in many ways to afford individuals a property right in their person, and promissory estoppel in contract is very tort-like.

[52] The shared root, "proprio," is again suggestive. *See* Alexander, *supra* note 49.

[53] All structure imports distribution via the distinct nodes that are structured. *See* Hockett, *Distribution*, *supra* note 2; *see also infra* Part II.B.

[54] This claim figures centrally in Hockett, *Distribution*, *supra* note 2. In an important sense all ethics, policy, and law—indeed all forms of normativity—that speak to relations between persons speak to distribution. The pervasive significance of this fact seems to me insufficiently registered in much normative theoretical writing.

[55] Formally speaking this is to say that an SWF includes not only aggregated arguments, but an aggregation rule stipulating how one is to "weight" and then amalgamate vectors of arguments into singular scalar values. *See infra* Part III. Absent the aggregation rule, there is no social welfare measure, hence no social welfare.

[56] Note the shared Latin root, "fin," implicit in such words as "define" and "definite." *See* 4 OXFORD ENGLISH DICTIONARY 383, 384 (2d ed. 1989) (defining the words "define" and "definite" and noting their origin). In the end we are talking about that "finitude," or "limiting," involved in defining or demarcating. The delimiting that must be done in prescribing is, among other things, the delimiting of what satisfactions are prescriptively permissible. The notion of preference-"bounding" also is rooted in this basic conceptual truth.

To prescribe laws with a view to optimizing some determinate form of social welfare, this entails, one must prescribe laws with a view to some prior ethical conception of distributive propriety. One must, to recur to an example employed earlier, determine what people are ultimately entitled to and thus, correlatively, what is going to count legally as "thievery." One must do so not only before one can determine what counts as individual "welfare" as distinguished from mere "satisfaction" as noted above, then: One also, and indeed correlatively, must do so before one can determine what can count as "*social* welfare."

In this sense, our conceptions of individual welfare and of social welfare are foundationally interdependent. They are "internally" related. There cannot be one without the other any more than there can be five times five without there being twenty-five. And both by their natures incorporate an aggregation-antecedent view of ethically appropriate relation hence appropriate distribution.[57] The moment you move from mere heaping to structuring in this territory, you assume a normative position in respect of "correct" structuring.

These observations of course link back to what emerged in the previous section: The "thief's" satisfaction, which we found must be distinguished from socially cognizable welfare, is none other than satisfaction in contravention of distributive propriety. I shall accordingly take "social welfare," in what follows, to denote the aggregate of what I shall call "distributively legitimate" satisfaction of preferences enjoyed by a society's members. "Thieves' satisfactions," that is to say, not only do not count as welfare: They also, for that very reason, do not add to "social" welfare.

This we shall see is the minimal degree of preference-bounding, in defining "welfare" and "social welfare," that is analytically consistent with social or legal prescription. We can eschew all "perfectionist" telic ends for societies—the glory of God under various names, maximal numbers of bright, beautiful, blond, high earning or high endorphin human specimens, etc.—reducing the number of factors deemed determinative of social welfare to the minimum possible beyond individuals' self-adjudged welfares. But that minimum, I've now suggested, isn't zero. It's one: It is appropriate distribution.

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[57] The aggregation-antecedence of a view of appropriate distribution finds reflection in the fact that one must determine an aggregation rule before one can construct an SWF pursuant to which "social welfare" is so much as defined. *See infra* Part III. The requirement of an aggregation-antecedent view of distributive propriety also accounts for what proved to be the prescriptive global indeterminacy of the Kaldor-Hicksian "wealth-maximization" once favored by advocates of the normative economic analysis of law. *See supra* note 5.

3. Preference-Regard and "Welfarism"

The foregoing observations supply all we require to provide some brief clarifying remarks about what has come to be called "welfarism." As observed above, it is a commonplace that welfare and social welfare, whatever else they might involve, are at least partly a function of individual preference satisfactions. Satisfactions, we've observed, can plausibly be viewed as their "substance." It also has long been a practice to employ the term "welfarism" to name this conviction.[58]

But recent years have brought some regrettable slippage in use of this word: Many in past times employed it to name the view simply that preferences "count" for purposes of legal and policy prescription.[59] Many today use it to denote the view that *only* preferences thus count.[60]

If we take "welfarism" to denote the latter view, we shall have to conclude that welfarism is incoherent. That would be a shame, in view of the rich past and continuing ethical resonance of the word and its cognates. I shall therefore propose, in a moment, an improved terminological convention—a counterpart to the conventions announced above in connection with "welfare" and "social welfare."

The view from which I aim to detach the word "welfarism" is incoherent for distributional reasons elaborated below but anticipated above: Reading "welfarism" to denote the position not only that preferences count, but that only preferences count, is to assimilate the airplane to its parts, or the organism to its organs, considered apart from their structured and whole-constituting relations. It is, in other words, to conflate prescriptive form with prescriptive substance.

To say only preferences count for prescriptive purposes is to say that distributive principles do not count for such purposes. That is what "only" means. It is also what "nothing else" means.[61] And it is what "versus" means when one speaks such literal nonsense as "fairness versus welfare."[62]

To speak in this way is thus to deprive oneself of explicitly nameable distributive principles as a category distinct from, and normatively incumbent upon, preferences in determining how well a society is faring. It is thus also to deprive oneself of analytic or linguistic capacity to distinguish between bona fide welfare and thieves' or slaveholders' satisfac-

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[58] *See, e.g.*, Amartya K. Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463 (1979). If we drop the "ism," it has been even longer accepted to speak of welfare as something with which policy ought to be concerned. *See, e.g.*, ARTHUR PIGOU, THE ECONOMICS OF WELFARE (1947).

[59] *See, e.g.*, PIGOU, *supra* note 58; Sen, *supra* note 58.

[60] *See, e.g.*, PIGOU, *supra* note 58; Sen, *supra* note 58.

[61] *See supra* note 2.

[62] *See supra* note 2.

tions—and indeed even so much as to formulate a *concept* of "thievery." It is accordingly to deprive oneself of a coherent conception of welfare, a coherent conception of social welfare, and ultimately of any capacity to prescribe or proscribe—to prohibit thievery, so to speak—at all.

Each of these species of normative self-deprivation grows out of the "Original Sin" noted in Subsection 1: conflating welfare with unbounded satisfaction, hence normative principal with positive preference. The "sin" is passed down and perpetuated, in turn, by the error of construing "welfarism" as the quite incoherent claim that "only" preferences count for prescriptive purposes, hence that fairness is categorically capable of standing "versus" welfare.[63]

Because the view that principled, distributively appropriate preference satisfaction contributes to well faring is a perfectly respectable one, while the view that "only" preference satisfactions thus contribute is incoherent, I shall henceforth observe this terminological convention: "Welfarism" shall designate only the prior position. I shall also call this position, when emphasis upon literal meaning is called for, "preference-regard." The incoherent position that "only" preference satisfaction counts in social prescription, irrespective of principles of distributive fairness, for its part will take the names "Paretian welfarism," or "*strict* preference-regard." I shall also continue, when occasion recommends, to employ scare-quotes in speaking sometimes of "today's self-described 'welfarists'" and suchlike.

Strict preference-regard, as emerges quite fully below, not only fails to provide a principled conception of welfare or a coherent conception of social welfare: It also in consequence contradicts any—and I do mean *any*—coherent "master principle" by reference to which lawyers or policy analysts might prescribe or evaluate law or policy. It not only fails to provide "new foundations," that is to say, but immediately undermines any that we might conceive. Moreover, we shall see, because strict preference-regard is logically entailed by a certain form of strict adherence to any of the several Pareto criteria defined in the next Subpart, its own inconsistency with social and legal prescription equally incapacitates what I shall be calling "Paretianism."

B. *Preferences, Principles, and Paretianism*

There is somewhat less obscurity in the literature over the several Pareto criteria and what they entail than there is about welfare. But there is some. It will accordingly be helpful briefly to characterize these criteria and their relation to welfare, social welfare, and welfarism in anticipation of the arguments below. It will also be helpful to query the sense

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[63] This is quite literally incoherent. *See infra* Part IV.

in which any of the Pareto criteria might accurately be said to constitute or underwrite anything resembling a "principle."

1.   Weak, Strong, Indifferent, & Full Pareto

If we were to speak metaphorically, we might treat social welfare as a sort of "satisfaction aggregate" or quasi-aggregate that can be raised or lowered by various means. One such means would be that of differentially distributing, over persons, certain "inputs" to individual satisfaction. These would comprise various goods, services, and suchlike—the resources with which preferences are satisfied.

If we view matters thus, we will be treating social welfare as a manner of "output," or "product"—a social "satisfaction output," so to speak, of the same form as "gross national product." We'll construe social welfare in such case rather as old style Soviet "planners" viewed industrial output per their various "n year plans." We'll then be tempted to view this output's efficient maximization as a resource allocation problem. Some allocations of preferred goods and services over persons will, on this line of thinking, result in higher aggregate satisfaction. Other such allocations will result in lower aggregate satisfaction. And which does which will ride simply on what goods and services raise which persons' satisfactions at what rates.[64]

Now suppose for the sake of argument that there were no difficulties in quantifying, interpersonally comparing, and aggregating satisfactions. Suppose also, implausibly in light of Subpart A but again arguendo, that there were no independent normative determinants of the propriety of distributions over persons apart from the resultant aggregated social satisfaction output. In such a case all normative questions concerning goods and services allocations over persons would be very simple, just as we noted in A.2 that "social welfare" that wasn't internally structured would be simple. Anyone posing the primal legal and policy question, "what shall we do?" might arrive at the Benthamite answer in such case. This person might, pursuant to a sort of natural focal point attending her "engineer's" picture of social welfare, aim to spread resources over persons in whichever ways "maximized" the satisfaction aggregate.

But of course neither of the two suppositions just supposed actually is satisfied. To the vexation of social welfare planners—though these won't vex us—there are notorious satisfaction-measurement difficul-

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[64] It's a good bit like Leontieffian linear programming, another engineering technique from which the picture appears partly to derive. *See, e.g.*, ROBERT DORFMAN ET AL., LINEAR PROGRAMMING AND ECONOMIC ANALYSIS (1958). Individuals are viewed as variably efficient satisfaction machines on this view. *See id.*

ties.[65]   And, both as noticed above in A and as emerges more fully be-low, there are aggregation-antecedent determinants of distributive propriety—determinants that welfare economists have viewed as vetoing Benthamism.

This is where Pareto comes into the social welfare picture. The best way of interpreting the several Pareto social welfare criteria is as efforts to salvage what can be salvaged of the hydraulic "output-maximization" picture when either or both of the two suppositions just entertained—no measurement problems, no independent norms of distributive propri-ety—are recognized not to be satisfied.

It might not be operationally feasible or ethically permissible to maximize a full-bore aggregate in such case, this line of thinking would run. "Utility" is admittedly hard to measure and compare, both within and across persons. And taking goods from Grumpy and Sad Sack and Mister Mopey to feed Utility Monster in the name of a larger social util-ity aggregate is admittedly "contestable."[66] But we might still be able, without taking from anyone, to maximize a sort of *quasi*-aggregate, might we not? We might avoid perceived waste even while avoiding intractable measurement problems and "subjective distributional judgments."[67]

So, the thought here continues, if person A fares just as well—i.e., is just as satisfied—by allocation 1 as by allocation 2, while person B fares better under allocation 2 than under allocation 1, why not "socially" choose allocation 2? No interpersonal welfare or satisfaction comparison need be made. Nor need an intrapersonal satisfaction "level" or "amount" be quantified. Yet we can nevertheless in a (somewhat tor-tured) sense "bring more satisfaction into the world." We shall do so through person B. Hence we can exploit an opportunity and avoid need-less waste. We avoid the waste of leaving a welfare growth opportunity unexploited. And avoiding waste is what is everywhere known as "effi-ciency"—which, like welfare, is always a good thing. Trim those empty calories, shed the extra pounds, pear that deadwood: Why forgo the chance to make someone yet happier when doing so will not harm anyone?

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[65] For comprehensive summary treatment, see Hockett, *Distribution*, *supra* note 2. These won't vex us for reasons that emerge *infra* Part V.

[66] I just made up a couple of those characters, but I'm alluding to Nozick's well-known "utility monster" objection to classical utilitarianism. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 39 (1974). Cognate concerns partly motivated Posner's proposed "wealth-max-imization" norm in the 1970s. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 64 (2d ed. 1976); RICHARD POSNER, THE ECONOMICS OF JUSTICE 1–54 (1983).

[67] The qualifier "subjective" as used in this oft-encountered phrase appears to lack sense. *See supra* Part I.A.; *see also infra* Part II.

The several Pareto criteria familiar to the welfare economic, policy-analytic and, increasingly, legal-theoretic literatures all amount to variations on this salvaged fragment of the original hydraulic picture. They aim to exploit the putative opportunity and avoid the postulated waste just described. There are effectively three of them.

A judgment of comparative social welfare as between two alternative states of the world is said to be "strongly Paretian" (SP) when it deems one state socially preferable to another so long as so little as one inhabitant of the world prefers that state and no inhabitant prefers the other.[68] The opportunity to render someone more satisfied is exploited, not squandered, and this comes at no cost to anyone. So there is a sense in which more welfare is brought into the world. A quasi-aggregate has been enlarged.

A judgment is said to be "weakly Paretian" (WP) when it deems one state of the world preferable to another when literally every inhabitant of the world prefers that state.[69] The remarks just offered in connection with SP hold here as well, save with arguably more force: Now "everyone," quite literally, "wins" at least something, rather than one person winning something while no one else loses anything.

A comparative social welfare judgment is said to be "Pareto indifferent" (PI) if it draws no preferential distinction between states of the world when none of the world's inhabitants finds more preferences satisfied in one than in the other. The idea in this case is that a society fares well or ill in no manner that is not fully reducible to the preference satisfactions of its inhabitants. There is accordingly an obvious link here with strict preference-regard—the position taken by many who today call themselves "welfarists"—as discussed in A.3.

Finally, a social welfare judgment is said to be "fully Paretian" (FP) when it is both Pareto indifferent and strongly Paretian.[70] The term is accordingly abbreviative only—it means SP + PI—and we need employ or attend to it but little in what follows. I mention it simply in the interest of completeness.

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[68] This form is said to be "strong" because it requires "society" to prefer states of the world in a manner responsive to as little as but one of its members' preferences. The requirement is what is "strong."

[69] "Weak" is understood in contrast to the aforementioned "strong." The idea is that a requirement that "society" prefer in a manner responsive to *everyone's* preferences is less demanding than a requirement that it prefer in a manner responsive to but one person's preferences.

[70] The significance of "full" here seems to be that "society" never judges unless at least one of its members "prefers," while society always judges when at least one of its members "prefers." Full Pareto is "strong in both directions," so to speak—the direction of judging and the direction of abstaining from judgment.

2.   The Pareto "Principle" and Distributive Principles

Little more need be said of the Pareto criteria for the moment, apart from an observation concerning their relation to welfare, social welfare, and "welfarism" as explicated in Subpart A. There we noted the centrality of explicitly articulable, preference-incumbent principles of distributive propriety in distinguishing between bona fide welfare and mere "thief's satisfactions," hence also in formulating a conception of social welfare as distinguished from merely heaped satisfactions. I have also reported that principles of this kind will figure centrally in distinguishing social and legal prescription from brute individual demand and conscription as analyzed in Part II, hence in determining explicitly nameable, deliberately chosen, distributively principled aggregation rules for social welfare functions in Part III.

But now consider what this is apt to mean for Pareto as just outlined. Pareto, we observed, is designed partly in order to *duck* distributional questions. It serves as a veto upon any redistribution counseled by distributive principles—not only utilitarian ones, but *any* ones.[71] Yet if distributive questions are central to the concepts of welfare and social welfare in the ways discussed above, and if explicitly nameable distributional principles are central to prescription as distinguished from conscription in the way to be seen in the next two Parts, this means Pareto is apt to duck welfare and prescription themselves. And so, we shall soon find, it does.

You will catch an immediate hint of this already in the case of PI as defined just above. In tying social decision strictly to preference alone with no room for preference-incumbent distributive principle, it links to strict preference-regard. The latter, recall, is the misnamed latterday "welfarism" discussed in A.3, which we there noted to be, and in Part IV shall prove to be, prescriptively incoherent. So we can immediately expect PI to prove incompatible in some way with welfare, social welfare, and social hence legal prescription. What is perhaps less immediately apparent is that SP and WP might be so. After all, they permit "wins" only when "no one loses." What could be distributively problematic about that?

The makings of an answer emerge when we notice that SP and WP say nothing about the following: (1) how much anyone "wins"; (2) whether some such winnings—for example, "windfall gains" —might be best shared; and (3) for that matter, how anyone's "winnings" are won. Weak and Strong Pareto are silent on these questions. But this means that they are prescriptively silent. For these are precisely the kinds of matters with which the preference-incumbent distributive principles fig-

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[71]   On the "veto" characterization, see *supra* note 9.

uring into any form of social or legal prescription, hence any coherent conception of welfare and social welfare, are always concerned.

Distributive principles, as effectively noted in Subpart A, speak to the way gains are come by. They also specify what it is to put things to rights when gains accrue illegitimately. The concept of restitution, for example, familiar to law and coordinate with the concept of "thievery" considered in connection with welfare above, is of course one germane instance of social and legal prescription's cognizance of "ill-gotten gains."

But now note: A "welfarist" Paretian who views even thieves' satisfactions as welfare, and vetoes society's "taking" from anyone in the interest of "giving" to another, determines a conceptual space offering no more room for a concept of restitution than for a concept of thievery. Indeed the Paretian in this case will view "society" and "the law" as the only conceivable "thief." Thievery, it would seem, can be nothing but overriding of the veto.[72]

As we shall see in Part IV, the same result comes of the veto's operation upon any normative distributional principle you can name. That means any such principle as might distill welfare from generic satisfaction per A.1 above, determine a social welfare conception's mode of aggregation per A.2 above, or determine a social welfare function's aggregation rule per Part III below. Principles of equal opportunity for welfare—a member of the family of views that Part V will call "fair welfare"—for example, might counsel the spreading of large windfall gains. If we impose SP or WP and thus proscribe spreads of that sort, we shall proscribe that form of prescription, and with it the correlative opportunity-egalitarian conception of welfare.[73]

As emerges more fully below, Pareto proscribes *any substitute* normative distributional principle that you might conceive in place of the opportunity-egalitarian one just countenanced, including the utilitarian one. That means it proscribes welfare, social welfare, and prescription themselves. And this is but another way of saying Paretians can't prescribe. The "best" they can do is to rubber-stamp a distributively arbitrary status quo ante—*any* such status quo ante—and permit, not prescribe, such distributively arbitrary departures therefrom as do not "take" from anyone—including from slaveholders or thieves. That, we shall be situated to see with particularity by the end of Part II, is neither principled nor prescriptive.

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72 There might be a "genealogical" link to the notoriously aristocratic Pareto's sensibility. He lived his last decades an isolated, castle-dwelling misanthrope who could stand the company of none but his countless cats. *See* Hockett, Pareto Versus Welfare, *supra* note 2.

73 For more on welfare-opportunity-egalitarianism, see *infra* Part V and Hockett, *Distribution*, *supra* note 2.

Today's legal Paretians do not seem to appreciate how deeply inimical Pareto is to prescription. Not only have they not noticed what we shall prove below in Part IV, they have not noticed what is already apparent in light of the foregoing paragraphs. I think it is in part because they have not considered the deep linkage between prescription and distributive principles, to which we turn next in Part II. One cannot prescribe, we shall now find—one cannot "go normative" in any manner—without them.[74] Failure thus far to have noticed this fact accounts for not noticing the way in which Pareto, in "vetoing" distributive principles, vetoes prescription itself.

One factor blocking our requisite self-scrutiny might be incessant use of the inapt expression, "Pareto Principle," to designate one or another Pareto criterion.[75] The phrase stems originally from Pareto's "second life" as a sociologist. It designates, not a putatively normative efficiency criterion, but an empirical wealth-distributional regularity he thought he had spotted across industrial societies.[76]

Whether the so-called "80-20 Rule"—this regularity's other popular name—is a "principle" in some sense I leave to the reader to judge. It states a situational generality we shall find in Part II to characterize what we call "principles," but does not profess to be prospectively action-guiding as we generally take principles to be. What ought to be clear in all events is that "Just Say 'No' to Distributive Propriety" is, normatively speaking, rather less principle than anti-principle. It states a proscription upon prescription.[77] To why that is so we now turn.

II.   SOCIAL AND LEGAL PRESCRIPTION: IMPERATIVES AND JUSTIFICATIONS

Our concern is the relation between Paretianism and strict preference-regard—today's so-called "welfarism"—on the one hand, and social hence legal prescription on the other. Part I has just characterized the first two. This Part now characterizes the third. The aim is to distill the essentials of, first, what it is to impel actions with imperatival com-

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[74] "Go normative" is an endearing expression I believe originates with Ian Ayres.

[75] Kaplow & Shavell employ it to designate PI. *See, e.g.* KAPLOW & SHAVELL, *supra* note 2; Kaplow & Shavell, *Notes on the Pareto Principle*, *supra* note 2; Kaplow & Shavell, *Fairness*, *supra* note 2. Others, notably Sen, use it sometimes to designate SP, sometimes to designate WP.

[76] The regularity, also known as the "Pareto Distribution" and the "80-20 Rule," turns out to be one of a large family of continuous probability distributions, including the Bradford Distribution and Zipf's Law, found to characterize many phenomena. *See, e.g.*, PER BAK, HOW NATURE WORKS: THE SCIENCE OF SELF-ORGANIZED CRITICALITY (1996); Z. Burda et al., *Wealth Condensation in Pareto Macro-Economies*, 65 PHYS. REV. 3 (2002). The original site of Pareto's observation is found in Vilfredo Pareto, *Cours d'économie politique* (1896).

[77] Call it a "meta-prescription" to the effect that we must not prescribe, if you like. In such case its instability will be worn on its face.

munication; then second, what it is more specifically to guide actions via prescription; and finally third, what it is to engage, more specifically still, in social hence legal prescription.

The results that emerge in this Part ultimately account for the puzzles and problematics noticed in Part I. They also reveal the principal formal lacuna we shall find in the still incomplete "language" of SWFs in Part III. This means in turn that they lie at root of the impossibility results derived in Part IV, and in turn suggest the "fair welfare" ideal proposed in Part V as that true "new foundation" toward which we have been, not quite fully self-cognizantly, striving all along. The key to all of this, I believe, is that we have not as yet asked what it is to prescribe—and what we find when we do.

A. Prescription as Imperatival Performance

Let us then start at "square one": The most basic and, in consequence, easily forgotten attribute of prescription is that it is a form of action. Prescribing is something we *do*. In particular, it is the act of indicating to another, others, or even oneself or "ourselves," what is to be done. In prescribing, then, we engage in a form of action—communicative action—meant in turn to impel or guide action. Prescription is agents procuring action from agents, or guiding actions undertaken by agents, or both.

The "agents" and "we" here include lawyers, legislators, courts, agencies, normative legal theorists, policy analysts, and even some social choice theorists. Insofar as any of these prescribe, they are deed-doers, here in the world, telling others in the world what deeds they should do. In this sense they are, after a manner, willing or intending for others. Stating what others should do, they state what others should will or intend.

This much seems obvious and even banal once we reflect upon it. But it is so close to us that we tend not to notice either it or its implications. These have certainly gone forgotten by Paretian "welfarist" legal theorists, in a sense and with consequences soon to emerge.

Now, many of the actions we perform in our lives as agents are complex and articulated. The guiding of actions must often in consequence be articulated as well. Direction, when fully elaborated, is isomorphic to action. One therefore often tells others not only what to do, but also, in one way or another, how to do it: One specifies or alludes to some orderly sequence of steps.

Detailed directing of this sort is generally done through a spoken or written language, in what grammarians call the imperative mood. The "language" in which directing is done can be some familiar idiom like English or Hindi. Or it can be some formal symbolic system such as the

"deontic logic" of formal ethicists, or the apparatus of SWFs favored by welfare economists and policy analysts.

An advantage offered by such systems is that they typically wear the "formal," or "structural" features of instructions upon their faces. The root word shared by "structure" and "instruction" is no accident: Deontic logical formulae and SWFs manifest the *logical forms* of the actions they enjoin, with greater or lesser degrees of transparency. They also are meant to render explicit, within formulae, certain features of background context typically taken for granted as "understood" in informal communication.[78] Below I am going to argue that this kind of form and this kind of explicitness have been inadequately considered in technical legal theory and policy analysis.

Now the imperative mood in which imperatives are communicated can for its part be indicated by various devices. One may employ particular words, word combinations, directive gestures, or facial expressions, for example: "Please," "Thou shalt," "One ought," a nod, a directed index finger or raised hand, etc. In oral communication, imperatives typically indicate mood by context-sensitive means: "Halt!" shouted firmly in face of an imminent trespass, say; or the mentioned lift of a hand.

In deontic logics, the imperative mood is indicated by the "necessity operator" borrowed from modal logics—" "—prefixed to an action description α or propositional expression π. It is then read as something like "α is obligatory," or "make it the case that π."[79] In SWFs, the imperative mood is sometimes indicated by the prefix "Max," indicating that the function specified in the subsequent string of symbols is to be "maximized" subject to some stated constraint.

In Part III I am going to show that, in the "language" of SWFs as currently constituted, "Max" does not fully capture the specifically obligatory nature of prescription as distinguished from mere description or conscription. It cannot do so absent the addition of one variable to the SWF's argument domain: a variable corresponding to the preference-incumbency of normative distributional principles mentioned above.

In Part V, in turn, I am going to argue for replacing "Max" with "Eq." Equalize the right thing, which is normatively more transparent and operationally more efficient to do, I shall show, and maximization of the right thing takes care of itself. I accordingly ask that the reader take

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[78] *See supra* note 14 and accompanying text; *see also infra* Parts II.B, III.

[79] The other logical operator borrowed from modal logic is that for possibility—"$\diamond$"—which in deontic logics indicates permissibility. Various equivalences familiar to various modal logics then find counterpart equivalences in various deontic logics: $\neg\diamond\ \alpha \equiv\ \ \neg\alpha$, for example, stating that α is not permissible if and only if it is obligatory not to α, is often encountered. *See* G. H. von Wright, *Deontic Logic*, 60 MIND 1(1951). Many books and articles have treated the subject since. *See infra* Part III.

in this Part with a view to how its arguments might tend toward those conclusions.

Most of the discussion of this Part, then, will be concerned with the formal—the logical or "distributive-structural"—properties of the aforementioned action descriptions α and propositional expressions π. The only point to bear in mind as to the imperative mood as such is that it is simply expressible. It requires no more articulation than "Schnell!"

Distilling the narrower class of prescriptions from the larger class of generic imperatives accordingly requires we attend to the internal structures of those action descriptions α and propositional expressions π. This is where the distinction between prescription on the one hand and mere conscription or description on the other is most readily mapped. On, then, to those.

That which one dictates or guides imperatively—the action description α or propositional expression π, which I shall generically call "content"—is, in contrast to the imperative mood indicator, complex. And as indicated above, it can be quite variably complex. This is particularly clear when context is taken into account and then explicitly rendered.

Consider these instructions, for example, both as enunciated and as more fully explicated if presupposed context is verbally unpacked: "Silence!," "Cease and desist," "Avast, ye swabs,"[80] "Brush your teeth," "Go to your room," "BYOB," "Do your homework," "Go long fifty shares Celotex for Sally," "Take the last train to Clarkesville and I shall meet you at the station," "Disperse, ye rebels," "Follow this blueprint," "For a good time, call 123-4567," "Work thou in well doing."[81]

These display varying degrees, and kinds, of complexity, as well as of implicitly presupposed context. Being thus variably complex and contextually grounded, imperatival contents are possessed of variable structures. Structural properties are logical properties.[82] These turn out to be central to the natures of distinct species of imperatives—hence, as indicated above, of that species which we call "prescription." Imperatives are thus distinguished for normative purposes by their logical forms—forms we shall explicate below.

The next basic observation to make about prescription is rooted in this matter of variable logical forms: The class of generic imperatival

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[80] This one is more internally complex than you might suppose. It's derived from the Dutch *houden*, meaning to hold, and *vast*, meaning fast: Hold fast. See 1 OXFORD ENGLISH DICTIONARY 814 (2d ed. 1989) (defining "avast").

[81] The last is a vatic pronouncement made in THOMAS CARLYLE, SARTOR RESARTUS (Kerry McSweeney & Peter Sabor eds., 1987). The others I assume are more or less familiar.

[82] It is a commonplace that logic and complexity go hand in hand. *See, e.g.*, DENNIS STANTON & DENNIS WHITE, CONSTRUCTIVE COMBINATORICS (1986); DIRK VAN DALEN, LOGIC AND STRUCTURE (2008). The logical properties that will be of concern to us are properties of generality familiar to first-order "predicate," or "quantificational" logic.

performances is broader than that to which the more specific term "prescription" has application. And distilling species from genus here requires attention to logical form.

My central claim is this: Prescriptions form a subclass of imperatives considered more generally. And, crucially, they do so in precisely the way that Part I found that "legitimate" satisfactions—the kind that rise to the level of welfare—form a subclass of the fuller set of possible satisfactions considered more generally.

The reason is simple but deep: There turns out to be an intimate relation between the "distributive" structure found in Part I to distinguish bona fide welfare from generic satisfaction on the one hand, and the logical structure we shall find here to distinguish full-blown prescriptions from generic imperatives on the other. This structural link turns out to be the key reason why strict preference-regard and Paretianism prove to be fundamentally incompatible with social and legal prescription. And failure to have noticed this link is a key reason why we have not grasped the nature and depth of that incompatibility.

Now, what kind of "intimate relation?" What *is* the "structural link" of which I am making so much? Elaborating the full answer to those questions is the task of the following Subpart. Here is the idea *in nuce*: Imperatives take on the status of bona fide prescriptions according as the demands they embody are justified or legitimated. And it turns out that the demands which can underwrite social, hence legal prescriptions are justified or legitimated in precisely the way that Part I found preferences must be, if their satisfactions would be counted as bona fide welfare. That is, recall, by explicitly referenced, preference-incumbent principles.

In Part I we characterized the principles in play as "distributive" in nature. In this Part we now in effect find occasion to unpack that notion of "distributivity." We do so by noticing its systematic formal linkages to that form of explicit justification necessary to render a generic imperative a full social, hence legal, prescription. That is the kind of prescription that not simply you or I, but any "we" can jointly and justifiably issue.

The mentioned form of justification for its part involves explicit appeal to two interconnected forms of logical generality which are themselves inherently "distributive" in Part I's sense. The generality in play is logically equivalent to a form of impartiality, hence to a form of equality as between agents.[83] And equality, of course, sounds in distribution. The "distributivity" in play in Part I accordingly turns out, via these links

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[83] It is precisely this form of impartiality, incidentally, which lay at bottom of the intuitive appeal of John Harsanyi's and John Rawls's employments of "veils of ignorance" on behalf of, respectively, their utilitarian and contractarian accounts of justice. *See* RAWLS, THEORY, *supra* note 43; J. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of*

of equality and impartiality, to correspond to impartiality-equivalent forms of logical generality. And precisely these forms prove decisive here in Part II to characterizing imperatives fit to be social hence legal prescriptions.

Unlike the immediate cut drawn in Part I between satisfaction in general and welfare in particular, however, the cut drawn in this Part between generic imperatives and the narrower class of social prescriptions involves an intermediate step. For while all prescriptions are what I shall here be calling "principled" imperatives, not all of the principles in play in this Part are what Part I called "distributive." It is only what I shall call "*ethically* principled" imperatives that are fully "distributive" in the normative sense operative in Part I.

Nevertheless, the mediate step from unprincipled to principled imperatives, en route to ethically principled ones, proves heuristically important. It affords an intuitively appreciable progression from fewer to more forms of explicitly articulable logical generality. And that turns out to be a progression which all of us will recognize as having moved through ourselves, in graduating from the murky, dependent, and largely directionless egocentrism of childhood, on through adult agency to self-cognizant ethical maturity.

B.   *Prescription versus Conscription: Justified Imperatives*

Let us now consider in detail this "progression" from bare imperative mood to full prescriptive force. That will flesh out and renders explicit the systematic linkage between Part I's Pareto-inimical "distributive structure" on the one hand, and this Part's prescription-constitutive "logical generality" on the other. The root of this linkage is in the relation between generic preferences as discussed in Part I, and generic imperatives as discussed just above.

Recall Part I's thought experiment for a moment: Even thieves issue imperatives in the interest of satisfying their preferences, don't they? "Stick 'em up," "Stand and deliver," "Your money or your life." And so on. But these are not prescriptions, they're attempted conscriptions. Conscription corresponds to "thieves' satisfactions" as we shall now find prescription to correspond to welfare.

Satisfaction, we suggested in Part I, affords the "substance" of welfare. We shall now find the source of what we called its "distributive structure." We find its logical form.

Risk-Taking, 61 J. Pol. Econ. 434 (1953); *see also* Ronald Dworkin, *Justice and Rights*, *in* Ronald Dworkin, Taking Rights Seriously (1977).

1.   "Nike" Imperatives: No Reasons, Only Preferences

Let's begin with those imperatives that seem most lacking in prescriptive force. These correspond to the "thief's preferences" countenanced in Part I.

Think back and remember: Most of us learn early in childhood that there is often an immediate and forceful urge, in response to an imperative issued by another, to respond with "Why?"[84] We immediately seek an explicit justification when another agent speaks as to bind our wills. Each of us also learns quickly that some forms of reply to this query are not very satisfying, while others are more so and still others quite so.

What is most remarkable about this apparently natural, spontaneous, and perhaps even "hard-wired" preference ordering, I think, is this: It applies even to cases in which the propositional content, as distinguished from justificatory form, of the reply is invariant across forms. Even if *every* form of reply to my question why I may not adopt the puppy, say, carries the upshot that I may not adopt the puppy, I shall still regard some forms of reply as more satisfying than others. I shall do so in virtue of the "internal," "formal," logical, justificatory properties of the replies.

The reply "because," not followed by anything else, is likely the least satisfying of all. (It was to me, anyway.) With nothing following the "because," the reply is an ersatz reply. It is what lawyers call "unresponsive." It leaves you waiting for what you were seeking: a reason that might account for, explain, underwrite or justify the imperative.

The "because" is no more than a placeholder in these cases. That is why it typically elicits some such rejoinder as, "But *why*?," or "*Why* because?"[85] The surreply "just because," or "because because,"[86] only confirms the suspicion that no real answer is coming. And a real answer—an explicit justification—is what is sought.

There is no "cause" for the "be" to bind up with in imperatives thus "justified."[87] The same holds of fatuous "causes" of the kind that occur

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[84] Elizabeth Anscombe famously characterized the theory of intentional action as being concerned with contexts in which "a certain sense of the question 'Why?' is given application." *See* G.E.M. ANSCOMBE, INTENTION 9 (1963). It emerges here that the prescription of action implicates and answers an internally related sense of the same question. Anscombe's "why" is that of "why does she do it?" Our "why" is that of "why should she do it?" The relation is internal because when we prescribe, we prescribe action.

[85] This was the form typically taken by my own such rejoinders.

[86] This was the one I often received, opening into a game that at first was delightful but quickly grew tiresome.

[87] The particular form of "cause" involved in reasons for action, which we might take for a correlate to Anscombe's "Why?," *see* ANSCOMBE, *supra* note 84, is central to Donald Davidson's well-known essay, *Actions, Reasons, and Causes*, 60 J. PHIL. 685 (1963). *See generally* DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS (rev'd ed., 2001) (providing more of his seminal articles on action and agency).

in such answers as "Why must you go to your room? Because two plus three equals five, that's why,"[88] or "Because I say so." Again no bona fide reason is proffered to underwrite the command. The command is in that sense ungrounded. It is also in that sense unintelligible: It is opaque to the intellect. It is "arbitrary." Lacking evident reason, it is "unreasonable."

"Just because," like "just do it," carries a sort of "don't expect reasons" disclaimer. We might accordingly call such imperatives "Nike imperatives."[89] They're bare commands—the sort of imperative even thieves issue. ("Stick 'em up.") They express no more than "brute," "naked" preferences. Those are preferences of the kind held not only by persons who share space with others and reflect upon how best to live; They are held also by solitary animals that would much sooner eat you than explain themselves to you. They are preferences which therefore when satisfied need not underwrite social welfare as discussed in Part I.

Bona fide reasoned imperatives, by contrast, are underwritten by bona fide reasons that can be articulated. If the child is told, "No puppy because the landlord won't allow it," or "No puppy because we've no yard," she is apt, particularly if "reasonable," to be somewhat more satisfied than she was with the Nike imperative.

Of course she might still be displeased. She might even at some point, if clever, ask why then not move. She might, that's to say, not quite share the reason. But she at least sees a bona fide reason hence the rudiments of a shareable reason: the possibility of letting a reason that underwrites someone else's preferences underwrite preferences of her own. She sees a ground for the "no puppy" imperative upon which her own will and agency might stand with the issuer's.

How is it that this occurs? What precisely works the transition from the Nike imperative to the imperative underwritten by shared reasons? In other words: What, microstructurally speaking, is it that the Nike imperative lacks? I think it is that the Nike imperative lacks all of three forms of logical generality. Shared reasons import forms of "general applicability." We turn now to the first of them.

2.   Principled Imperatives: From Reasons to Situation-General Reasons

The category of a bona fide justification of the sort lacking in Nike imperatives opens three "spaces." It opens one for "relevantly similar" circumstances: a "space of situations." And it opens one for the situa-

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[88] Yes, I have heard this one too. It was a tough childhood. (Well, not all that tough.)

[89] You know, the old Nike slogan: "Just do it."

tion-responsive agency of each party to the communicative transaction: two "spaces of reasons."[90]

There is thus the space, first, of circumstances in which a given reason is apt to be implicated or applicable—the space in which want of a yard connects with the wisdom of keeping a dog, for example. There is then the space, second, of reasons for the recipient of an imperative to agree in a particular situation—the space in which children find cause to comply with a parent's "no puppy" imperative, for example. And there is finally the space, third, of reasons for the issuer's issuance of the imperative in the first place given the circumstances—the space in which parents decide want of a yard weighs against keeping a puppy, for example.

I now want to claim that the first space is that in which reasons' constituting, articulating, or appealing to what we call "principles"[91] is determined. In general, the more situations in which a proffered reason might be apparently applicable, the more "principled" the reason is. Reasons of this sort are often called "maxims," or "principles of action." They're fit to guide action as "princes" once did. Principled reason-status and principled agency are thus both of them functions of what we can reasonably call "situational generality." "Because I feel like it right now" might be applicable only to "it," and only "now." "Because it befits my manhood" might well "fit" many more times and circumstances.

In general, the more principled in this sense your reasons for acting, the more deliberate, "in control," and "autonomous" you will be. You don't "fly by the seat of the pants" or "muddle through" as you otherwise might—as you might have done when a child, for example. You're in that sense more "free" and "adult." Your "sphere of agency" is now larger. You're fit to engage in "practical reasoning." You can link situations up to your preferences, roughly trace out some preference-resonant "decision trees," then "plan" or "project" accordingly.[92]

A principled—that is, a situationally general—reason is thus more fully reflective of an actor's agency than is an unprincipled one. A principled imperative—that is, an imperative that might be justified by a situ-

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[90] I'm echoing, but not really intending, Wilfred Sellars's oft-quoted notion here. I suppose we could call these two subspaces of Sellars's "space of reasons." See WILFRED SELLARS, EMPIRICISM AND THE PHILOSOPHY OF MIND (1967).

[91] Principles which might but need not include "ethical" principles. For it is the other two forms of generality we shall find to impart ethical status.

[92] These terms and some of their cognates have become terms of art. See, e.g., MICHAEL BRATMAN, FACES OF INTENTION (2003); MICHAEL BRATMAN, STRUCTURES OF AGENCY (2006); JOSEPH RAZ, PRACTICAL REASONING AND NORMS (1979); J. DAVID VELLEMAN, THE POSSIBILITY OF PRACTICAL REASON (2000); J. DAVID VELLEMAN, PRACTICAL REFLECTION (1989). The modern theory of "practical reason" is rooted most deeply in writings by Aristotle and Kant. The contemporary revival of the subject appears to originate with Anscombe and Davidson. See ANSCOMBE, supra note 84; Davidson, supra note 87.

ationally general reason—is apt to be correspondingly more respectful of its recipient's agency. It is further away from "ad hocery" from the issuer's point of view, and correspondingly further away from "arbitrariness" from the recipient's point of view.

This is why, I suspect, we tend to reserve the word "prescription" for principled, as distinguished from ad hoc or "Nike" imperatives. One thinks of doctors and other deliberate planners, whose instructions one can more plausibly imagine following, when one thinks of prescriptions. In contrast, even those acting on impulse or reflex shout "Silence!" or "Go!" type imperatives.

A situation-general reason, a principle, is fit to serve in the practical reasoning of one agent at multiple times. It is diachronically applicable, one might say.[93] The same generality can render it synchronically applicable—fit to serve in the reasoning of multiple agents at one time. Its situation generality renders a principled reason, "in principle," a potentially shared reason. It might then underwrite an imperative of the prescriptive, as distinguished from conscriptive, or "Nike," variety.

When a principled, shareable reason underwrites an imperative, the same reason that prompts or justifies issuance of the imperative is available as an independently persuasive reason for the recipient to act. The proffered reason is "generally applicable" even if not universally dispositive. It can plausibly be thought by the issuer in such case to be accessible to both parties involved in the transaction. It is in that sense "objective." It is "inter*sub*jective."[94]

The more circumstances to which a principled reason has application, the more agents there are who might independently find it compelling. When more agents in more circumstances can find a reason compelling, the reason becomes more widely shareable, even if not always shared. The more shareable the reason is, in turn, the more fit it is for sharing between issuers and recipients of imperatives underwritten by that reason. The more fit it is, then, in a sense to command issuer and recipient alike.

Now, as noted in passing above, none of this is to say that a situationally general—or "generally applicable"—reason is indefeasible or always dispositive. It is simply to say it can figure in multiple genuine appeals, as distinguished from Nike imperatives, issued by one party to another. The child considered above might respond to her parent's "no yard" reason, for example, with the observation that some breeds of dog

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[93] Michael Bratman speaks in this manner. *See* BRATMAN, STRUCTURES OF AGENCY, *supra* note 92.

[94] I employ Frege's understanding of objectivity as intersubjectivity. *See* GOTTLOB FREGE, THE FOUNDATIONS OF ARITHMETIC (J. L. Austin trans., 1961); *see also* DONALD DAVIDSON, SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE (2001).

live comfortably indoors. If so, she implies that the "no yard" reason is not decisive of the "no puppy" imperative, only perhaps of a "no Mastiff" or "no Wolfhound" imperative. But she also recognizes it as a bona fide reason deserving of bona fide rejoinder.

This is how reasoned discussion—joint deliberation—typically works. One agent recognizes, reaches out toward, and seeks some space of union with, rather than simply dismissing or obliterating another. Each seeks a partial communion of wills. There is respect between agents, the rudiments of a sharing of portions of agency itself. And this is accomplished by making explicit reference to shareable reasons.

Say you proffer principled reasons as considerations that both prompt your issuance of, and "independently" warrant your interlocutor's acting upon, some imperative. Then you appeal to something independent of your bare will or brute preferences as reasons for assent. You clothe your theretofore bare will in a garment that others might don. You civilize your theretofore brute preferences as preferences that others might harbor and satisfy along with you.

When your imperative is thus "underwritten," your will has a "ground" upon which to stand. It's often ground you assert to be "common." You point to a "neutral third party," an "independent" arbitrator, hence speak *non*-arbitrarily yourself. The principled reason is what arbitrates. Your request is thus made to "make sense" in virtue of the reason that grounds it. (The *reason* is the "sense.") And this form of sense-making is rooted in sharing just as the sense-making that is linguistic meaning requires sharing. (Isn't there a link between "meaning" and "intending?") A sharing of reasons renders an imperative intelligible much as a sharing of usages renders a string of phonemes or symbols intelligible as "language."[95]

The mentioned sharing also begins to import a form of mutuality and reciprocity, a small space of shared equal status, between you and your interlocutor. You imply recognition that the recipient of a principled imperative is not "beneath" you, but that both of you are instead "under the principle" to which you refer. In more fully elaborating your imperative by appeal to a principle, you accordingly move in the direction of ideals sounding in what we call "equal justice under law," and "a government of laws, not men." You not only share wills, joining into

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[95] Notice all the "under" and "basis" language in these expressions, and the link between such foundational talk of this kind and the notion of "sense." Indeed when things "make sense" to us we say that we "*under*stand" them. As for the link between sense of this sort and shareability, note that Frege employs the word *Sinn*—the rough German equivalent to our "sense"—to designate that which is shared between speakers who understand one another's attempts to communicate with language. *See* FREGE, *supra* note 94.

one will in regard to the matter at hand: You share them under an aspect available to all "similarly situated" others, such that they too can join.

Principles of this sort are those by virtue of which many "I's" often combine into one "we," a true E Pluribus Unum: "Out of many, one," as found on the national coinage. Principled reasons, again like language, are a form of "common currency" facilitating all manner of transaction. This sort of "we" also includes that found in "We, the people"—the "we" who prescribe through our law—our law which also facilitates interactions, and for that matter provides for the national currency itself.

But to this point, believe it or not, we have barely begun. For situational generality is necessary, but not sufficient, to constitute principles of the kind that in general underwrite social hence legal prescription. The reason is that where situational generality of the kind just considered is the only form yet available, the logical space between putative principle and bare will or brute preference can be cynically narrowed by gerrymandering. In the degenerate case, you can render it "arbitrarily" small. You need only appeal to some such pseudo-principle as "One ought in general to satisfy my will." Many an "arbitrary despot" has "prescribed" in this manner.

For most purposes, a maxim of the "one ought to satisfy my will" form will amount to a pseudo-principle in the same sense that "because I say so" amounts to a pseudo-reason. The only difference is that one has generalized the ersatz reason-fragment that is "my will in the present circumstance" in the first case, to the ersatz principle-fragment that is "my will in all circumstances" in the second case. The proffered "principle," like "because I say so," is for most purposes simply a more tastefully dressed brute demand. It is a bare "expression of preference" without an appreciable reason to be satisfied by anyone who, like Bartleby the Scrivener, "would prefer not to."[96]

It bears noting that the pseudo-reason and pseudo-principle just mentioned can for *some* purposes constitute more bona fide exemplars of their types. If in the first case you are poised to force your will upon me if I do not comply, your willing it will indeed constitute a reason of sorts—even if only sometimes a prudential and never an ethically "good" one—for me to comply. Likewise, if in the second case you are *generally* ready to force your will upon me, there will be something sounding in the cause of my continued good health and welfare to be said for the "principle" that I ought indeed generally to satisfy your will.

But none of this is to say that these examples do not nevertheless raise ethical hackles. And they do so, I think, because they force a dis-

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[96] *See* Herman Melville, *Bartelby, the Scrivener: A Story of Wall Street*, *in* THE PIAZZA TALES 16 (Egbert S. Oliver ed., 1948).

tinction between reasons for issuance and reasons for compliance. And this simply means that the "some purposes" mentioned in opening the previous paragraph are not ethically prescriptive purposes. Reasons, and principles—reasons with situational generality—might suffice to carry imperatives in the direction of prescription simpliciter. But they are not sufficient, even if necessary, to render imperatives fit for *social or legal* prescription. For that we need not simply principles, but ethical principles—the kind under which maxims like "one ought in general to satisfy my will" cannot masquerade.

3.   Ethical Imperatives: Recipient- and Beneficiary-General Reasons

What we call ethical principles, then, are principles by dint of their possessing situational generality of the sort we've just considered. Principles are just situation-general reasons for action, to which one might refer in addressing a "why" question concerning such action. What then is required to render such principles ethical ones, in turn, is their possession of the other two forms of generality anticipated earlier. They must be recipient- and beneficiary-general in addition to being situation-general. Ethical principles are situationally, recipient-wise, and beneficiary-wise general reasons for action.

The best way to elaborate this characterization is by recourse to another hypothetical scenario. Return, then, to the mother and child who discoursed upon whether to adopt a pet. To render clearer the sense in which compliance with an imperative might "benefit"—hence make a beneficiary of—the issuer by satisfying the issuer's preference, however, we shall suppose a new "situation." The imperatival transaction will concern not something the child would like and the mother initially prohibits, but something the mother would like and the child might prefer not to provide.

Since we're seeing so much of these characters, let's give them names now as well. We shall call the child "Childe" and the mother "Ma." Now suppose Ma has directed Childe to sing her a song. Assume further that Ma replies to the inevitable "Why?" with, "Because it will comfort my troubled nerves." Childe might understand the proffered reason to implicate any of a number of principles. These in turn can be varyingly general along any of the three dimensions we have named.

Here is a small sampling of candidates, with salient dimensional "argument places" italicized: "*Childe* should generally *sing* to soothe *Ma's* nerves, *when these are troubled*." "*One* ought *generally* act to sooth Ma's nerves whenever they're troubled." "One ought generally act to keep *one's mother's* nerves always untroubled." "One ought to honor one's father and mother." "When one has done as much for another as

Ma has for Childe, the benefited party ought when possible to return the favor." "One ought always seek the greatest good for the greatest number."

And of course we could go on. Now the principle to which Ma intends actually to appeal might be any of a large number of variations on a single human-relational theme: human relational because there is a recipient and a distinct issuer-beneficiary. Each variation will involve greater or lesser degrees of generality as to who ought generally to do what for whom upon what sorts of occasion. Which particular such variation the uttered imperative is best interpreted as flowing from in the particular case will generally be determined, if desired and sought, by further refining inquiry. That will be inquiry meant to render explicit the referenced reason implicit in the proffered justification.

Inquiries of this kind are familiar to lawyers. They're akin to "Socratically" extracting the *ratio decidendi* from a common law court holding. Our inquiry for the moment, however, is less legal than "metalegal." And it is metaethical or metanormative. We are asking how to recognize specifically ethical principles of the sort I am going to claim underwrite social and legal prescription.

Now to address this question, begin by noticing that the principle to which Ma's principled imperative made perhaps insufficiently explicit appeal was variable in two respects additional to the situational circumstances—troubled nerves—that engaged it.[97] It was variable as between claims that (1) either "one" in general, or "Childe" in particular, should generally undertake, (2) to soothe the nerves of or comfort either "Childe's" mother, "one's" mother, or perhaps simply any person or sentient creature.

The first of these two poles of variability is the "recipient" dimension of the principle to which we've referred. The allusion is to the class of prospective recipients of imperatives underwritten by the principle— those whose action the imperative is meant to guide. We could as well call it, in contract-resonant jargon, the "obligee" dimension. The second pole of variability is the "beneficiary" dimension. Here the allusion is to the class of prospective beneficiaries of actions counseled by the principle underwriting the imperatives in question—often but not always including the issuer herself.[98] Where the would-be beneficiary of the

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[97] There is of course situational variation as well: The candidate principles spoke in some cases to troubled nerves, in other cases to nerves, in another case to filial piety, in another to "the good" of people (or perhaps creatures that can experience good or ill). The greater the generality here, the more "principled" the proffered maxim is.

[98] A venerable distinction once found in the metaethical literature, associated with Richard Hare, is that between so-called ethical "universality" and "generality." *See* HARE, FREEDOM AND REASON, *supra* note 7. The first, which Hare takes from Kant, roughly corresponds to what I am calling "recipient" generality; the second corresponds, somewhat more roughly,

action directed by the imperative is herself the issuer of the imperative, we might also call it the "obligor" dimension.

Notice that the term "beneficiary" used here connotes "benefit"—that is, some desired good. Something like "welfare" is thus implicated here. So too is the idea that welfare might have something to do with preference-satisfaction. For the issuer of the imperative apparently "prefers" that the recipient act in the prescribed manner yielding the "benefit."

But the fact that some such imperatives—the thief's "stand and deliver," for example—are conscriptions rather than prescriptions also suggests something: It suggests first that generic imperatives and full prescriptions share a common "substance" as subject matter—satisfactions. And it suggests second that what distinguishes them, and thus distinguishes generic satisfaction from bona fide welfare, might then be form. And so it is. It is logical form, which turns out to be intimately bound up with Part I's "distributive structure." The principles bearing the logical form in question are precisely the kind that determine normatively salient distributive structure.

Now, what formally characterizes ethical principles, I think, is just the presence of high degrees of recipient and beneficiary generality in their articulation. And what appears to characterize the most august and enduring of such principles is precisely that their prospective recipient and beneficiary classes are so wide as actually to coincide entirely: Those subject to them are the same as those benefitting by them.

"Do unto others as you would they do unto you." We are all of us "others" and each of us "you" in these cases. We are all in a sense obligors, and obligees, alike under these principles. And for precisely this reason, these are the principles most immediately suited to constitute what we above called shared reasons, hence what we below shall work into collective intentions. These in turn are the intentions that ground social and legal prescription. Such is, at any rate, my conjecture.

We can flesh out and substantiate this conjecture by returning to our story. We were seeking the principle embedded in Ma's reason proffered to Childe in justifying her request of a song. We noticed that the articulation of principle there could be formulated to implicate varyingly narrow—"Childe"—or broad—"One"—ranges of potential recipients of the

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to my "beneficiary" generality. *See id.*; *see also* HARE, THE LANGUAGE OF MORALS, *supra* note 12; R. M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981).

Hare's "universality" and "generality" are easy to conflate, a fact Hare bemoaned. *See, e.g.*, HARE, FREEDOM AND REASON, *supra* note 7, at 36–42. But the conflation is understandable when one notices that "universality" and "generality" amount to a single logical attribute—that of what logicians call "quantificational" generality—as refracted upon objects falling within two distinct ranges of application. I think that Hare would have done well to attend to this, for doing so yields the fruitful results that soon emerge here.

imperative underwritten by it. It also could be formulated to implicate varyingly narrow—"Ma"—or broad—"One's mother," "One's parent," "another"—ranges of potential beneficiaries of the action enjoined.

High recipient generality is that which is found at the broad end of the first, high beneficiary generality is that which is found at the broad end of the second. We've had a glimpse at the "high end" of both just above in the Golden Rule. Let's now have a go at the "low end," then turn to the "middle ranges."

A limiting case at the narrow end of both dimensions would be that Ma intends, by way of imperative-underwriting principle, no more than that "*you*, Childe, ought in general endeavor to soothe *my*, Ma's, troubled nerves." If Ma would not say the same to any of Childe's numerous equally available siblings, the principle is low on recipient generality.

Childe is singled out as uniquely subject to this would-be "ethical principle," notwithstanding what might have been thought others' equal suitability to the task. It looks as though no one could be "similarly situated" to Childe without *being* Childe per this "principle." Childe seems a bit "owned." She's certainly "beneath" her siblings. Perhaps we should be calling her "Cinderella."

Now suppose Ma names not only Childe as recipient, but herself as beneficiary in articulating her "principle." We suppose she would not say the same of Childe's *other* parent's—Pa's—nerves, or of anyone else's, in enunciating it. The proffered principle is then wanting in *beneficiary* generality. Ma is the sole beneficiary.[99] The principle in this sense places Ma "above" everyone else much as it places Childe "beneath" everybody else. That too leaves the "principle" a bit short on ethical force. People are not apt to view it as a plausibly shared reason, either by Ma and Childe or by Ma and themselves if they are added to the recipient class.

The low degree of recipient generality found in Ma's would-be action-guiding principle imports a form of agent-subordination. Childe's agency is treated as legitimately circumscribed in ways that her siblings' agencies are not. The low degree of beneficiary generality for its part implies a corresponding form of superordination. Ma's actuating preferences, not those of other agents, are those that her principle asserts to be those that will properly actuate other agents. It conscripts other agents' agency.

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[99] It is a weakness of Hare's "universality" versus "generality" schema that his conception and discussion of the latter do not attend specifically to the centrality of beneficiaries and the way they are singled out to ethical prescription.

In both dimensions, then, a low measure of generality correlates to a form of ethical inequality—what I shall call agent inequality.[100] Ma's putative ethical principle binds and benefits agents differentially within each of the ethically relevant dimensions, and does so precisely in virtue of its want of logical generality. This is precisely what accounts for its air of pseudo-ethicality.

True ethical principles, then, are those that bind and benefit agents equally, precisely because they are generally applicable in all three dimensions: situation-wise, recipient-wise, and beneficiary-wise.[101] "*Fully generally* applicable" action-guiding—that is, ethical—principles means "*equally* applicable" such principles. It means equally applicable to all similarly situated agents, including the agent who issues the imperative.[102]

You can see this graphically by altering the tale of Childe and Ma to what I shall call the tale of Thomas and Sally. We shall say that Tom occupies Ma's position, and Sally occupies Childe's. But Sally is no child. She is a woman, and Tom owns her. We're in Virginia, circa 1815. Though the law currently says otherwise, Tom is at least ethically speaking a thief—a thief of the most serious kind. He has stolen agency.

Now suppose Tom aims to justify one of his thieving demands made of Sally by explicit appeal to principle. He aims to act as though he were engaged in prescription rather the conscription. If Tom then says, "Folk ought to comfort one another," it is immediately open to Sally to say, "Very well, comfort me by emancipating me." She is taking Tom at his word—the logical form of his word.

Now if Tom doesn't cotton to this,[103] his "folk" and his "ought" here are shown for mere window-dressing. If he then proffers a principle more "narrowly tailored" to the underlying agency structure of his and Sally's situation, he'll say something more like this: "Sally ought to comfort Tom," or "Slaves should comfort their masters." But now of course his proffered "principles" forego the forms of generality that I am claim-

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[100] This agent inequality turns out to be essentially equivalent to Daniel Markovits's agent inequality. *See* Daniel, Markovits, *How Much Redistribution Should There Be?*, 112 YALE. L.J. 2291 (2003); *see also infra* Part V. It also serves to underwrite what might be called "equal agency," which turns out to be cognate with Sen's "equal functionings," Dworkin's "equality of resources," Arneson's "equal opportunity for welfare," Cohen's "equal access to advantage," Roemer's "EOp," and other material opportunity egalitarian principles. *See* Hockett, *Distribution*, *supra* note 2.

[101] We say "*Childe* ought because *one* ought," not "Childe ought because *Ma want Childe do*." The third person indefinite—"one"—and its indifference to names is the indicator of recipient generality.

[102] We must specify means of detecting gerrymandering here just as with principles more generally. It proves easy to do, however, notwithstanding the fact that it doesn't yet seem to have been explicitly done.

[103] I suppose it would be tobacco rather than cotton in this case.

ing characterize ethical ones—recipient and beneficiary generality. And if you guffawed at those last two "principles," I think that it means you agree. There is no real "ought" in these proffered justifications. Hence his mandate remains non-prescriptive. It is conscriptive. It is a politely worded brute command, as one supposes befits the courtly Virginian.

The fact that agent equality is at the heart of these forms of logical generality that characterize veritably ethical principles shows up in another place. It figures critically in the way we determine whether restrictions upon full generality amount to gerrymandering of the "one ought to satisfy my will" sort or not. We turn now, then, to the promised apparently "middling" cases between high and low ethical generality.

You've likely noticed that many ethical principles are stated in the form of what logicians call "conditionals." They are of the form: If π, then σ. The first term "conditions" the applicability of the second. If the second mandates some action, then, and the first term conditions the mandate upon some prior circumstance's obtaining, the first term appears to rein in the full recipient or beneficiary generality of the imperative. Whether it does so in an "ethically relevant" way or not determines whether the conditionally formulated imperative is gerrymandered.

"Slaves ought to obey their masters." That is conditionally formulated: "If one is a slave, he ought to obey his master." The antecedent condition reins in the recipient and beneficiary generality of the imperative.[104] One might initially suppose that this reining-in from full generality is what led to the urge to scoff at Tom's pious pronouncing of this principle to Sally. But it isn't. For substitute the words "inmates" and "wardens" for "slaves" and "masters," and it won't be so funny anymore—assuming the penal code and the prisons as presently constituted are ethically legitimate in a way chattel slavery emphatically is not. We shall say we are in Sweden to play it safe.

What, then, determines the "ethical relevance" or legitimacy of the reinings-in from full generality? There's been much fuss about this over the decades,[105] but I think the answer's immediately forthcoming in light of the focus on agent equality that I proposed above: One should assess

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[104] I have simplified the logical structure of the imperative for expository purposes. Strictly speaking, one will "disaggregate" the antecedent π and the consequent σ to reflect the relational structure that links slaves to masters. One will say something like "For all x and y, if x is slave to y, x should obey y." If we render "is slave to" as "S," and "obey" as "O," we shall formally render the imperatival content thus: $\forall x,y: Sxy \supset Oxy$. Deontic logicians will then indicate the obligatory nature of the content by prefixing the obligation operator " " to the whole statement.

[105] *See, e.g.*, HARE, FREEDOM AND REASON, *supra* note 7. Hare struggles mightily, but to no ultimate avail, I think, because he lacks an explicit concept of agency, hence of agent equality.

antecedent conditions like π just above by reference to how they themselves comport with the agent equality principle.

Here is our cut-drawing "master principle": If a putative ethical imperative put into conditional form delimits the class of prospective recipients to less than full generality, ask whether it does so by reference to responsible choices exercised by those recipients. (Responsible choosing is just what agency is.) That gets at the ethics-consistent form of antecedent condition precisely because it comports with agency. Slaves are not responsible for being slaves. Inmates—at least in Sweden and, we shall hope, here—are responsible for being inmates. Less dramatic examples abound: fiduciaries, promissors, those entering into contracts hence agreeing "to be bound" —that is, agreeing to bind their preferences—for example.

How about delimitations of the class of prospective beneficiaries? Same principle, albeit with a wrinkle presented by the fact that not all claims held by beneficiaries of ethical principles are the product of specific undertakings by those of us who are obligated. If a putative ethical imperative put into conditional form delimits the class of prospective beneficiaries to less than full generality, ask two things: first, whether it does so by reference either to responsible choices exercised by those beneficiaries, just as with recipients; and second, whether the delimiting is done by reference to welfare deficits suffered by those beneficiaries for which they are not responsible.

Again it is easy to illustrate with examples. "Do not take from another unless what you take was unearned or stolen by that other." In other words, take only from windfall-recipients and thieves. The applicability of the non-taking imperative is conditioned, in that one who is unjustly enriched or who takes illegitimately will not be heard to invoke it to protect her takings. The condition is in keeping with agent equality in the sense elaborated above. Note that it is also a principle that partly underwrites a regime of restitution, which we found Pareto to proscribe in Part I.

"Direct windfalls in favor of those who are born handicapped." This one disproportionately favors a subclass of prospective beneficiaries, hence reins-in full beneficiary generality. But it does so in keeping with agent equality, because it directs welfare-inputs that are not the product of agency—that is why they are "windfalls"—to persons with welfare-deficits not attributable to their agency—that is what "born handicapped" means.

If we are looking for a "master principle" by reference to which to identify veritable ethical principles, agent equality looks as though it might be it. In Part V I shall argue that, interpreted rightly, it is. It even enables us to determine that "equilibrium" —the word is of course nicely

suggestive—which is *how much* "comforting" folk ought to afford one another, per Tom's more legitimate, because recipient- and beneficiary-general, imperative above.

You might remember while we are at it here that this last example—prescribing how to direct windfalls—was one that Pareto had nothing to say about in Part I. It won't directly proscribe it, but also won't independently counsel it. We called that Pareto's "rubberstamp," or "piggyback" quality as manifest in such particular prescriptions as it does not immediately proscribe. But in Part IV we shall see that it does in fact globally proscribe all such principles as might *independently* prescribe. So while it might locally appear to permit some prescriptions, piggyback fashion, in fact it turns out globally to prohibit all of them. It does so precisely by dint of its proscribing distributive principles themselves—like the agent equality ideal we've just found at the core of all ethical prescription. That might still ring a bit counterintuitive, but please read on.

You might also have noticed by this point that welfare has just again shown itself to be still in the picture, as we noted above in connection with the words "beneficiary" and "issuer" in respect of imperatives. For I just made reference to undeserved "welfare deficits" in stating which restrictions upon full beneficiary generality appear to be consistent with the agent equality ideal manifest in full recipient and beneficiary generality.

What we are talking about in speaking of the agent equality ideal and the impartiality through which it finds expression in the specifically ethical forms of logical generality, then, is again something that might be called "fair welfare." Or, less redundantly, we are speaking of welfare simpliciter, true welfare, bona fide welfare. Call it "welfair" if you like.[106] Welfare is appropriately distributed satisfaction, and it is beginning to look as though *ethically* appropriately distributed satisfaction just is satisfaction in keeping with the agent equality ideal. We shall find that confirmed in Part V.

Now it would be nice if *legally* appropriately distributed satisfaction equated to this ethically appropriately distributed satisfaction. But as the tale of Tom and Sally suggests, it ain't always so. There can be gaps between what is legally appropriate and what is ethically appropriate. But this is, of course, precisely what normative legal theory is for. This is what it is to "assess" law and policy, as policy analysts put it. It is to determine what forms of legally determined propriety are in keeping with ideal normative propriety.

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[106] An admittedly intolerable play on words, but perhaps one that serves to emphasize fairness's internality to the concept of welfare—that is, distributively licit satisfaction—itself.

We thus have here, in our sights, precisely the place where we ought to be looking if we seek a "master principle" or "new foundation," per the Introduction, for the general normative assessment of law and policy. The place we must look is in the direction of the agent equality ideal. That is the terrain I shall be sketching more fully in Part V. For it remains still to draw out more precisely the sense in which this terrain offers no space for Paretians or present-day "welfarists."

C. Social and Legal Prescription: Ethical Incumbency and Shared Reasons

There is a final pair of observations to make about principled, and especially ethical, imperatives before we move on to that just mentioned task. Both flow from the foregoing remarks on the gap between "ought" and "is."

The first is that virtually all of us seem to feel the call of ethical and other principled imperatives, and in consequence wish to know more precisely what they require. We hear their voice, so to speak, and so we endeavor to make out their words. The latter endeavor is just what we do in ethical theory as individuals, for example, and in legal theory as members of a polity governed by law. Anyone with a sense of "ought" in relations to others possesses this sense of ethical imperativity. We sometimes colloquially call it "knowing right from wrong." We say that one who possesses this knowledge and acts accordingly is "a just," or "a good," woman or man. Anyone with a sense of "fittingness" between projects or plans or forms of life and particular actions, in turn, possesses a cognate sense of imperativity: a sense of situational generality.

We view the rightness, goodness, and fittingness in question in these cases as "objective" inasmuch as we see it as impartial—as equally incumbent upon all rather than "playing favorites." This view is reflected in linguistic practice. For we say that one should prefer something "because it is the right," or "the fitting," thing to do, not that something is right or fitting "because he wants it," as if that were the end of the matter.

Those who reverse this order of "cause," and thus lack a sense of ethical incumbency, of right and wrong, we call "sociopaths," even "psychopaths." They're not mere eccentrics. Those lacking in a sense of situation-general reasons are likewise viewed as deficient. We call them "childish," even "dysfunctional." And this is just because they lack the idea of a reason—the sort of thing one explicitly names in justifying an action or the issuance of an imperative; the sort of thing that we name just after employing the word "because" after "why?" as discussed in II.B.

This sense of "ought" or "well ordering," of "propriety" or "right and wrong," lies behind the incumbency of those "preference-incumbent" normative distributional principles which figured importantly above. We know ourselves to be subject to these forms of "ought" even when our immediate impulses are "out of synch" with them. That is one reason why in growing to maturity we develop capacities of what we call "self-control." In keeping with these tendencies and capacities, we reflect on ourselves. We critique ourselves as if "from above," as if with "meta-," or "second order" selves. I find it helpful sometimes to view this reflective capacity metaphorically, as a sort of "third eye" with which we view and critique ourselves.

The form of self-reference involved in these capacities is familiar, of course, to modern logic and metamathematics, though oddly lacking, we shall see, in the formal "language" of SWFs.[107] It is also involved in all forms of normativity, not just the normative systems of logic and mathematics. It is even at the center of intentional action itself. And indeed, one influential theory of schizophrenia, Bateson's "double bind" account, diagnoses this disease itself as none other than a lack of the usual capacity to go "meta" in respect of oneself.[108]

Developing and acting upon these reflective capacities is part of what learning to live not only with others, but even to live intertemporally, is.[109] What we called recipient and beneficiary general principles are what we learn in the first, ethical connection. And what we called situational generality is what we learn in the latter, intertemporal connection. Learning to live in time is learning the preference-incumbency of situation-general reasons. Learning to live in time with others is learning the preference-incumbency of recipient- and beneficiary-general reasons.

Because we view ethical imperatives in particular as especially incumbent, we judge it important to inquire after and think through what their underlying principles actually are, and what they require of us.

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[107] *See* BERTRAND RUSSELL, THE PRINCIPLES OF MATHEMATICS (1903); Kurt Gödel *Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme*, 38 MONAT-SHEFTE FÜR MATHEMATIK UND PHYSIK 173 (1931); Alfred Tarski, *The Concept of Truth in Formalized Languages*, *in* LOGIC, SEMANTICS, META-MATHEMATICS (J.H. Woodger trans., 1956). *See generally*, Hockett, *Reflective Intensions*, *supra* note 19.

[108] *See, e.g.*, Gregory Bateson et al., *Toward a Theory of Schizophrenia*, 1 BEHAV. SCI. 27 (1956). The idea is that communication involves not only consciousness of objects discussed in a language, but of self-referential awareness of the acts of linguistic communication themselves. Lack of this capacity is said to account for communication failures, including in particular a blindness to irony. Bateson specifically cites Russellian "type" theory in elaborating his account. *See* BERTRAND RUSSELL & ALFRED NORTH WHITEHEAD, PRINCIPIA MATHEMATICA (1911).

[109] The relation between so-called "diachronic agency" and second order intentions, hence self-critiquing capacity, is of course central to much of Michael Bratman's recent and influential work in action theory. *See* BRATMAN, STRUCTURES OF AGENCY, *supra* note 92.

Normative legal theory and "policy analysis" are species of this general form of inquiry. We inquire what "we" ought to do as a polity, as a legitimate collective agent. And we do so precisely in order to determine the detailed contours of that "distributive propriety" discussed above in Part I: that form of propriety which draws the cut between bona fide welfare and generic satisfaction.

The preference-incumbency of our distributive principles springs direct from the incumbency of normativity's more general call upon all of us as individuals and as citizens who explicitly give reasons to one another and to ourselves for what we do. That is why we make explicit reference to them, and to their incumbency upon us, when we attempt to tell others what to do, or tell them why *we* do what we do. And it is why we refer to them regularly in normative legal theoretic prescription and disputation notwithstanding the absence we shall find, in Part III, of an argument space for these items in the "language" of SWFs as presently constituted.

The final point to be made before we move on is this: The discussion of ethical imperatives and their incumbency, hence of ethical prescription, dovetails almost immediately into a recognizable picture of *social and legal* prescription. To prescribe socially is to prescribe for society, in the name of society, by explicit reference and appeal to the same sorts of reasons as underwrite any form of prescription, but especially ethical prescription.

Why "especially" ethical prescription? Well, note first that for social or legal prescription to occur, there must be some coherent source—typically called "the state" or "the government"—able to "speak with one voice" on behalf of society by reference to such reasons. When it does so, we call the authoritative communications "edicts" or "laws."[110]

Now if the government in question is autocratic or "authoritarian," its prescriptions tend to be more "edict" than "law." They are accordingly apt to be in want of what we call "legitimacy." We find them in this sense "unlawlike." We think of these as governments of "men, not laws." In such case the prescriptions will tend for the most part to bear what we've called situational generality, hence be "principled" after a manner. But they are apt to be short on recipient-generality, beneficiary-generality, or both. They'll be more of the "one ought in general to satisfy my will" variety.

The agent equality ideal we found to underlie bona fide ethical principles seems straightforwardly to condemn social prescription of this

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[110] This picture of things seems familiar. Unless I have badly misread them, it's more or less the picture presented by such as H.L.A. Hart and Hans Kelsen. *See* H.L.A. HART, THE CONCEPT OF LAW (1961); HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (1947).

sort.[111] It recommends democratic governance of the equality-resonant "one person, one vote" variety. Many modern polities are constituted accordingly, with the agent equality ideal more or less self-consciously in mind—and indeed explicitly appealed to in justifications of legislation. Polities that manifest these ideals and standards are unsurprisingly called governments "of the people, by the people, and for the people."

Legal prescription in such polities tends in consequence to be in the nature of ethical prescription, bearing the form elaborated in II.B. It is likely, on balance over time, to possess a fair degree of recipient and beneficiary generality: It is as applicable to those who draft it as to those who do not and is often explicitly noted to be so. Such is, at any rate, the ideal toward which we strive. And such is the self-image we wish self-consciously to maintain. By the same token we decry "elitist" and "autocratic" governments as ethically wrongful and unlawlike—"illegitimate."

There is an obvious reason for all of this. It is that in a democratic polity our legal prescriptions give explicit expression to what we wish to think of as collective intentions—intentions "we" hold in respect of ourselves and the society we constitute. That way in acting in conformity with our laws, each of us is able to apprehend herself as acting in accord with her own will or intentions, at least with her own "better angels."[112]

But collective intentions are just widely shared intentions—intentions underwritten by shared reasons. And as we saw in II.B, it is precisely the ethical principles—those possessed of high recipient and beneficiary generality—that are most fully suited to constituting shared reasons.

In the limit, then, we might reasonably expect that social and legal prescription would just be ethical prescription—prescription conducted with explicit appeal to logically general ethical principles. But, as we likewise have noted, there is ever a gap between "is" and "ought." The preference-incumbency highlighted above, I suspect, just is the drive toward this asymptote. And normative legal theory and policy analysis are our collective response to that drive. They are our reckonings with the socially and legally prescriptive face of normative incumbency.

III.   PRESCRIBING WITH SOCIAL WELFARE FUNCTIONS

Our heaviest lifting now has been done. In this Part we turn to a brief consideration of how the apparatus of social welfare functions (SWFs) maps onto the constitutive elements of prescription as just elaborated. We should recall, as we do so, something emphasized early in Part II: Prescription is a species of linguistic-imperatival communication. It

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[111] At least absent some quite compelling practical reason for departure from the ideal.

[112] *See* THE FEDERALIST No. 10 (James Madison).

bears "outward" performative and "inward" logical properties that mark it off as distinct.

Insofar as it is to give full and explicit expression to prescriptive judgments or mandates, the apparatus of SWFs will possess counterpart features. In particular, a fully prescriptive SWF will purport to commend or command—as, for example, one might command by ordering someone to "maximize." And, as we've seen in Part II, it will do so by explicit reference to preference-incumbent principles that purportedly justify the commandment.

We shall proceed here with that question of "fit" in full view. We shall first briefly characterize the basic features of the apparatus of SWFs—what they are for, how they "mean," how we communicate with them, and the like. We shall then outline how SWFs are used to give would-be prescriptive expression to the value of individual preference satisfaction—what Parts I and II called the "substance" of welfare. We shall then outline how they are used to give such expression to distributive structure mandated by preference-incumbent ethical principles— what Parts I and II called the "form" of welfare.

Finally, we shall characterize how one might actually prescribe with an SWF—that is, how one might combine imperatival mood indication and principled "content" in the manner found by Part II jointly to constitute acts of prescriptive communication. We shall find that it is here that the apparatus as currently found is in want of some simple supplementation. Once we fill the gap, the prescriptive sterility of Paretian welfarism immediately surfaces in the dominant idiom itself. We find that only an ethically *fair* form of welfarism is consistent with prescription as distinguished from mere conscription or description.

A. The Formal "Language" of Welfare Functions

First, then, the "what they are" question. It is instructive to recognize the apparatus of SWFs as constituting a very simple formal "language," complete with a meaning-grounding semantics, a primitive syntax, and an underdeveloped pragmatics.[113] Like the formal language known as "deontic logic" noted briefly in Part II, SWFs for the most part are sufficiently supple to discharge the tasks for which they are employed.[114] One reason for this is that the tasks are for their part quite simple.

An SWF is just a means of giving precise expression to a quite basic idea. The idea is that some sets of circumstances might be better than or

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[113] For more on the concept of a "formal language" and the categories that fall thereunder, see Tarski, *supra* note 107 and JOHN LYONS, LANGUAGE AND LINGUISTICS (1981).

[114] *See* Adler, *supra* note 2 (providing a nice exposition and defense on this point).

preferred to other such sets in an individual's or society's estimation, on various explicitly nameable grounds. We call these sets of circumstances "states of the world," "state descriptions," "complete descriptions," "possible worlds," or something to the same effect. We distinguish such worlds one from another in turn by explicit reference to the mentioned nameable "grounds." And we then register a world's being better than or preferred to another by any of a number of related possible means.

Heuristically, the simplest such means is to assign numeric values to worlds. One world's receiving a higher number then indicates its "dominating" a world assigned a lower number. The real number system $\mathbb{R}$ is often the preferred scale. One reason for this is that the reals lend themselves to readily intuited graphical representation in Cartesian spaces. A further, albeit related, reason is that recourse to these spaces permits theorists to make use of techniques and results long established in mathematical analysis and linear algebra—Brouwer's Fixed Point Theorem or the Separating Hyperplane Theorem, for example—to prove certain consequences' following upon certain premises.

Once the reals are selected as scale, the derivation of welfare measures for worlds can misleadingly resemble the taking of sensitive readings of physical magnitudes. It might seem we're employing a detailed thermometer to measure something like temperature, for example. But it needn't be so and it usually isn't. When objections are raised in such cases to the effect that there is no singular magnitude to be "measuring," the theorist need only reply that the reals are used for convenience. They just "represent"—and this is indeed a term of art here—a subtle ordering relation of one kind or another.[115]

Theorists and analysts do become persnickety about numeric assignments when they wish to make finer distinctions, some of which indeed can be made. In such cases the enriched informational environment finds expression in group-theoretic restrictions placed on permissible transforms of formulae.[116] These need detain us no further, however, for our concerns and results are quite generally applicable. They are the same irrespective of how informationally "thick" or "thin" the environments thought to bear welfare-relevant characteristics might be.

Now as just suggested, SWFs grow sophisticated sometimes. One might then wonder why such heavy machinery would be employed for purposes as simple as those I first mentioned—representing some worlds as "dominating" other worlds. There are multiple reasons. But the one of most interest here is that SWFs afford capacity to represent, with pre-

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[115] *See, e.g.*, JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 135–43 (1996).

[116] *See generally* Claude d'Aspremont, *Axioms for Social Welfare Orderings*, *in* SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER 19, 19–76 (Leonid Hurwicz et al. eds., 1985).

cision, the fact that and the comparative degrees to which *distinct characteristics* of possible worlds—the valuational "grounds" mentioned in opening this section—render them superior to other such worlds in persons' or planners' estimations.

Such is what prompted Bergson to introduce the SWF device seventy years ago,[117] and Samuelson to fine-tune it several years later.[118] The aim was to afford means of taking *explicit* account of *every* constituent of value in a possible world.[119] There is accordingly an immediate link between the animating purpose behind the formal language of SWFs on the one hand, and Part II's repeated reference to explicit appeals to imperative-justifying reasons on the other. To formulate a prescription, per Part II, in the language of SWFs, per this Part, is to name the components of value that serve as justifying reasons underwriting the prescription.

Now, Bergson's expectation has been largely, if not yet quite fully, borne out. SWFs do offer the prospect of giving what theorists call "complete" expression to judgments of value. SWFs also afford the prospect of real precision in tracking the *comparative contributions* made to value by distinct kinds, or components, of value in possible worlds. But we shall see that one value-component found in Part II to be fundamental to prescription has yet to find expression in the SWF apparatus as currently employed. We shall come to see how by first treating of individuals' valuations of worlds, then proceeding to "social" such valuations and the expression thereof.

B. *Welfare-Functional Semantics: Substantive Precision*

It is easiest to flesh out the foregoing observations first by showing how SWFs give expression to the basic idea that a world's value or preferredness might ride upon multiple grounds or determinants. We shall start with the case of an individual person, then proceed to a society. For individual satisfactions, as we have noted above, constitute the ground level "stuff" of welfare, and individual satisfaction functions accordingly figure centrally in what theorists call the domain of arguments of an SWF. They are its principal "nouns," or "atoms," and an account of their significance accordingly provides a kind of preliminary "semantics" for SWFs.[120]

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[117] *See* Bergson, *supra* note 21.

[118] *See* Samuelson, *supra* note 21.

[119] *See id.*; *see also* Bergson, *supra* note 21.

[120] The semantics of a formal language are just the objects assigned as denotations to the most basic meaning-units, or "terms," of the language. To make such an assignment is to specify a "model" for the language in question. *See* Tarski, *supra* note 107. In the "language" of SWFs, individual preference functions typically figure as the basic such units, called "arguments" in this language. Because this "language" is a straightforward outgrowth of the more

Suppose, then, an individual named *i*, or "Eye." Eye values worlds in virtue of various features they bear. A sunny world is better than a cloudy one, say, and a cool one is better than a hot one in Eye's estimation. We can call such features *f1*, *f2*, *f3*, and so forth. We can call a world bearing such features *x*. We can then designate multiple such worlds *x*, *x'*, *x''*, and so on, and say they belong to a set *X* of possible worlds.

We also can say that when any such world *x* improves by virtue of any of its salient features *f*, then, all other such features being equal, Eye assigns that world a higher number. We then can say, finally, that Eye's "utility," or "satisfaction," or what ever, is higher in these higher-numbered worlds. We've then made the transition to using a substantive term—higher and lower "satisfaction"—to designate variability in respect of an adjectival or adverbial predicate—"more and less satisfied"—after the manner described in Part I in connection with "welfare" and "well."

Now in the functional notation imported from mathematical analysis into social choice theory, we represent the above as follows: We say that Eye's satisfaction is a "function" of states of the world. Representing Eye's satisfaction as, say, "*U*," derived from the venerable "utility," we then say that $Ui = U(x)$, which simply means that Eye's satisfaction functionally rides upon satisfaction-salient states of the world, *x*. To indicate that Eye's satisfaction is, more completely speaking, grounded in and hence a function of distinct *features* of worlds like *x*, we say something like this: $Ui(f1(x), \ldots fm(x))$. The multiple *f*'s simply designate multiple features or "satisfaction-grounds" that might vary in the degrees to which they are present or instantiated in various worlds.

Eye's preference function in this case is what an algebraist will call "composite." Eye's satisfactions derive not from worlds or states of the world "directly" or simpliciter, but via those features of worlds that matter to Eye and hence "ground" his satisfaction. Compositionality is often expressed thus: $U \circ f \circ x$. A simpler rendition is this one: $U = U(f(x))$. If one wishes to single out particular worlds, features, and persons, one simply indexes the letters with subscripts. This is where Eye's name— "*i*" —came from. It is an index for *U*. *Ui* is Eye's preference function.

And that is in essence the story here. For present purposes, we can call this a matter of welfare functional "semantics," after the fashion of Tarski.[121] Semantics just is the study of the role played by that which a

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or less structurally identical "language" of price theory, however, I shall "break open" individual preference functions here in order to facilitate grasp of the internal features of SWFs.

[121] *See id.* I find it intriguing, incidentally, that Kenneth Arrow was a research assistant of Tarski's. *See* ALFRED TARSKI, LOGIC AND THE METHODOLOGY OF DEDUCTIVE SCIENCES xiv (1941) (thanking Arrow in the introduction to the book for his proof-reading assistance).

substantive term—a noun, say—denotes, in affording meaning to larger meaning-units composed of such terms—sentences, for example. In the idiom of welfarist SWFs, the meanings of SWFs are rooted in the denotations of the component U expressions just rehearsed. Speaking of individual satisfaction functions U as supplying the "semantics" of SWFs is a way to give formal-logical purchase to a suggestion I have repeatedly made now: that individual satisfactions constitute the ground level "stuff," or "substance" of welfare. On now to its form.

C.   Welfare-Functional Syntax: Distributive Precision

Logicians and linguists refer to the contributions made to phrase or sentence meaning by structure—the *arrangements* of multiple meaning units—as "syntax" or "logical form."[122] In light of what we noticed in Parts I and II about the role of explicitly nameable distributive structure and logically general ethical principles in constituting welfare and prescription, it is helpfully suggestive to think about the way SWFs give expression to distributive structure as supplying the basis for a primitive prescriptive "syntax" of SWFs. At least this is so insofar as a legal theorist seeks to frame prescriptions—which, recall, are communicative actions—by means of them.

Here is how the syntax works in this case. We noted above that an individual's satisfaction function might be multivariate insofar as it values worlds x by reference to multiple distinctly nameable features f of those worlds. Now suppose Eye, up above, had valued worlds partly by dint of hours of sunshine, and partly by dint of cool temperatures. Suppose also that among the worlds available for Eye to inhabit, you don't get cool temperatures unless you limit the hours of sunshine. Eye is then faced with a tradeoff. At some point he might decide he is willing to forgo a bit of sunshine in order to bring the temperatures down.

The rates at which Eye is willing to trade features of worlds off against one another are what price theorists call his "marginal rates of substitution" between features. These constitute "exchange rates" or "price ratios" of a sort. In valuing possible worlds, Eye must decide how warm a world must get before he'll trade it in for another world with a bit less of the sunshine he likes, in hopes of getting a bit of cool evening's sleep. If you've taken a microeconomics course at some point, this is likely familiar to you. If you haven't, I trust you can see that it's not a terribly sophisticated idea.

Now if Eye values worlds in virtue of additional features besides temperature and sunshine, he'll eventually do well, if he's able, to derive

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122 See Tarski, *supra* note 107; *see also* RUDOLF CARNAP, THE LOGICAL SYNTAX OF LANGUAGE (1937); NORBERT HORNSTEIN, LOGICAL FORM (1995).

multiple sets of exchange rates like that between sunshine and coolness. He might even look for a numéraire and develop an index—a price index—to which he can reduce all of these varyingly valued features of worlds. He'll be looking to do what we do with money and the various goods that we treat as comparable in "dollar value" terms.

Were price theory our subject, this form of index-construction would be our "syntax," and the features f of worlds x would be our "semantics." But "social welfare" rather than price theory is our subject, so now we shall "ascend" one semantic "level,"[123] taking the satisfaction functions of people like Eye as our semantics and our society's "distributive structure" as our syntax. On then with the "ascent."

We shall suppose now that Eye gets a new name and new job, along with a case of amnesia. He begins calling himself "All Seeing Eye." We shall call him "Ace" for short. Ace thinks like a sort of god, and does not at the moment remember having ever been earth-bound. He's not a free-floatingly indifferent god, however: He still differentially values worlds. But he's a benevolent god.[124] Ace is so benevolent that he values worlds only in keeping, in some yet-to-be fully specified sense, with the way lesser creatures like Eye value them. That means that he is a strict "welfarist" of the sort described in Part I. He doesn't intervene directly to change worlds, however. He's no Zeus or Poseidon. He only tells government functionaries what they must do in light of what he, Ace, learns through data-collecting about how people like Eye value possible states of the world.

Now Ace is faced with a question not unlike that faced by Eye in valuing worlds pursuant to a multivariate satisfaction function. Eye had to arrive at marginal rates of substitution between features $f1$ and $f2$ in order to develop a scalar index along which to value multiple possible worlds. Ace has to do much the same thing in respect of the many variously satisfied people who shared the world with Eye.

Once you begin thinking about it, it quickly comes to look as if Ace in this picture, who wants to maximize "aggregate satisfaction" in the world much as Eye wished to maximize his own satisfaction in the world, will have to work out a schedule of tradeoffs. If a certain succession of possible worlds x', x'', x''' makes Left Eye increasingly happy and Right Eye increasingly sad, for example, Ace might hope to find some "optimal" world bearing this feature: The "degree" by which Left Eye would be made more happy if this world were changed "just isn't

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[123] "Semantic ascent" is Tarski's term. *See* Tarski, *supra* note 107.

[124] You might have noticed that the "ben" in "benevolent" is the "ben" in "benefit," and in the Latin "bene"—good—from which the term "welfare" adverbially derives. *See* 20 OX-FORD ENGLISH DICTIONARY 108 (2d ed. 1989) (noting welfare comes "from the verbal phrase *wel fare*" and providing one definition for the term as "the general good").

worth it" because it would make Right Eye so very much more sad. Ace will in such case look for a manner of "social welfare index" rather as Eye looked for a price index.

Formally, we describe what Ace is now doing this way: Using the functional notation employed earlier in connection with Eye, we say that Ace believes that $W = W(U1(x), \ldots Um(x))$. Here "$W$" just means aggregate welfare, and the functional expression simply means that the aggregate welfare of any world x is a function of the satisfactions U of all people like Eye in that world.

Were Ace a monocrat or elitist of the sort mentioned in II.C, he might let all ride on Eye or Eye's friends. Were Ace an animal rights advocate, he might try to add critters' satisfaction functions as well, though he might have to do a bit of imaginative satisfaction-imputing. "Extended sympathy," he might call it.[125] And were Eye in part a "perfectionist" or "fetishist" after the manner described in Part I, he might add other things too. To keep things simple, however, we shall just assume Ace is a democratic humanist—or what Samuelson would call an "individualist."[126]

Now if Ace wishes to maximize the satisfaction aggregate, the task he faces is formally identical to that which Eye faced. He even faces a resource constraint analogous to what would have been called Eye's "budget constraint." It's just that in Ace's worlds, the salient "features" are individually nameable persons' satisfactions in those worlds. The function W is an SWF. It is benevolent Ace's godly utility function.[127]

Now, what does this have to do with the "distributive structure" and "ethical principles" discussed in Parts I and II? Simply this: There are various ways—infinitely many, in fact—that Ace might comparatively "weight" the satisfactions of persons like Eye who figure into his SWF. If Ace is left-leaning, for example—as any truly benevolent god surely is—he might count Left Eye's satisfactions in possible worlds ten times as heavily as Right Eye's. Then if an increment of lost satisfaction on the part of Left Eye is to be tolerated, it will only be because that loss purchased a delirium's worth of joy for Right Eye. Working out trade-offs like this is working out how satisfaction-inputs are going to be distributed as between Right Eye and Left Eye.

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[125] *See* Kenneth J. Arrow, *Extended Sympathy and the Interpersonal Comparison of Utility*, 67 Am. Econ. Rev. 219 (1977).

[126] See Samuelson, *supra* note 21, at 231. This just means that he counts all persons' individual satisfaction functions.

[127] This might all seem a bit fanciful, but things actually have been treated more or less after this fashion. Ace is rather like Harsanyi's "Impartial Observer," although he has not yet selected an aggregation rule as Harsanyi's putatively utilitarian observer did. *See* Harsanyi, *supra* note 83.

Ace might weigh different persons' satisfactions differently on all sorts of differing bases. The pleasure that Right Eye derives from lying about on his back, scratching himself and insulting his wife, or from cleaning his gun, pulling the wings off of flies and watching Fox News, for example, might count for nothing. Let's hope so. The pleasure that he and Left Eye both take in political participation, on the other hand, might count for much. Or, if Right Eye is mentally or otherwise ill or handicapped, Ace might show a special "prioritarian" solicitude by way of compensation for his bad fortune, perhaps weighting all or some of his few satisfactions more heavily in consequence.[128] Again, there is any number of ways to weighqualitatively and quantitatively speaking alike.

We call the fully specified set of weighting arrangements for any SWF its "aggregation rule." And I trust it is more or less obvious now what this might have to do with Part I and Part II's distributive structure and explicitly articulated ethical principles. In essence, how Ace weights differing persons' individual satisfaction functions in computing a social welfare aggregate will determine who Ace thinks should receive what scarce resources in what amounts. It will, in other words, determine the legally mandated distribution of entitlements. For "resource" here just means all "inputs" to individual satisfactions—the "substance" of welfare—which constitute the "stuff" of legal prescription.

Any SWF's aggregation rule, then, is its distributive structure. It is "internal" to the SWF just as Part I found distributive structure to be internal to welfare and social welfare alike, and just as Part II found specifiable preference-incumbent distributive-ethical principles to be internal to prescription. It is accordingly as constitutive of the SWF as are the so-called "argument" variables U that figure within the parentheses above—just as, again, we found distributive structure, or form, to be as constitutive of welfare and prescription as was the "substance" of individual satisfaction.

The SWF's aggregation rule, then, corresponds in a straightforward way to the resource-distributive structure "on the ground" that will be recommended for a society if the SWF is used to frame prescription in that society. The rule exhibits in precise, abstract form, what people are to be treated as entitled to, hence what laws in keeping with what the SWF prescribes will entitle them to.

Many such distributive structures have been recommended through history. The best known SWF, for example, is probably the classical utilitarian one. This one derives social welfare from individual satisfaction functions alone and weights everyone's function equally. Some util-

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[128] There is a rapidly growing literature on so-called "prioritarianism." *See, e.g.*, Derek Parfit, *Equality or Priority?*, The Lindley Lecture (Department of Philosophy, University of Kansas, 1995) (initiating discussion of "prioritarianism").

itarians used to say that this meant they were egalitarian welfarists,[129] but we shall see in Part V that this is a plausible claim only if it is sound to identify persons with their utility functions. If they're agents, it isn't.

Ace can also be welfarist without being a utilitarian, of course. If he differentially weights individual satisfaction functions, for example, he'll depart from the utilitarian aggregation rule. What sort of weighting would be most in keeping with the logical properties of ethical principles as derived in II.B, so as to lend an SWF to social prescription as characterized in II.C? I shall defer a full answer to Part V. By now you will not be surprised, though, to read that it is a weighting in keeping with the agent equality ideal. Stay tuned.

Now note that, per our discussion in I.A, Ace can also be welfarist without being a "strict," Paretian welfarist. If he permits social welfare to vary in response not only to individual satisfactions, but to things like beauty and truth as these are realized and discovered in the world, for example, he'll be a sort of mixed welfarist—perhaps a beautiful and truthful one. And if he tosses out individual preference functions altogether while keeping beauty and truth, or while seeking to maximize the number of blonde heads or high foreheads, he'll be what Part I identified as either a "perfectionist" or "fetishist" of one sort or another.

In the mixed case Ace will of course have to figure exchange rates between happiness and truth or whatever. In the perfectionist and fetishist cases, he'll have to do the same if there are multiple goods or fetishes. That will involve something like "distributive structure" as well, of course, but it won't be distributive structure of the sort that Parts I and II found ethically interesting. We won't worry about them, then.

It is worth recalling in this connection, however, what we noted at the end of I.A.2 about the number of factors additional to individual satisfactions that might be taken for determinants of social welfare. We observed that the minimal number is not zero, but one. We saw why that is the case both there in Part I and then in Part II: To prescribe, we require explicit appeal to specific distributive principles that are incumbent on preferences—principles that draw a cut between welfare on the one hand and generic satisfaction on the other, and that in the articulation distinguish prescription from mere conscription.

How is this requirement satisfied in the "language" of SWFs? How, that is, is what Parts I and II called the prescriptive *incumbency* of appropriate distributive structure upon preferences given what Bergson, Samuelson, and other welfare economists would call "full," "explicit," or "complete" expression? The answer requires we treat SWFs under a fi-

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[129] *See e.g.*, HARE, FREEDOM AND REASON, *supra* note 7.

nal remaining linguistic category: that of so-called "pragmatics," the study of languages' actual use in particular acts of communication.

D.   Welfare-Functional Pragmatics: Prescriptive Completion

You might suppose that the answer to the last question just raised is supplied by the fact that Ace is a god. After all, he's commending his SWF from on high as a frame for policy to government functionaries below. So the distributive structure manifest in his SWF's aggregation rule arguably just is the god-given, hence the "incumbent," distribution principle. It is incumbent in the way that the medieval "voluntarist" philosopher-theologians, people like Ockham and Scotus, viewed "the will of God" as incumbent. Theirs was a God who conscripted His subjects.[130] He didn't have to "state reasons" or "give an account of Himself." He was a non-Hellenic Nike.

But what if Ace isn't really a god? What if Ace isn't in fact All Seeing Eye but is just Eye, another gal or a guy, like you—I presume—and I? And what if he's not up above but is positioned, like the rest of us, down here below? Won't he then have to prescribe by explicit reference to nameable, preference-incumbent ethical principles in the way that we saw in Part II? Won't that be necessary, at least, if he's not throwing lightning bolts or holding a gun to our heads?

Let's run with this. We shall assume Eye is a well-grounded human being again now, but is not simply a preference-holder. He is that, to be sure, but he's also a self-reflective prescriber, a prescriber here on earth. That means he's like us. For we too are both holders of preferences and principled prescribers, both individually and collectively as citizens.

How now will Eye name and register the preference-incumbent ethical principles that justify his SWF's distributive structure-mandating aggregation rule, if he isn't a god or a dictator who just *makes* his distributive principles incumbent by issuing conscriptive commands? How will he prescribe, in the words of Part II, "by explicit reference" to ethical principles that underwrite and justify his imperatives? How will he name and refer to those principles, or at the very least register their availability and incumbency?

This is a question, in part, of what linguists call "pragmatics." It is a question of what one must do to ensure that he's fully understood when the communicative context—brief articles in professional journals—is sufficiently thin as to require explicit articulation.

Supplying an answer to this question requires we recall something that I have said several times now in this Part: The SWF is meant to give what analysts call "complete" and "explicit" expression to value judg-

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[130] *See* Hockett, *Reflective Intensions*, *supra* note 19 (discussing this history).

ments—the judgments to which one commits by dint of prescribing.[131] This word "complete" and its variants have been with us since the start of the Bergsonian program.[132] The idea is that *all* that adds or "grounds" value, all that renders a world better pursuant to the particular tastes manifest in an individual preference function or in a social *ethic* that finds expression in an analyst's SWF, is to be given expression in the particular function.

In effect, this is the welfare economic counterpart to what we discussed throughout II.B: the matter of explicitly justifying imperatives— and hence answering the inevitable "why?" question—by explicit reference to preference-incumbent reasons. It was a good idea. Has it been effected?

In Part II we observed that seeking, finding, naming, and acting upon the right principles—principles that always imply distributions—is itself taken for valuable by anyone who thinks normatively or prescribes. We noted also that this form of valuing is distinct from the valuing involved in simple preferring, since seeking an "ought" is seeking something incumbent upon such preferring—something one takes it for "right" to prefer. Finally and more generally still, we noted in Part II that the act of explicitly prescribing always involves explicit reference and appeal to such preference-incumbent principles.

None of this is registered in the strict welfarist SWF considered above. That registers only preferences, not principles, the value of ascertaining these principles, or the preference-incumbency of such principles. It includes, in other words, no space for reasons. It does not make explicit, "in writing," what anyone actually speaking would have to reply if asked "why?" upon issuing an imperative. How would we register that in the "language" of SWFs? How would we make reference and "explicit appeal" to preference-incumbent reasons in a manner that can make a bona fide social or legal prescription of an imperatival communication?

Here's how I do it: I just use a dot. I set down the same functional expression set down above, but add a dot, yielding this: $W = W(\bullet, U1(x), \ldots Um(x))$. The dot simply registers that "minimum of one" noted above in I.A.2, which must be added to satisfactions if our SWF is to give "complete" and "explicit" expression to a *prescriptive judgment* rather than merely heaped preferences. It is an explicit reference to or argument space for the explicitly nameable value added by those preference-incumbent principles that determine the SWF's aggregation rule itself.

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[131] This form of commitment is a counterpart to Brandom's "discursive commitment." *See supra* note 14.

[132] *See, e.g.*, Bergson, *supra* note 21, at 310; Kaplow & Shavell, *Non-Welfarist Method*, *supra* note 2, at 282.

This is a kind of reference that formulators of SWFs themselves of course typically make, in ordinary language,[133] when advocating adoption of this or that aggregation rule for an SWF. The dot or some equivalent denoting expression seems the only way to do that kind of referring, in turn, *within* the language of SWFs. For the primitive syntax and semantics of SWFs are such as to register values only by assigning possible worlds higher rankings in virtue of those values' instantiations. "This is how we do it."[134] We do it with the addition of a value to the SWF's domain of arguments—the domain of named values. Since, per Part I, the value of preference-incumbent principles is as constitutive of veritable welfare and social welfare as is that of preference-satisfaction itself, a fully specified, complete, and explicitly prescriptive SWF must name that value as well. The dot stands in for this.

Now, you can interpret the dot in various subtly differing ways, all of which come to more or less the same for present purposes. It might register and thus underwrite explicit reference to the value of *seeking* the right SWF. Or it might register and thus underwrite explicit reference to the value of *having found* the right SWF. I like to think of it as registering the value of having found *this SWF itself*, the one in which the dot appears, as the *right* or *correct* one. For we *must* take our SWF this way if we're to treat it as worth *advocating*—that is, as fully prescriptive because underwritten by explicitly named preference-incumbent ethical principles, and as "complete" in its registration of all that goes into making worlds indeed "better."[135]

Note further here that you even can "weight" the dot *minimally* if you like in comparison to the *U* functions with which it shares argument space. You can take it for meaning something as little as this: All else being equal, this SWF treats a world as better for its—this SWF's—own discovery and deployment in that world. I call this ceteris paribus rendition of the dot "minimal incumbency." Those who actually argue for their SWFs, I think, effectively commit themselves to something more than merely minimal incumbency: The more vehemently you argue, in fact, the less minimal the incumbency you view your SWF as rightfully possessing. But I shall settle for minimal for now. It's all that I need.

The self-reference brought into the SWF by the dot neatly enables it to mirror that self-reference in which we ourselves engage when we inquire of ourselves what we ought to be doing and how well we measure

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[133] Or "in the metalanguage," as Carnap or Tarski might put it. *See* CARNAP, *supra* note 122; Tarski, *supra* note 107.

[134] Forgive me. The allusion is to Montell Jordan, "This is How We Do It" (1995), *available at* http://www.youtube.com/watch?v=AYIPlDjUGYo (last visited May 8, 2009).

[135] It is a striking fact that not one person identifying himself as a "welfarist" of today's kind has yet advocated on behalf of a particular SWF with a particular aggregation rule.

up.[136] It's sort of a symbol for what I called metaphorically in Part II our "third eye"—our capacity for and tendency toward self-examination, self-criticism, and self-betterment. It also nicely captures the earlier noted self-reference involved in intentions themselves—the fact that to intend to do something is to intend to do it pursuant to the intention itself, rather than just to hope it might "happen" somehow. That's something particularly worth capturing given that a prescriptive SWF is meant to frame and give formal expression to a would-be collective intention per II.C.

I think that Paretian strict welfarists have missed all of this because they have in a certain sense missed themselves: They have spoken of SWFs as if All Seeing Eye had delivered them from outside of the world, apparently forgetting that it is people like Eye who construct them right here in the world—here where the right SWF is first sought and then found and then argued for and acted upon, all with a view to preference-incumbent principles. Since we do that here in the world, we take the world to be better for our doing it.

The betterness here is quite type-distinct from that of mere preference-satisfaction, as noted in II.C. It is of a different order: the order of principles incumbent on preferences—the sort of thing you argue for rather than merely demanding submission to. It is an order that accompanies you the moment you move from an individual preference function articulated in terms of goods and services, to a social welfare function articulated not only in terms of individual preference-functions, but also in terms of the preference-incumbent principles that determine distributive structure.

As we observed in Part II, you can call such preference-incumbent distributive principles "second order" or "meta-" preferences if you like, just as we saw in Part I you can call licit and illicit satisfactions "Fred" and "Ginger" if you like. But then you have still registered the type-distinction—"first" as distinguished from "second"—while functions without dots do not do this. The dot thus *completes* the functional notation in a manner permitting its registering all value commitments, and registering the aforementioned "semantic ascent" from mere preference functions to full social welfare functions. It thus fills a critical gap—a gap whose filling is as critical as are we when we examine ourselves with a view to what we ought to be doing, how we ought to be distributing, and how we measure up.

But isn't the relevant incumbency already registered in the aggregation rule itself? Doesn't this "show" the relevant incumbency, as Wittgenstein might have put it, so that it is unnecessary and perhaps even

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136 *See supra* Part II.C.

nonsensical to "say" it?[137] Nope. For there is nothing to register the
prescriptive nature of the aggregation rule. One can always quickly fash-
ion, ex post, an aggregation rule that matches most any set of distributive
facts on the ground, just as one can quickly formulate a Dirichlet-style
"arbitrary function" to match virtually any graph.[138] This would be de-
scriptive not prescriptive—unless, say, you were normatively arbitrary in
the manner of Pareto or Pope's *Essay on Man*, blessing everything after
the fact and making it your maxim that "whatever is, is right."[139] And
even the latter would be, so to speak, more postscriptive than prescrip-
tive. If you're explicitly prescribing, we saw in Part II, you must explic-
itly name—refer to—your justifying principle. And names go into the
argument domain. The dot is a placeholder for all such names.

     You arrive at this same conclusion, incidentally, if you ask where
the particular aggregation rule found in an SWF *came* from: Did the ana-
lyst simply impose it after flipping a coin? If so, what's prescriptive as
distinguished from merely descriptive or conscriptive—in Part II's par-
lance—about that? Would such an "analyst" be anything more than a
Cartesian trickster god? If on the other hand the analyst arrived at this
aggregation rule by principled means, where are those principles' names,
and where is the incumbency of those principles upon even his own pref-
erences registered in this would-be "explicit" and "complete" expression
of valuational judgment? How and where does he "make reference" to
them in the language of SWFs themselves?

     Perhaps you will speculate—implausibly, but never mind—that the
analyst just held a vote among people like Eye as to what the aggregation
rule should be. Very well, then, who determined the aggregation rule
used to weight the *votes*? Was that voted on too? Clearly we're off on
an infinite regress. And as the same fellow who brought you the say/
show distinction referenced above also once said, the real problem with a
regress is not that it has no end: It's that it has no beginning.[140] There's
no ground for it.

     All right, then, how about "Max" placed before the SWF? Doesn't
this register the necessary prescribing, rather as " " does in deontic logic
when placed before an action-description? Again no, for two reasons:
First, it is ambiguous as between prescribing maximization and merely
describing it. And second, even if we stipulate that it is to register a
command—the command to "max"—there is again no reason to see this

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[137] *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, Proposition 4.121
(1921).

[138] *See, e.g.*, HAL VARIAN, MICROECONOMIC ANALYSIS 333–35 (1992); *see also* Hockett,
Reflective Intensions, *supra* note 19 (providing more on Dirichlet functions).

[139] ALEXANDER POPE, ESSAY ON MAN, FIRST EPISTLE (1732).

[140] *See* LUDWIG WITTGENSTEIN, ZETTEL 693 (1984).

as a prescription rather than an attempted conscription, in Part II's parlance. There is no reference to any justifying principles. There is not even a name-space for them as yet.

The name-space has to be there, and something must fill it. After all, in keeping with the lessons of Part II, *on what grounds* is the analyst telling you to "max" his SWF? If it is merely his preference, then there is no prescription, only conscription. He is effectively Arrow's "dictator."[141] If by contrast the grounds are impartial ethical principles that the analyst views as incumbent even upon him, his would-be value-complete and explicit SWF must register those principles and that incumbency if it is indeed to be complete and explicit and thus suitable for prescribing "by reference" to principle. And this is just what my dot does. In simple formal languages, "to be is to be the value of a variable," quoth the oft-quotable Quine.[142] In the idiom of SWFs, the variable that registers the value and being of incumbency is the dot.

In order actually to formulate prescriptions, then, an SWF must add at least one value additional to individual preference functions to its argument domain. I register this fact with the dot. We shall now see that this dot—hence the ethical principles and prescriptive incumbency that it registers—shows something about Paretian welfarist SWFs that their advocates have missed along with themselves and the dot.

IV.   The Impossibility of Strictly Welfarist or Paretian Prescription

We are now situated, conceptually and formally alike, to prove very quickly the deep incompatibility of strict welfarism and Paretianism with social and legal prescription.

A.   *Here's Proof: Two Impossibility Results*

This will be our set-up. We shall assume that the world is essentially as it is now, with its current set of inhabitants. We shall assume also that the world can be changed in various ways, and that any time a change is made there is a new "state of the world," or "possible world," that has been realized.

Finally, we shall assume that there is a legal theorist or policy analyst somewhere in this world evaluating possible states of the world. Now suppose that the analyst plans to communicate the results of his analyses in the form of principled prescriptions made to government functionaries or others who can act to affect the world. He plans to do

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[141] *See infra* Part IV.C.

[142] *See* W.V.O. Quine, From a Logical Point of View 15 (1951).

so, moreover, in the compact idiom of SWFs. I claim that his SWF cannot be exclusively preference-regarding or consistently Paretian.

1.   Prescription vs. "Welfarism": Preferences Alone Do Not Prescribe

Recall that an exclusively preference-regarding, or "strict welfarist" SWF assigns real number values to possible worlds solely on the basis of number values assigned the same worlds by the individuals whose preference functions figure among its arguments.[143] But this entails that there can be no two worlds deemed equally preferred—that is, assigned the same real numeric value—by each of those individual preference functions, while not being deemed equally preferred by the SWF. As go the first-order preference functions, so goes the SWF. For there is nothing but individual preference functions of this sort in the SWF's domain. In the idiom of Part III, there is not even a "dot" in addition to those.

Next recall, per III.D, that a prescriptive SWF includes at least one value additional to individual preference functions among its arguments: It also values the incumbency of those principles that have gone into its construction and which ultimately warrant what it is itself employed to prescribe.[144] This can be strong incumbency, middling incumbency, or even minimal incumbency. But some degree of incumbency will be valued at least in the sense that, all else being equal, the prescriptive SWF will assign a world a higher numeric "score" if the SWF itself has been found in that world. The SWF accordingly includes at least one "dot" among its arguments.

But this means that there can be two worlds as between which each individual whose preferences are counted in the prescriptive SWF is indifferent, but as between which the prescriptive SWF is not itself indifferent. For the analyst employing the SWF is not thus indifferent, in her capacity as, not merely a preferrer, but also now a prescriber. All else—in particular, each counted individual's preference satisfactions—can be equal in these two worlds, with the prescriptive SWF then "breaking the tie" in virtue of its or its animating principles' being incumbent in one of those worlds and not in the other. And this in turn means that the prescriptive SWF is not, after all, exclusively preference regarding. It is, rather, *both* preference regarding *and* incumbency regarding. It has express regard both to preferences and to preference-incumbent principles.

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[143] Formally, taking *X* for the set of possible worlds and *x, x', x''*, etc., for its members, there exist no *x, x'* ε *X* such that $Ui(x) = Ui(x')$ for all *i* and yet $W(x) \neq W(x')$.

[144] Formally, it is of the form described *supra* Part III, bearing a "dot": $W(\bullet, U1(x), \ldots, Um(x))$.

2. Prescription vs. Paretianism: Principles Bound Preferences

Now Pareto: First let us call an SWF "Paretian" if and only if it satisfies one or more of the Pareto conditions specified above in I.B. It is Paretian, that is, if and only if it satisfies indifferentist (PI), weak (WP), or strong (SP) Pareto.[145]

Next let us suppose, arguendo, that there exists at least one indefinitely divisible resource or profile of such resources such that, if each individual whose preferences are counted by our preference regarding SWF receives an increment more of it in one world than in another, then, all else being equal, each such individual deems the first world preferable to the second.[146] We are supposing, that is, the existence of at least one "normal good" for each individual whose preferences "count" in our SWF.[147] I shall accordingly call this "the normal good supposition."

Finally, let us call an SWF "consistently" Paretian if and only if it is Paretian as defined above and, any time that the normal good supposition holds, the SWF also is at least weakly continuous and monotonically increasing in each individual's allotment of the normal good in question.[148] Less technically put, that is to say that a world's value per the SWF is bumped up a bit any time anyone gets a bit more of something she likes a bit—a half inch of dental floss to add to the compost heap, perhaps, or maybe a grain of sand to toss into the birdcage for the budgie.

What is the significance of consistent Paretianism in this sense? It is this: First, a consistently PI SWF will represent the world as unambiguously improving or worsening only insofar as it gains or loses—even infinitessimally—in the quantum of "normal good stuff" that it contains. This will be so irrespective of any accompanying loss or gain in respect of some other value not itself among the normal goods in question— including, for example, the incumbency of this SWF itself.[149]

Second and relatedly, consistently WP and SP SWFs for their parts will not "trade off" so much as an infinitessimally small increment of gain in the resources supposed per the normal good supposition. They will not do so whether the traded increment of forgone gain is divided over everyone (WP), or would have gone to but one person (SP). It will

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[145] Formally, either PI holds of W, i.e. $\forall\ i\ \varepsilon\ N$; $x, x'\ \varepsilon\ X$: $Ui(x) = Ui(x')$. $\supset$: $Wp\ (x) = Wp\ (x')$; or WP holds of W, i.e., $\forall i\ \varepsilon\ N$; $x, x'\ \varepsilon\ X$: $Ui(x) > Ui(x')$. $\supset$: $Wp\ (x) > Wp\ (x')$; or SP holds of W, i.e., $\forall i\ \varepsilon\ N$; $x, x'\ \varepsilon\ X$: $Ui(x) \geq Ui(x')$ & $\exists i\ \varepsilon\ N$; $x, x'\ \varepsilon\ X$: $Ui(x) > Ui(x')$. $\supset$: $Wp\ (x) > Wp\ (x')$.

[146] Formally, taking $ri\ /r(x)$ for each person i's allotment of r in world x, and $ri\ /r(x')$ for i's allotment of r in world x', we have $\forall i\ \varepsilon\ N$: $ri\ /r(x) - ri\ /r(x') = \varepsilon$. $\supset$. $\forall i\ \varepsilon\ N$: $Ui(x) > Ui(x')$.

[147] Normal goods are simply those of which it is true to say "more is better."

[148] Formally speaking, "weakly" continuous here means simply that if $ri\ /r\ (x) > ri\ /r\ (x')$, then there is a neighborhood $V(ri\ /r\ (x'))$ of $ri\ /r\ (x')$ all of whose members $ri\ /r\ (x)$ exceeds.

[149] The obvious link with "welfarism," noted *supra* Part I and just found to be incompatible with social prescription, will be seen again below.

not do so in return for any gain, no matter how large, in respect of some other value valued by the SWF, again including the incumbency of this SWFs itself.

Even the existence of a very robust, universal commitment to or endorsement of the normative principles that have prompted and determined this SWF's design on the part of those whose preferences the SWF counts, for example, will not be deemed by the consistently WP or SP SWF to outweigh an infinitesimal increase in the quantum of the normal good—for example, the addition of a spoonful of ice-cream to the world. And this will be so whether the spoonful of ice cream is divvied up among all 6 billion people in the world or is added as a bonus to Dick Cheney's next Halliburton dividend.

It is now easily shown that no prescriptive SWF can be consistently Paretian. There are three cases to consider: First, in the case of PI, it is long established that when we restrict the domain of a preference regarding SWF to a particular profile of individual preference functions, weak transitivity and Pareto indifference jointly entail the SWF's being what in A just above we called *strictly* preference regarding.[150] Here we are indeed restricting attention to a particular profile of preference functions— that of those now in the world whose preferences our SWF is "counting."

We have also assumed at least weak transitivity by dint of the definition of "consistent" Paretianism above, for weak continuity and monotonic increasingness per that definition entail it. So our consistently PI SWF is exclusively preference regarding. But we saw in A just above that no prescriptive SWF is exclusively preference regarding. So no consistently PI SWF is prescriptive. This is the link between PI and strict preference regard, incidentally, that we found a "hint" of above in I.B on grounds of the definitions of PI and strict preference regard themselves.

The next case is that of WP. We know from the definition of strict preference regard that if an SWF is not exclusively preference regarding, there can be two states of the world between which all individuals whose first-order preferences count in that SWF are indifferently satisfied, but to which the SWF assigns distinct values. (An example was the SWF's valuing one world more highly when, ceteris paribus, the SWF was itself incumbent in that world.) Now suppose a particular such function *F* which is weakly Paretian, and a pair of possible worlds *W1* and *W2*, such that all individuals whose first-order preferences "count" in *F* value *W1* and *W2* equally, while *F* values *W1* more highly—perhaps because *F* itself is robustly incumbent therein.

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150 *See, e.g.*, A. K. Sen, *Social Choice Theory*, *in* 3 HANDBOOK OF MATHEMATICAL ECONOMICS 32 (K. Arrow & M. Intriligator eds., 1986).

Next suppose a world *W3* which is identical to *W2* in all respects save one: There is a miniscule increase ε in the amount of the normal good—ice cream, dental floss, or grains of sand, say—available in *W3* for each individual whose first-order preferences count in *F*. Everyone receives a jot of the preferred item. This entails that all counted individuals will assign *W3* a marginally—quite marginally—higher value than *W2*. ("A fleck more of ice cream? Sure, what the heck, I suppose that is at least *somewhat* better.") And since those individuals value *W1* and *W2* equally, they will of course also assign *W3* a marginally higher value than *W1* as well.

Now observe that, granted weak continuity and monotonicity in the normal good profile per the normal good supposition, there is some *å* sufficiently small that our putatively WP SWF, which we assume not necessarily to be exclusively preference regarding, will rate *W1* more highly than *W3*. That is to say, at some point the ice cream flecks become so tiny and negligible—ε will become so small—that our SWF will rate the world in which its own animating prescriptive principles have been sought, found and acted upon—that is, in which they are incumbent—more highly, notwithstanding the absence of the miniscule ice cream flecks, than it will rate the world with the miniscule ice cream flecks notwithstanding the want of incumbency of the SWF's own animating principles in that world. There is *some* degree of incumbency so large that it will eventually trump *some* sufficiently small ice cream flecks.

But then *this* means that there is some ε so small that *F* will rank *W1* marginally more highly than *W3*, while the individuals whose first-order preferences count in *F* will have ranked *W3* marginally more highly than *W1*. And that violates WP. So a strictly WP SWF will have to relinquish its non exclusive preference regarding if it is to remain WP. It must be *exclusively* preference-regarding to remain consistently weak Paretian. But as we saw above in B, in relinquishing its non exclusive preference regard it will relinquish its prescriptivity.

That a prescriptive SWF cannot be *strongly* Paretian—SP—now follows trivially: Note first that SP entails WP; any strongly Paretian SWF also is weakly Paretian. But that means that it also is non-prescriptive, since we have just found that WP excludes prescriptivity. SP entails WP entails no prescription, so SP entails no prescription.

All cases having been considered, we see then that not only can no exclusively preference regarding SWF prescribe, but no consistently Paretian SWF can prescribe either. This too, like the case of exclusive preference regard, is unsurprising once we reflect upon just what prescription and Paretianism amount to. Why have we not thus reflected till now?

B.   Why Was That Surprising?

I am guessing that you might think there must be a trick or a catch in there somewhere. If it is that easy to show that strict preference regard and consistent Paretianism are inconsistent with the incumbency of normative principles and hence prescription itself, how can this have been missed for so long?

I think there are two kinds of reason that answer this question. One is a family of mutually reinforcing initial conflations. The other is a set of circumstances that have allowed the conflation to go undetected. I shall take them in that order.

1.   "Is" Ain't "Ought" but "Ought" Sure Is

The initial error is simply that "Original Sin" noted in Part I in connection with strict "welfarism." Strict welfarism commits the oldest conflation in the book, so to speak. It confuses the mere "is" of preferences and their satisfaction with the "ought" of prescription.

There is a sense in which this is only natural to do. Individuals—especially pre-adult individuals—tend naturally to think of their demands as in a sense "self-prescribing." If I want it, I oughtta have it. Case closed. If we then think of social prescription as no more than heaped or amalgamated individual demanding, as if society were simply a pile of narcissists, we will then tend to think of social welfare in these self-prescribing terms too. It will just be the sum of those clamoring demands.

The problem with this is that it quite forgets the requirement, for prescriptive purposes, of something more than mere preferences—something that can adjudicate among conflicting preferences. That something is more than an unprincipled "is." It is a principled "ought" that can override "thief's preferences." It is the "is" of explicitly nameable, preference-incumbent distributive principles. It is these principles that we found draw the cut between welfare proper and unadjudicated satisfactions in Part I. And, in parallel, it is these articulable principles that we found draw the cut between prescription and mere conscription in Part II. Strict welfarists miss this because they collapse normative principles into positive preferences.

This primal error goes undetected by dint of a number of reinforcing tendencies that have grown as a sort of hedge around it. One is the absence of a type-distinct incumbency-value in the idiom of SWFs as presently constituted, as described in Part III. Our proofs just now rode on the presence of the incumbency "dot" added to render the SWF idiom complete and explicit per the original Bergsonian program.

The "dot," we might say, is what trumps the "jot" —the jot of ice cream. At least it does so "at the limit": At some point the added bit of

ice cream becomes so small that a large dose of prescriptive incumbency—e.g., everyone's having come to appreciate that the right SWF is the one we should act upon—is even better in our SWF's estimation than is the jot of ice cream. "The limits of my language," it has wisely been said, are "the limits of my world."[151] Paretian welfarists' language, lacking the dot, lacks prescriptive capacity, an absence concealed in a blindspot. Add the dot, and out go Pareto and strict welfarism.

The error also goes reinforced a complementary tendency we noticed in Pareto earlier: its "piggy back" quality when it is not vetoing. As mentioned a moment ago, it's "only natural" to think initially of preferences as self-prescribing. We then tend to think of Pareto, especially weak Pareto and especially when we mislabel this a "principle" as in "Pareto Principle," as somehow normatively endorsing these preferences. It is as if, knowing in the backs of our minds that individual demands are not veritable principled social commands, we were viewing the necessary stamp of approval as coming from Pareto. But Pareto gives no added endorsement at all. It simply says "OK" when nobody says "no." In its "affirmative" aspect, then, Pareto is merely parasitic. It goes along for the ride. And this is precisely when we've least need of adjudicative principles hence social or legal prescription: "You're *all* OK with it? Then so am I," says Pareto.

Where Pareto gets teeth and becomes something other than a "yes man" is, ironically, precisely when we are apt to want it to hush up: That's when there is some distributive wrong in the world that needs fixing, fixing in keeping with prescriptively preference-incumbent principles. It is only in these cases that Pareto has any effect at all, and it's a nasty one: If Tom, who we shall assume to live long enough, wants to keep owning Sally and Lincoln wants to sign the Emancipation Proclamation, Pareto steps in and says "Sorry, Abe, no can do." And that's just proscribing prescription.

We don't notice this problem because it's the "positive," rubber-stamp face of Pareto that gets all the press. It's called a form of "efficiency," and no one is going to go on record against efficiency any more than she's going to say she's against "wellbeing" or "welfare." And when it's called a "principle" to boot, people tend often, uncritically, to assume there has been some manner of bona fide blessing. Our misleading terminology, then, along with the gap in our formalism, has kept things obscure. There is one more bit of terminology, I think, which has reinforced all of this.

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[151] *See* WITTGENSTEIN, *supra* note 137, Proposition 5.6.

2.   Deontology & Consequence: Obligation & Action Joined at the Hip

Paretian welfarism's false conflation finds reinforcement in a false dichotomy. I refer to the time-honored, if threadbare, distinction between so-called "deontological" and "consequentialist" ethics. "Deontology" refers simply to the logic—the *logos*, structure, or form—of duty or obligation—deontos, or "oughtness" itself.[152] Its focal point is the obligatory intention that issues in action and consequent effect. "Consequentialism" refers simply to the belief that consequences matter in ethical assessment.[153] The focal point in this case is less the "inward" intention than the "outward" action and effects issuing therefrom.

But all social and legal prescriptions, whether cast in "efficient" maximization, "fair" equalization, or other terms, are laid down as obligations. These obligations, when accepted and acted upon in the world, issue in consequences in the world. Among these consequences are the "outward" actions issuing from "inwardly" accepted obligations themselves. They themselves are accordingly "consequences" in the relevant sense. They are events that transpire in the world by virtue of which an SWF can evaluate that world.

So-called "deontology" and "consequentialism," then, vary in respect of "focus" or "emphasis," but not in respect of prescriptively relevant constitutive elements. You can see this quite quickly by reference to a couple of examples apt to be familiar.

Utilitarianism, the "consequentialist" ethic par excellence, lays down a duty, the duty to act as to seek this consequence: a maximized aggregate that is the sum of equally weighted individual utility measures.

Now consider opportunity-egalitarianism, a transparently fairness-oriented ethic that anyone who traffics in the putative "deontology"/"consequentialism" distinction is apt to take for paradigmatically "deontic" in orientation. Opportunity-egalitarianism lays down a duty schematically identical to the utilitarian, to act as to seek this substantively alternative consequence: a fair distribution of material opportunity, such as results in a maximized aggregate not of "utility," but of equal-opportunity-grounded welfare. The opportunity-egalitarian accordingly differs from the utilitarian only in respect of the aggregation rule she takes for normatively binding in formulating an SWF.

Both norms are then formally identical while substantively distinct. Both are as "consequentialist" as they are "deontic." Both articulate duties to act as to bring about consequences; they simply articulate duties to act as to bring about *different* consequences. Were they not to lay down

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[152] *See supra* notes 28, 29 and accompanying text.
[153] *See id.*

such duties, they would not be prescriptions. And were they in turn not to lay down duties that spoke to consequences, they would be inconsequential. The "duties" would be empirically and pragmatically empty because they would say nothing about action in the world.

The misapprehended dichotomy between deontological and consequentialist ethics in legal theory and policy analysis tends to perpetuate the category error registered in locutions like "fairness versus welfare," and the conflation of preference and principle. The reason is that those of us who engage in legal theory and policy analysis know that we care about consequences—that's why we sought law or policy related degrees and careers. When we are then told that there's another group who don't care about consequences—caricatured precious "Kantians" are the usual bugbears—and that this group is all about "fairness" and "principles," we conclude that we must then be about "welfare" and "preferences."

But this is nonsense. It is like thinking we have to be mosquitoes or termites if we are not angels, or horizontally if not vertically situated. As principled, self-critical creatures who live in the world, we are both deontic and consequentialist. And so is any prescriptive SWF.

3. Arrow, Sen, & Others Subsumed: What We (Implicitly) Knew All Along

What the results drawn above bring too light might also have been obscured by misapprehension concerning the significance of well-known results derived earlier by Arrow, Sen, and others. Reinterpreting those results in light of our own helps further to consolidate the appropriate lesson. I can only be broadbrush here. Fuller treatment appears elsewhere.[154]

Sen's 1970 result famously showed a conflict between Pareto on the one hand, and the maintenance of any individual's sphere of liberal autonomy on the other.[155] Say that I, "Lewd," wish to read *Lady Chatterly's Lover* in private. Say that you, "Prude," are distressed by the fact of my doing so. Sen showed that there is in such case no basis, on Paretian assumptions, for not viewing my reading choice as an inefficiency-inducing "externality." This result has attracted much commentary and discussion, particularly in light of its challenge to cherished beliefs concerning liberalism's tendency to issue in efficient states. It has even acquired a canonical name: the "Liberal Paradox."

In light of our results in this Part, Sens's result is predictable. Its having fixed upon a "sphere of liberal autonomy," in fact, now seems to have obscured what was actually at stake. The critical and more gener-

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154 Hockett, Parteo Versus Welfare, *supra* note 2.

155 Amartya K. Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

ally applicable point is that individual preference-satisfactions of the sort rubberstamped by Pareto are not enough to settle distributive entitlements of any sort, hence to prescribe at all. And that is because the question for social decision is always the distribution of preference-satisfactions, which preferences alone do not suffice to adjudicate.[156]

Arrow's 1951 result is of course even more notorious, and more general, than Sen's.[157] The sense in which the results derived in Part IV generalize Arrow's is thus more immediately apparent than the sense in which they generalize Sen's. What Arrow shows is that, in the presence of certain conditions—Pareto among them—that Arrow and others have taken for attractive, there is any number of possible preference scenarios under which no determinate social decision can be reached via a mere aggregation of preferences. This result formalizes and generalizes the well-known "voting paradoxes" that emerged from the work of Borda, Condorcet, and others in the 19th Century.

In light of what emerged in Part IV, none of this is surprising.[158] For all that "social decision" is, is social or legal prescription. And we have seen that prescription always proceeds from something other than and indeed incumbent upon preferences. Those are just what we have been calling preference-incumbent distributive principles. So all that Arrow's results actually confirmed was that preferences alone—even when aggregated—are inadequate to the task of underwriting determinate social prescription. That too is hardly surprising in view of what we have noted to be prescription's principal task in a polity: the task of adjudicating between always potentially *conflicting* preferences.

What is actually surprising, in retrospect, is that Arrow's results should have been found so surprising. Should it not have been obvious all along, as surely as it is obvious that "is" is not "ought," that Arrow's result would follow immediately from his assumptions? Why, then, was the result so surprising?

I think that Arrow hit the nail more or less right on the head when he referred to a "nominalist temperament of the modern period," to which "the assumption of the existence of the social ideal in some Pla-

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[156] I do not mean in saying any of this that Sen was himself surprised by his result, or that it was not valuable for him to have derived it. Quite the contrary. My point here is that, once we think about it, we ought not to have been so surprised that one could prove the impossibility that Sen proved.

[157] KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

[158] The observation made *supra* note 156, in connection with Sen's result, is apt here as well. The result is obviously a very important, and "game-changing" one. But its having been met with surprise indicates something's having been lost to theorists' consciousness at the time—namely, the critical role played by preference-incumbent normative principles in determining the means by which to aggregate preferences. Preferences themselves cannot play that role.

tonic realm of being was meaningless."[159] The "meaning" of this sentence itself is a bit obscure.[160] But what Arrow seems to have meant is that modern "nominalists" hoped to derive social prescriptions from preferences alone, eschewing preference-incumbent principles.[161] This was quite as mistaken as the assumption that a belief in there being rightful and wrongful actions commits one to Platonist metaphysics.[162] Once the assumptions were made, however, prescriptive indeterminacy was foreordained: The baby of normativity was tossed out with the bathwater of Platonic "forms." And this is what Arrow valuably showed.

The results in Part IV also complete a small circle of impossibility theorems more recent than Arrow's and Sen's. Among them are results derived by Suzumura, Kaplow and Shavell, and Fleurbaey et al.[163] These all confirm, in essence, the relations between Paretianism and strict preference-regard found in Part IV. What they do not do is take the last step—that which shows those relations in turn to render Paretian welfarism inconsistent with social prescription itself.

The inconsistency shows up, however, the moment one notices that among all of the values that Paretian welfarism excludes from the SWF will be any to which one might have recourse in deciding upon the SWF's aggregation rule. And that means that these "SWFs" have nothing what ever to do with either "S" or "W." For the upshot of Parts I and II is that there is nothing that counts as welfare or social welfare absent such preference-incumbent distributive principles as can recommend an aggregation rule for an SWF.

V.   What We All Want: Fair Welfare

So now we see very starkly that consistent Paretianism logically entails strict preference-regard, which in turn rules out social and legal prescription themselves. This in turn proves unsurprising once we notice the centrality of preference-incumbent distributive propriety—that is,

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[159] *Supra*, note 157.

[160] Assumptions might be false, but they're no more suited to being "meaningless" than they are to being orange. If the words in which one purports to express an assumption lack sense, one has not managed to articulate an assumption at all.

[161] Note the reference to Ockham and Scotus *supra* Part III.C, in connection with theological voluntarism. It is no accident that, in respect of their metaphysics, Ockham and Scotus are known as "nominalists" as well. *See* Hockett, *Reflective Intensions*, *supra* note 19.

[162] *Contra* Ralph Wedgewood, The Nature of Normativity (2007) (providing a state-of-the-art argument to the contrary).

[163] Kotaru Suzumura, *Pareto Principles from Inch to Ell*, 70 Econ. Letters 95 (2001); Kaplow & Shavell, *Non-Welfarist Method*, *supra* note 2; Fleurbaey et al., *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle: A Comment*, 111 J. Pol. Econ. 1382–85 (2004); *see also* Donald E. Campbell & Jerry S. Kelly, *Impossibility Theorems in the Arrovian Framework*, *in* 1 Handbook of Social Choice and Welfare 35 (Kenneth J. Arrow et. al. eds., 2002) (providing a plenary discussion of multiple cognate results).

normative distributional principles that are ethically incumbent upon preferences—to welfare, social welfare, and prescription themselves, as analyzed in Parts I and II. For the preference-incumbency at work here is something to which strict preference-regard and the Paretianism that entails it offer no conceptual room for maneuver. All that was needed to derive this analytically straightforward truth in the formal language of SWFs themselves was to supplement that idiom in a manner affording it capacity to register normative preference-incumbency explicitly. That is what we did in Part III, and doing so then yielded the proofs of Part IV.

But now, where does this leave us, prescriptively speaking? Does the fact that Paretian "welfarism" cannot afford a satisfactory normative foundation for legal theory mean that *no* form of welfarism can? Not at all. For we also found in the foregoing discussion that preference-satisfaction is indeed central to genuine well-faring, social welfare, and legal prescription. It is just that it proved not to have the stage to itself. Rather, it constituted what we found to be the "substance" of welfare, social welfare, and legal prescription, while what the Paretian welfarists leave wanting is what we found to be these things' "form." To prescribe legally, socially, or indeed in any manner at all, we must attend not only to welfare's "substance"—satisfaction—but also to its distributive *form*. What then is this form?

A.   *Agent Equality and Material Opportunity*

In Part I we found that preference-incumbent principles of distributive propriety draw a cut between those generic satisfactions that do, and those that do not, count as welfare. The kind that do not we called distributively illegitimate, "thief's satisfactions." The kind that do we called distributively *legitimate* satisfactions. In Part II we found that satisfactions of the illegitimate, "thief's" kind might be—and indeed often are—demanded in imperatival language, but that in such case the issued imperative would constitute an attempted *conscription* rather than prescription. Bona fide prescription, we noted by contrast, aims to guide action by explicit appeal to nameable, generally applicable, preference-incumbent ethical principles—principles that determine Part I's "distributive propriety" itself. Appeal to such principles is what satisfactorily answers the "why?" question apt to be raised in response to any attempt to guide or control another agent's agency with imperatival—"thou shalt" —type language.

These latter, ethical principles, we then found to be marked by the *impartiality* they carry in virtue of their logical properties of recipient- and beneficiary-generality. The impartiality involved is what prevents the imperative from being a mere attempt at conscription of one will by another, rather than prescription to which both wills are equally subject

in principle. These forms of generality and the impartiality they import, in short, we found to sound in a form of *agent equality*. And since equality of *any* sort in turn sounds in *distribution*, we observed, the agent equality that we found characteristic of Part II's ethical principles might be expected to underwrite the principles of *distributive propriety* referenced in *Part I*. And so, we are now going to find, they do. The distributive "form" of genuine welfare, social welfare, and social hence legal prescription, that is to say, just is this: It is satisfactions' being distributed in keeping with the agent equality ideal. The *form* of welfare, in a word, is *fairness*.

Now, what might distribution in keeping with the agent equality ideal—that is, fair distribution—look like? The place to look for an answer, I think, is in agency and action themselves, since *these* are the "substance" of *agent equality* itself. In particular, we should look to their relation to those preference satisfactions which we found to constitute the "substance" of *welfare*. If you want to find the relation between agent equality and bona fide welfare, in other words, look first to the relation between the "substance" of each of those: That is the relation between *action and satisfaction*.

Now for purposes of social and legal prescription, it would seem that the most noteworthy feature of this relation is that it is *materially mediated*, in a certain broad sense of the word "material." When as agents we act to satisfy preferences, we act *in the world*.[164] We manifest our agency in the world, hence in the many *materials* that go into *constituting* the world. In acting *purposefully*, moreover, we actively *produce satisfactions*—the substance of welfare—from those materials. For satisfaction just is success in effecting a purpose, in realizing an aim.[165] It is an upshot of agency itself, just as agency is manifest in one's acting on preferences or "plans." Action is what mediates between preference and satisfaction. The mentioned "materials" of agency then, are our "inputs," satisfactions are the "output," and agency is the "production process." It is the process of transforming "materials" into "satisfaction." In this sense, as agents who pursue aims and achieve satisfactions, we act "materially."[166] And the materials upon which we act are, functionally speaking, in this sense "resources," or "material opportunities"[167]

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[164] This was precisely what "All Seeing Eye," as social welfare analyst rather than demigod, seemed to have forgotten in Part III.

[165] Or if you prefer the somewhat more facile language of price theory, in "satisfying a preference."

[166] If we wish to emphasize this feature of our agency, we might call it "material agency," or, in the manner of Aristotle, "sensuous agency."

[167] "Resources" here to be construed broadly like "material" itself. I believe these are the resources Dworkin has in mind. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

How then should these materials—the "stuff" of agency—be distributed, if, as we noted above, "ethically appropriate distribution" just is distribution in keeping with the *agent equality* ideal? The answer would seem to be hidden before our very noses: Surely the material counterpart of agent equality just is equality of access to the "stuff" of agency. It is accordingly what I call "equal material opportunity." Since access to this "stuff" is what materially delimits our material agency itself, *treating agents as equals* just is *affording them equal distributive entitlements to this agency-delimiting stuff.*

Now note that this pre-action "stuff" implies a sort of ethical complement: If the stuff of agency is the "raw material" upon which our agency operates, then that which we actively "produce" out of that material is arguably of an ethically distinct status. It is no longer "raw." That which you make of the materials of agency is in a certain sense "you." It is you in the evocative Lockean sense that you have "mixed your labor" with it. Your agency has commingled with it, and you are yourself in this sense manifest in it.[168]

In what sense is this post-action status of "worked materials" ethically distinct? I think it is this: If some salient portion of your product of this sort—your dollar income, say—is in some sense "unequal" to the *counterpart* portion of *my* product of this sort, while both of our products proceed nonetheless from equal initial endowments of the aforementioned "raw material" broadly construed, *then* to attempt to equalize our post-agency portions of this product will be to treat us *unequally* as agents. It will be to conscript the agency of one of us in the service of the other. Equal opportunity, in other words, does not of itself entail equal outcome—if by "outcome" we fixate upon only one "salient" component of that vector which is outcome, such as income.

Now, there is a temptation to say that what this means is that unequal "outputs" are ethically permissible so long as there really has been equal "input." And there is a sense in which this way of putting things is perfectly in order. Indeed, I myself find it useful in many contexts to refer to these inputs as what I call "ethically exogenous" resources, while then calling the outputs "ethically endogenized."[169] That facilitates our

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[168] I hasten to add that this does not of itself suffice to confer ethical title. One must antecedently bear a right to do that "mixing" before the mixing can confer entitlement status. Even Locke, of course, recognized this, as is manifest in his well known "as much and as good" proviso. The task of distributive ethics today can plausibly be characterized, I think, as the task of finding a plausible replacement for Locke's proviso when "as much and as good" are no longer materially on the cards. Nozick's well known Paretian rendition, I trust, will in light of Part IV be recognized at once as inadequate. *See* Hockett, *Distribution*, *supra* note 2 (providing greater discussion on this topic).

[169] *See, e.g., id.*; *see also* Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179 (2005); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints and Finance in the Design of a Comprehensive*

bearing in mind that it is the *inputs* with whose equalization we ought to be concerned, from an *operational* point of view. I shall come back to this shortly.

From the point of view of "pure theory," however, I think it helpful to phrase matters this way: The "output" of agency, just like the "input," is always variegated. It is a vector of many dimensions.[170] You might transform your inputs into many dollars and little leisure, for example. I might transform mine into few dollars and much leisure. There is a sense, in such cases, in which our "total" outputs will then remain just as equal or otherwise as were our inputs, provided we've acted freely. It is just that the compositions have changed, through what amount to our "input-transformation decisions," i.e., our actions. And this means that if I lay claim to a portion of your dollars simply because you have more than I, without *first* attending to whether we *started* with *equal inputs* and then simply made different unforced decisions, I might well be attempting to *conscript your agency*. For I still have the leisure, which you did not have.

We might think of this as a sort of "law of conservation of matter" in respect of the materials of agency. If, then, we really *did* possess *equal* access to the "ethically exogenous" materials of agency, we really *would* be treated equally as agents, quite irrespective of the composition of the *outputs* of that agency. Everything, accordingly, ethically hinges on this equal material opportunity to which I've referred. Equalize this form of opportunity or access, and you have realized that agent equality ideal which we have found above to be at bottom of bona fide ethical principles, distributive propriety, and hence appropriate legal prescription and true welfare themselves.[171] Hence you have fully addressed those foundational matters of form that Parts I and II found central to welfare and legal prescription, and that Parts III and IV found to be unaddressable by Paretian "welfarism."

Now, there are many technical questions implicit in all of this—matters that any complete and satisfactory unpacking of the agent equality ideal will accordingly address. Most of them are questions intimately bound up with matters of measurement, however, so I shall defer them to

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and Contemporary American Ownership Society, 79 S. CAL. L. REV. 45 (2006); Robert Hockett, *Toward a Global Shareholder Society*, 30 U. PA. J. INT'L L. 101 (2008); Robert Hockett, *What Kinds of Stock Ownership Plans Should There Be? Of ESOPs, Other SOPs and 'Ownership Societies,'* 92 CORNELL L. REV. 865 (2007); Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1 (2005).

[170] This implicates measurement questions I address presently.

[171] The same idea appears to underlie not only Dworkin's account of justice, see DWORKIN, *supra* note 167, chs. 1–2, but also Arneson's "equal opportunity for welfare," Cohen's "equal access to advantage," and Sen's "equal functionings." It also is accordingly at work in Roemer's EOp, which Roemer expressly offers as a formal rendition of Arnesonian opportunity. See Hockett, *Distribution, supra* note 2, for full discussion.

just below. For I am going to argue that the great flowering of empirical methods now underway in the legal academy is particularly well suited to working along lines of inquiry raised by this true "Grundnorm" of normative legal theory: Fair Welfare.

I believe that in a certain sense most of us have been working toward this ideal of equal material opportunity all along. The reason to shine a spotlight on it here in this Article and its companion piece is therefore simply to afford greater self-cognizance in the effort, in order that we might avoid needless distractions like that of Paretian faux-welfarism.[172] There are two "macro-recommendations" to make here that I think are particularly apt in this connection, which I shall now offer before closing.

B.   Equalize What You Ought, the Maximization Will Follow

Noticing that equal material opportunity is what we're actually concerned with suggests a change in the dominant mode of formally "framing" our normative inquiries, if I may use the newly received jargon for these purposes: We should move from casting our SWFs and their less formal counterparts as maximization formulae or norms, to casting them as equalization formulae or norms.

Maximization language directs our eye to the wrong "ball." Why? Because as we've seen repeatedly over Parts I through IV, satisfaction is only the substance of welfare, while fairness construed as agent equality, hence equal material opportunity, is its form. And this means that as a lawmaking polity we maximize *bona fide* welfare not by collectively acting to produce a satisfaction aggregate, but by acting to equalize holdings of ethically exogenous resources among our agent citizens, who then do the normatively *germane* form of maximizing *themselves*. They, that is to say, produce the *fair* satisfaction—i.e., the *true* welfare—aggregate, so long as we assure fair distribution at the front end.

Our eyes, then, should be on the "ball" of equalizing these material resources—the "stuff of agency" —among ourselves. Do that, and the normatively cognizable, prescriptively relevant welfare aggregate will effectively maximize itself. It will proceed immediately from the independent activity of agents pursuing their own visions of what well-faring consists in, with their rightful pro rata shares of ethically exogenous material resources.

Now note that the particular "eyes" on the ball here will be those not only of theorists, but also of "planners" and other functionaries. There are accordingly good operational reasons, not simply analytical or conceptual ones, for recasting our language and formulae from "max-

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[172] *See* Hockett, *Distribution*, *supra* note 2.

imization-speak" to "equalization-speak." Equalization formulae, be-
cause more transparently tied to the agent equality ideal which is the
actual normative "master principle" that we have found to be at work in
our ethical principles and legal rules of distributive propriety, are just
much more immediately helpful to anyone acting to *realize* our ideals.

It is easier to do this recasting, moreover, than you might think: It is
simply a matter of straightforward, systematic translation. Why? Be-
cause to maximize one thing is *always* effectively to distribute another
thing and to equalize yet another thing—the latter thing amounting, in
turn, to some attribute with which we identify the recipients of distribu-
tions.[173] For every maximandum, that is to say, you can formulate an
equalisandum, one that then correlates with a construal of the recipient.
It might help here to make the point formulaically.

The following translation rule captures the basic idea. For any ag-
gregative maximizing imperative of the form:

$$\text{Max } \Sigma \; ui,$$

in which *u*-factors such as utility functions are summed per the sigma,
simply translate the summand, ui, into its counterpart equalisand, ui^*,
and state the imperative thus:

$$\forall i: \text{Eq } (ui^*),$$

where "$\forall i$" is read, "for all i," and "Eq" means to "Equalize" just as
"Max" means to "Maximize." In short, rather than summing u factors
and maximizing the sum, we enjoin functionaries, equivalently, to equal-
ize the summand's egalitarian counterpart, u^*, over citizens. Since there
is always a counterpart, we always can work the translation.[174] I provide
multiple examples of this elsewhere.[175]

That, then, is my first macro-recommendation by way of changing
the orientation of our theoretic agenda in closer and more direct keeping
with the Fair Welfare ideal that has emerged in the course of our inquiry.
"Maximize this," we might say, echoing the name of a recent Robert
Deniro film: the aggregate of fair welfare. And notice that the best way
to do this is simply to equalize material opportunity over the citizenry;
they will then do the relevant form of maximizing themselves.

C.   New Wine for New Bottles: The Empirics of Opportunity

A final macro-recommendatory point to make in connection with
the fair welfare ideal is that it affords a salutary agenda to those involved

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[173] *Id.*

[174] Though of course conceptual and idiomatic dexterity would be required in many
cases, in some of which there would be little more than theoretical interest in the translation
exercise.

[175] *See* Hockett, *Distribution*, *supra* note 2.

in the current flowering of empirical methods in the legal academy. It offers normatively intelligible purpose to these methods, purpose of a kind that old line "wealth-maximizing" and new line Paretian faux-welfarism could never hope. How so? Just look at the measurement questions opened up by the characterization of equal material opportunity above.

There is the question of what a complete accounting of pre-action "resources" or "material opportunity" will include, for example. For there are many "resources" internal to the human body itself, after all, in addition to the many resources external to it. And there is much room for controversy over how a polity should handle innate and other arbitrary disparities in respect of such capacities.

There is also the question of how we might *commensurate* the great variety of resource types and thus form one scalar index with which to measure "resource stuff." That is particularly challenging given that differing resources are apt to be differently valued by differing agents.

There is also the question of where agency—or "free will" —ends and "forces beyond our control" begin, which might effectively just be another way of phrasing the "what is a resource" question.[176] And finally, there is the question of how actually to effect, through legal prescription, distributing and/or redistributing material opportunities over time.

What, then, *are* the real material opportunities? What means will enable us most accurately to limn the boundary between ethically exogenous and ethically endogenous such opportunities? How will we best spread the former, so that the latter—the sole ethically intelligible maximand—might be automatically maximized? What institutions are better suited to which tasks in this project, and how much functional specialization is needed?

All of these and other questions press urgently, the moment we see that we can't really dodge them. Our agent equality ideals show that we can't. And the new methods now coming on line are well suited to the task of addressing them head on. So, at any rate, I show at length in the companion article to this one.

CONCLUSION: A WELL-FOUNDED FUTURE

We have of course covered much ground here. But this is because there is much ground to clear. Notwithstanding what we have done here, it seems clear that much more remains to be done. Indeed, if I'm right in what I have been arguing, there is more to be done than we have hitherto

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[176] For on some understandings, the "resources" just are the things for which you are not responsible in agency.

realized. For it seems we have been on the wrong track now for years, where the normative theory of law and its links to policy are concerned. We have been fixated upon end-states that are not only unmeasurable, but are normatively uninteresting even as aims. And all the while we should have been looking toward ethically salient opportunity "inputs" whose right distribution allows rightful "outputs" to take care of themselves.

If collective action affects distributions of material opportunity to our fellow citizens, who are agents acting materially, we cannot *help* but think through the *ethics* of distribution. We must "take distribution seriously." And if we find, on analysis, that distributive ethics call out for the growing and spreading of material opportunity, we must think through how that can be done. Consider the breathtaking sweep of the research agenda that opens. We've only begun here to glance at it.

It is now long forgotten that Pareto the man was the dubious beneficiary of a state funeral presided over by none other than Il Duce himself, a man whom Pareto would doubtless have found risible. Surely a more fitting tribute, in keeping with the man's own sensibilities, would on this, his *Manual*'s centenary, be to lay all our misused "Paretianism" and ersatz-prescriptive strict "welfarism" at long last to rest, and move on to advance real *welfare*—which has always been no more and no less than *fair* welfare.