

Article

In Defense of Redistribution Through Private Law

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INTRODUCTION

Most people agree that enhancing overall well-being in society and promoting equality among its members are legitimate and important goals of the state. Much more controversial, however, are questions concerning the appropriate trade-off between these two goals, and the means which should be used to redistribute welfare. Specifically, an ongoing debate has centered on whether redistribution should be attained solely through taxes and transfer payments, or also via legal rules, and in particular the private law.¹ Redistribution of the former kind may be achieved by methods such as progressive taxation, negative taxes, cash assistance to needy families, social security, unemployment compensation, and disability benefits.² Redistribution of the latter type refers to legal rules that do not form part of the tax-and-transfer system, such as rules of property and contract law.³

1. See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 147–56 (3d ed. 2003); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093, 1093–1102 (1971); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 *J. LEGAL STUD.* 667, 667–68 (1994); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 *J. LEGAL STUD.* 797, 797–98 (2000).

2. For purposes of this Article, these methods of redistribution are collectively termed taxes and transfer payments, or tax-and-transfer.

3. This Article focuses on redistribution through private law. The term “legal rules” or “redistributive legal rules” thus ordinarily refers to private law

One of the most powerful arguments against redistribution through private law rules is grounded on economic considerations. It has forcefully been claimed that legal rules are more costly and less effective at redistributing welfare than the tax-and-transfer alternative.⁴ Therefore, by attempting to redistribute through private law rules, we inevitably give the poor *less* than we could have, and might even worsen their position.⁵ If the whole point of redistribution is to achieve the most favorable outcomes for the worse off, why, so the argument goes, use legal rules that are inherently inferior in this regard?

Not surprisingly, this argument has drawn criticism from economists and noneconomists alike. These counterarguments have mainly addressed the redistribution issue *from within* the economic framework. Critics have attempted to show that legal rules may effectively transfer wealth in particular circumstances;⁶ that certain legal rules do not distort optimal incen-

rules. The Article uses the term “redistribution” in a broad sense that encompasses all distributive concerns. I am aware that “redistribution” may carry ideological weight, implying that a previously allocated legal right has been taken from one person and transferred to another. In contrast, the term “distribution” may be understood as referring to situations in which distributive considerations determine the initial allocation of entitlements. Nevertheless, I primarily use the term “redistribution,” since it is invariably used in the literature (and, in particular, the economic literature) debating the desirability of attaining distributive justice through private law rules.

4. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 8–10, 111–13 (4th ed. 2003); POLINSKY, *supra* note 1, at 152–56; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 482–85 (6th ed. 2003); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–25 (2000); Kaplow & Shavell, *supra* note 1, at 667–77; David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 446–53 (2003); see also Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264, 266 (1979) (arguing that distributional objectives should be achieved through the tax system alone, and that government programs should be chosen solely on the basis of their efficiency).

5. COOTER & ULEN, *supra* note 4, at 9, 112; POSNER, *supra* note 4, at 482; Kaplow & Shavell, *supra* note 4, at 823; Kaplow & Shavell, *supra* note 1, at 674; Weisbach, *supra* note 4, at 448–49; see also POLINSKY, *supra* note 1, at 150–51 (discussing how the market can distort the desired effects of distributional legal rules).

6. See Ackerman, *supra* note 1, at 1097–98, 1102–19, 1186–88 (asserting that housing codes can redistribute wealth when certain market conditions exist); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FLA. ST. U. L. REV. 485, 497–506 (1987) (explaining the circumstances in which the implied warranty of habitability will redistribute wealth).

tives;⁷ that distributive considerations can *sometimes* enhance efficient outcomes;⁸ and that taxes and transfer payments may also create inefficiencies or may otherwise be difficult to implement.⁹ Thus, even the counterarguments concede that successful redistribution through legal rules is not guaranteed. This form of redistribution relies on the existence of restrictive conditions and circumstances, or requires further empirical investigation. For example, Anthony Kronman concludes that both taxes and redistributive contract rules can either succeed or fail, and that “[t]his question is an empirical one which must be resolved on a case-by-case basis, in the light of detailed information about the circumstances likely to influence the effectiveness of each method of redistribution.”¹⁰ Consequently, the case for redistributive legal rules is context-dependent.

This Article, in contrast, offers a general and principled defense of redistribution through private law rules by taking a different approach.¹¹ The economic argument against such

7. See Sanchirico, *supra* note 1, at 799–800 (arguing that distortion occurs only when monetary redistribution is a function of the affected parties’ income, but not when it is done “across the board,” irrespective of their income).

8. See Jennifer Arlen, *Should Defendants’ Wealth Matter?*, 21 J. LEGAL STUD. 413, 415, 422–24 (1992) (claiming that when individuals are risk averse, defendants’ wealth should be taken into account in determining the efficient due care standard and efficient level of compensatory damages); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 788 (1999) (arguing that incorporation of egalitarian concerns into the takings doctrine will enhance efficiency); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 508–10 (1980) (asserting that administrative costs may make redistribution through contract law cheaper than redistribution through taxation).

9. See Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1130, 1144–48 (2004) (claiming that due to the heterogeneity of individuals and their ex ante behavioral adjustments, it is virtually impossible to implement Kaplow and Shavell’s theoretically superior tax-and-transfer model); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 613 (1982) (arguing that taxation and compulsory contractual terms involve the same kinds of waste); Kronman, *supra* note 8, at 502–03, 506–07 (asserting that taxes may be as under-inclusive and as prone to having their goal frustrated by the affected parties’ behavior as redistributive contract rules); Chris W. Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1051–56 (2001) (arguing that the haphazardness of redistributive legal rules has been exaggerated, whereas the haphazardness of taxes has been downplayed).

10. Kronman, *supra* note 8, at 508.

11. The focus of this Article is the economic critique of redistributive legal

rules is based on the acceptance of a particular consequentialist theory. Although very influential, economic efficiency is certainly not the only plausible consequentialist theory. Once we broaden our perspective and consider rival consequentialist approaches, we may find that redistributive legal rules fare very well and enjoy various advantages that taxes and transfer payments lack. Thus, even if our aim is to promote best consequences, there are good reasons to employ private law rules alongside taxes and monetary transfers.

Specifically, standard economic analysis of redistributive legal rules rests on two premises. First, it assumes that people's well-being consists solely of satisfying their actual preferences, whatever those may be.¹² Second, it presumes that redistribution should be evaluated according to the bare quantity of resources people receive, regardless of the way they were obtained.¹³ Accordingly, the method generating the distributive outcome does not affect its goodness and is irrelevant to the welfare-promotion issue. The unsurprising conclusion is that the optimal redistribution method is the one which grants its recipients the largest increase in the amount of income at their disposal.

These premises, however, are both normatively and empirically flawed. There are persuasive reasons to replace them with more plausible ones. The two alternative premises offered in this Article rest on both philosophical, normative analysis, and on lessons from behavioral studies.

First, instead of satisfaction of actual preferences, I advocate an objective theory of human well-being. Fulfillment of people's actual preferences might result in a reduction in their welfare, if their desires are based on misinformation, mistakes, or lack of self-respect and self-esteem. An objective approach

rules. It should be noted, however, that although this critique is most influential in legal literature, it is not the only critique of redistribution through private law. Thus, for example, Dworkin argues that concern for people's personal liberty supports a "division of labor" between the private and public spheres: distributive justice should be the responsibility of the government, to be pursued in the public arena via taxes and transfer payments. RONALD DWORKIN, *LAW'S EMPIRE*, 295–312 (1986). Individuals, in their daily lives and interactions, should be allowed the freedom to promote their self-interest. *Id.* For criticism of this view, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 70–72 (2002); Kronman, *supra* note 8, at 503–05.

12. See *infra* notes 33–37 and accompanying text.

13. See *infra* notes 37–38 and accompanying text.

that judges welfare by external standards would better promote individuals' well-being. Accordingly, certain things—such as physical health, material goods of sufficient quantity and quality, self-respect and aspiration, knowledge of ourselves and the world around us, and attainment of deep and meaningful relationships—are intrinsically valuable, and having them makes for a better life. Their value does not depend entirely on whether they are, in fact, desired by those whose welfare is being evaluated.¹⁴

Second, in lieu of the simplistic economic premise of source-independence, I submit that the benefit people derive from resources depends on complex factors, including the acts that generate the resources and the source from which they are received. Therefore, if our aim is to maximize favorable distributive outcomes, we must not content ourselves with technical aggregation of quantities. The same quantity of goods may be more or less valuable depending on the mode of its production. The degree to which methods of redistribution contribute to welfare-promotion depends on their placement along the continuum between two extremes which I label *humiliation* and *reward*. A form of redistribution that is closer to the positive pole of the continuum promotes well-being to a greater extent than one that is closer to the negative pole. Therefore, when evaluating distributive schemes and their outcomes, one should assign differential weights to modes of production.¹⁵

Once we adopt these alternative premises, the advantages of redistribution through private law rules become apparent and purported disadvantages diminish. If our aim is to redistribute welfare objectively defined, then private law rules are most suited to the task: in contrast to tax-and-transfer rules, they convey a message as to the things worth having and directly provide for those things.¹⁶ Furthermore, private law rules assist in forming notions of entitlement, which are more conducive to the attainment of objective goods (such as self-respect, accomplishment of worthwhile goals, and appropriate relationships) and enhance the recipients' valuation of the things they have been given. At the same time, these rules decrease both the givers' opposition to the redistribution and the injury to the givers' welfare. Taxes and transfer payments, on

14. See *infra* notes 39–79 and accompanying text.

15. See *infra* notes 97–111 and accompanying text.

16. See *infra* notes 83–89 and accompanying text.

the contrary, often imply charity giving which, in turn, diminishes the goodness of the distributive outcome and its value for the beneficiaries, and increases both the resistance of those whose wealth is taken and the injury to their welfare. For these reasons, a redistributive output via private law rules enhances people's well-being to a greater extent than a similar (or even larger) output generated through the tax-and-transfer system.¹⁷

Following the theoretical discussion, the Article demonstrates the greater desirability of redistributive legal rules under the alternative consequentialist theory in a few particular contexts, including landlord and tenant law and family property.

It should be stressed that the two arguments proposed in the Article are mutually reinforcing but not mutually dependent. Thus, one may accept the argument regarding the appropriate criterion of well-being without accepting the argument concerning the significance of manners and sources of attaining things, and vice versa. Each of the two arguments individually makes redistribution through private law rules much more attractive than portrayed by standard economic analysis, and their cumulative effect is doubly powerful. Accordingly, substantive legal rules have important and unique advantages as distributive devices, strongly legitimating their use alongside tax-and-transfer schemes.

The plan of the Article is as follows. Part I summarizes the standard economic argument against the use of legal rules as a means of redistribution. Part II exposes the shortcomings of the economic premises underlying this standard argument and proposes a more plausible consequentialist theory. Part II.A objectively defines well-being under the suggested theory. Part II.B.1 describes how the alternative consequentialist theory aims not only to maximize the quantity of a person's well-being, but also to account for the positive or negative effects of the method through which, and the sources from which, her welfare was attained. Part II.B.2 draws on psychological empirical studies to illustrate how people's valuation of something they receive depends on the cause or process that has generated it. Part II.C addresses two possible critiques of the proposed theory: a liberal critique of its alleged paternalism and a deontological critique of its consequentialist character.

17. See *infra* notes 111–17, 139–64 and accompanying text.

Part III moves from theory to legal doctrine, and demonstrates how the suggested theory may better explain, justify, and evaluate the redistributive aspects of various legal schemes. Part III.A analyzes two issues in landlord and tenant law: the rules disallowing self-help eviction, and limitations on restraints on alienation by the tenant. Part III.B examines different family property regimes, illustrating how my proposed theory may be used not only to compare tax-and-transfer systems to legal rules, but also to evaluate the desirability of different legal rules from a distributive perspective. Part III.C criticizes proposals to attain redistributive outcomes through the rules of compensation for property takings, and Part III.D discusses the drawbacks of the voucher system as a method of redistribution. The latter two Parts demonstrate the advantages of private law as a mechanism of redistribution not only in comparison to the tax-and-transfer system, but also as compared to “intermediate” systems, in which only one side of the redistribution scheme (the taking or the giving) is accomplished through legal rules, while the other may be achieved through taxes and transfer payments.

I. THE ECONOMIC ARGUMENT AGAINST REDISTRIBUTIVE LEGAL RULES

A. THE BASIC ARGUMENT

Economic analysis of law has primarily been devoted to the goal of welfare maximization—namely, to the ways in which society can maximize the overall size of its welfare pie. This major goal is conceived to be (at least partially) in conflict with the goal of “fairness,” which relates to the distribution of the pie’s slices among individuals. Early discussions of this conflict generally addressed the tension between the two goals and the appropriate tradeoff between welfare maximization and fairness considerations.¹⁸ More recent economic literature has focused on the “fairness” component of the equation, in itself, and has addressed the issue of redistribution directly.¹⁹ These writings can be characterized as attempts to find the ideal way to

18. See, e.g., ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 88–120 (1975) (examining government compromises between economic efficiency and equality, such as progressive income taxes, aid to low-income groups, and employment opportunity programs).

19. See *supra* note 4.

“maximize” the desired distribution of welfare in society. In other words, the redistribution issue is now analyzed with the same tools that were formerly applied to the “overall welfare” component of the equation. The aim of these scholars is to identify the method that would maximize the favored distributive outcomes while incurring the lowest possible costs.

The common economic claim is that taxes and transfer payments constitute the ideal form of redistribution.²⁰ Legal rules, in contrast, produce less of the desired distributive output, and for a higher price. Therefore, redistribution should be carried out solely through taxes and transfer payments. Advocates advance various reasons for the inherent inferiority of redistributive legal rules.²¹

When legal rules redistribute income in favor of the poor, they distort people’s work incentives just as much as the tax system. People will respond to a redistributive legal rule in the same way they respond to an increase in their marginal tax rates, and may consequently choose leisure over labor.²² Legal rules, however, create an *additional* inefficiency that the tax and transfer system avoids—the distortion in the very behavior that the legal rules aimed to regulate (a direct result of the le-

20. See *supra* note 4.

21. See *supra* note 4.

22. POLINSKY, *supra* note 1, at 148–49, 153; Kaplow & Shavell, *supra* note 4, at 823; Kaplow & Shavell, *supra* note 1, at 667–68. This distortion, labeled the “substitution effect,” is caused by the reduction of the reward per unit of labor. JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE GREAT DEBATE OVER TAX REFORM 105–10 (2000). Before the imposition of the tax, an additional hour of work was worth more to the individual than an additional hour of leisure; after its imposition, an extra hour of work may be worth less than an hour of leisure. *Id.* Note, however, that the substitution effect will not necessarily occur whenever income is taxed. An increase in taxation may cause an opposite behavioral response, known as the “income effect”: people may work harder and for longer hours in order to ensure themselves a certain level of income. *Id.* But see Reuven Avi-Yonah, *Why Tax the Rich? Efficiency, Equity and Progressive Taxation*, 111 YALE L.J. 1391, 1392–98 (2002) (questioning the validity and magnitude of behavioral responses by the wealthy to tax increases); Gary Calderwood & Paul Webley, *Who Responds to Changes in Taxation? The Relationship Between Taxation and Incentive to Work*, 13 J. ECON. PSYCHOL. 735, 735–37 (1992) (finding that most workers are not responsive to tax changes); Howard Chernick, *Tax Progressivity and State Economic Performance*, 11 ECON. DEV. Q. 249, 249 (1997) (finding that the degree of progressivity in a state’s tax system has an insignificant effect on the state’s rate of income growth). For the purposes of this Article, there is no need to take a stand on the incidence of the two effects. It suffices that a reduction in income—due to taxes or redistributive legal rules—may adversely affect people’s work incentives.

gal rules' deviation from the dictates of efficiency in order to implement distributive concerns).²³ Thus, for instance, a thirty-percent marginal tax rate together with an inefficient tort rule that redistributes one percent of wealthy defendants' income to poor plaintiffs would distort work incentives as much as a thirty-one percent tax rate coupled with an efficient tort rule. The former regime, however, entails the additional costs involved in defendants taking excessive precautions and refraining from efficient activities. In other words, even under the assumption that legal rules are equally successful in redistributing income, they achieve this result at a higher cost to society.²⁴

The assumption of equal success in attaining the redistributive outcome is, however, contested as well. Critics claim that legal rules are much less effective than taxes and monetary transfers in terms of actual, distributive outcomes.²⁵ Legal rules achieve less because in contractual settings (as opposed to circumstances in which bargaining is impractical) the market often responds in a way that wholly or partially offsets the redistribution.²⁶ Take, for example, a mandatory quality standard in favor of tenants, requiring landlords to lease residential units that are fit for human habitation.²⁷ This rule might fail to achieve its distributive goal because increasing landlords' costs is likely to increase rents and reduce the supply of low-rent

23. POLINSKY, *supra* note 1, at 153, 155; Kaplow & Shavell, *supra* note 1, at 667–69.

24. See COOTER & ULEN, *supra* note 4, at 9, 112–13; Kaplow & Shavell, *supra* note 1, at 667–68, 677. This argument against redistributive legal rules was coined the “double distortion” argument. Sanchirico, *supra* note 1, at 799.

25. POLINSKY, *supra* note 1, at 152–55; Kaplow & Shavell, *supra* note 4, at 823; Kaplow & Shavell, *supra* note 1, at 674.

26. See COOTER & ULEN, *supra* note 4, at 9, 112; POLINSKY, *supra* note 1, at 150–51; Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993, 1126 (2001); Kaplow & Shavell, *supra* note 4, at 823; Kaplow & Shavell, *supra* note 1, at 674; Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. (PAPERS & PROC.) 177, 180, 182 (1989); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 126–27 (2002); Weisbach, *supra* note 4, at 448–49.

27. The implied warranty of habitability, imposed on landlords in most jurisdictions, encompasses not only health and safety hazards (such as unsound ceilings or rodent infestation), but also the provision of essential services, such as heating and electricity. For a general discussion of the implied warranty of habitability, see 1 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 10.101 (4th ed. 1997); ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* §§ 3:16–:17, 3:27 (1980); WILLIAM B. STOEUBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* §§ 6.38–.40 (3d ed. 2000).

housing, thereby harming—rather than aiding—the poorest tenants.²⁸ In addition, redistributive legal rules cannot be tailored as carefully as taxes and transfer payments, so they are frequently under- or over-inclusive.²⁹ Thus, for example, a general mandatory quality standard will apply not only to wealthy landlords and poor tenants, but also to landlords who are not affluent and tenants who are well-off.³⁰ Obviously, it is unreasonable to redistribute in favor of those who are better off in society.

In summary, the common economic critique of redistributive legal rules is that they are more costly and less effective than the tax-and-transfer alternative. If valid, this critique ends the debate. It is decidedly irrational to adopt a form of redistribution that is inferior to other methods available to the state; one that affords the poor less or might even worsen their condition.

The following subsection exposes the philosophical assumptions of this critique. This discussion, in turn, will lead to an alternative account of good consequences.

28. POSNER, *supra* note 4, at 482–84; Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1186–92 (1973); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889–97 (1975). In contrast, other writers argue that quality housing standards may successfully redistribute wealth in favor of low-income tenants if certain market conditions exist. These conditions include the lack of exit from the market by landlords, or the public provision of supplemental subsidized housing, and the existence of a group of tenants who do not attach much value to improved housing. The various conditions are discussed in Ackerman, *supra* note 1, at 1097–98, 1102–19, 1186–88; Kennedy, *supra* note 6, at 497–506; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 772–74 (1983). An empirical investigation into the effect of certain landlord and tenant reforms concluded that tenants, in fact, were not made financially worse off, due to such factors as increased consumer preference for ownership (as opposed to tenant) status and increased housing subsidies for the poor. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 561–78 (1984).

29. POLINSKY, *supra* note 1, at 154–55; Kaplow & Shavell, *supra* note 1, at 674–75; Weisbach, *supra* note 4, at 449.

30. POSNER, *supra* note 4, at 483 n.3; *see also* Rabin, *supra* note 28, at 560–62; Daniel P. Schwallie, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525, 531–32 (1990).

B. THE ARGUMENT'S PREMISES

In order to evaluate the economic opposition to redistributive legal rules we need to understand its underlying philosophical foundations. The economic attack is launched from a particular, narrow consequentialist perspective. "Consequentialism" is the title given to a broad array of moral theories holding that consequences are all that matter.³¹ Accordingly, rules, acts, and institutions are compared and evaluated only by the goodness of the outcomes they generate.³² From a consequentialist point of view, the ideal method of redistribution is the one that produces the best outcomes.

Any consequentialist normative theory must rest on some theory of the good. A theory of the good answers such questions as: What is the good one should strive to promote? How is this good measured? What factors bear on the goodness of an outcome? The force of the economic argument against redistribution through private law rules stems from—and depends on—its underlying theory of the good. As explained below, two central features of this theory of the good are the focus on satisfaction of actual preferences and the concentration on end-results.

31. See SHELLY KAGAN, *NORMATIVE ETHICS* 60, 70 (1998) (stating that consequentialism holds that goodness of outcomes is the only factor having intrinsic moral significance); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 2 (1982) (asserting that all consequentialist theories require agents "to produce the best available outcome overall"); David O. Brink, *Utilitarian Morality and the Personal Point of View*, 83 *J. PHIL.* 417, 420 (1986) ("Consequentialism is usually understood as the claim that actions and other objects of moral assessment are right or justified just in case their *causal consequences* have more intrinsic value than alternative actions, etc."); Stephen Darwall, *Introduction to CONSEQUENTIALISM* 1, 2 (Stephen Darwall ed., 2003) (defining as consequentialist all moral theories holding that moral rightness and wrongness is "determined by the *nonmoral value* of *relevant consequences*"); David Sosa, *Consequences of Consequentialism*, 102 *MIND* 101, 101 (1993) ("Consequentialism's basic idea is that the ethical status of an act depends on the value of its consequences.").

32. It is important to stress that non-consequentialist (or deontological) theories do not deny the importance of outcomes. Deontological theories maintain that outcomes should be taken into account and are sometimes even a decisive consideration. They reject, however, the contention that outcomes are *all* that matter, arguing instead that there are several additional factors of intrinsic moral importance. Furthermore, the independent consideration of these factors (such as principles against harm doing) may constrain the production of best outcomes, thereby preventing the maximization of the good. KAGAN, *supra* note 31, at 70–73; Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 *PHIL. & PUB. AFF.* 313, 323, 348–49 (1994); Samuel Scheffler, *Introduction to CONSEQUENTIALISM AND ITS CRITICS* 1, 2 (Samuel Scheffler ed., 1988).

1. Theory of the Good (1): Satisfaction of Actual Preferences

Economic analysis evaluates redistributive legal rules by examining their success in transferring income from the rich to the poor. The underlying assumption is that redistribution should take the form of money; money is the thing that we should strive to distribute more equally. This assumption follows naturally from the theory of the good embraced by standard economic analysis. Economic theory holds that the good to be promoted is people's well-being, and that the appropriate criterion for measuring well-being is "preference-satisfaction."³³ Satisfaction of preferences is tantamount to the occurrence of the individual's desired state of affairs.³⁴ Thus, people's welfare is determined by the extent to which their preferences are fulfilled. If, indeed, satisfaction of their preferences is what makes people better off, then money seems to be an appropriate "currency" for the redistributive process. By giving the poor a larger income, we enhance their opportunities to fulfill their desires.

Note that the absolute supremacy of money as the object of redistribution depends on an additional, implicit assumption: that from among the variants of preference theories of the good, we should adopt the simplest one—*actual* preferences. Actual preferences are those which a person has in fact, whatever their content.³⁵ In contrast, *ideal* preferences theories of well-being (also called "informed desire," "hypothetical preferences," "true preferences" or "rational preferences") advocate the satisfaction of desires a person *would have had* (but may never actually have) in certain idealized conditions for forming desires

33. JOHN BROOME, ETHICS OUT OF ECONOMICS 4 (1999) (arguing that the preference-satisfaction theory of the good "is implicit in much of welfare economics"); see also Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle*, 110 YALE L.J. 173, 175 (2000) (stating that economic analysis of law defines utility in terms of "the satisfaction of [an] individual's preferences"); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197 (1997) (asserting that economic analysis of law is based, among other things, on the idea that "utility is best analyzed in terms of the satisfaction of preferences").

34. RICHARD B. BRANDT, THE THEORY OF THE GOOD AND THE RIGHT 146–47 (1979); Thomas Scanlon, *Value, Desire, and Quality of Life*, in THE QUALITY OF LIFE 185, 186 (Martha Nussbaum & Amartya Sen eds., 1993).

35. See JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE 10 (1986); John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in UTILITARIANISM AND BEYOND 39, 55 (Amartya Sen & Bernard Williams eds., 1982).

and reaching decisions, such as full information and time for reflection.³⁶

Redistribution of income and actual preferences theory are a perfect match: money is the most easily exchangeable resource. It does not convey any message as to its appropriate use. Hence, money ensures individuals unfettered and uninfluenced freedom in satisfying their actual preferences. An ideal preferences theory, in contrast, supports the use of additional forms of redistribution (not exclusively money), since it accepts that people's ideal preferences may diverge from their actual ones.³⁷

2. Theory of the Good (2): End-Results

Simplicity is the distinctive feature of another aspect of the theory of the good underlying economic analysis, namely, its sole reference to end-results.

The economic analysis of redistributive legal rules focuses on end-results and disregards the process that generates the redistributive outcome. This narrow conception assumes that the good's source and "mode of production" do not affect the goodness of the outcomes. A unit of increase in the amount of the good achieved through rule X is equivalent in every respect to a unit of increase attained through rule Y. Accordingly, maximization of the good involves no more than a simple, technical aggregation of *quantity*.

Merging the aforementioned two assumptions together, we can now articulate the economic claim as follows: the optimal redistribution method is that which grants its recipients the largest increase in the amount of income at their disposal. The means used to attain this goal are immaterial.

Given this expression of the redistributive goal, it is not surprising that economic analysis finds taxes and transfer payments superior to redistributive legal rules. For the purposes of this Article, I will presume that this conclusion is valid with respect to maximizing the redistribution of quantities of income.³⁸ Notwithstanding this presumption, I argue that legal

36. See GRIFFIN, *supra* note 35, at 11–13; KAGAN, *supra* note 31, at 38; HENRY SIDGWICK, *THE METHODS OF ETHICS* 110–12 (7th ed. 1981); Harsanyi, *supra* note 35, at 55–56.

37. See *infra* notes 44–55 and accompanying text (providing further discussion of ideal preferences theories of well-being).

38. It is important to note, however, that this assumption of absolute superiority is contested. See *supra* notes 6–9.

rules serve an important and unique distributive role, and looking through the lens of a different consequentialist perspective can justify their employment by the state.

II. AN ALTERNATIVE CONSEQUENTIALIST THEORY AND ITS REDISTRIBUTIVE IMPLICATIONS

This Part criticizes the premises of the economic analysis of redistributive legal rules. It proposes an alternative consequentialist theory that rests on an objective theory of well-being and on the dependence of well-being on the manner in which, and the sources from which, a person receives resources. One can alter either or both assumptions of economic analysis while retaining the consequentialist framework. This alteration has various advantages and significantly strengthens the case for redistributive legal rules.

A. THEORY OF THE GOOD (1): ATTAINMENT OF OBJECTIVE WELL-BEING

Any consequentialist moral theory requires the promotion of favorable outcomes. It entails a choice between different legal rules according to the goodness of their resulting states of affairs. The consequentialist framework, however, is not committed to any particular theory of the good. Although “well-being” is a plausible good and “actual preferences satisfaction” a prevalent criterion for evaluating this good, they are certainly not the only candidates. One may strive to maximize goods other than welfare,³⁹ or adopt a *different* criterion for measuring welfare.⁴⁰ Since I am interested in the economic argument with respect to the redistribution of well-being in society, I will

39. Thus, one may argue that the preservation of species or cultural treasures is a good to be promoted regardless of its effect on human well-being. Darwall, *supra* note 31, at 2–4. Derek Parfit illustrates this point by stating that although every consequentialist theory embraces the sole aim that outcomes be as good as possible, consequentialism covers not only acts “but also desires, dispositions, beliefs, emotions, the colour of our eyes, the climate, and everything else. More exactly, [consequentialism] covers anything that could make outcomes better or worse. According to [consequentialism], the best possible climate is the one that would make outcomes best.” DEREK PARFIT, REASONS AND PERSONS 25 (1984).

40. For instance, one may claim that the appropriate criterion of well-being is a favorable mental state, rather than the satisfaction of preferences. A famous example of the former is Jeremy Bentham’s utilitarian conception of welfare, which equates well-being with happiness. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–12 (J.H. Burns & H.L.A. Hart eds., Anthlone Press 1970) (1789).

assume that the good to be enhanced is welfare and only advocate a different theory for evaluating and promoting people's well-being.

As explained above, economic analysis's stance on the redistributive issue implies that the appropriate criterion for measuring well-being is the satisfaction of people's actual preferences.⁴¹ This unrestricted conception of the good has long been deemed inadequate by moral philosophers. Indeed, its deficiencies are thought to be so obvious that it is summarily rejected, and discussions center on more sophisticated theories of well-being.⁴² The major objection to the actual preferences theory is that people often desire what is bad for them.⁴³ Fulfillment of desires based on misinformation, mistakes, prejudice, whims, or lack of self-respect and self-esteem might leave people worse off, and thus reduce their welfare.⁴⁴

The philosophical literature offers a partial solution to the problem of mistaken actual preferences with the aforementioned theory of ideal preferences. This theory focuses not on the preferences a person actually has, but on preferences she would have had if she had thoroughly, clearly and calmly deliberated all possible alternatives and their consequences with full, relevant information and no reasoning errors.⁴⁵ Yet, a switch to ideal preferences does not eliminate all the difficulties

41. See *supra* notes 33–37 and accompanying text.

42. John Broome bluntly states that “the preference-satisfaction theory is obviously false, and no one really believes it.” BROOME, *supra* note 33, at 4. Similarly, Griffin writes that “[t]he objection to the actual-desire account is overwhelming.” GRIFFIN, *supra* note 35, at 10.

43. The discussion assumes that it is possible to say that satisfaction of certain preferences does not advance a person's welfare. To take an extreme example, fulfillment of a person's desire to commit suicide (although rational in certain circumstances, such as painful terminal illness) cannot increase a person's *well-being*. I believe that judgments regarding the connection between preference-satisfaction and welfare-promotion are possible even in less extreme cases.

44. See ROBERT MERRIHEW ADAMS, *FINITE AND INFINITE GOODS* 84–85, 89–91 (1999); KAGAN, *supra* note 31, at 38; Richard J. Arneson, *Human Flourishing Versus Desire Satisfaction*, 16 *SOC. PHIL. & POL'Y* 113, 124 (1999). This unhappy result is also due to the unavoidable gap between *ex ante* expectations and *ex post* experiences: our desires are always directed toward some future state of affairs. We may wish our preferences to be fulfilled because we anticipate that their fulfillment will improve our lives, but these expectations may be disappointed when we actually experience the satisfaction of our desires. For elaboration of this point, see L.W. SUMNER, *WELFARE, HAPPINESS, AND ETHICS* 129–30 (1996).

45. See *supra* notes 35–36 and accompanying text.

of an actual preferences theory of welfare. Although an ideal preferences theory can correct mistakes of fact and logic,⁴⁶ it cannot remedy such problems as adaptation to oppressive circumstances or lack of self-respect and self-esteem. Preferences that do not promote individuals' well-being may persist even in the face of full information.

Amartya Sen, for instance, illuminates the case of the poor, the starved, and the oppressed, whose deprivations are so great that they "have learned to keep their desires in line with their respective predicaments."⁴⁷ Even with adequate information and time for reflection, their own desires might remain too modest.⁴⁸ The state should therefore enhance the welfare of these people beyond their preferences.⁴⁹ Another example is an intelligent and creative person who prefers a life of idleness to a life of learning or accomplishment. She may acknowledge that learning and accomplishment are valuable, yet persevere

46. Suppose, for instance, that a person's persistent chain-smoking is based on an erroneous belief that smoking improves lung functioning. Then, one can reasonably assume that if the smoker knew the true facts about the hazards of smoking, she would change her preferences.

47. AMARTYA SEN, ON ETHICS AND ECONOMICS 45–46 (1987) [hereinafter SEN, ETHICS AND ECONOMICS]; Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 191 (1985) [hereinafter Sen, *Agency and Freedom*].

48. Similarly, Anderson doubts that ideal preferences theory can solve the problem of impoverished desires and failure to care for oneself due to either lack of self-respect or the adaptation to oppressive circumstances: "One cannot simply add self-valuation to the conditions of rational desire." ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 131 (1993). In a similar vein, Adams states that "it is not plausible to suppose that ill will toward oneself would disappear if one had full realization of one's alternatives and their consequences." ADAMS, *supra* note 44, at 90. Hausman and McPherson likewise claim that "[w]omen who have been systematically oppressed may not have strong preferences for individual liberties, the same wages that men earn, or even for protection from domestic violence. But liberties, high wages and protection from domestic violence may make them better off than giving them what they prefer." DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS AND MORAL PHILOSOPHY 79 (1996).

49. We could certainly hypothesize about the preferences of these people if the preferences were formed in ideal circumstances. This may require that the deprived are properly fed, in good health, have a roof above their heads, at least a high school education, a reasonably well-paying job, and supportive family and friends. But can we still claim that we are talking about the same subjects? In truth, we have replaced these people and their impoverished actual preferences with our own value judgments of the good life, and so have stepped outside the confines of a *preferences* theory of well-being. See Sen, *Agency and Freedom*, *supra* note 47, at 191 (stating that since determination of preferences in such unspecified circumstances is an imaginary exercise, "we need not live in the fear of being proved wrong").

in her lack of activity. We would not consider her as leading her best possible life, but rather view the choice of not exercising her capabilities and potential as a shame and a waste.⁵⁰ The problem with this person's preferences does not stem from lack of information, inconsistency, or logical errors, but from the failure to properly appreciate the value of different activities and to develop appropriate capacities.⁵¹

Even this partial solution to the shortcomings of the actual preferences theory is not available to advocates of redistribution solely through taxes and transfer payments. Increasing people's income can only enhance their ability to satisfy their *actual* preferences. Obviously, the additional money will not be used to satisfy preferences that its recipients *do not have* in fact, but *would have formed* in ideal conditions. One cannot have one's cake and eat it too: adherence to the exclusivity of the tax-and-transfer method of redistribution must come at the price of accepting a flawed criterion of well-being.

Most law-and-economics scholars do not question their chosen criterion of welfare and do not distinguish between actual preferences and ideal preferences theories of well-being. Usually, it is at least implicitly assumed that efficiency, or welfare maximization, involves the value-free process of satisfying people's actual preferences, regardless of their content.⁵² Interestingly, the few law-and-economics scholars who explicitly re-

50. Griffin discusses a similar example of a person whose aim in life is to count blades of grass in lawns. James Griffin, *Against the Taste Model*, in INTERPERSONAL COMPARISONS OF WELL-BEING 45, 49–50 (Jon Elster & John E. Roemer eds., 1991). Adams mentions the case of a person who fails to prefer what is better for him because his desires are base: he prefers “money to friendship, idleness to creativity, casual commercial sex to love.” ADAMS, *supra* note 44, at 91.

51. Theoretically, we can extend the ideal-preferences scope of correction to include not only irrationalities, but also lack of proper appreciation of the good things in life. The insertion of such value judgments into the ideal-preferences criterion transforms it from a *subjective* to an *objective* theory of well-being because it implies that a person is mistaken not about some states of the world, but about the value of certain things according to an *external* standard. See *infra* notes 55–79, 173–80 and accompanying text (providing a discussion of objective theories of welfare).

52. See ANDERSON, *supra* note 48, at 129 (“Welfare economics identifies rational preferences with actual preferences.”); GRIFFIN, *supra* note 35, at 10 (“The simplest form of desire account says that utility is the fulfillment of *actual* desires. . . . Economists have been drawn to it.”); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 191, 199 (1999) (stating that standard economic theory determines a person's welfare by the extent to which she satisfies her unrestricted preferences).

fer to the competing theories admit—albeit in different legal contexts—that ideal preferences are superior to actual preferences as a criterion of welfare.⁵³ It seems that no one is willing to defend the opposite view. Why, then, contend that satisfaction of actual preferences should be our only goal in the redistribution context?

A possible answer is that these scholars conveniently assume that people by and large strive to advance what is in fact good for them according to the ideal preferences theory.⁵⁴ If, indeed, there is little or no discrepancy between the consequences of implementing actual and ideal preferences theories, then the theoretical differences between them can be disregarded. Regrettably, this is not the case. As a large and growing body of empirical studies demonstrates, people's actual desires and choices do not always advance their welfare.⁵⁵

53. Adler & Posner, *supra* note 52, at 202, 243–44; Chang, *supra* note 33, at 194; Kaplow & Shavell, *supra* note 26, at 984, 1330–34.

54. See SEN, ETHICS AND ECONOMICS, *supra* note 47, at 16–18 (describing and criticizing the common economic assumption); Kaplow & Shavell, *supra* note 26, at 984 (“[W]e will usually assume that individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them.”); Nussbaum, *supra* note 33, at 1197 (noting that economic analysis of law involves the idea that “rational agents are self-interested maximizers of utility”); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 251 (1998) (arguing that although “economic analysis does not rest on the normative claim that rational preferences are a superior criterion for human well-being than actual ones,” it does rest “on the empirical claim that people’s actual preferences are rational”).

55. See generally ROBIN M. HOGARTH, JUDGEMENT AND CHOICE (2d ed. 1987) (book-long survey of various manifestations of people’s bounded rationality); CHOICES, VALUES AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000) (collected studies on bounded rationality); JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1999) (same). For additional, shorter studies and surveys, see Ward Edwards & Dertolf von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986) (analyzing numerous cognitive illusions that impair individuals’ decision making); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–79, 1541–45 (1998) (discussing such problems as bounded rationality and bounded willpower and their implications for paternalistic intervention); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075–1102 (2000) (describing numerous decision-making strategies, heuristics and cognitive biases that do not maximize utility); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167–83 (2003) (exploring the relationship between failed decision making and institutional paternalism).

The shortcomings of the preferences theories of welfare lead one to consider the alternative of an objective theory of well-being. An objective theory holds that certain things are good for people, and that having such things makes for a better life.⁵⁶ These goods have intrinsic value independent of whether individuals desire them, either actually or hypothetically under ideal conditions.⁵⁷ Similarly, some things can be deemed bad for individuals, even if they are unaware or do not wish to avoid them.⁵⁸ Having these negatives leaves one worse off, in terms of well-being.⁵⁹

Objective theory advocates do not argue that actual preferences are unimportant in assessing people's well-being. What they reject, however, is the impossibility of judging a person's well-being by an external standard that is distinct from desires and tastes.⁶⁰ The objective approach to welfare is accompanied by a non-exhaustive pluralist "list" of goods worth having; hence, the term "objective list" theories.⁶¹ Although no unanimously agreed-upon list exists, there is considerable overlap between the various objective theories of well-being. Lists constructed by different people from diverse backgrounds and times have much in common; they cannot be viewed as arbitrary, capricious, or just "a matter of taste."⁶² The values com-

56. KAGAN, *supra* note 31, at 39; PARFIT, *supra* note 39, at 499; Arneson, *supra* note 44, at 141–42; Brink, *supra* note 31, at 422.

57. STEPHEN DARWALL, *WELFARE AND RATIONAL CARE* 1, 3, 103 (2002); THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* 112–13 (1998); Brink, *supra* note 31, at 422.

58. KAGAN, *supra* note 31, at 39; PARFIT, *supra* note 39, at 499.

59. KAGAN, *supra* note 31, at 39; PARFIT, *supra* note 39, at 499.

60. Griffin articulates this point nicely: "[W]hen [objective values] appear in a person's life, then whatever his tastes, attitudes, or interests, his life is better." GRIFFIN, *supra* note 35, at 54.

61. Derek Parfit coined the term "objective list theory." PARFIT, *supra* note 39, at 493, 499. Scanlon regrets this term, which might mistakenly imply arbitrariness and rigidity. Scanlon, *supra* note 34, at 188. He prefers the term "substantive-good theory" since it holds "that there are standards for assessing the quality of a life that are not entirely dependent on the desires of the person whose life it is." SCANLON, *supra* note 57, at 113. The writing of Aristotle presents a classic objective theory of welfare. Aristotle offered an account of the ideal human life in which human nature flourishes and reaches perfection. He argued that well-being consists of the exercise and full development of various intellectual and moral virtues and that the best life is the philosophical life. ARISTOTLE, *NICOMACHEAN ETHICS* 12–14, 263–69 (David Ross ed., 1980) (n.d.). Contemporary objective theories provide more pluralistic and flexible lists of objective goods and deny that there is a single ideal of human life fit for everyone.

62. GRIFFIN, *supra* note 35, at 54, 72.

monly included in objective goods lists are autonomy and liberty, understanding, accomplishment, deep and meaningful social relationships, and enjoyment.⁶³

1. Autonomy and Liberty

These values include the ability to determine one's own course in life and the freedom to act according to one's choices.⁶⁴ Autonomous living is necessary for a meaningful human existence.⁶⁵ Autonomy and liberty assume the existence of certain basic capabilities to act—being in a state of physical and mental health.⁶⁶ This requires adequate levels of nutrition, health and sanitation; freedom from anxiety and pain; certain levels of self-respect, self-esteem and aspiration; and sufficient material goods, such as a home and household property.⁶⁷

2. Understanding

An important ingredient in a good life is knowledge about oneself and the world. Similarly, lack of ignorance, confusion, and error is good in any person's life.⁶⁸ The value of understanding requires that every individual receive an adequate education and sufficient material resources to enable him or her to appreciate the good things in life, to adopt worthwhile goals, and to realize his or her potential.⁶⁹

63. How, then, are the specific values on the list chosen? Some writers do not attempt to explain or justify the items on the objective list. *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 64–65 (1992) (“The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration.”). Others deduce the goods on the list from the distinctive and essential characteristics of human nature. *See, e.g.*, GRIFFIN, *supra* note 35, at 70; THOMAS HURKA, *PERFECTIONISM* 3 (1993); GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* 202, 229 (1997). Still others deduce the goods from the common, widely shared values of people. *See, e.g.*, MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 74 (2000); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 308–09 (1986); Sen, *Agency and Freedom*, *supra* note 47, at 192.

64. GRIFFIN, *supra* note 35, at 67.

65. *Id.*; SHER, *supra* note 63, at 177; Mozaffar Qizilbash, *The Concept of Well-Being*, 14 *ECON. & PHIL.* 51, 65 (1998).

66. GRIFFIN, *supra* note 35, at 67.

67. NUSSBAUM, *supra* note 63, at 78–80; Qizilbash, *supra* note 65, at 65, 67.

68. FINNIS, *supra* note 63, at 64–69, 87; HURKA, *supra* note 63, at 99–100, 136; SCANLON, *supra* note 57, at 87; SHER, *supra* note 63, at 178, 199–201.

69. DAVID O. BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 231, 234 (1989); NUSSBAUM, *supra* note 63, at 78–79.

3. Accomplishment

The pursuit and successful achievement of worthwhile goals is valuable. It is objectively good to adopt meaningful goals that give our lives weight and substance, exercise our capacities, and fulfill our potential.⁷⁰ Accomplishment depends both on the identity of the chosen goals and on their successful realization.⁷¹ In contrast, it is objectively bad to waste one's life on petty, trivial, self-debasing, or otherwise unworthy aims.⁷² As is the case with the values explained above, accomplishment relies heavily on the availability of adequate material resources. Security of our daily existence is a prerequisite to the pursuance of long-term goals. In addition, material resources are needed to realize these goals and may sometimes be the "material" upon which our projects are implemented and our talents and creativity are exercised.

4. Deep and Meaningful Social Relationships

This value concerns the existence of significant, authentic, and reciprocal relations of friendship and love.⁷³ Developing and sustaining deep bonds and exercising concern and respect for others are good in themselves, apart from the happiness that these relationships may provide.⁷⁴ Humans are social beings, and a solitary life is an impoverished life—guaranteeing adequate material resources to everyone assists in the development of a person's ability to love, share, cooperate, and care for others.⁷⁵

70. BRINK, *supra* note 69, at 231–33; GRIFFIN, *supra* note 35, at 64–67; PARFIT, *supra* note 39, at 499.

71. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 3–4, 38 (1994); SCANLON, *supra* note 57, at 121–25.

72. DARWALL, *supra* note 57, at 97; RAZ, *supra* note 63, at 298–99.

73. FINNIS, *supra* note 63, at 88; NUSSBAUM, *supra* note 63, at 79; SCANLON, *supra* note 57, at 87–89, 123–25.

74. GRIFFIN, *supra* note 35, at 67–68; HURKA, *supra* note 63, at 134–36.

75. Extreme poverty may cause self-centeredness. For example, a hungry person who concentrates all of his efforts on the next meal may not be able to develop deep relationships. HURKA, *supra* note 63, at 170. In addition, giving a gift, a donation to charity, or a dinner invitation requires, respectively, an owned object from which to part, spare cash, or a home.

5. Enjoyment

Experiencing pleasure and satisfaction in different aspects of life (at home, during play, and at work) and being able to enjoy beauty or nature contribute to the objectively good life.⁷⁶

It is important to stress that the objective theory I endorse is neither rigid nor elitist. There is no single ideal of the good human life, suitable for everyone; the objective values on the list are broad enough to allow sufficient flexibility and pluralism. Well-being is a mixture of the listed values, and the particular compound of these values varies from one individual to another.⁷⁷ In addition, the content of each specific value on the list necessarily differs for every individual, and so there are many ways to achieve a good life.⁷⁸ Thus, for instance, the good of “accomplishment” may mean scholarly research for one, cultivating the land for another, and community work for a third. If, in pursuing these diverse activities, the individual has realized her potential and pursued goals that are as worthwhile as anything she could have done, then she has attained the good of “accomplishment.”⁷⁹

Adoption of an objective criterion of well-being—in lieu of a preferences-satisfaction criterion—is perfectly acceptable within a consequentialist approach. Indeed, philosophers have long acknowledged that consequentialism requires the promotion of the good, but does not offer in itself any theory of such good.⁸⁰ Thus, the good can be based on objective criteria rather

76. FINNIS, *supra* note 63, at 87–88; GRIFFIN, *supra* note 35, at 67; SHER, *supra* note 63, at 200–01.

77. BRINK, *supra* note 69, at 232–33; GRIFFIN, *supra* note 35, at 58–59.

78. HURKA, *supra* note 63, at 136; NUSSBAUM, *supra* note 63, at 105; Scanlon, *supra* note 34, at 189–90.

79. RAZ, *supra* note 63, at 298–99; Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 780–82 (1989). Similarly, the content of the good “enjoyment” greatly varies from person to person. Qizilbash, *supra* note 65, at 69.

80. See JAMES GRIFFIN, VALUE JUDGEMENT: IMPROVING OUR ETHICAL BELIEFS 161 n.7 (1996) (claiming that consequentialism is a much broader value theory than utilitarianism, since it looks “either at well-being or at moral goods, such as equality, respect for rights, fidelity to one’s word, and so on, or indeed, and commonly, at both”); KAGAN, *supra* note 31, at 61 (“[I]n principle, almost any theory of the good could be incorporated into a consequentialist framework. Accordingly, there are as many different versions of consequentialism as there are theories of the good.”); SCHEFFLER, *supra* note 31, at 1–2 (stating that consequentialist theories may differ from one another with respect to their conceptions of the good, but all such theories share the same conception of the right, namely, that the best outcomes should be promoted); Philip Pettit, *Introduction to CONSEQUENTIALISM*, at xiii, xv (Philip

than on a person's actual (or even ideal) desires.⁸¹ Furthermore, scholars widely accept that a consequentialist framework can be applied not only to the goal of maximizing *overall* welfare (usually assumed to be synonymous with efficiency and measured in utility or preference-satisfaction terms) but also to the promotion of a goal that focuses on the optimal distribution of welfare⁸² or combines considerations of equality or rights with those of overall welfare.⁸³

Once we adopt an objective theory of welfare, the advantages of redistribution through private law become apparent and their purported disadvantages diminish. If our aim is to

Pettit ed., 1993) ("The consequentialist holds that an option is right just in case it is associated with better relevant consequences than alternatives, however the superiority of those consequences is to be judged: whether by reference to a utilitarian theory of the good, for example, or by reference to some other theory. . . . Consequentialism is uncommitted in the theory of the good; it amounts only to a theory of the right.").

81. See Adler & Posner, *supra* note 52, at 202–04 (concluding that all theories of well-being can be accommodated within a cost-benefit analysis aimed at maximizing welfare); Brink, *supra* note 31, at 421–22 (stating that a consequentialist theory can adopt different conceptions of welfare, both subjective and objective); Kaplow & Shavell, *supra* note 26, at 984 n.41 (noting that most of their analysis of welfare maximization in terms of preferences-satisfaction can be applied to welfare maximization in terms of an objective criterion).

82. Although many philosophers addressing this issue refer to the possibility of *combining* considerations of overall welfare maximization and justice or equality, some have mentioned that we can similarly focus solely on the maximization of justice or equality. *E.g.*, GRIFFIN, *supra* note 80, at 161 n.7 (noting that a consequentialist theory can concentrate exclusively on promoting equality); Amartya Sen, *Rights and Agency*, in CONSEQUENTIALISM AND ITS CRITICS 187, 188–89 (Samuel Scheffler ed., 1988) (explaining that a consequentialist approach is not confined to utilitarianism, but may also judge states of affairs "by the utility level of the worst-off individual in that state").

83. See SHELLY KAGAN, *THE LIMITS OF MORALITY* 6–7 (1989) (claiming that the theory of the good need not be confined to promotion of *overall* well-being, rather it is possible to adopt a pluralist theory of the good, "one that gives independent weight to several factors[.] . . . for example, it might be claimed that various distributional factors are relevant to the goodness of outcomes"); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 149 (1990) (stating that it is possible to retain a consequentialist structure while replacing the goal of happiness or preferences-satisfaction maximization with some other concept of the good; one which includes among its components "the non-existence of extreme unfairness in the distribution of advantages among persons"); T.M. Scanlon, *Rights, Goals, and Fairness*, in PUBLIC AND PRIVATE MORALITY 93, 98–99 (Stuart Hampshire ed., 1978) (explaining different ways in which a consequentialist framework can accommodate considerations of equality; one such way is to hold that "equality of distributions and fairness of processes are among the properties that make states of affairs worth promoting").

redistribute well-being, *objectively* defined, rather than just income as a means for actual preferences satisfaction, then redistributive legal rules are by their very nature better suited to the task than taxes and monetary transfers. Private law rules convey a message as to the things worth having and directly provide for the goods deemed necessary for people's well-being.⁸⁴ An income increase contains no such communication and only grants the financial means to attain the objective goods if individuals happen to desire them. Although a person's right to transfer and welfare payments is generally inalienable,⁸⁵ the money itself, once received, can be used for any purpose.

This relative superiority of redistributive legal rules is not eliminated by the possibility that their costs may be passed on to the party benefited by the rules. To understand why, let us revisit the example of the warranty of habitability, requiring landlords to provide tenants with residential units that meet minimal standards of safety, sanitation, and so forth.⁸⁶ Even if the quality standard largely fails to redistribute income—because the market responds by raising the rents or altering other terms of the lease, it may still succeed in redistributing the objective good of minimal quality housing.⁸⁷ Better housing

84. Thus, for example, a rule prohibiting self-help eviction by landlords directly promotes security of tenants' shelter, a community property system directly ensures spouses an adequate part of the marital assets, and rules requiring safety measures in the workplace directly provide employees with a secure environment. For discussion of the first two examples see, respectively, *infra* Parts III.A.1, III.B.

85. Thus, for example, the rights to social security benefits and pension funds are generally inalienable. 42 U.S.C.A. §§ 407(a), 1383(d)(1) (West 2003 & Supp. 2006) (social security); 26 U.S.C.A. § 401(a)(13) (West 2003 & Supp. 2006) (pensions).

86. See *supra* notes 26–30 and accompanying text.

87. The possibility that the costs of redistributive legal rules would be passed on (if they are mandatory), or that the rules themselves would be contracted around (if they are defaults), should not be overstated. First, this would not occur in non-contractual scenarios, such as between potential defendants and victims in torts cases. Second, and more importantly, such behavior does not always occur even in contractual settings. Take, for instance, family property systems, which employ various rules to redistribute wealth between spouses. See *infra* Part III.B (discussing marital property regimes). Although these arrangements, in principle, may be contracted around (and despite the fact that the richer of the two spouses stands to lose substantial wealth if the rules are implemented), relatively few couples enter into pre-marital agreements. See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 14 (1989); Carolyn J. Frantz & Hanoach Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 80 n.12 (2004). Similarly, in the field of landlord and

may be viewed as objectively important: a rat-infested, leaking and broken-down apartment cannot grant the basic security, comfort and means that are essential for advancing self-respect and autonomous action, acquiring knowledge, pursuing long-term goals, or developing deep and meaningful social relationships with other people.⁸⁸ In addition, even if the quality standard is only partially successful (because some tenants would not desire, or be able to afford, more expensive, better quality housing),⁸⁹ in those cases that *do* succeed, we are guaranteed that the objectively good outcome was indeed achieved: more people occupy habitable housing, and thus this good is more equally distributed throughout society. With monetary transfers, in contrast, there can be no similar—even partial—assurance. If people choose to spend their additional income on goods that do not advance their welfare, then the objectively worthwhile redistribution is not achieved.

The plight of the extremely worse-off, who would not be able to afford more expensive quality housing without financial aid, should be addressed also by the conventional methods of transfer payments and rent subsidies administered by the state. I do not claim that the tax-and-transfer system should be abolished and replaced by redistributive legal rules. Rather, I argue that the latter should be employed alongside the former. Well-being, objectively defined, would be further enhanced if

tenant law, some writers argue that in certain circumstances, redistributive legal rules successfully transfer wealth to tenants. *See supra* note 28. Thus, the final result in terms of *wealth* redistribution is complex and context dependent.

88. Richard Craswell has argued that, in contrast to common intuition, the ability of sellers to pass on much of the cost of a legal rule is, in many cases, an indication that consumer benefit from the rule surpasses the cost, and thus consumers are willing to pay the additional price. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 370–76, 380–83 (1991). This analysis was based on the assumption that welfare is judged by reference to consumers' actual preferences. *Id.* at 368–69. The objective theory of well-being extends the justification of redistributive legal rules to cases in which consumers subjectively would have preferred that the rules did not exist. Even in these cases, the legal rule may be deemed successful at enhancing the distribution of an objective good.

89. A tenant who is able to afford better-quality housing, but would have preferred to rent cheaper, inferior-quality housing, may nevertheless rent the objectively superior type of apartment if the “overall lease package” is still more valuable to her than the next best alternative (like moving in with a relative or becoming homeless).

we do not aid everyone solely through the tax-and-transfer system, but distribute also via legal rules whenever possible.

Another advantage of distributing objective goods relates to the probable effects of the redistribution on the recipients' work incentives. An increase in people's unearned income increases their demand for all goods, including leisure, and so the amount of labor supply may fall. For this reason, cash transfers and negative taxes may detrimentally affect the work incentives of the poor.⁹⁰ Objective well-being redistribution schemes may be different since they generally involve in-kind distribution.⁹¹ To the extent that the objective goods are not perceived as "cash substitutes" or "unearned income," they would not be regarded as increasing the recipients' wealth, and so would not affect their work incentives in the same way as cash transfers. This may certainly be the case for legal rules that do not aim to make the poor richer,⁹² but rather strive to enhance their attainment of values such as self-respect, autonomous action, accomplishment, and appropriate social relationships with others.⁹³

For similar reasons, redistribution through legal rules may not adversely affect the work incentives of the rich to the same extent that taxation does. If, indeed, economic analysis is correct in claiming that redistributive legal rules are *less* successful at transferring wealth, then there is also *less* distortion of the givers' choices between work and leisure. Presumably, the fact that these rules reduce the freedom of the relatively better-off by requiring them to treat the worse-off fairly and respectfully does not have distortion effects identical to that of a reduction in income.⁹⁴

90. MURPHY & NAGEL, *supra* note 11, at 183–84; DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* 192 (2d ed. 1989).

91. Examples include a rule that prevents unreasonable restraints on tenants' right of alienation and a rule that permits employers to fire workers only for just cause. For discussion of the former rule, see *infra* Part III.A.2.

92. Minimum wage laws, for example, do aim to make the poor richer.

93. I do not claim that any increase in unearned income would necessarily distort people's work incentives. The value that people attach to being employed may cause them not to substitute employment-generated income for income transfers via taxes or legal rules. I only argue that to the extent that, and in the circumstances in which, unearned income affects labor decisions, this detrimental effect is less applicable to redistributive legal rules.

94. Indeed, economic analysis usually assumes that sellers and landlords are indifferent between giving an inferior asset for a lower price or a superior asset for a higher one. The economic argument further assumes that people react to redistributive legal rules in the same way as to an increase in *mar-*

In summary, when comparing the performance of taxes and transfer payments to that of redistributive legal rules, we should bear in mind that they are largely redistributing different kinds of goods. The former redistribute solely money, and hence are naturally suited to an actual preferences approach to well-being. The latter redistribute mainly in-kind, and thus are superior from an objective welfare perspective.⁹⁵

B. THEORY OF THE GOOD (2): COMPLEX STATES OF AFFAIRS

As explained above, the economic analysis of redistributive legal rules assumes that the characteristics of the process generating the good are of no importance.⁹⁶ The source and mode of

ginal—rather than *average*—taxes. Distortions of labor supply from progressive taxation result mainly from marginal tax rates. The labor/leisure decisions of a person earning \$100,000 would not be significantly altered by a change in the tax rate applying to the first \$10,000 of income. In contrast, this person may decide to work less if a higher tax rate would apply to the last dollars of income. After such taxation, the last hour (or hours) of work may be worth less than an additional hour (or hours) of leisure. MURPHY & NAGEL, *supra* note 11, at 69–70, 136; SLEMROD & BAKIJA, *supra* note 22, at 105–06; C. Eugene Steuerle, *And Equal (Tax) Justice for All?*, in TAX JUSTICE 253, 266 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002). Therefore, even assuming that people perceive redistributive legal rules as transferring income, such redistribution would not significantly affect their behavior unless they also equate it with an increase in the taxation of their last dollars of income. This assumption seems quite dubious and in need of empirical proof. It is much more natural to view the economic effect of a redistributive legal rule as an increase in average—rather than marginal—tax rates. Cf. Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1669–73 (1998) (arguing that due to the psychological phenomenon of mental accounting, redistributive legal rules would not be perceived as a direct charge against income, but as expenditures out of income).

95. Note that there are writers who argue that the state should not aim at equality of *welfare*, but at equality of *resources*. *E.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 11–119 (2000). This debate, however, is less relevant for our purposes. First, Dworkin’s argument relates to the question “equality of *what*,” whereas this Article focuses on the question of “*which method*” should be used to achieve the desired form of equality. Second, and more importantly, some of the problems of the “equality of welfare” concept are mainly applicable to preferences theories of well-being, and much less to the objective theory of welfare which I endorse. A good example is the problem of satisfying expensive tastes. If some people desire champagne while others suffice with beer, then the state would have to spend a larger part of its limited resources in order to grant the former an equal level of welfare. An objective theory of welfare can easily bypass this problem, since it is not tied to the satisfaction of people’s actual preferences but to the promotion of objective goods. An objective theory can afford less (or no) weight, at the outset, to the fulfillment of non-urgent, expensive, trivial, or unworthy desires.

96. See *supra* notes 37–38 and accompanying text.

production are not viewed as a part of a rule's consequences and so do not affect the evaluation of the goodness of its outcomes. Thus, it is presumed that the consequentialist maximization formula is but a technical aggregation of end-results. Viewed in this way, it is once again not surprising that taxes and transfer payments are found to be superior to redistributive legal rules: if any unit of increase in the amount of a good is equivalent to any other unit of increase in that good, then greater quantity of a good (and at lower costs) is better than less. These assumptions, however, can be contested, both normatively and positively, as I demonstrate below.

1. Broadening the Definition of Outcomes—Normative Analysis

Contrary to the assumption of economic analysis, a consequentialist theory is not compelled to accept a narrow definition of outcomes. Indeed, writers in the utilitarian and consequentialist traditions have argued for a richer, more comprehensive conception of consequences that combines diverse influencing variables. Thus, for example, writers have maintained that the very performance of a certain act may itself be a factor in assessing outcomes.⁹⁷ Consequences need not be limited to what happens *after* the act and do not have to be discrete *from* the act.⁹⁸ The goodness or badness of the acts themselves may affect the goodness or badness of the resulting states of affairs, and hence our choice between them. Arguably, an act of murder “makes the world bad above and beyond the

97. RAZ, *supra* note 63, at 269–70 (stating that most consequentialists agree that the intrinsic value or disvalue of acts may be regarded as part of the outcomes).

98. KAGAN, *supra* note 83, at 7 n.6 (asserting that “the very performance of a given type of act may itself be a factor in how well the history of the world goes” and thus “talk[ing] of the goodness of the ‘outcome’ . . . should not be understood in a narrow sense, i.e., limited to what causally follows from the act, or what happens after the act”); Sen, *Agency and Freedom*, *supra* note 47, at 181–82 (“[A]cts themselves may have value or disvalue, distinct from the valuation of states resulting from such acts. . . . A state of affairs in which Brutus kills Caesar is not just one in which Caesar has expired. . . . Caesar could have expired in many different ways, and the fact that he got knifed by Brutus must be a *part* of that state.”); Sosa, *supra* note 31, at 102 (“An act’s outcomes are the states of affairs brought about by that act[;] . . . if an act fulfils a promise, the state of affairs of that promise’s being kept is an outcome of that act.”).

badness of the resulting loss of innocent life.”⁹⁹ Therefore, when comparing scenarios in which people die, we should consider not only the number of dead people in each world, but also the causes of their death. Similarly, the consequences of an act may depend not only on what follows from it, but also on *who* performs it. For instance, the outcome that a son was saved from drowning by his father is different from the outcome that he was saved by a stranger. We may attribute more weight to a state of affairs in which, other things being equal, a father who can save only one of two children from drowning chooses to save his own child.¹⁰⁰

Philosophers have also claimed that we should not confine ourselves to comparing the consequences of specific acts in isolation, but rather evaluate the relative goodness of alternative world histories, including in this comprehensive assessment such variables as acts, rules, dispositions, motivations, and character traits existing in each world.¹⁰¹ Thus, for example, a world in which people tend to act out of certain motives, like love, may have better overall consequences than one in which people adhere to a commitment to calculate impersonally the optimality of each act.¹⁰²

99. KAGAN, *supra* note 83, at 26; Sosa, *supra* note 31, at 102–03. Sosa discusses the innocent’s murder case as well as an opposite example in which the *goodness* of the act affects the outcome. Sosa, *supra* note 31, at 102–03 (“Loyal acts bring about states of affairs in which a loyal act has been performed. Those states of affairs carry some positive value.”); *see also* Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 488 (1979) (“[A] tortured body, an unfed belly, a bullied person, or unequal pay for equal work, is as much a part of the state of affairs as the utility and disutility occurring in that state.”). A thorough discussion of this issue is found in JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 129–48 (1990).

100. Sosa, *supra* note 31, at 114–15. For different consequentialist justifications of agent-relativity, see SCHEFFLER, *supra* note 31, at 15–16 (claiming that according to human nature, people cannot function effectively unless they devote more energy to the welfare of themselves and close-ones; thus, agent-relativity is justified by the long-term advantages of having psychologically healthy agents); Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 ETHICS 461, 472–75 (1991) (arguing that an individual should focus on the welfare of a small number of close-ones, not because she rates their welfare more highly than the welfare of others, but because she is in a better position to succeed in securing their welfare).

101. MICHAEL SLOTE, *COMMONSENSE MORALITY AND CONSEQUENTIALISM* 93, 102–05 (1985); Sen, *supra* note 99, at 466.

102. *See* SLOTE, *supra* note 101, at 92–94 (discussing the case of acting out of love to save one’s own child instead of children one does not know). For additional writers arguing that overall good would be better promoted if it were not pursued directly in each and every case, *see* JOHN BROOME, *WEIGHING*

Yet other writers have contended that in assessing the relative value of alternative outcomes we must consider the worthiness of the object generating the outcome and whether its recipient deserved that outcome.¹⁰³ One may argue, for instance, that objects of people's attitudinal pleasure can be ranked on a scale in terms of their suitability to serve as a source of pleasure. Some objects are more suitable than others. For example, contemplation of a beautiful painting is more suitable as a source of pleasure than participation in mud wrestling. Accordingly, the value of any experience is determined *both* by its amount (measured in intensity and duration) and by whether it derived from a higher-altitude or a lower-altitude object.¹⁰⁴ In a similar fashion, the value of a pleasure may be said to be a function of two variables: its amount and the extent to which it is deserved or justly experienced. Positive desert (due to deficient past receipt, legitimate claim or moral worthiness) enhances the intrinsic goodness of a pleasure, whereas negative desert mitigates it and neutral desert neither enhances nor mitigates goodness.¹⁰⁵

As all these examples demonstrate, the valuation of outcomes need not be limited to a technical aggregation of quantities that follow an act. Admittedly, there are writers who hold

GOODS: EQUALITY, UNCERTAINTY AND TIME 5–6 (1991); Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 315–18 (1985); Brink, *supra* note 31, at 423–26.

103. FRED FELDMAN, PLEASURE AND THE GOOD LIFE: CONCERNING THE NATURE, VARIETIES, AND PLAUSIBILITY OF HEDONISM 73–77, 119–21, 160–67 (2004) [hereinafter FELDMAN, PLEASURE]; Fred Feldman, *Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice*, 55 PHIL. & PHENOMENOLOGICAL RES. 567, 572–77 (1995) [hereinafter Feldman, *Adjusting Utility*].

104. FELDMAN, PLEASURE, *supra* note 103, at 73–77, 119–21, 160–67. See generally Noah M. Lemos, *Higher Goods and the Myth of Tithonus*, 90 J. PHIL. 482 (1993) (providing another discussion of higher goods). The possibility of formulating a consequentialist theory that ascribes intrinsic value to the sources generating end-results can be traced back to Mill, who rejected the view that all pleasures are equally valuable. JOHN STUART MILL, *Utilitarianism*, in ON LIBERTY AND OTHER ESSAYS 136, 137–43 (John Gray ed., Oxford World's Classics 1998) (1861). Mill distinguished between “higher” pleasures (such as those of a scholarly life) and “lower” pleasures (such as those of a contented pig wallowing in the mud), and argued that the former type enhance a person's well-being to a much greater extent than a similar quantity of the latter type. *Id.*

105. Feldman, *Adjusting Utility*, *supra* note 103, at 572–77. Feldman develops a parallel argument with respect to the valuation of pains. FELDMAN, PLEASURE, *supra* note 103, at 119–21, 192–97; Feldman, *Adjusting Utility*, *supra* note 103, at 578–82.

more restrictive conceptions of consequentialism. They may argue, for instance, that consequentialist reasoning is impartial and therefore an agent cannot give more weight to her personal or loved-ones' interests.¹⁰⁶ They may also argue that the intrinsic value or disvalue of acts and states of affairs cannot play a role in the evaluation of outcomes.¹⁰⁷ For the purposes of this Article, however, it is immaterial that no unanimity on this issue exists.¹⁰⁸ It suffices that consequentialism does not necessarily entail the theory of the good that economic analysis takes for granted.

The possibility of adopting a broader definition of consequences is highly relevant to the redistribution debate. It enables one to argue that the goodness or badness of a redistributive outcome depends on *both* the quantity of the end result, *and on the process which generates it*. Once one realizes that people's welfare depends not only on what they have, but also on how they got it, it is clear that their welfare consists of more than the quantity of things they have. The same quantity of goods may be more or less valuable depending on the mode of its production. Different modes of production vary in their ability to promote goods; some are more conducive than others.¹⁰⁹

106. See ANDERSON, *supra* note 48, at 31 (stating that consequentialist theories often add the condition of agent-neutrality, but refraining from adopting this requirement in her discussion of consequentialism); Sosa, *supra* note 31, at 113–14, 120 (describing the restrictive view). The impartiality requirement is often assumed by writers opposed to consequentialism, who then use it to criticize this theory. *E.g.*, Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 75, 108–18 (J.C.C. Smart & Bernard Williams eds., 1973).

107. See ANDERSON, *supra* note 48, at 30 (defining consequentialism as a theory that “assesses the value of a state of affairs independent of the values of persons, actions, motives, norms, practices, states of character, or anything else”). Later on, Anderson relaxes this requirement and discusses theories which she labels “hybrid consequentialism.” *Id.* at 79–90; see also Feldman, *Adjusting Utility*, *supra* note 103, at 583–85 (describing and rejecting this limiting view).

108. Feldman states that the definition of consequentialism is a matter of great controversy, and that the literature contains various, and sometimes incompatible, definitions. Feldman, *Adjusting Utility*, *supra* note 103, at 584 & n.26; see also RAZ, *supra* note 63, at 268 (“There is no one single idea which forms the core of consequentialism, none that is universally agreed upon to be an inescapable part of the consequentialist outlook.”).

109. Although the economic critique of redistributive legal rules focuses on simple, quantitative aggregation of end-results, it is worthwhile to note that, in theory, welfare economics allows for a more sophisticated maximization process. Welfare economics requires the aggregation of individuals' preferences into a social welfare function. In this process, distributive concerns may

To illustrate this point crudely, assume that an individual can receive the same amount of a resource (say, \$100), either with a spit in the face or with congratulations for excellent achievement. Surely the well-being of that person is enhanced in the second scenario more than in the first. This is true not only from an objective welfare perspective but also according to an actual preferences theory of well-being. That is to say, most individuals would view the two scenarios as generating *different* outcomes. Therefore, my argument for a broad definition of outcomes can be adopted even by those who favor a preferences-satisfaction criterion of welfare over an objective one.

Similar comparisons and judgments can be made with respect to less extreme scenarios. All methods of redistribution—including taxes, transfer payments and redistributive legal rules—can be classified as positioned somewhere along the continuum between the two extremes of *humiliation* and *reward*.¹¹⁰ Generally speaking, taxes and transfer payments are closer to the negative pole, whereas redistributive legal rules are nearer to the positive pole.¹¹¹

Private law rules set the baseline for interactions between individuals, determine what each party has (or should have) at the outset of their relationship, and frequently convey an educative message of entitlement.¹¹² The implied warranty of habi-

be addressed by giving additional weight to the preferences of the worse-off. Such non-unitary weights represent decision-makers' views regarding the fair distribution of well-being in society. ROBERT SUGDEN & ALAN WILLIAMS, *THE PRINCIPLES OF PRACTICAL COST-BENEFIT ANALYSIS* 198–210 (1978); Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310, 322–33 (1938). In practice, however, the economic-legal literature does not flesh out this possibility and assumes in its analysis that all preferences are given equal weight. Note that although assignment of non-unitary weights enables distribution-sensitive aggregation of preferences, it also focuses on end-results and does not account for the effect of different distributive methods on the goodness of outcomes.

110. As explained in detail below, a method of redistribution may humiliate if it is associated with failure, charity or no-right. In contrast, a redistributive mode may be seen as rewarding when it implies desert, entitlement, or right. The latter type of method enhances the goodness of the distributive outcome, whereas the former kind diminishes it.

111. Again, this observation may be true not only under an objective criterion of welfare but according to a preferences-satisfaction criterion as well. See *infra* Part II.B.2.

112. See Jolls, *supra* note 94, at 1672 (asserting that the beneficiaries of redistributive legal rules are often “regarded as having *rights* to what they receive; for instance, the tort victim has a *right* to the damages paid by the tortfeasor”); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1461 (1996) (arguing that pri-

tability in landlord and tenant law, for instance, carries with it a message that the object of a lease can only be a house fit for human habitation. Tenants therefore have a right to such housing; a landlord complying with this requirement is simply fulfilling his obligation, not granting any favors. Furthermore, private law rules establish standards and guidelines regarding what is objectively good for *all* people, and do not directly refer to the interacting parties' wealth. Usually, the rules do not carry a banner of "help for the needy." To illustrate, although a rule requiring residential units to be habitable is mainly relevant for the non-wealthy (since the rich would in any case lease only high-quality apartments), the rule is addressed to all tenants, not only to poor ones. The same holds true for other types of private law rules: safety measures in the workplace are applicable to all workers, and rules equalizing the division of marital property are addressed to all spouses. These features of private law rules increase the goodness of their distributive outcomes for the reasons delineated below.

A method of redistribution that is coupled with entitlement and does not explicitly connect between the conferred benefits and need, is more conducive to promoting objective goods. By declaring that recipients have rights to the things that are worth having, such a method treats them with dignity and respect, and thus may cultivate the objective values of self-respect and self-esteem.¹¹³ These values cannot be promoted (at all or to the same extent) by a redistributive mode that implies charitable giving or even humiliation. The same can be said with respect to the good of autonomous action,¹¹⁴ which cannot be advanced through dependency on others. In addition, the value of a distributive outcome may vary according to the identity of the giver. By laying down the fair terms for dealing and cooperating with others, private law rules can foster appropriate relationships between people, thereby contributing to the objective good of "deep and meaningful social relationships."¹¹⁵ Mutual cooperation and concern may also be important for suc-

vate property is "a social system composed of entitlements that shape the contours of social relationships"); Sunstein, *supra* note 26, at 109 (stating that the choice of default rule "might matter because it has a legitimating effect, carrying important information about what most people are expected to do").

113. See *supra* notes 64–67 and accompanying text.

114. See *supra* notes 64–67 and accompanying text.

115. See *supra* notes 73–75 and accompanying text.

cessfully achieving long-term, worthwhile and challenging projects, thereby realizing the good of accomplishment as well.¹¹⁶

Taxes and transfer payments are a totally different redistribution method, devoid of these positive characteristics. They do not address day-to-day interactions between human beings, such as the relationships of landlords and tenants, employers and employees, or spouses. People interact with the government—which functions as either a taker or bestower of money—rather than among themselves. Thus, the “link” between the individual givers and receivers of the redistribution is severed. The former do not have a view of the latter’s faces, which consequently remain anonymous. No notions of entitlement in mutual relationships can be formed; patterns of cooperation, fair dealing and commitment cannot emerge. In addition, taxes and welfare payments expressly and transparently connect between the monetary transfers and the existence of poverty or need. The worse-off are “singled out” as the only beneficiaries of these rules, and it is clear that the payments are financed by money taken from others. Consequently, it is not surprising that taxes and transfer payments are often perceived—by non-recipients and recipients alike—as a form of charity: other people’s money transferred to not-altogether-deserving beneficiaries.¹¹⁷

116. See *supra* notes 70–72 and accompanying text. For the reasons delineated above, private law rules that apply to all, and do not explicitly tie between benefits and need, enhance well-being to a greater extent than private law rules that condition receipt on proof of personal need. An example of the latter is a tort rule that allows courts to adjust levels of due care and damage awards according to the evidence regarding the parties’ relative wealth.

117. See MURPHY & NAGEL, *supra* note 11, at 31–37 (describing and criticizing this common belief regarding redistributive taxes); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1901–02 (2005) (criticizing the prevailing view that welfare payments are the taking of the pretax income of others, but admitting that it may be almost impossible to change this belief). I do not argue that all taxes and transfer payments are perceived as handouts or are humiliating, either at all or to the same extent. As explained above, there is a continuum between two extremes which I label “humiliation” and “reward,” and each form of redistribution may be positioned on a different place along this continuum. See *supra* notes 109–11 and accompanying text. For example, pension benefits are not humiliating, since they were “earned” through years of fruitful labor, partly financed by contributions deducted from the recipients’ salaries, and paid after a person’s work-life has ended “naturally” (rather than prematurely). In contrast, welfare payments that are conditioned upon need and involve close scrutiny review (such as prior proof of eligibility and personal interviews) are much closer to the “humiliation” pole. Negative taxes that generally suffice with beneficiaries’ self-declared statements of eligibility and

In summary, it is theoretically possible to broaden the definition of “outcomes.” Moreover, such an extension is worthwhile, because it enables us to take into account how redistributive methods differ in their ability to promote good outcomes in terms of well-being.

The next Part supplements the normative argument by showing how, in fact, people’s valuations of something they receive may depend on the cause or process generating it. Thus, individuals may value benefits obtained through legal rules more highly than similar (or even somewhat greater) benefits received via taxes and transfers.

It is important to stress that this positive claim does not conflict with my former claim that redistributive legal rules should (and mainly can) aim at distributing objective well-being. True, an objective theory judges well-being by an external standard that is not necessarily dependant on people’s preferences and perceptions. This characteristic, however, is not tantamount to an assertion that people would usually reject the goods on the objective list, or that their desires and beliefs are unimportant. An objective theory gives substantial, though not decisive, weight to individual preferences and pleasures.¹¹⁸ Furthermore, education, easy access, exposure, and familiarization with objective goods can help achieve the ideal state of affairs in terms of well-being: individuals would not only possess the good things in life, but would desire and enjoy them as well. Therefore, to the extent that people in fact desire—or *would come to desire*—the goods worth having, it is highly relevant that our chosen method of redistribution can increase or diminish the goodness of the redistributive outcomes.

In addition, the positive argument delineated below can prompt those who reject my first argument—that welfare

need hold an intermediate position. The Temporary Assistance to Needy Families (TANF) is an example of the second, humiliating kind. *See* 42 U.S.C.A. §§ 601–19 (West 2003 & Supp. 2006). The Earned Income Tax Credit (EITC) is an example of the third, intermediate type. 26 U.S.C.A. § 32 (West 2002 & Supp. 2006). For a discussion of both types of monetary transfers and the differences between their eligibility requirements and processes, see Zelenak, *supra*, at 1876–81. For criticism of the TANF requirements, see Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 394–402, 411–17 (2002). Notwithstanding these differences and as a generalization, I maintain that taxes and transfer payments are closer to the negative pole of the continuum, whereas private law rules are closer to the positive pole, for the reasons delineated above.

118. *See supra* notes 59–60, 64–67, 76–79 and accompanying text; *infra* notes 173–80 and accompanying text.

should be judged according to an objective criterion—to accept my second argument—that “outcomes” should be extended to include methods of production or generation.

2. Non-Equivalence of Redistributive Methods—Behavioral Analysis

Psychological experiments and empirical studies support the argument that private law rules and taxes-and-transfers will produce different effects as methods of redistribution. These studies have shown that, contrary to the economic assumption of source independence,¹¹⁹ people react differently to materially equivalent outcomes generated from dissimilar perceived sources. Individuals’ valuation of a thing depends to a certain extent on the source through which they obtained it. In particular, an object believed to be attained “as of right,” through effort, or due to skill, is valued much more highly than a similar object obtained through no entitlement, by chance, or as a result of failure.

Lowenstein and Issacharoff, for example, tested source dependence in a pair of interesting experiments.¹²⁰ In the first, they distributed mugs to students who excelled in a previously conducted class exercise.¹²¹ Half of the students were informed that they received the mug based on their performance on the exercise.¹²² The other half were told that they were randomly selected to receive a mug.¹²³ All mug receivers were asked to fill a form in which they could choose between keeping the mug and trading it for a monetary sum ranging from twenty-five cents to ten dollars.¹²⁴ The remaining students in the class, who did not receive a high grade on the exercise, were given a choice between getting a mug or similar amounts of money.¹²⁵

119. See George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 J. BEHAV. DECISION MAKING 157, 157 (1994) (stating the economic assumption that “the utility of consuming an object does not depend on the source of the object, or on the source of the money used to purchase it”).

120. *Id.* at 159–65.

121. *Id.* at 159.

122. *Id.* at 159–60.

123. *Id.* at 160.

124. *Id.*

125. All the students were told that the examiners predetermined the money amount for the mugs, and that this information would be revealed *after* they stated their valuation. If the stated sum was found to be lower than the predetermined price, the student would get the money; if it was higher, they

Loewenstein & Issacharoff found that the perception that mug possession was due to *skill* rather than *chance* substantially increased its valuation; it increased by the same absolute amount as did mere possession of the mug.¹²⁶ In other words, source dependence was found to be equal in magnitude to the well-known endowment effect, namely, that people value an object they possess more than a similar object they have an opportunity to acquire.¹²⁷

In the second experiment, Loewenstein and Issacharoff compared mug evaluations of students who thought that they had received a mug (or not received a mug) due to high or low performance on the exercise.¹²⁸ In one class, the low scorers got the mugs, and in another class, the high scorers received it.¹²⁹ The results revealed two interesting phenomena. First, students who received a mug due to their high score on the exercise valued it significantly more highly than those who obtained a mug due to their low score.¹³⁰ A positive-perceived source enhances the valuation of an object, while a negative-perceived source diminishes it. Second, low performers who *obtained* mugs did not value them more than high performers who *did not receive* mugs.¹³¹ That is to say, when the source dependence effect operated *in opposition* to the endowment effect, the former eliminated the latter.¹³²

would keep (or receive) the mug. This was done to induce truthful evaluations from the students. *Id.* at 160.

126. The mean valuation for students with no mugs was \$3.23; for students with mugs due to chance \$4.71; and for students with mugs due to skill \$6.35. *Id.* at 160–61. The difference in valuation between high performers who associated mugs with success and high performers who believed that mugs were randomly assigned rules out the possibility that high valuation was due to being in a “good mood.” If this was the case, the valuation of both types of high performers would have been roughly the same.

127. Studies documenting and discussing the endowment effect include Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 665–70 (John H. Kagel & Alvin E. Roth eds., 1995); Elizabeth Hoffman & Matthew Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993); Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 196–97 (1991).

128. Loewenstein & Issacharoff, *supra* note 119, at 162.

129. *Id.* at 162–63.

130. The mean valuation in the former case was \$6.17, and in the latter, \$4.76. *Id.* at 163.

131. *Id.* at 163–64.

132. *Id.* at 164.

A possible explanation for source dependence is that people associate between causes and effects, so that contemplation of one evokes the other. Since it is pleasurable to think about success, this association increases the positive affect attributed to the thing obtained. This affect, in turn, provides an incentive for increasing one's valuation of the thing above what it would have been had it been received in a more neutral way. Similarly, since thinking about failure is generally unpleasant, the value of an object diminishes if it was obtained as a result of such an event.¹³³

Additional behavioral studies demonstrate the existence of source dependence. A bargaining experiment by Hoffman and others showed that when sellers felt that they earned entitlement to a sum of money (by scoring highly on a preliminary general knowledge quiz, rather than by randomly receiving it), they were less willing to share equally the gains of the trade with buyers.¹³⁴ Thus, notions of entitlement enhance the valuation of the resource. Similarly, studies by McGraw and others found that the identity of the relational source of an object or an income and its social meaning strongly affected its valuation and consequent decisions whether to sell or spend (rather than save) it.¹³⁵ Objects and windfall income received from family members or close friends were valued much more highly than objects or income received from different sources, such as from

133. See *id.* at 159. Many studies have demonstrated the correlation between emotions and valuation. *E.g.*, Jennifer S. Lerner et al., *Heart Strings and Purse Strings: Carryover Effects of Emotions on Economic Decisions*, 15 PSYCHOL. SCI. 337, 339 (2004) (finding that prior feelings of sadness or disgust reduced subsequent selling prices). Note that the above explanation for source dependence *differs* from the one suggested for the endowment effect. The common explanation for the latter phenomenon is not based on the enhanced attractiveness of a thing one possesses, but rather on the pain associated with giving it up. Assuming that people are averse to losses and that parting with an object is viewed as a loss, they will demand a higher price for it. See, e.g., Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296, 299–300 (1992) (providing experimental support for the “loss aversion” explanation of the endowment effect).

134. See Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346, 351, 361–62, 370 (1994). Interestingly, buyers shared sellers' notions of entitlement and were generally willing to accept lower shares of the profits in these circumstances. *Id.* at 362.

135. See A. Peter McGraw et al., *The Limits of Fungibility: Relational Schemata and the Value of Things*, 30 J. CONSUMER RES. 219, 222–26 (2003).

an authority (employer, teacher) or in market relationships.¹³⁶ In the former scenarios, individuals demanded much higher sums in order to part with the asset, and were much more likely to save the income than spend it.¹³⁷ Thus, the more positive the symbolic, historical source of an object or an income, the greater it is valued by the recipient.¹³⁸ Note that the above experiments found source dependence even with respect to money, the quintessence of a fungible asset. Money—and not only a tangible asset—was treated in different ways, according to its source and the identity of its giver.¹³⁹

These diverse experiments support my argument that to the degree that redistributive legal rules cultivate notions of entitlement in their recipients, these notions of entitlement will enhance the recipient's valuation of the things they have received. In contrast, if receiving money through the tax-and-transfer system is associated with failure, or, at most, viewed as "neutral" in terms of failure or success, then money's relative value will be diminished as a result.

Empirical data also supports the claim that taxes and transfer payments would more often than not be perceived as handouts rather than entitlements.¹⁴⁰ This phenomenon may result both in lower valuation by the transferees and in stronger opposition from the transferors.

Before proceeding, an important caveat is in order. I do not claim that taxes and transfer payments *should* be opposed as undeserved charity or that people have a right to their pretax

136. *Id.* at 223–25.

137. *Id.* at 223–26.

138. *Id.* at 224, 226, 228.

139. Further studies have demonstrated that money is not really fungible, and that people "routinely assign different meanings and separate uses to particular monies." VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 5 (1997). It was found, for example, that prostitutes distinguished between and separated "honest" money (from legitimate sources, such as welfare or health benefits) and "dirty" money (income from prostitution). *Id.* at 3. The former was carefully budgeted and spent on the "straight life"—to pay rent and bills. *Id.* The latter was quickly squandered on drugs and alcohol. *Id.* In general, people earmark money for particular uses, distinguish between monies by how they were earned, and designate special users for particular exchanges. *Id.* at 200, 209, 211; see also Richard H. Thaler, *Mental Accounting Matters*, in CHOICES, VALUES AND FRAMES, *supra* note 55, at 241, 259 (discussing how the source of an income and its perceived seriousness or frivolous affects the use to which it is put).

140. See *infra* notes 151–58.

income.¹⁴¹ I do argue, however, that to the extent that this method of redistribution conjures such perceptions and that these perceptions are widely entrenched and unlikely to change, we must take them into account when contemplating the optimal way to redistribute. Any redistributive mode should not ignore people's probable reactions to it, and the fact that a different method is likely to meet with less resistance and animosity is a relevant consideration.¹⁴²

Comprehensive public opinion surveys have found that people hold conflicting beliefs regarding the explanations for poverty and wealth. To varying extents individuals simultaneously endorse both individualistic and social explanations of poverty and wealth, without viewing them as mutually exclusive.¹⁴³ Poverty can be attributed to individualistic factors such as lack of ability and effort or loose morals, or it can be attributed to social factors such as discrimination, lack of equal opportunity, or the failure of the economic system.¹⁴⁴ Similarly, wealth may be explained individualistically by exceptional talent, hard work, or willingness to take risks, or it can be explained socially as a result of having greater opportunities from the outset, or due to the fact that the economic system allows

141. See MURPHY & NAGEL, *supra* note 11, at 8–9, 15, 31–37 (arguing that private property is a legal convention, created and sustained by the government and defined in part by the tax system, and that as a result one may not legitimately appeal to a baseline of property rights in pretax income for evaluating tax policy).

142. See James R. Kluegel & Masaru Miyano, *Justice Beliefs and Support for the Welfare State in Advanced Capitalism*, in SOCIAL JUSTICE AND POLITICAL CHANGE: PUBLIC OPINION IN CAPITALIST AND POST-COMMUNIST STATES 81, 81 (James R. Kluegel et al. eds., 1995) (claiming that it is difficult to sustain welfare programs over time in the face of unsympathetic public opinion); Adam Swift et al., *Distributive Justice: Does It Matter What the People Think?*, in SOCIAL JUSTICE AND POLITICAL CHANGE: PUBLIC OPINION IN CAPITALIST AND POST-COMMUNIST STATES, *supra*, at 15, 19 (arguing that judging what can be done politically requires knowledge of popular opinion).

143. See JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 87–88 (Peter H. Rossi et al. eds., 1986); James R. Kluegel et al., *Accounting for the Rich and the Poor: Existential Justice in Comparative Perspective*, in SOCIAL JUSTICE AND POLITICAL CHANGE: PUBLIC OPINION IN CAPITALIST AND POST-COMMUNIST STATES, *supra* note 142, at 179, 205; James R. Kluegel & Petr Mateju, *Egalitarian vs. Inegalitarian Principles of Distributive Justice*, in SOCIAL JUSTICE AND POLITICAL CHANGE: PUBLIC OPINION IN CAPITALIST AND POST-COMMUNIST STATES, *supra* note 142, at 209, 209, 229–30.

144. KLUEGEL & SMITH, *supra* note 143, at 78–79; Kluegel et al., *supra* note 143, at 189.

for the taking of unfair advantage.¹⁴⁵ Negative individualistic explanations for poverty and positive individualistic explanations for wealth imply that inequality is fair, a product of people's own behavior and responsibilities; whereas social explanations for these phenomena imply that they are unfair and should be corrected.¹⁴⁶

In the United States, positive individualistic explanations of wealth are prevalent. People, whatever their own social status, strongly believe that the rich become so due to superior personal qualities.¹⁴⁷ In contrast, social explanations for poverty are not as widely endorsed and are more strongly correlated with one's own social position.¹⁴⁸ Negative individualistic explanations for poverty are common—more so in the United States than in other western, free-market societies—and are held by poor and rich alike.¹⁴⁹ Notwithstanding these tendencies, people's beliefs as to the causes of poverty are to a great extent mixed; they regularly attribute poverty to *both* individualistic and social causes.¹⁵⁰

The co-existence of these diverse beliefs affects people's attitudes toward different types of redistribution. People's support for or opposition to a redistributive program may depend on whether it is framed in a way that makes the social or individual explanations for poverty and wealth salient.¹⁵¹ Kluegel and Smith have found increased opposition over the years to certain kinds of redistributive programs.¹⁵² In particular, direct income transfers to the poor and food stamps receive the *least* public support.¹⁵³ In contrast, the public widely supports efforts to aid the "working poor" through job creation, for instance.¹⁵⁴ A probable explanation for these results is that the latter type

145. KLUEGEL & SMITH, *supra* note 143, at 76–77; Kluegel et al., *supra* note 143, at 189.

146. See KLUEGEL & SMITH, *supra* note 143, at 80–81.

147. See *id.* at 23–24, 76–77, 90–91; Kluegel et al., *supra* note 143, at 188, 205–06; Kluegel & Mateju, *supra* note 143, at 221–25.

148. See Kluegel et al., *supra* note 143, at 188, 203; Kluegel & Mateju, *supra* note 143, at 228.

149. See KLUEGEL & SMITH, *supra* note 143, at 23–24, 78–81; Kluegel et al., *supra* note 143, at 203, 205–06; Kluegel & Mateju, *supra* note 143, at 228.

150. See KLUEGEL & SMITH, *supra* note 143, at 87–88; Kluegel et al., *supra* note 143, at 190, 194, 205–06.

151. See Kluegel et al., *supra* note 143, at 206; Kluegel & Mateju, *supra* note 143, at 209.

152. KLUEGEL & SMITH, *supra* note 143, at 152–53, 163.

153. See *id.* at 152, 163.

154. See *id.* at 152–53.

of redistribution is seen as correcting market problems and providing equal opportunities for hard work and achievement.¹⁵⁵ Thus, this approach does not conflict with the widespread belief that people control their fortunes. In addition, it may be less clear that effectuating this type of redistribution involves taking from the rich.¹⁵⁶ In contrast, direct income transfers are easily perceived as a transfer from those who legitimately earned their wealth to the less deserving, thereby undermining individuals' incentives to better their own position.¹⁵⁷ In other words, monetary transfers directly and most blatantly challenge widely held beliefs about the individualistic causes of poverty and wealth.

Kluegel and Smith summarize their policy recommendation:

Although most Americans want to do something about poverty, it has become increasingly clear that this 'something' does not include direct-transfer payments. Such payments directly challenge prevailing equity norms. . . .

Our findings suggest that the public evaluates inequality-related policy according to its place on a continuum from equal opportunity to direct-income redistribution. If any government involvement is believed to be needed, the closer it is in content to assuring equal opportunity the greater is the degree of public support. The more it looks like direct redistribution, the greater is the opposition.¹⁵⁸

These findings are clearly relevant for the debate regarding redistributive legal rules. Economic analysis recommends redistribution solely through the method that encounters the

155. *See id.* at 152–54.

156. *Id.* at 152.

157. *Id.* at 152–57, 163–65, 175. People oppose minimum wages less than direct income transfers, although minimum wages are not as broadly endorsed as job creation. *Id.* at 152–53. This “intermediate” result can also be explained by people’s attitudes towards wealth and poverty. On the one hand, minimum wages may be seen as helping only those with positive personal traits, namely those who are making an effort to help themselves. On the other hand, it is much more apparent that such help is financed by those who earned their fortune through hard work and ability. *See id.* at 157.

158. *Id.* at 293. A similar conclusion may be drawn from David Miller’s survey of studies of people’s attitudes towards distributive justice. David Miller, *Distributive Justice: What People Think*, 102 *ETHICS* 555 (1992). Miller shows that, although individuals want to eliminate extreme poverty and guarantee everyone some minimum according to need, they strongly believe that subject to this floor constraint society should allow and promote inequalities that result from individual ability and hard work. *Id.* at 564–70, 578–79. Comparable attitudes were found in an Israeli survey with respect to inequality. Noah Lewin-Epstein et al., *Distributive Justice and Attitudes Toward the Welfare State*, 16 *SOC. JUST. RES.* 1, 14–18, 20–21 (2003).

greatest resistance. The tax-and-transfer method is the one which makes the individualistic explanations for poverty and wealth the most salient. Since the “taking” from the wealthy is done separately from the “giving” to the needy, it is quite understandable if the givers form no notions of personal responsibility toward the anonymous recipients. This state of affairs may affect not only the redistribution’s chances of success, but also the magnitude of the injury perceived by those whose wealth is taken.

Redistributive legal rules clash with individualistic beliefs to a much lesser extent. Since they are often framed in terms of setting the background rules for fair dealing, cooperation, and appropriate relationships between people,¹⁵⁹ they are more naturally seen as creating equal opportunities for welfare and success. This, in turn, affects not only the welfare of the poor, but that of the wealthy as well. The rich may be resentful when the government takes their money for purposes which they cannot control, yet they may feel less offended or even gratified by the rewarding relationships with their counterparts under the redistributive legal rules (e.g., tenants, consumers, employees, or spouses).

Furthermore, to the extent that legal rules distribute objective goods rather than income,¹⁶⁰ they do not conflict with the positive individualistic explanations for wealth. The hard-working, talented rich are not made poorer by these rules (or at least not significantly so). In fact, it may at times be less obvious that legal rules are aiming at redistribution at all. Progressive taxation and transfer payments are extremely transparent methods of transferring income from the wealthy to the poor. In contrast, redistributive legal rules may have various aims and can be rationalized in different ways.¹⁶¹ For this reason as well, they are not in direct tension with prevailing individualistic beliefs.

159. See JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 177 (2000) (“Legal rules structure the contours of the relationships within which bargaining occurs.”); Singer, *supra* note 112, at 1462 (“[P]roperty law helps to structure and shape the contours of social relationships.”); Sunstein, *supra* note 26, at 109.

160. See *supra* notes 83–89, 93–95 and accompanying text.

161. Thus, for example, rules that protect tenants from self-help eviction by landlords or promote their ability to assign their rights, apply to all tenants, not only to poor ones. In addition, at least some people would view these rules as aiming at economic efficiency, rather than redistribution. For discussion see, respectively, *infra* notes 199–200, 212–14 and accompanying text.

Note that the above arguments differ from those made by Christine Jolls concerning the disparate effects of the two methods of redistribution.¹⁶² Jolls relies on the robust behavioral finding that people are often unrealistically optimistic and underestimate the probability of negative events. Taxation is a certain event, whereas an event triggering the application of a redistributive legal rule—such as being involved in a car accident—is an uncertain one. If potential defendants underestimate the latter risk, they will perceive its costs to be *lower* than they actually are. Consequently, a redistributive tort rule will distort their work incentives *less* than a tax yielding the same amount of revenue for the government.¹⁶³ My claims do not depend on the probabilities that people assign to redistributive legal rules and taxes. Moreover, and for this very reason, these claims are equally applicable to redistributive legal rules that govern *more certain* events. Such are the rules regulating the relationship between landlords and tenants or spouses, in contrast to tort rules applying to *strangers*. It is argued that in the former types of cases as well, legal rules may encounter less resistance, cause less injury to the welfare of the transferors, and distort work incentives to a lesser extent.

Up to a certain point the dependency of valuation and acceptance on source or method and the association of redistributive legal rules with entitlement are positive phenomena. It seems desirable, for example, that people would value income from work more highly than income by means of unemployment benefits.¹⁶⁴ This is not a case of cognitive bias that we wish to correct.

162. See Jolls, *supra* note 94, at 1658–74.

163. See *id.* at 1658–63.

164. Indeed, many behavioral studies have found that income is a fairly weak predictor of happiness, except for the extremely poor who need more money for subsistence. In contrast, employment is a significantly more important factor, and premature unemployment is a major source of unhappiness. See Michael Argyle, *Causes and Correlates of Happiness*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 353, 354, 356–64, 369 (Daniel Kahnemann et al. eds., 1999); Michael Argyle & Maryanne Martin, *The Psychological Causes of Happiness*, in SUBJECTIVE WELL-BEING: AN INTERDISCIPLINARY PERSPECTIVE 77, 82–84, 87–88 (Fritz Strack et al. eds., 1991); Ed Diener et al., *Subjective Well-Being: Three Decades of Progress*, 125 PSYCHOL. BULL. 276, 280, 287–94 (1999). Argyle therefore concludes that governments should not focus only on increasing people's income, but also on reducing unemployment, which is a much more important factor affecting happiness. More individuals would be able to work if governments adopted measures such as work-sharing, shorter working hours, or shorter working lives. Argyle, *supra*, at 369.

In summary, the *method* by which redistribution is achieved should—and does—affect our evaluation of the goodness of redistribution's outcomes.¹⁶⁵ Consequences should therefore not be defined as involving merely technical aggregation of end-results. In a certain sense, redistribution through private law rules is actually “cheaper” than redistribution via taxes and transfer payments: allocation of a smaller quantity of resources through private law may advance the welfare of the recipients to a greater extent than the same or even a larger amount received through the latter mode. Furthermore, the redistributive output is achieved by a method that is less injurious to the givers' well-being, and is thus likely to elicit less resistance and opposition from them.

A possible counterargument is that humiliating redistributive methods should sometimes be used. Humiliation and stigmatization, so the argument goes, can serve as strong incentives to actively better one's own position. Society should therefore differentiate between the “deserving” and “undeserving” poor (e.g., between the working poor, people with grave disabilities, or “homemaker” spouses, and those who are able to work for their living but choose not to), and grant redistributive treatment accordingly. This proposal should be rejected for two main reasons. First, the proposal is impractical with respect to most private law rules. For instance, we cannot draft an implied warranty of habitability, or a rule prohibiting overnight eviction by landlords that would protect solely “non-lazy” tenants. Generally, we can only choose between granting these rights to *all* tenants or to none. I believe that the former option is preferable, since it does not hurt those who are not blameworthy and it enables them to enjoy the distinctive benefits of redistributive legal rules. Second, and more importantly, even if differential treatment under private law rules is a feasible option, it should not be employed. Redistributive private law rules are commonly aimed at providing necessities, preventing worst outcomes, and assuring every individual at least a mini-

165. In a different context, Dan Kahan has argued that different forms of punishment, such as imprisonment, community service, and fines, vary in their expressive dimension, and that this phenomenon explains the public's rejection of alternative sanctions that fail to express sufficient condemnation. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591–92 (1996); see also Lewis Kornhauser, *The Normativity of Law*, 1 AM. L. & ECON. REV. 3, 9–11, 15 (1999) (explaining why fines and liability rules would induce more compliance with the law than taxes and fees of similar monetary value).

mal, acceptable level of welfare. These conditions should be afforded to every person, regardless of merit. Even if a poor tenant could have found work which would have enabled her to timely pay the rent, she should still not be evicted overnight or have rats as her companions in the apartment.¹⁶⁶

I do not argue that any quantity of redistribution through legal rules is preferable to any quantity achieved by way of taxes and transfer payments. Rather, I maintain that to a certain extent, the lesser “net” quantity of redistributive legal rules is offset by the unique benefits generated by this particular form of redistribution.

3. Non-Equivalence of Bad Redistributive Outcomes

My argument regarding the goodness of states of affairs can be extended to the badness of redistributive outcomes. Since—contrary to the assumption of economic analysis—modes of production affect outcomes, those modes can either mitigate or exacerbate the badness of states of affairs. In particular, the badness of an outcome may be less severe if generated from a source that is less injurious to the receivers’ well-being, and vice versa. Arguably, the negative consequences of a law *permitting* slavery are greater than those of a law *prohibiting* slavery that is frustrated by the defiant behavior of many former slave-owners. In both cases, reality is grim; but in the former instance, there is the additional badness of the message conveyed by the legal rule—that certain people are inferior to others.¹⁶⁷

The same kind of argument is sometimes relevant to the debate regarding redistributive legal rules. Even if the intended outcomes of such rules are frustrated by the market, this state of affairs may be less harmful to the intended receiv-

166. For analysis of self-help eviction, see *infra* Part III.A.1.

167. Similarly, Richard Pildes has argued that a decision to deny compensation to former slave-owners serves an important expressive role. Such decisions “reflect and create social understandings about which policy changes interfere with existing investments morally important enough to be considered ‘property.’” Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1550 (1992). The idea that laws can inflict expressive harms was forcefully developed and defended in Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504–06 (2000). This idea has been especially applied in the fields of constitutional law, administrative law, and criminal law. See *id.* at 1531–64; Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 382–85 (1997); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 64–72 (1995).

ers' long-term well-being than if an *anti*-redistributive rule were adopted instead. A redistributive legal rule sends a supportive message that mitigates the harms of market frustration in the short run, and may lead to changes in norms and behavior in the long run.¹⁶⁸ In other words, anti-redistributive rules may involve a “double badness”: badness in terms of end-result outcomes and badness in terms of expressive harms.¹⁶⁹ In contrast, “frustrated” redistributive legal rules involve only the former kind of badness, which may be further mitigated by the positive expressive message conveyed by the rules.¹⁷⁰

Note that the potential harms of a rule allowing unfairness are not limited to the probable pain, insult, or indignation it might inflict on those treated unfairly, as well as their sympathizers. The resulting state of affairs—in terms of objective well-being—may be no better, and may even be worse, if people over time come to accept the rule's holdings as fair, or as how things ought to be. Were individuals to believe, for instance, that they have no right to decent living conditions, the chances of achieving the desired results, in terms of self-respect, self-esteem, and autonomous action, would become even slimmer.¹⁷¹

168. Several scholars have explored the role of law in changing people's preferences, norms, and behavior. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–44 (1996); Edna Ullman-Margalit & Cass R. Sunstein, *Inequality and Indignation*, 30 PHIL. & PUB. AFF. 337, 354–58, 361–62 (2001); Amy L. Wax, *Expressive Law and Oppressive Norms: A Comment on Richard McAdams's “A Focal Point Theory of Expressive Law,”* 86 VA. L. REV. 1731, 1762–74 (2000) (employing game theory analysis to explain how the law may assist in changing oppressive norms).

169. An important caveat is in order. Not all anti-redistributive rules involve “double badness” or convey a message that is injurious to individuals' well-being. Legal rules that do not aim at redistribution may be neutral in terms of their expressive dimension towards the worse-off. A good example is the compensation of property takings. See *infra* Part III.C.

170. While Kaplow and Shavell argue that redistributive legal rules have a “double distortion” effect, they ignore the possibility that anti-redistributive legal rules might have a “double badness” effect. See *supra* notes 22–24 and accompanying text (discussing the “double distortion” effect in terms of efficiency).

171. For a discussion of how laws might cause people to accept inequality or not to fight it, see Dennis R. Fox, *Psycholegal Scholarship's Contribution to False Consciousness About Injustice*, 23 L. & HUM. BEHAV. 9, 12–21 (1999); Ullman-Margalit & Sunstein, *supra* note 168, at 358–59, 361. Psychologists have also found that people may reduce dissonance associated with inequity by altering their perceptions of entitlement. Karen A. Hegtvedt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 93, 94, 105–06 (Joseph Sanders & V. Lee Hamilton eds., 2001).

This argument regarding the undesirability of people's acceptance of anti-redistributive legal rules supplements the "schizophrenia" argument against limiting redistribution to the tax-and-transfer arena. The schizophrenia argument asserts that people's beliefs and perceptions in one field of their lives carry over to other fields as well and cannot be radically inconsistent. Therefore, if we allow and educate the well-off to largely disregard the fate of others in their daily lives—for instance, in property and contract law contexts—then we cannot reasonably expect them to accept egalitarian norms when the time comes to tax their wealth.¹⁷² My argument, in contrast, focuses on the "worse-off." If they come to believe that rules denying them objective goods are fair, then this belief in itself diminishes their well-being and also weakens the chances of obtaining the objective goods by other means.

In summary, since redistributive legal rules are preferable to anti-redistributive rules even when their net quantitative outcomes are similar, the former are all the more preferable to the latter in the much more common scenario in which desirable distributive effects are at least partially attained.

C. RESPONSES TO POSSIBLE CRITIQUES

The consequentialist approach suggested in the Article differs from the one commonly adopted by economic analysis in two main respects. First, it advocates the replacement of an actual preferences theory of well-being with an objective theory of welfare. Second, it claims that the definition of "outcomes" should encompass complex states of affairs and assign differential weights to methods of production.

Before discussing some applications of the proposed theory, I wish to briefly discuss two possible critiques. The first critique addresses the suggested criterion of well-being and finds it excessively paternalistic. The second critique targets the broader conception of outcomes and questions the very need for a complex consequentialist framework. Let us examine them in this order.

172. THOMAS NAGEL, EQUALITY AND PARTIALITY 96–98, 116–17, 123–26 (1991); Dagan, *supra* note 8, at 791–92; Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 277–78 (1999).

1. Excessive Paternalism?

Notwithstanding the arguments in favor of an objective theory of well-being, the skeptic may still insist that a major problem remains: An objective criterion of welfare seems to imply that a person's life could be going well if she possesses certain goods, even if that person does not enjoy or desire them. Since an objective theory suggests that other people are sometimes better judges of a person's well-being than the individual whose welfare is being considered, the theory may invite unwarranted paternalism.

Indeed, objective theories contend that the best criterion of well-being has significant objective factors. Such a criterion helps us form (rough) judgments regarding different people's welfare. But whether we should *act* on these judgments by coercing any person to promote her own objective well-being is a totally different question, and only this latter question involves paternalism.¹⁷³ One should, therefore, distinguish between choosing the most adequate criterion of well-being and deciding when and how to implement it. An individual's life might be lacking in value, but it would still be unjustifiable to interfere with that life.¹⁷⁴ The question of whether to intervene in a particular case or class of cases should thus be judged on the merits.¹⁷⁵

Admittedly, an objective standard necessarily constrains the role of individuals' preferences in questions pertaining to their well-being.¹⁷⁶ Were it not so, the objective theory could not overcome the difficulties arising from subjective accounts of welfare.¹⁷⁷ Yet, there are ways to guard against excessive paternalism.

One safeguard is already built into the objective theory. According to the theory, objective goods include "autonomy and

173. Allan Gibbard, *Interpersonal Comparisons: Preference, Good, and the Intrinsic Reward of a Life*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 165, 172 (Jon Elster & Aanund Hylland eds., 1986).

174. BRINK, *supra* note 69, at 218; Raz, *supra* note 79, at 785.

175. Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1231 (1989) ("[W]hether or not a particular moral objective should be pursued by legal means is a question to be judged on the merit of each case, or class of cases . . .").

176. ADAMS, *supra* note 44, at 99 ("[An objective] theory of the good life . . . that emphasizes excellence will not support a fastidious reverence for all human desires or wishes as such.").

177. See *supra* notes 42–55 and accompanying text.

liberty” and “enjoyment.”¹⁷⁸ Because these goods are not the only ones on the list, they consequently do not receive the same supremacy that they would have had in an actual preferences theory of welfare. To illustrate, according to an objective standard, sufficient increases in other goods may outweigh losses in autonomy. Nevertheless, autonomy, free-will, and pleasure can and should be given substantial weight.¹⁷⁹ Thus, for instance, the value of autonomy may prevent us from compelling people to adopt a single best activity; but it would not preclude us from the much milder interference of forbidding a certain worst activity or preventing a result that would greatly reduce well-being, while leaving numerous other options available for free choice.¹⁸⁰

Redistributive legal rules comply with this restraint, since they are commonly aimed at providing necessities, preventing worst outcomes, and assuring every person at least a minimal, acceptable level of well-being. They usually do not apply to decisions and choices beyond this threshold. Thus, for example, redistributive legal rules require habitable housing and prevent overnight eviction of tenants,¹⁸¹ prohibit discrimination and ensure safety in the workplace, or guarantee the poorer spouse sufficient resources upon divorce.¹⁸² In addition, the proposed consequentialist approach can guide our choice between different paternalistic private law rules¹⁸³ or between private law

178. See *supra* notes 64–67, 75–76 and accompanying text.

179. See BRINK, *supra* note 69, at 269–70 (concluding that autonomy may outweigh the value of other goods such as nonbasic goods or the realization of personal projects); GRIFFIN, *supra* note 35, at 71 (asserting that any promotion of other values must respect the non-absolute but still important value of autonomy); SEN, ETHICS AND ECONOMICS, *supra* note 47, at 42 (“Even an objectively founded theory can give an important role to what people actually do value . . .”); Scanlon, *supra* note 34, at 192 (“[A]ny plausible substantive good theory will count agreeable mental states among the things which can make a life better.”).

180. HURKA, *supra* note 63, at 149, 152, 156. In a similar vein, Joseph Raz argues that a pluralistic view of autonomy requires only the availability of a large number of different “morally acceptable” options. RAZ, *supra* note 63, at 381.

181. For a discussion of rules against self-help eviction by landlords, see *infra* Part III.A.1.

182. For a discussion of redistributive family property rules, see *infra* Part III.B.

183. See *infra* Part III.B.

rules and other forms of in-kind, paternalistic giving such as food stamps and vouchers.¹⁸⁴

Moreover, one should keep in mind that no supporter of redistributive legal rules (myself included) recommends abolishing taxes and transfer payments and achieving redistribution solely through legal rules. Rather, I claim that redistributive legal rules should operate *alongside* taxes and transfers.¹⁸⁵ In other words, objective in-kind redistribution through legal rules will supplement, rather than replace, conventional monetary giving through the tax-and-transfer system. Hence, people would still have ample opportunity to satisfy their preferences with the cash they receive. Another way to lessen the intrusion on people's autonomy is to craft well-being enhancing *default* rules rather than *mandatory* rules.¹⁸⁶ The default rules would aim at educating people by providing valuable options for their consideration and subsequent choice.¹⁸⁷ In summary, the alternative consequentialist approach need not entail unwarranted interference with people's autonomy and liberty.¹⁸⁸

184. See *infra* Part III.D (explaining why redistribution through private law rules achieves better outcomes in terms of objective well-being than redistribution via food stamps and vouchers).

185. See, e.g., Kronman, *supra* note 8, at 510.

186. Indeed, it sometimes may be difficult, or even practically impossible, to contract around default rules because of obstacles, such as high transaction costs and endowment effects. Sunstein, *supra* note 26, at 109; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1755–65 (1997). In such circumstances, the distinction between default rules and mandatory rules is blurred. It is still true, however, that default rules are usually less intrusive on personal autonomy than mandatory rules.

187. See Sunstein, *supra* note 26, at 111, 132–34 (advocating the use of default rules and use of the endowment effect phenomenon to shape people's preferences and "push" their subjective valuations in a welfare-enhancing direction). This education rationale for default rules differs radically from two other influential rationales: (1) reducing transaction costs by mimicking the parties' desires and (2) providing incentives for optimal information disclosure, known as "penalty default." The first rationale is discussed in Zamir, *supra* note 186, at 1755–56. The second rationale is developed in Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97–100, 127–28 (1989).

188. Note that intervention in people's autonomy is not confined to objective theories of well-being. In fact, any plausible theory of well-being, including a preference-satisfaction theory, contains strong objective components that bring it very close to an objective theory of welfare. Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1690–1700 (2003). It should also be mentioned that preferences theories employ various techniques to reach results that are similar to those of objective theories. To illustrate: An objective theory would justify the giving of

2. Why Consequentialism?

A different critique can be directed at the proposed consequentialist framework itself. One might ask why one should bother with such a framework at all. Why attempt to articulate and fine tune a consequentialist theory that would justify the use of redistribution through private law rules, rather than opt for a non-consequentialist theory instead? The latter would still acknowledge the importance of outcomes but deny that they are all that matter.¹⁸⁹

I believe that an effort to vindicate redistributive legal rules “consequentially” is worthwhile because the attack on redistributive legal rules is launched from a consequentialist perspective and is *prima facie* very powerful. It claims that redistributive legal rules have no advantage whatsoever over taxes and transfers, and that by applying them we often harm the very people we wish to assist. They would fare much better, so the argument goes, if we were to completely refrain from using this inferior method of redistribution.¹⁹⁰ A consequentialist critique is particularly compelling in the context of redistribution, because the very essence and goal of redistribution is outcome-oriented. Hence, a non-consequentialist reply, which focuses on considerations other than outcomes for the worse-off, may prove unpersuasive. In this context, it may seem perverse or

food stamps, in lieu of cash, by emphasizing the importance of this basic good to people’s objective welfare, even if these people would have preferred to trade the stamps for other goods. A preferences theory would oppose this disregard for the recipients’ actual preferences, but arrive at similar results by using the concept of “externalities to third parties.” These externalities may refer to the joy or preference-satisfaction of numerous third parties stemming from the fact that the poor are adequately fed or may refer to the sorrow and preference-frustration that numerous individuals experience when this is not the case. It thus is stated, with no fear of contradiction or refutation, that the magnitude of positive third-party effects from supplying basic goods to the poor more than offsets the disutility of the poor from the frustration of their preferences. For literature that uses this kind of explanation to justify in-kind giving to the poor, see WEIMER & VINING, *supra* note 90, at 142–44; Summers, *supra* note 26, at 178. I believe that it is no less paternalistic—yet much less persuasive—to rationalize redistributive measures that do not give decisive weight to the beneficiaries’ preferences by relying on externalities. When we give goods in-kind, we enhance the *recipients’* welfare rather than diminish it or promote non-recipients’ well-being.

189. For a definition of non-consequentialist theories, see *supra* note 32.

190. See *supra* notes 22–30 and accompanying text.

cold-hearted to “honor” or “respect” the egalitarian goal rather than to “promote” or “maximize” it.¹⁹¹

A justification for redistribution through private law that uses the same methodology as the economic critique is, therefore, a worthwhile undertaking. By explaining that economic analysis is based on one—but certainly not the only—consequentialist theory, and by showing how redistributive rules fare much better according to a different, yet philosophically plausible consequentialist approach, the case for redistributive legal rules becomes stronger.¹⁹² Furthermore, the alternative consequentialist theory captures and vindicates what many people intuitively feel: that there is a real difference between the methods of tax-and-transfer and redistributive legal rules, in terms of their effects on outcomes.

III. APPLICATIONS AND POLICY IMPLICATIONS

To demonstrate the fruitfulness of the theoretical analysis, this Part evaluates several redistributive schemes other than taxes and transfer payments. Part III.A of the Article discusses two issues in landlord and tenant law: self-help eviction by landlords (Part A.1) and restraints on alienation by tenants (Part A.2).

191. Philip Pettit defines consequentialism as the view “that whatever values an individual or institutional agent adopts, the proper response to those values is to promote them,” whereas non-consequentialism holds that “at least some values call to be honoured whether or not they are thereby promoted.” Philip Pettit, *Consequentialism*, in *A COMPANION TO ETHICS* 230, 231 (Peter Singer ed., 1991). He also explains that according to non-consequentialism “agents are required or at least allowed to let their actions exemplify a designated value, even if this makes for a lesser realization of the value overall.” *Id.* Similarly, James Griffin states that a characteristic of deontology “is its denial that we are merely to *promote* the related values” and adds that “some values are to be respected, not promoted.” GRIFFIN, *supra* note 80, at 111.

192. Note that non-consequentialists often reject the very use of consequentialist methodology and terminology. For instance, they argue that it would be wrong to analyze issues such as human rights by inquiring whether their recognition would generate more beneficial outcomes than their denial. Such reasoning in itself, so the argument goes, fails to show appropriate concern and respect for the affected individuals. See ANDERSON, *supra* note 48, at 81 (“[T]o count respect for persons as just another value of an act that may be traded off against others, such as maximizing welfare, is to fail to respect persons at all.”); Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 496–97 (2001) (claiming that consequentialist reasoning of constitutional issues expresses the wrong attitude because it fails to show equal concern and respect for individuals). According to such approaches, a consequentialist justification for redistributive legal rules, no matter how sophisticated or complex, will always be distinct from a non-consequentialist one.

The proposed theory is useful not only for comparing legal rules and tax-and-transfer as alternative redistributive schemes, but also for comparing different private law rules. Part III.B illustrates such application of the theory in choosing between different systems of family property.

Thus far, I have contrasted two types of redistributive schemes: the tax-and-transfer system, in which both taking from the better-off and giving to the worse-off are done through public law mechanisms; and the private law system, where the redistributive transfer is made directly from the better-off to the worse-off via rules of property, contract, family law, and so forth. Analytically, there are also at least two “intermediate” schemes. The first involves taking outside of the tax system, e.g., through the rules of eminent domain, but without direct transfer of the resources obtained in this way to the transferees (who may or may not benefit through other transfer mechanisms).

The other intermediate scheme involves in-kind transfer to the needy, e.g., via food stamps and vouchers, without direct connection to the people whose taxes finance the in-kind transfer. In these two intermediate schemes, only one side of the redistributive mechanism—the taking or the giving—is done through legal rules, while the other may be attained via the tax-and-transfer mechanism. Parts III.C and III.D below critically evaluate such intermediate rules through the lens of the proposed theory: redistribution through compensation for property takings and the voucher system.

A. ISSUES IN LANDLORD AND TENANT LAW

Landlord and tenant law is a field in which redistributive concerns predominate. Consequently, supporters and opponents of redistributive legal rules commonly discuss landlord and tenant law.¹⁹³ Throughout the Article, I have referred to the much-analyzed example of the implied warranty of habitability and explained how it may be seen in a more favorable light through the lens of the alternative consequentialist approach.¹⁹⁴ In this Part, I apply this approach to two less-discussed redistributive rules in landlord-tenant relationships:

193. See, e.g., POSNER, *supra* note 4, at 482–84; Ackerman, *supra* note 1, at 1097–98, 1102–19, 1186–88; Kennedy, *supra* note 6, at 497–506; Komesar, *supra* note 28, at 1186–92.

194. See *supra* notes 26–30, 86–89, 112–16, 181 and accompanying text.

the disallowing of self-help eviction by the landlord, and the limitation of restraints on alienation by the tenant. I argue that these rules are primarily aimed at enhancing the distribution of objective welfare.

1. Disallowing Self-Help Eviction

Landlords are entitled to evict tenants who do not pay the rent.¹⁹⁵ However, they are usually not allowed to dispossess defaulting tenants by themselves.¹⁹⁶ A majority of states require the landlord to resort to court eviction proceedings.¹⁹⁷ This requirement postpones eviction and enables the tenant to contest the landlord's claim or find an alternative residence.¹⁹⁸ Some states hold that the tenant's right to such a process cannot be contractually waived, whereas other states permit such waivers.¹⁹⁹

The efficiency of a mandatory rule opposing self-help is doubtful. Even assuming that most tenants prefer a prerequisite of court-ordered eviction, this assumption hardly justifies a mandatory—rather than a default—rule in this context. This is because we are not dealing with an issue involving complex, costly information acquirement, or investigations by tenants, in contrast to such issues as latent defects in the leased premises. Furthermore, there is no reason to believe that landlords would refuse to voluntarily insert or abide by an anti-self-help rule—if this is indeed their tenants' preference—for a higher price.²⁰⁰

195. See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.1 (1977).

196. *Id.* §§ 14.1, .2(1).

197. 2 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES 1246–47, 1254 (4th ed. 1997); SCHOSHINSKI, *supra* note 27, § 6:9; Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 764, 777–78 (1994).

198. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 11–12 (2d ed. 2005); Gerchick, *supra* note 197, at 768–70.

199. FRIEDMAN, *supra* note 197, at 1248–49; SCHOSHINSKI, *supra* note 27, § 6:6. The Restatement holds that if the relevant controlling law does not give a landlord the right of self-help, “an agreement that the landlord may resort to self-help is against public policy and void.” RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.2(2) (1977).

200. Some scholars have criticized the imperfect information rationale for intervening in the content of contracts. See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 635 (1979) (“[R]eduction of information acquisition costs, other things being equal, is preferable to legislative or judicial determination of contract terms, because reducing information costs enables individuals to make informed choices to maximize their own util-

The traditional distributive justification for a mandatory rule is likewise problematic. It assumes *both* that tenants prefer a court-ordered eviction rule (but may sometimes lack the income to pay for it), and that the redistributive legal rule grants them their wish for free. Consequently, opponents of the redistributive rule can easily undermine it by noting that the costs of the rule to landlords will often be reflected in other terms of the contract, and so the rule would fail to transfer wealth. Since my alternative consequentialist approach rests on none of these assumptions, it is not subject to similar criticism.

According to the suggested approach, there are good reasons to adopt a mandatory rule in this context. Restrictions on eviction are not primarily aimed at redistributing income or wealth. Rather, they focus on promoting distribution in-kind of objective well-being.²⁰¹ The goal of restrictions on eviction is to prevent the grave, negative effects on people's welfare caused by *immediate* eviction.²⁰² Individuals' self-respect, self-esteem, and ability to act autonomously are severely diminished if they can be dispossessed overnight, and the landlord can throw their belongings into the street.²⁰³ Such extreme insecurity in one's own shelter adversely affects the possibility of realizing additional objective values, such as understanding and accomplishment.²⁰⁴

Restrictions on eviction are welfare-enhancing, even if they do not always accord with people's actual preferences. Therefore, it is not decisive if tenants do not value the rule enough to voluntarily pay a higher rent for explicit inclusion of the restriction in their leases. Furthermore, the distributive legal rule can be deemed successful even if the contract is adjusted to reflect its cost in the form of either a higher rent or a "downward" alteration in other aspects of the lease. If the mandatory rule regulates an issue that is crucial (or at least extremely important) to tenants' objective well-being, it may still be the case

ity."); Alan Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8, 11–18 (1973).

201. See *supra* notes 59–85 and accompanying text.

202. See also Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 107 (2002) (stating that respect for human dignity justifies protecting tenants from eviction without a court proceeding).

203. *Id.*

204. See *supra* notes 63–72 and accompanying text.

that the benefits received outweigh the losses in terms of income or less essential contractual terms.

2. Limiting Restraints on Alienation by the Tenant

Another issue of distributive concern in landlord-tenant relationships is restraint on alienation by the tenant. Leaseholds are property rights, and as such are ordinarily transferable.²⁰⁵ Landlords, however, have property rights too, and a legitimate interest in controlling the identity of their tenants.²⁰⁶ The landlord, for example, may wish to ensure that the apartment be kept in good condition or that the tenant is financially sound and will pay the rent in a timely fashion.²⁰⁷ Consequently, legislators and courts must take a stance on the scope of permissible restraints on tenants' right of alienation. Current state rules on this issue are not uniform.²⁰⁸ Although clauses prohibiting transfer are generally enforceable,²⁰⁹ there is less homogeneity with respect to clauses that only require the landlord's consent. Some states allow the landlord complete discretion when the contractual clause does not require "reasonable" discretion.²¹⁰ Other states, however, infer an implied reasonableness requirement, and the landlord must grant consent unless she has a reasonable basis for refusing.²¹¹ The reason given for this requirement is that by referring in the contract to the issue of consent rather than prohibiting transfer, the landlord inti-

205. SCHOSHINSKI, *supra* note 27, §§ 8:10, :15; Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 756 (1988).

206. SCHOSHINSKI, *supra* note 27, § 8:15.

207. FRIEDMAN, *supra* note 27, at 284; SCHOSHINSKI, *supra* note 27, § 8:15.

208. FRIEDMAN, *supra* note 27, at 321.

209. *Id.*; Johnson, *supra* note 205, at 756–57.

210. FRIEDMAN, *supra* note 27, at 321–23; SINGER, *supra* note 198, at 498.

211. Reasonable reasons for refusal are typically connected to objective factors, such as the financial responsibility of the proposed tenant, the assignee's suitability for the particular property, the legality of the intended use of the property, or the nature and extent of alterations needed by the proposed tenant. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2 cmt. g (1977); SCHOSHINSKI, *supra* note 27, § 8:15; Martha Wach, *Withholding Consent to Alienate: If Your Landlord Is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 691–94 (1993). In contrast, subjective reasons are usually deemed unjustified. Such are those pertaining to the assignee's race, religion, or beliefs. *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 297 N.Y.S.2d 156, 159–60 (1969); RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2 cmt. g; FRIEDMAN, *supra* note 27, at 344; Wach, *supra*, at 691–94.

mates that transfers are possible, and this in turn suggests that consent will be denied only for defensible reasons.²¹²

Efficiency considerations alone cannot guide our choice between these variant rules. On first thought, efficiency analysis supports a reasonableness requirement. Assuming that a tenant wishes to transfer her right when she no longer needs or can use the premises, or when a third party values it more highly, placing too many obstacles in the way of the transfer is inefficient. A reasonableness requirement both respects the legitimate interests of the landlord and facilitates the efficient transfer. But, on second thought, a “complete-discretion-to-landlords” rule will not necessarily result in the apartment being used less efficiently. First, it is far from clear that tenants or courts are better judges than landlords as to the most efficient user of the premises. Second, although the original tenant may vacate the apartment in response to the landlord’s denial of consent, the landlord has an economic and legal incentive to find a replacement: the mitigation of damages principle would deny the landlord rent for the period surpassing the reasonable time for finding a new tenant.²¹³ In addition, an absolute-discretion rule is a clear rule, as opposed to the vaguer reasonableness rule. As a result, the former is more likely to reduce transaction costs. For all these reasons, we may conclude that the rule requiring reasonable consent is distributive in nature.²¹⁴

As in the case of disallowing self-help eviction, the common justification for the existence of the distributive rule is not

212. FRIEDMAN, *supra* note 27, at 325; SINGER, *supra* note 198, at 498. The Restatement seems to accept this rationale for a reasonableness requirement by holding that “[a] restraint on alienation without the consent of the landlord of the tenant’s interest in the leased property is valid, but the landlord’s consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.” RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 15.2(2). Such a provision would not be viewed as freely negotiated if the tenant “has no significant bargaining power in relation to the terms of the lease.” *Id.* cmt. i.

213. 2 FRIEDMAN, *supra* note 197, at 1084–87, 1090. The Uniform Residential Landlord and Tenant Act holds that if the landlord does not make reasonable efforts to mitigate the damages caused by the tenant’s abandonment by attempting to rent the apartment at a fair rental value, the lease is terminated “as of the date the landlord has notice of abandonment.” UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.203, 7B U.L.A. 632 (2000).

214. See also Johnson, *supra* note 205, at 780–88 (explaining the efficiency of a clause that completely prohibits the alienability of the lease).

wholly convincing. If, for the reasons explained above,²¹⁵ a reasonableness requirement in favor of tenants would fail to make them wealthier, then it has not achieved its purported goal.

The suggested consequentialist approach may better justify a reasonable consent requirement. Although this requirement may fail to transfer income (either wholly or partially), it may still distribute in-kind. An important value on the objective goods list is accomplishment.²¹⁶ The ability of tenants to successfully pursue worthwhile projects and realize their talents and potential can be severely hampered by unreasonable restrictions on alienation. Such restrictions restrain their mobility and hence their opportunities for self-realization. Moreover, a reasonableness requirement advances the welfare of the assignees by striking down refusals that would be gravely injurious to the latter's welfare, such as refusals based on the proposed tenant's race, religion, or beliefs. At the same time, limiting non-enforceability to *unreasonable* restrictions mitigates the injury to the objective well-being of the landlord. Although the legal intervention injures the landlord's autonomy, the loss in terms of objective welfare is somewhat offset by the fact that the refusal cannot be seen to advance any reasonable, worthwhile goal.

Note that my alternative redistributive approach rejects the distinction between prohibition and consent clauses. If the aim is to enhance the distribution of objective welfare rather than only promote opportunities for preferences-satisfaction, then we should not limit intervention to the case in which the contract implied the possibility of consent. Even if the lease explicitly prohibited any alienation, this should not be a decisive factor against intervention.²¹⁷

B. CHOICE OF A FAMILY PROPERTY SYSTEM

Marital property is another area of law in which distributive concerns play a major role. It regulates the use, enjoyment and division of property between spouses, and must take a stance on the issue of inequality in spouses' property holdings.

215. See *supra* notes 200–01 and accompanying text.

216. See *supra* notes 70–72 and accompanying text.

217. Such is the case in Israeli law. According to Section 22 of the Hire and Loan Law, unreasonable refusals to transfer a leasehold are not enforceable. In this respect, it is immaterial whether the lease agreement prohibited any transfer or conditioned it on the landlord's consent. Hire & Loan Law, 5731–1971, 25 LSI 152 (1971–72) (Isr.).

To what extent and by which means should the law protect a spouse—usually the wife—from the poverty or dependency that may result from gross inequalities? Most states employ certain methods of redistribution with respect to marital property.²¹⁸ My arguments regarding redistribution through tax-and-transfer systems and legal rules are also relevant to the choice between *different legal rules*. Since distributive modes differ from one another in their ability to promote good outcomes, this factor should be taken into consideration when choosing between methods of redistributing marital property.

Generally speaking, there are two types of family property systems: community property and separate property.²¹⁹ The first arrangement is based on the view that marital relationships are a kind of “partnership to which each spouse makes a different but equally important contribution.”²²⁰ Accordingly, property earned by either party during the marriage is owned jointly and equally by both spouses, notwithstanding formal title.²²¹ Each spouse has similar, vested property rights in the marital assets, and they may exercise these rights at any point during the course of their relationship.²²² In addition, community property systems limit a spouse’s freedom to transform co-owned property into separate property, and courts may review agreements to this effect for fairness.²²³

218. For a persuasive explanation as to why equalizing the division of marital property cannot be based on the goal of efficiency maximization, see Frantz & Dagan, *supra* note 87, at 102–03.

219. SINGER, *supra* note 198, at 402; 1 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 2:5 (3d ed. 2005) (discussing community property); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 53 (1985).

220. 4 THOMPSON ON REAL PROPERTY § 37.07(d) (David A. Thomas ed., 2d Thomas ed. 2004).

221. STOEBUCK & WHITMAN, *supra* note 27, at 225; WEITZMAN, *supra* note 219, at 53–54. Each spouse, however, is allowed exclusive ownership in property that he or she acquired prior to the marriage, as well as in gifts and inheritance received during the marriage. SINGER, *supra* note 198, at 397, 402, 408.

222. Thus, each spouse has equal management and disposition rights over the jointly owned assets. STOEBUCK & WHITMAN, *supra* note 27, at 234; Frantz & Dagan, *supra* note 87, at 124–25.

223. UNIF. MARITAL PROP. ACT § 10(f)–(g), 9A U.L.A. 131–32 (1998) (stating that a marital property agreement executed either before or during marriage may not be enforceable under certain circumstances); SINGER, *supra* note 198, at 411; STOEBUCK & WHITMAN, *supra* note 27, at 232–33 (describing the legal requirements for converting community property into separate property or vice versa).

The majority of states have not adopted the community property arrangement, but rather the separate property system.²²⁴ Accordingly, each spouse retains the property that he or she earned both prior to and during the marriage.²²⁵ Notwithstanding this non-egalitarian starting point, most of these states have enacted various rules that aim at a more equal distribution of property.²²⁶ This goal is achieved in various ways. Some states' legislation provides for equitable division of marital assets in the event of divorce.²²⁷ The extent of the redistribution is based on a broad range of considerations, including need, contribution in the home, rehabilitation, health, age, occupation, and the length of the marriage.²²⁸ Other states protect the poorer party by awarding periodic alimony or maintenance payments.²²⁹ A third technique to mitigate inequality is to investigate the voluntariness or fairness of premarital agreements.²³⁰ In these diverse ways, separate property regimes endeavor to reach outcomes that are close to those of community property systems.

According to the thesis of this Article, these attempts cannot be fully successful. Even assuming that the market value of alimony and maintenance payments, or property given at the time of the divorce, is equal to that of assets jointly owned un-

224. The community property system has been adopted in only nine states. SINGER, *supra* note 198, at 402, 408; Frantz & Dagan, *supra* note 87, at 124.

225. SINGER, *supra* note 198, at 397, 402–03; WEITZMAN, *supra* note 219, at 53–54.

226. SINGER, *supra* note 198, at 403.

227. *Id.*; Frantz & Dagan, *supra* note 87, at 100–01.

228. SINGER, *supra* note 198, at 403–04; 4 THOMPSON ON REAL PROPERTY, *supra* note 220, § 37.07(c); 2 TURNER, *supra* note 219, §§ 8:10–:11, 8:14–:20; Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 831, 843, 854–56 (1988). Some separate property states have adopted a presumption of equal distribution with respect to marriages that have lasted over ten years. Less redistribution will be made in short-term marriages. SINGER, *supra* note 198, at 404.

229. SINGER, *supra* note 198, at 404; WEITZMAN, *supra* note 219, at 45; Reynolds, *supra* note 228, at 831–32. The entitlement to alimony payments is tied to the recipient spouse's dependency and needs. Ellman, *supra* note 87, at 3–6.

230. SINGER, *supra* note 198, at 406–07; Ellman, *supra* note 87, at 15. Only a small minority of couples enter premarital agreements. Ellman, *supra* note 87, at 14; Frantz & Dagan, *supra* note 87, at 80 n.12. *But see* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him The Best Years of My Life,"* 16 J. LEGAL STUD. 267, 297–98 (1987) (explaining that "the use of prenuptial marriage contracts has increased in recent years" in order to protect assets acquired prior to marriage).

der a community property regime, redistribution through a community property system produces better outcomes.

Whereas an actual-preferences theory of well-being suffices with increasing people's income, an objective theory aims at promoting such goods as autonomy and self-respect, accomplishment, and deep and meaningful relationships.²³¹ These values would be enhanced to a greater extent if we redistribute by giving assets *in-kind*, and not only cash payments.²³² Little self-respect or self-esteem can be advanced when a spouse has little or no property that is also hers during the marriage or after it dissolves. Furthermore, the value of accomplishment cannot be achieved if there is nothing to show for years of toil in the home. The fact that a spouse can buy *other*, new objects, with alimony payments does not remedy the problem of not maintaining part of the property accumulated over the course of the marriage. Likewise, a deep and meaningful relationship between spouses cannot be fully attained if one is largely subordinate to and dependent on the other. Thus, according to the objective theory of well-being, distribution in-kind of marital assets is clearly preferable to cash-transfers in the form of alimony and maintenance payments.²³³ For similar reasons, redistribution in-kind implemented during the marriage, as is the case in the joint ownership, community property regime, promotes welfare to a greater extent than redistribution that is effected only in the future when the relationship ends, as happens in those separate property systems that redistribute in-kind upon divorce.

The advantages of community property systems are even more striking when we compare the different processes of redistribution. As explained above, the goodness of a distributive outcome depends on *both* the quantity of the end-result, and the method which generated the result.²³⁴ Thus, we should classify the various modes of redistribution according to their placement on the continuum between the two extremes of humiliation and reward.²³⁵ Alimony and maintenance payments are closer to the negative pole, since—like taxes and transfer

231. See *supra* notes 63–76 and accompanying text.

232. See *supra* notes 83–89, 94–95 and accompanying text.

233. For similar reasons, redistribution of marital assets in-kind is clearly superior to dealing with the poorer spouse's situation by giving him or her money via the tax-and-transfer system.

234. See *supra* notes 108–09 and accompanying text.

235. See *supra* notes 109–11 and accompanying text.

payments—they resemble charity giving. They confirm that the spouse has no right to the property accumulated throughout the marriage, but rather only to receiving some of the other spouse's money in order to make ends meet. This type of redistribution is the most closely associated with failure, thus diminishing the value of the thing received.²³⁶

In contrast, joint ownership under a community property system is closer to the positive pole. It grants both spouses equal standing and property rights in marital assets at the outset of their relationship, thereby fostering notions of entitlement, responsibility, and sharing. These notions, in turn, are much more conducive to the enhancement of the various objective goods. Moreover, the perception that assets were received “as of right” and due to personal effort is more strongly associated with success, which increases the value of the quantitative outcome.²³⁷ In this respect, there is a significant difference between a community property regime and a separate property regime coupled with rules enabling equitable division upon divorce. Although the latter is superior to cash payments, it shares some of the disadvantages of monetary transfers; it too, at least partially, conveys a message of “no-entitlement.” The poorer spouse does not have, at any time, property rights in the marital assets, and cannot realize the advantages of having such rights during the entirety of the marriage. It is true that upon divorce she will receive some, or even half, of these assets.²³⁸ But this will plainly be due to the obtainment of *another person's property*. Furthermore, the extent of the transfer will usually depend on the examination of such factors as the recipient spouse's needs, rehabilitation, age, state of health, and skills.²³⁹ Review of such factors reinforces the association of the redistribution with handouts to the needy.

In conclusion, a given quantity of distributive outcome through a community property regime will enhance its recipient's well-being to a greater extent than a similar (and even larger) quantity by way of other family property systems.

236. See *supra* notes 116–17, 119 and accompanying text.

237. See *supra* notes 111–16, 125–33, 159–60 and accompanying text.

238. WEITZMAN, *supra* note 219, at 53–54.

239. SINGER, *supra* note 198, at 403–04; 2 TURNER, *supra* note 219, §§ 8:10–11, 8:14–20; Reynolds, *supra* note 228, at 831, 843, 854–56.

C. UNDESIRABILITY OF REDISTRIBUTION THROUGH PROPERTY TAKINGS

My argument in favor of redistribution through legal rules is based on certain characteristics that such rules often have, and which tax-and-transfer rules usually lack. Thus, for instance, I emphasized the ability of private law rules to *directly provide* for objective goods, contrasting it with the tax-and-transfer system's capability to only grant the monetary means to attain such goods.²⁴⁰ Furthermore, I pointed out that by setting the ground rules for appropriate interaction between individuals, redistributive legal rules may assist in forming notions of entitlement, which in turn increase the goodness of the redistributive outcome. More specifically, a redistributive method that is coupled with entitlement is more conducive to advancing objective goods such as self-respect, accomplishment and appropriate relationships; enhances the recipients' valuation of the things they have been given; and may decrease both the givers' opposition to the redistribution and the injury to their welfare.²⁴¹ Taxes and transfer payments, in contrast, do not share these advantages. There is no direct link between the individual givers and receivers of the redistribution, and notions of entitlement, fair dealing, and commitment cannot be formed. The consequent association of taxes and transfers with charity diminishes the goodness of the distributive outcome and its value for the recipients, and increases both the resistance of those whose wealth is taken and the injury to their welfare.²⁴²

Since the above advantages depend on certain characteristics of legal rules, my defense of redistributive legal rules is limited to rules that indeed possess those characteristics. Let us illustrate this point with the case of regulatory takings of land.

The complex questions of when an injury to property constitutes a taking and when the government should grant compensation are widely debated in the property literature.²⁴³ I

240. See *supra* notes 83–89 and accompanying text.

241. See *supra* notes 111–16, 139, 159–66 and accompanying text.

242. See *supra* notes 116–17, 139, 158–59 and accompanying text.

243. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 182–215 (1985); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 558–73 (2001); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 416–23, 467–74, 507–09 (1977); Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation"*

need not pursue these questions here.²⁴⁴ For the purposes of this Article, I will briefly address the following question: should landowners' right to receive compensation be diminished, to some extent, due to redistributive considerations?

According to the arguments raised in this Article, compensation rules for regulatory takings of land are a problematic redistributive method, even assuming that we can carefully tailor them to ensure that they adversely affect only the relatively well-off.²⁴⁵ As a mode of redistribution, they share the disadvantages of the tax-and-transfer system and lack the advantages of private law rules.

In contrast to many redistributive legal rules, they do not directly provide for objective goods or advance the worse-off's well-being. Rather, they mainly involve a "leveling down," that is, a move towards greater equality by reducing the welfare of the better-off.²⁴⁶ There is no guarantee that the money "saved" by non-compensation of landowners would be used in any project that benefits the poor, or that the latter's welfare would be

Law, 80 HARV. L. REV. 1165, 1183–1254 (1967); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1671–92 (1988); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURIS. 161 (1996).

244. I have explored this issue in Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47 (1996).

245. Such redistributive rules were proposed by Hanoch Dagan. Dagan argued that regulatory takings rules shape people's conceptions of what it means to own land, and thus their relationships with one another as landowners. Dagan, *supra* note 8, at 791. To achieve greater equality and social responsibility in the community, governmental action imposing a disproportionate burden on property owners should not be considered a taking if it complies with two conditions. *First*, the burden must not be overly extreme. *Id.* at 744, 769–70. This condition is evaluated by comparing the diminution in the property's value to the total value of the land affected and to the total holdings of the owner in the same surroundings. *Id.* at 744. *Second*, the burden need not be compensated if it is likely to be roughly offset by similar benefits that the property owner will receive from *other* public actions (which harm neighboring lands). *Id.* These countervailing benefits need not accrue immediately; it suffices that they would probably be conferred in the long run. *Id.* at 744–46, 767–81.

246. An extreme example of leveling down is to enhance equality between the blind and the sighted by putting out the eyes of the sighted. LARRY S. TEMKIN, *INEQUALITY* 247–48 (1993); Derek Parfit, *Equality and Priority*, 10 RATIO 202, 210–11 (1997). While some writers support equality measures that only lower the level of the better-off, others argue that we should mitigate inequality by raising the level of the worse-off. The latter view does not focus on equality per se, but rather on giving priority to those who are worse off. TEMKIN, *supra* at 245–82; Parfit, *supra* at 211–21.

promoted in the long-run by harming the former. If one believes that the welfare level of the worse off ought to receive some kind of priority, one should favor redistributive legal rules that raise the level of the weak over rules which equalize by reducing the welfare and power of the strong.

Moreover, even assuming that limiting compensation has positive redistributive effects in the long run, this method of redistribution shares the drawbacks of the tax-and-transfer mode. Like the latter, it severs the link between the coerced contribution and the subsequent benefits. The taking—as is indicated by its name—involves only the property owner and the state. Since there is no interaction between individuals across both sides of the redistribution, the educational effects of the rule—in terms of entitlements, fair dealing, and appropriate relationships between people—are likely to be weak. This, in turn, both reduces the value of the redistributive outcome to the recipients and increases the resistance and injury suffered by those from whom things were taken.²⁴⁷ In addition, the absence of any clear link between the givers and recipients implies that an opposite “non-distributive” compensation rule would not adversely affect the welfare of the worse off. In this context, a rule of full compensation (unreduced by distributive concerns) is very different from a legal rule that directly and clearly legitimizes unfair contractual terms or property arrangements.²⁴⁸

Finally, takings compensation rules are particularly subject to the economic charge of haphazard application, much more so than other types of redistributive legal rules. With respect to most redistributive rules, the goal of redistribution is the main and intended aim, and therefore the rules are designed with this goal in mind. Such are, for example, prohibitions on discrimination in the workplace, mandatory quality requirements in lease agreements, or equal-division systems of marital property. As a result, they are better capable of targeting the relevant better-offs, and have, a priori, a better chance of applying to all the members of this group.

247. Although I share Dagan’s view that legal rules have an expressive dimension that is likely to generate cultural consequences, for the reasons mentioned above I believe that the effect of granting limited compensation for takings on people’s conception of ownership is too indirect, implicit, remote, and of infrequent occurrence to significantly enhance property owners’ social responsibility and solidarity toward the worse-off in their community.

248. See *supra* notes 167–71 and accompanying text.

The takings scenario is very different. The injury caused, for instance, to a landowner by a significant down-zoning of her parcel is an *unintentional* and incidental consequence of the public authority's actions.²⁴⁹ The choice of a landowner to bear a loss does not—and should not—have any connection to her identity or relative wealth, but is determined by planning considerations.²⁵⁰ While some wealthy landowners suffer losses from the regulation, most other well-off owners are not similarly affected, or even enjoy betterments.²⁵¹ This inherent characteristic of redistributive takings aggravates the problem of haphazardness.²⁵²

D. DRAWBACKS OF THE VOUCHER SYSTEM

Methods of redistribution are often analyzed according to the cash/in-kind distinction.²⁵³ Hence, it is natural to view most redistributive legal rules as a form of in-kind giving,²⁵⁴ alongside such devices as vouchers and food stamps.²⁵⁵ This comparison, however, can be somewhat misleading. Although all methods of in-kind giving share common characteristics, there

249. Lewinsohn-Zamir, *supra* note 244, at 55–56, 58.

250. *Id.* at 56, 58.

251. *Id.* at 59–60.

252. Generally, the problem of haphazard application does not support abandonment of redistribution through legal rules. It only requires that we carefully choose those rules that can adequately serve distributive goals. One should also bear in mind that the tax-and-transfer system is not immune to the haphazardness problem. Sanchirico, *supra* note 9, at 1051–56. It has even been found that state and local taxes are often regressive rather than progressive. MICHAEL P. ETLINGER ET AL., WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 2–3, 4, 7–8 (1996); David Brunori, *The Limits of Justice: The Struggle for Tax Justice in the States*, in TAX JUSTICE, *supra* note 94, at 193, 193, 196–97, 199, 200–01, 208–09; Andrew Reschovsky, *The Progressivity of State Tax Systems*, in THE FUTURE OF STATE TAXATION 161, 167, 169–75, 182 (David Brunori ed., 1998).

253. See, e.g., ROBIN W. BOADWAY & DAVID E. WILDASIN, PUBLIC SECTOR ECONOMICS 454–58 (2d ed. 1984).

254. I refer of course to redistributive legal rules that are not limited to the transfer of cash, like minimum wage laws.

255. Vouchers allow their recipients to purchase specific favored goods—such as food, housing, and health care—in the market at reduced prices or for free. The suppliers of the goods can cash the vouchers at their real value. Susan Rose-Ackerman, *Social Services and the Market*, 83 COLUM. L. REV. 1405, 1406–07 (1983). For a list of the various in-kind assistance and transfers exercised in the United States, see Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 855–61 (2002).

are important differences between them.²⁵⁶ In particular, I believe that redistribution through private law rules does not share some of the disadvantages of other in-kind transfers and possesses advantages that both the latter and the tax-and-transfer system lack. Thus, the arguments advanced in this Article are relevant not only to the debate between tax-and-transfer and legal rules, but also to the choice between different types of in-kind redistribution.

True, private law rules can be said to be similar to vouchers and food stamps in the sense that they often embrace an *objective* approach to welfare.²⁵⁷ Such rules convey an educative message regarding the things worth having and aim at directly providing them.²⁵⁸ Akin to vouchers and food stamps, they do not afford supreme weight to people's subjective, actual preferences in the same manner that monetary transfers do.²⁵⁹ Furthermore, although private law rules sometimes succeed in transferring income, they are more attuned to enhancing the distribution of goods like autonomy, self-respect, understanding, accomplishment, and appropriate relationships between individuals.²⁶⁰

More significant, however, for my purposes are the differences between private law rules and other forms of in-kind giving. First, scholars have criticized in-kind giving via vouchers and food stamps as stigmatizing the recipients.²⁶¹ Individuals may feel inferior or shamed when forced to reveal themselves to others as recipients of public assistance in the form of vouchers, Medicaid cards, or food stamps.²⁶² In this respect, in-kind transfers may be perceived as more stigmatizing than negative taxes or other cash transfers. Although even the latter may be viewed by recipients as a form of charity,²⁶³ they at least do not involve a publicly humiliating manifestation.²⁶⁴ Admittedly, tax-and-transfer payments differ in the degree to which they

256. See WEIMER & VINING, *supra* note 90, at 142–45.

257. See *supra* notes 59–83 and accompanying text.

258. See *supra* notes 83–89 and accompanying text.

259. See *supra* notes 33–37, 175–84 and accompanying text.

260. See *supra* notes 84–95 and accompanying text.

261. Coven, *supra* note 255, at 849, 891–93.

262. *Id.* at 891–93.

263. See *supra* notes 116–17, 129–40, 151–59 and accompanying text.

264. Cf. Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 280–81, 288 (2000) (stating that cash payment-subsidy schemes encouraging employers to employ disabled workers, racial minorities, or women, may be opposed as stigmatizing their intended beneficiaries).

humiliate their recipients or signify failure. Thus, for example, a welfare payment that is conditioned upon close scrutiny of eligibility, lengthy form-filling, and face-to-face interviews may enhance individuals' well-being to a lesser extent than a monetary transfer that is conditioned upon self-declared eligibility or need.²⁶⁵ However, food stamps and vouchers stigmatize their recipients to a greater extent. In the case of tax-and-transfer payments, revelation of need is largely restricted to interactions between the recipient and the tax or welfare officials. Food stamps and vouchers, in contrast, involve a public manifestation of need in many spheres of the beneficiaries' lives, such as in school, at the supermarket, in the apartment building, and so forth.

The case of redistributive legal rules is usually the reverse. Not only do they not stigmatize, they assist in forming notions of entitlement, that is, of receiving a thing "as of right."²⁶⁶ As explained above, this important feature of legal rules enhances the goodness of their distributive outcomes.²⁶⁷

Second, as in the case of taxes and transfer payments, vouchers and food stamps are granted by the state.²⁶⁸ Thus, they too sever the link between the individuals financing the giving and its beneficiaries. No notions of entitlement and responsibility in mutual relationships can be formed; patterns of fair dealing and cooperation cannot emerge.²⁶⁹ Consequently, it is but natural if the better-off view vouchers and food stamps as handouts, and thus oppose these public programs. Once again, this disadvantage is not shared by private law rules. Since they are often framed in terms of setting the ground rules for appropriate interaction between people, they will not be similarly viewed as conferring undeserved benefits.²⁷⁰

265. Welfare payments made pursuant to the Temporary Assistance to Needy Families Act, 42 U.S.C.A. §§ 601–19 (West 2003 & Supp. 2006), are an example of the former kind, whereas the Earned Income Tax Credit, 26 U.S.C.A. § 32 (West 2002 & Supp. 2006), is an example of the latter. *See supra* note 117.

266. *See supra* notes 111–12 and accompanying text.

267. *See supra* notes 113–16, 139–40, 159–60 and accompanying text.

268. David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1273–88 (2004); Michael J. Trebilcock et al., *Government by Voucher*, 80 B.U. L. REV. 205, 206–08 (2000).

269. *See supra* notes 116–17 and accompanying text.

270. *See supra* notes 158–66 and accompanying text.

Third, transfers in the form of vouchers and food stamps are most clearly cash-substitutes or “unearned income.” Therefore, like the tax-and-transfer system, they might adversely affect the recipients’ work incentives.²⁷¹ In contrast, inasmuch as redistributive legal rules strive to enhance the distribution of goods like self-respect, autonomous action, or accomplishment, they would not be perceived as increasing income and thus would not affect work incentives in the same way.

As these arguments show, in-kind giving through vouchers and food stamps is closer in significant respects to income redistribution by taxes and transfers than to redistributive private law rules. Consequently, it shares some of the former’s shortcomings rather than the latter’s advantages.²⁷²

CONCLUSION

Redistributive private law rules are a common and widespread phenomenon. Yet, if the economic critique is correct, this method of redistribution is inferior in every respect to the tax-and-transfer system. By attempting to redistribute through private law rules, so the economic argument goes, we inevitably give the poor less than we could have, and might even worsen their position. This critique suggests that the legislators, regulators, and judges who frequently employ redistributive legal rules are either stupid or mean: stupid if they do not understand or foresee the detrimental consequences of using such rules; mean if they “secretly” realize that private law rules are

271. See Coven, *supra* note 255, at 907–08 (claiming that in-kind aid, such as vouchers, and cash create similar disincentives to work); *supra* notes 90–93 and accompanying text.

272. A thorough discussion of the costs and benefits of vouchers, food stamps, or other forms of in-kind giving is beyond the scope of this Article. For our purposes, it suffices to point out the general similarities and differences between the three types of redistributive methods: private law rules; other forms of in-kind giving; and taxes and transfer payments. Many scholars have discussed the costs and benefits of in-kind giving. See BOADWAY & WILDASIN, *supra* note 253, at 454–58 (discussing cash and in-kind transfers); WEIMER & VINING, *supra* note 90, at 162–65 (analyzing the use of subsidies and taxes); Rose-Ackerman, *supra* note 255, at 1406–12 (addressing the limits of vouchers); Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 524–43 (1993) (examining public housing assistance); Super, *supra* note 268, at 1237–88 (discussing the merits of the food stamp program); Trebilcock et al., *supra* note 268, at 206–08 (investigating the pros and cons of voucher programs).

not aiding the poor (or even harming them), but nevertheless persist in drafting and applying these rules.²⁷³

This Article shows that by employing redistributive private law rules we are being neither foolish nor wicked. It vindicates and grounds the strong intuition that taxes and transfer payments should not be our sole vehicle of redistribution, and that private law rules can play a significant role in this sphere. Once we step outside of the simplistic and restrictive perimeters of economic analysis's consequentialist theory and adopt an alternative consequentialist approach, we discover that redistributive legal rules fare very well and enjoy advantages that taxes and transfer payments lack.

I should emphasize that the Article does not claim that redistributive legal rules should substitute for tax-and-transfer schemes. Rather, it argues that the former are an important and unique distributive tool that must be allowed to complement the latter. Private law rules assist in forming notions of entitlement, which enhance the objective and subjective value of the things that are distributed and, at the same time, decrease the givers' opposition to the redistribution and the injury to their welfare. Taxes and transfer payments, in contrast, often imply charity giving, which in turn diminishes the goodness of the distributive outcome and its value to the recipients, and increases the resistance of those whose wealth is taken. Therefore, allocation of a smaller quantity of goods through private law rules will advance the well-being of the beneficiaries to a greater extent than the same or even somewhat larger amount received via the tax-and-transfer system.

Taxes and transfer payments are best suited to redistribute income and thus enable people to satisfy their preferences. They do not distribute things other than money, and are much less capable of conveying valuable educative messages, or advancing such goods as autonomy and self-respect, understanding, accomplishment, and deep and meaningful relationships. Redistributive legal rules are best equipped to distribute in-kind and to enhance the attainment of objective goods. They are less capable of transferring wealth. Thus, there is a good "division of labor" between the two methods of redistribution. We need them both and should not dispense with either.

273. Indeed, Richard Posner raises the following possibility in his discussion of wealth redistribution through housing codes: "Might a covert purpose of housing codes be to increase the supply of middle income housing at the expense of the poor?" POSNER, *supra* note 4, at 483 n.3.