

Part III: Justification*

Thus far in this book, we have assumed agreement among our readers that, if possible, our laws and institutions should be reformed to alleviate the suffering caused by infectious diseases in developing countries. So long as the necessary reforms did not impose any burdens on the residents of developed countries, that assumption was probably warranted. But some of the reforms we advocated in Part II would impose such burdens. In particular, to run a prize system of the sort sketched in Chapter 5 would require expenditures of public funds, which would in turn necessitate tax increases in developed countries. And the implementation of an effective floor-and-trade regulatory regime of the sort advocated in Chapter 6 would result in an increase in the prices that developed-country residents paid (either directly or in the form of insurance premiums) for pharmaceutical products. In effect, this would constitute an indirect tax.

How large would the resultant financial burdens be? That would depend on the magnitude of the programs. We argued in Part II that one of the features of both the proposed prize fund and the proposed regulatory regime is that they could be as large or as small as the citizens of developed countries wanted. Indeed, we argued that it would make most sense to begin with small versions of both and then gradually increase their scale, stopping when the cost of saving an additional life in the developing world had risen to a level that developed-country citizens and their representatives found acceptable.

It is tempting to seize upon this feature to evade the question of whether developed countries have obligations to undertake these projects. We could simply defer to the democratic process the determination of how much money, if any, developed countries should spend to assist their neighbors. But such an approach would be unsatisfactory for three related reasons. First, the administrative costs of setting up either program would not be trivial. We should not incur those costs unless we are likely to implement at least modest versions of these ventures. Second, a vocal group of political leaders in developed countries would likely contend that we should not even start down these roads. The amount that we spend on humanitarian aid is already too large, they insist; we should be looking for ways to reduce our contributions to the developing world, not undertaking new commitments.¹

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¹ See, for example, Ryan Teague Beckwith, “Read Donald Trump’s ‘America First’ Foreign Policy Speech,” Time, April 27, 2016, <http://time.com/4309786/read-donald-trumps-america-first-foreign-policy-speech/>; John McCormack, “Romney: Let’s Cut Humanitarian Foreign Aid and Get China to Step Up,” The Weekly Standard, October 19, 2011, http://www.weeklystandard.com/blogs/romney-lets-cut-humanitarian-foreign-aid-and-get-china-step_598304.html; Steve Benen, “Perry, Romney Target Foreign Aid,” Political Animal, November 13, 2011, http://www.washingtonmonthly.com/political-animal/2011_11/perry_romney_target_foreign_aid033455.php; Amy Bingham, “GOP Candidates Take Aim at Foreign Aid,” ABC News, November 15, 2011, <http://abcnews.go.com/blogs/politics/2011/11/gop-candidates-take-aim-at-foreign-aid/>.

Their voices are increasingly influential² and should not be left unchallenged. Last but not least, we (the authors) are not agnostic on this issue. Both of us believe strongly that developed countries³ do indeed have moral obligations to mitigate the misery of the residents of poor countries. We thus hope to persuade our leaders and our fellow citizens to initiate, not merely minimalist versions of these ventures, but substantial ones.

Our effort to do so is organized as follows. In Chapter 8, we consider the principal arguments that have been (or might be) deployed in support of the kinds of initiatives we have proposed. We begin by canvassing considerations from national self-interest. We then consider several arguments grounded in considerations of justice, or in sentiments of mutual concern and well-wishing, that extend beyond national borders. These include arguments from historical equity, social utility, and deontological and teleological theories of distributive justice. We contend that each of these frameworks or perspectives provides support for our proposals.

In Chapter 9, we address five general objections to those arguments: First, full acceptance of the commitments we identify would impose intolerable moral burdens on the citizens of developed countries. Second, questions of distributive justice are properly limited to the level of individual polities. Third, recognition of the insights of communitarianism requires privileging the claims of the nation over the claims of the globe. Fourth, adoption of our proposals would disrupt the operation of the patent system and prevent us from achieving the important objectives it serves. Fifth and finally, interference with the free market in pharmaceutical products is either illegitimate or likely to do more harm than good. As one might expect, we contend that none of the objections, closely examined, holds up.

² Polls in the United States suggest that a substantial majority of Americans believe that foreign aid should be reduced. See, for example, Frank Newport and Lydia Saad, “Americans Oppose Cuts in Education, Social Security, Defense,” Gallup Politics, January 26, 2011, <http://www.gallup.com/poll/145790/Americans-Oppose-Cuts-Education-Social-Security-Defense.aspx> (59% of respondents favor cutting government spending on foreign aid; 37% oppose it; 4% have no opinion).

³ To be clear, we are not interested here in the morality of individual choice, but in the responsibilities of institutions. In other words, the forthcoming arguments are not aimed at motivating increased individual donations to charity (although, if effective outlets were found, we would hardly object). Our subject, rather, is the set of normative considerations that should inform the policies of governments and international agencies with respect to patent and related laws and aggregate health expenditures. A focus on personal choice risks individualizing what are properly social-institutional issues, as well as moral fatigue.

Chapter 8: Reasons

The zone of political and moral philosophy we are about to enter is crowded and contentious. Competing theories abound, and the disagreements among their proponents are intense. Our own view, as we have already intimated, is that several different theories all provide support for the claim that developed countries (which we will sometimes refer to as “the North”) should devote substantial resources to alleviating the health crisis in developing countries (which we will sometimes refer to as “the South”). The overlap of these perspectives is fortunate, because it much reduces – for present purposes – the stakes of the disagreements among the rival schools of thought.⁴

In this chapter, we offer an opinionated tour of the major camps, suggesting why the occupants of each should lend us their support. Few if any of the groups we visit would agree with all of our ruminations. But we hope to persuade most that, for one reason or another, they should make common cause with us.

A. National Self-Interest

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

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

In the language of economics, such infectious diseases exhibit a "negative externality," meaning a harm extending beyond the individual(s) directly involved. The harm is that each time any one individual is afflicted, everyone else, to varying degrees, faces an increase in the probability that he or she will contract the illness. This fact has led some observers to frame the issue of infectious disease outbreaks as an example of a global "public

⁴ By using this term, we mean to invoke, loosely, the concept of "overlapping consensus" developed by John Rawls in *Political Liberalism*. John Rawls, *Political Liberalism* 385-95 (expanded ed., Columbia Univ. Press 2005) (1993). Rawls offered the concept as a solution to the problem of disagreements between "comprehensive doctrines" or worldviews. *Id.* at 385-86. It seemed unlikely to him that reason could solve such disagreements. *Id.* at 387. Consequently, as a "political" solution to this "fact of reasonable pluralism" in the realm of moral metaphysics, he urged that, when debating core issues of public life, efforts be made to find an "overlapping consensus" about the fair terms of social cooperation. *Id.* at 390-91. This entails framing arguments in a shared vocabulary of "public reason," so that adherents to different "reasonable" comprehensive doctrines can recognize the arguments of others as congruent with, or even representing in altered form, their own deeper commitments. *Id.* at 392. Without committing ourselves to the assumptions underpinning Rawls's overall enterprise, we point out that a rough parallel exists between his concept and our attempt here to accommodate current disagreements (although in our case the disagreements are not between worldviews but between rival political philosophies, and they do not concern Rawls's "constitutional essentials" so much as "legislative" questions of social policy).

goods" problem, requiring supra-national collective action.⁵ This consideration arises most often in discussions of HIV/AIDS, but malaria and tuberculosis have also been singled out as diseases common in developing regions that pose ongoing threats to those in the developed world, especially as new strains emerge that render older inoculations or treatments ineffective.⁶

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

A second way in which, by helping to solve the health crisis in developing countries, developed-country residents could help themselves can be gleaned from the general literature on trade and economic development. One justification commonly advanced for promoting trade liberalization runs roughly as follows: the static efficiency gains from trade will facilitate the dynamic development of the South, which will not only benefit citizens in the South but will also be economically beneficial to those in the North, by providing them more productive trading partners and affluent consumer markets.⁷ It is increasingly well-accepted that there are strong links between improving the basic health of a country's people and improving its developmental prospects.⁸ Consequently, reforms of the sort we have proposed may increase the potential for future economic gains for citizens of developed countries.

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

Finally, eliminating one of the causes of underdevelopment in the South might reduce the threats that the residents of the North face either from spreading regional instabilities or from terrorism. The former concern, flagged by the World Health Organization's ("WHO") Commission on Macroeconomics and Health,⁹ appears to have

⁵ See Working Group 2 of the Comm'n on Macroeconomics and Health, World Health Org., *Global Public Goods for Health* 4-11, 47-57 (2002); *Global Public Goods for Health: Health Economic and Public Health Perspectives* 3-93 (Richard Smith et al. eds., 2003). This is seen as a "public goods" problem because the negative externality is a form of market failure, like pollution, that requires collective action to address. Alternatively, the "good" a healthy individual presents to others can be seen as a positive externality that is both non-rivalrous (enjoyment of its benefit by one does not derogate from its enjoyment by another) and not excludable or privately appropriable (it is difficult to provide to some while denying to others the benefit from an individual's health).

⁶ See Working Group 2 of the Comm'n on Macroeconomics and Health, *supra* note ____, at 48-49, 50 tbl.3.1.

⁷ See Vivek Arora & Athanasios Vamvakidis, *How Much Do Trading Partners Matter for Economic Growth?* (Int'l Monetary Fund, Working Paper No. 04/26, 2004), available at <http://www.imf.org/external/pubs/ft/wp/2004/wp0426.pdf>.

⁸ See Comm'n on Macroeconomics & Health, World Health Org., *Macroeconomics and Health: Investing in Health for Economic Development* 21-40 (2001).

⁹ *Id.* at 28.

underlain then-Secretary of State Colin Powell's declaration in 2001 that the AIDS crisis in Africa "is a national security problem" for the United States.¹⁰ Regarding the latter, although poverty is plainly not sufficient to cause terrorism, it may increase its incidence. In the formulation of economist Branko Milanovic, if "resentment breeds terrorism," then we should be concerned about impoverishment, which may breed resentment.¹¹

The intertwining of these themes was effectively captured in a speech by Senator Marco Rubio:

If it is done right, and when done in partnership with the private sector and faith-based community, foreign aid spreads America's influence around the world in a positive way. Let me give you an example: the Bush Administration's program to provide HIV medicine to Africa has not only saved lives, it has increased America's influence across the continent. These are allies in the future that can be our partners, not just in our political struggles on the world stage, but in economic trade. And a world where people are prosperous and free to grow their economies and pursue their own dreams is a better world for all of us.¹²

Arguments of these sorts have long figured frequently in the public debate in the United States over global health policy. Indeed, for important constituencies, these arguments provide the only plausible justification for expending scarce resources on humanitarian aid in general and global health care in particular. We certainly don't wish to renounce the support of those groups. However, we must acknowledge that our own view is that none of these arguments is especially powerful. Northerners who wish merely to protect their own health in the most cost-effective way should probably adopt quarantine systems or requirements that visitors or immigrants to their own countries show that they have received appropriate vaccines and are not infected with any of the diseases in question. More harshly, self-interest might argue against providing life-sustaining treatments (e.g., ARTs for AIDS) to developing-country residents on the ground that keeping infected and contagious people alive only increases the hazard to "us."¹³ And the causal connections on which each of the other considerations rests are admittedly speculative. For meaningful support for the reforms we are considering, we ourselves are inclined to look elsewhere – specifically, to theories that acknowledge that moral obligations or sentiments of "mutual

¹⁰ This Week (ABC-Television News broadcast Feb. 4, 2001) (interviewing Colin Powell). We thank Derek Bambauer for drawing our attention to this statement.

¹¹ Quoted in Larry Elliott & Charlotte Denny, Top 1% Earn as Much as the Poorest 57%, *Guardian* (London), Jan. 18, 2002, at 21. Milanovic's full statement was: "Should [rising global inequality] be of concern to the rich? Perhaps, if we believe that wide income gaps lead to immigration and resentment breeds terrorism. For ultimately, the rich may have to live in gated communities while the poor roam the world outside those few enclaves." *Id.*

¹² "ICYMI: Senator Rubio Delivers Remarks on America's Role in the World," September 13, 2011, <http://rubio.senate.gov/public/index.cfm/fighting-for-florida?ID=e4c1faed-f7e2-4e74-b87f-13de17917d2a>. A videotape of the speech is available on YouTube at <http://www.youtube.com/watch?v=SH0a3Uis0ck>.

¹³ An important exception would be ARTs for pregnant women, which drastically reduces the probability that their babies will be born with the disease.

well-wishing and concern"¹⁴ might extend beyond national borders. To such theories we now turn.

B. Historical Equity

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

The normative principle that underlies this argument is a variant of corrective justice. It finds expression in many settings. In popular parlance, it is manifested in a widely recognized obligation to return "ill-gotten gains." In law, it is embodied in several doctrines: the common-law cause of action for "unjust enrichment";¹⁵ the duty recognized in tort and criminal law to rescue a person whose peril one has caused;¹⁶ and the obligation, recognized in a growing number of jurisdictions, to return or repatriate works of art or cultural artifacts wrongly taken from their original owners, even if the current possessors both are innocent and were ignorant of the original wrongdoing.¹⁷ In moral philosophy, it receives its most crisp elaboration in Robert Nozick's "principle of rectification," which requires, roughly, the remedy of any injustices carried out in the past that yield effects traceable to present holdings.¹⁸

¹⁴ This is Richard Miller's encapsulation of the commitment to fellow-feeling or sociality that is central to the socialist tradition and which he suggests, we think correctly, is an attractive notion for the majority of residents in contemporary societies. See Richard Miller, *Analyzing Marx: Morality, Power, and History* 19 (1984). Compare Mill's remarks on the "social feelings of mankind" as a significant motivational force for most people. See John Stuart Mill, *Utilitarianism* 32-35 (George Sher ed., Hackett Publishing 1979) (1861).

¹⁵ See, e.g., [Callano v. Oakwood Park Homes Corp., 219 A.2d 332, 334 \(N.J. Super. Ct. App. Div. 1966\)](#); G. Palmer, *The Law of Restitution* (1978).

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

¹⁷ See, e.g., Native American Graves Protection and Repatriation Act, [Pub. L. No. 101-60, 104 Stat. 3048 \(1990\)](#) (codified at [25 U.S.C. §§ 3001-3013 \(2006\)](#) and [18 U.S.C. § 1170 \(2006\)](#)); Ashton Hawkins et al., [A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Art](#), 64 *Fordham L. Rev.* 49, 50 (1995); William G. Pearlstein, [Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market](#), 28 *Law & Pol'y Int'l Bus.* 123 (1996).

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

This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.

What, then, is the character of the historical injustice that, when read against this normative principle, would give rise to a duty on the part of current Northerners to assist current Southerners? Any of many cognate claims concerning world history might be inserted here,¹⁹ but the one that seems to us both most defensible and most germane to the problem before us runs as follows: the poverty of most Southern countries today is traceable in substantial measure (although not entirely, of course) to two major periods of modern history: (1) the period of encounter, coerced trade, conquest, imperial rule, and colonization by European countries with respect to much of the rest of the world (which extended, from, roughly, 1500 to the early 1900s);²⁰ and (2) the post-World War II era of decolonization marked by an international system of unequal political, economic, and military relations, in which Western dominance has been anchored in the power of the United States.

Not all historians would agree with this claim. David Landes and Mathias Risse, for example, dismiss it as the lament of "a dwindling group of Marxist historians."²¹ Nevertheless, we contend, three different lines of analysis, when combined, lend it considerable plausibility. The first focuses on suggestive indicators and correlations. Here is

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

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

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

- (1) What causal factors were behind the "rise of the West" during this period, and when exactly did the West become ascendant (e.g., 1500s or 1800s)?
- (2) To what extent were imperial and colonial spoils and relations necessary or strongly beneficial to the development/industrialization of the West?
- (3) What were the driving factors behind Western imperialism and colonialism?

For contrasting major treatments of the first set of questions, see generally Douglass C. North & R.P. Thomas, *The Rise of the Western World: A New Economic History* (1973); Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 *Past & Present* 30 (1976); *The Brenner Debate: Agrarian Class Structure and Economic Development in Pre-Industrial Europe* (T.H. Aston & C.H.E. Philpin eds., 1985) (1976); Charles Tilly, *Coercion, Capital, and European States, AD 990-1992* (1990); Jared Diamond, *Guns, Germs, and Steel* (1997); David Landes, *The Wealth and Poverty of Nations* (1998); Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World-Economy* (2000). For a variety of answers to the second question, see generally Immanuel Wallerstein, *The Modern World System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (1974); Immanuel Wallerstein, *The West, Capitalism, and The Modern World-System*, 15 *Review* 561 (1992); Robert Brenner, *The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism*, 104 *New Left Rev.* 25 (1977) [hereinafter Brenner, *Origins of Capitalist Development*]; Patrick O'Brien, *Imperialism and the Rise and Decline of the British Economy, 1688- 1989*, 238 *New Left. Rev.* 48 (1999); Pomeranz, *supra*. For responses to the third question, compare Tony Smith, *The Pattern of Imperialism: The United States, Great Britain and the Late-Industrializing World since 1815* (1981); Keith Griffin & John Gurley, *Radical Analyses of Imperialism, the Third World, and the Transition to Socialism: A Survey Article*, 23 *J. Econ. Lit.* 1089, 1091-1103 (1985); Patrick Wolfe, *Imperialism and History: A Century of Theory, from Marx to Postcolonialism*, 102 *Am. Hist. Rev.* 388, 418 (1997).

²¹ Landes, *supra* note 20, at 381, cited with approval in Mathias Risse, *Response to World Poverty and Human Rights: Do We Owe the Global Poor Assistance or Rectification?*, 19 *Ethics & Int'l. Aff.* 9, 13 n.9 (2005).

one: in 1500, the gap in wealth between today's developed and developing regions was 1.3 to 1; in 1820, 2 to 1; and today, 7 to 1.²² Another is the remarkable (although not total) overlap between the developed countries of the world today and countries that were either colonial powers or settler colonies of such powers, and between developing countries today and areas that were subject to non-settler colonial relations with the West.²³ To be sure, correlation is not causation, and other factors (politics, culture, tropical climates, etc.) might be marshaled to explain these patterns.²⁴ But they are sufficient, in our view, to create a *prima facie* case in support of the claim.

The second line of analysis distills from histories of many countries and regions the following generalizations: underdevelopment in several (though not all) peripheral countries is strongly linked to four manifestations of imperial and colonial coercion and post-colonial relations of power.²⁵ Early on there occurred: (1) the extraction of wealth in the form of resources and cheap labor; and (2) the retardation of local industry so as not to compete with the domestic output of the dominant country, either for the international or for the local market. Later on there occurred: (3) the prevention of semi-autonomous national developmental efforts, and the sustenance of client regimes, often through military intervention or threat; and (4) integration into a global economy on unfavorable terms of trade and debt.²⁶ Also significant on some accounts was the imposition upon subordinate

²² Angus Maddison, *The World Economy: A Millennial Perspective* 46 tbl.1-9b (2001). Comparing the richest and poorest regions within the developed and developing worlds (respectively, Western Europe and its offshoots, and Africa), the gaps are two to one in 1500, three to one in 1820, and nineteen to one today. *Id.* at 126 tbl.3-1b. In 1000 A.D., Western Europe was among the poorest regions in the world. *Id.*

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

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

²⁵ The extent to which the pattern defined by these four developments was inexorable does not affect its moral implications and thus need not detain us. For contrasting views on this score, compare Andre Gunder Frank, *The Development of Underdevelopment*, 18 *Monthly Rev.* 17 (1966), with Peter Evans, *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil* (1979), and Fernando Henrique Cardoso & Enzo Faletto, *Dependency and Development in Latin America* (1979).

²⁶ This sentence summarizes (rather brutally) more subtle arguments developed in Amiya Bagchi, *The Political Economy of Underdevelopment* (1982) (providing general study and integrating cases across periods and regions); Irfan Habib, *Colonization of the Indian Economy, 1757-1900*, 32 *Soc. Sci.* 23 (1975); Bipan Chandra, *The Colonial Legacy*, in *The Indian Economy: Problems and Prospects* 1 (Bimal Jalan ed., 1992). For a synthetic summary of the colonial period, see James Cypher & James Dietz, *The Process of Economic Development* 66-100 (2004). For case studies of the post-colonial period, see generally Cardoso & Faletto, *supra* note 25; Evans, *supra* note 25.

For reviews of relevant aspects of trade and debt, and international financial relations and institutions more generally, see generally Oxfam, *Rigged Rules and Double Standards: Trade, Globalization and the Fight Against Poverty* (2002); Cypher & Dietz, *supra*, 471-532; Branko Milanovic, *Worlds Apart: Measuring International and Global Inequality* 61-81 (2005) [hereinafter Milanovic, *Worlds Apart*]; Robert Wade, *Choking the South: World Finance and Underdevelopment*, 38 *New Left Rev.* 115, 122-27 (2006).

peoples of the socio-cultural formation and perspective of "modernity" itself. From this angle, the consciousness of "under-development," understood as an inadequate stage of industrial economic growth, was itself part of a sequence or trajectory pressed upon cultures that, whatever path they were on, were now forced to conform to that of the West.²⁷ As several scholars have emphasized, this account does not deny that corruption, collaboration, and mismanagement by elites within the developing countries contributed importantly to their impoverishment. On the contrary, in "imperialist" relations, it is common for the "center within the center" (i.e., elites in developed countries) to establish links or alliances with the "center within the periphery" (elites in developing countries), an arrangement that severely disadvantages the "periphery in the periphery" (masses in developing countries) and has indeterminate (i.e., case specific) impacts on the "periphery within the center" (the masses in developed countries).²⁸ Once again, however, it must be emphasized that imperial

There also exist a number of aggregate level, structural theories that advance different accounts for why unequal exchange or uneven development is, more or less, built into the very logic of international economic transactions given the existing differences in stages of development between "core" and "periphery" countries. Much of the work centers on terms of trade, and in particular on the "Prebisch-Singer Thesis" regarding declining terms for primary versus manufactured goods. See Econ. Comm'n for Latin Am., United Nations, *The Economic Development of Latin America and Its Principal Problems* (1950); Hans Singer, *The Distribution of Gains Between Investing and Borrowing Countries*, 40 *Am. Econ. Rev.* 473 (1950). For recent assessments of the extent to which variations of the thesis have been borne out, see United Nations Conference on Trade and Development, *Evolution in the Terms of Trade and Its Impact on Developing Countries* [hereinafter UNCTAD], in *Trade and Development Report 85*, 85-114 (2005); Cypher & Dietz, *supra*, at 159-70. (Note, the discussion of distribution in UNCTAD, *supra*, at 105-14, evinces a shift in emphasis away from a pure economic logic and toward socio-political factors as well, bringing it closer to the type of analysis advanced in the sources cited in the previous paragraph). For alternative structural accounts, see generally Samir Amin, *1 Accumulation on a World Scale* (Brian Pearce trans., 1974); Arghiri Emmanuel, *Unequal Exchange* (1972); Anwar Shaikh, *On the Laws of International Exchange*, in *Growth, Profits and Property* 204 (Edward J. Nell ed., 1980). Note, assuming arguendo their plausibility, for these accounts to be relevant to the argument we are presenting in this section, they would have to be supplemented by an argument regarding the normative implications of leaving these economic logics politically unchecked.

A number of empirical studies have attempted to assess the claims of the foregoing bodies of work by examining, at an aggregate level, long term trends in inequality between nations. For studies corroborating the existence of ongoing or even increasing gaps, see generally Charles Ragin & York Radshaw, *International Economic Dependence and Human Misery, 1938-1980: A Global Perspective*, 35 *Soc. Persp.* 217, 217 (1992); Lant Pritchett, *Divergence, Big Time*, 11 *J. Econ. Persp.* 3, 4-8 (1997); Roberto Korzeniewicz & Timothy Moran, *World-Economic Trends in the Distribution of Income, 1965-1992*, 102 *Am. J. Soc.* 1000 (1997); Arthur Alderson & Francois Nielsen, *Income Inequality, Development, and Dependence: A Reconsideration*, 64 *Am. Soc. Rev.* 606 (1999); Linda Beer & Terry Boswell, *The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975-1995*, 8 *J. World-Systems Res.* 30 (2002). For a dissenting study, see Glenn Firebaugh, *Empirics of World Income Inequality*, 104 *Am. J. Soc.* 1597, 1603-06 (1999) (arguing that, when population size differentials are factored in [so that, e.g., China and India are given greater weight], "there is little net change in inequality from 1960 to 1989"). Firebaugh's interpretation, even if sound, is not incompatible with the claim that there have been forces at work that hamper development in the South or obstruct the equitable distribution of the benefits of global efficiency gains (since, given the stark inequality between the respective countries, one might expect that overall global growth would be accompanied not by a leveling off in inter-nation inequality but rather by significant closing of the gap).

²⁷ See Björn Hettne, *Development Theory and the Three Worlds: Toward an International Political Economy of Development* 21-66 (2d ed. 1995); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* 27-113 (Sherry B. Ortner et al. eds., 2000). We thank Arneulf Becker for drawing our attention to Chakrabarty's study.

²⁸ See Johan Galtung, *A Structural Theory of Imperialism*, 8 *J. Peace Res.* 81 (1971).

and colonial relations of this sort cannot plausibly account for all aspects of the distribution of wealth within the world today. The skill of each country's own government in managing or mismanaging aspects of the development process always plays some role and sometimes plays a decisive role in determining its economic fate.²⁹

The third line of analysis seeks to explain the impoverishment of developing countries, not in terms of what was done to them, but in terms of what they lacked. It asks, in other words, what conditions necessary to consistent long-term economic growth were absent in these nations. The pertinent literature debates the relative importance of three main candidates for the missing element: (1) favorable geographic conditions; (2) greater integration into the global trading system, with its concomitant benefits from increased international specialization; and (3) political and legal economic institutions that reflect and foster stable, transparent, and responsive governments and that enable and stimulate some version of market transactions.³⁰ Theses emphasizing point (3) seem to be gaining ascendance in these debates.³¹ Because defects in political and legal institutions tend to be part of the legacy of colonialism, this third line of analysis increasingly converges with the second. For example, a number of historians of political institutions in Africa have insisted on the colonial past's significant causal role in handing down a disfiguring legacy of barriers

²⁹ For case studies (one of success, the other of failure) illustrating the central role played by domestic policies, see, for example, Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (1989); Pranab Bardhan, *Poverty, Agrarian Structure and Political Economy in India: Selected Essays* (2003). Broader studies developing the same argument are Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (1990); Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (1995).

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

³¹ See Karla Hoff & Joseph Stiglitz, *Modern Economic Theory and Development*, in *Frontiers of Development Economics: The Future in Perspective* 389 (G.M. Meier & J.E. Stiglitz eds., 2001); Mathias Risse, *What We Owe to the Global Poor*, 9 *J. Ethics* 81, 84-94 (2005).

to the development of political institutions that are well-suited to the ethnocultural, geographic, and factional contexts of many jerry-built African "nation-states."³²

A particularly dramatic confirmation of this convergence is provided by an empirical investigation conducted by economists Daron Acemoglu and his colleagues into "the colonial origins of comparative development."³³ The authors set out to test how strongly differences between the strategies adopted by European colonizers in different colonies, in terms of types of settlements and forms of institutions established (themselves partly the result of the disease environments faced by the early Europeans), can explain the current forms of institutions and, as a result, the current economic performance of the modern day successor nation-states. They conclude that there was a spectrum of types of colonial institutions. At one extreme were "extractive states" (such as the Belgian setup in the Congo): institutions that "did not introduce much protection for private property" or "provide checks and balances against government appropriation" and the main purpose of which was "to transfer as much of the resources of the colony to the colonizer, with the minimum amount of investment possible."³⁴ At the other extreme were so-called "settlement colonies" or "Neo-Europes," such as those of Australia, New Zealand, Canada, and the United States. In those areas, the settlers, attempting to replicate European institutions, put "great emphasis on private property and checks against government power."³⁵ Acemoglu and his colleagues hypothesized that the choice of colonization strategy was heavily affected by the mortality rates faced by early Europeans, and that those colonization strategies, in turn, have had myriad repercussions through the present. Those hypotheses, they found, were borne out by the evidence:

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

Four aspects of their results are worth highlighting. First, they found that "approximately three-quarters of the cross-country income differences we observe can be explained by differences in institutions." Second, the results were not altered by excluding outliers on either end (i.e., Australia, New Zealand, Canada, and the United States at one extreme and Africa at the other). Third, once the effect of institutions is controlled for, "neither distance from the equator (latitude) nor the dummy for Africa is significant." (In short, "Africa is poorer than the rest of the world not because of pure geographic or cultural

³² See, e.g., Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (1992); Paul Kennedy, *African Capitalism: The Struggle for Ascendancy* (1988); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); J. Lonsdale, *State and Social Processes in Africa: A Historical Study*, 24 *Afr. Stud. Rev.* 139 (1981).

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

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

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

³⁶ *Id.* at 3.

factors, but because of worse institutions.") Fourth, the authors considered and found empirically unsupported an alternative explanation for their findings--namely, that the "early European settlers might have brought a 'culture' conducive to economic progress."³⁷

The debate concerning why some parts of the world are rich and others are poor will undoubtedly continue for some time. It is neither possible nor necessary for us to settle the controversy here. Sufficient for our purposes is a rough generalization, supported by all three of the approaches we have just summarized: a significant portion of the poverty of developing countries today results from the manner in which those countries were treated by countries that today are prosperous.³⁸

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

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

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

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

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

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

C. Social Utility

The theory we just canvassed is retrospective; it seeks to remedy injustice done in the past. We turn now to a set of approaches less concerned with righting moral balances tipped years ago and more concerned with the shape of the world today or in the future. The first and best known of these is utilitarianism.⁴⁰ It urges lawmakers to choose the course of

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

⁴⁰ Utilitarianism is itself one variant of a broader framework, sometimes known as "welfarism," which takes the view that judgments of social policy should be based purely on the subjective utilities of individuals (as opposed to utility-independent notions such as fairness, liberty, objective well-being, perfectionist ideals, or communal values). See Amartya Sen, *Utilitarianism and Welfarism*, 76 *J. Phil.* 463, 463-64, 468, 471 (1979). Two other well-known criteria within the same family are (a) Pareto superiority, which justifies changes that make one or more people better off and no one worse off, and (b) "Kaldor-Hicks" efficiency (also known as potential Pareto superiority), which justifies changes that benefit some people enough that they could, from their gains, fully compensate the losers and still be better off themselves. We eschew both of these alternative criteria here for reasons well-developed in the pertinent literature: Pareto superiority is untenable as a guide to real world policy choices, which typically involve tradeoffs that violate its commitment to making no one worse off. See, e.g., Guido Calabresi, [The Pointlessness of Pareto: Carrying Coase Further](#), 100 *Yale L.J.* 1211, 1212, 1218-19

action that is most likely to produce the highest net social welfare, understood as "the greatest happiness of the greatest number."⁴¹ This guideline has well-known implications for distributive justice. In brief, when combined with plausible assumptions of diminishing marginal utility and randomized distribution of utility functions, it tends toward a rough egalitarianism, at least with respect to the distribution of basic resources or goods.⁴² An

(1991). The Kaldor-Hicks metric, though more often workable, is nevertheless frequently indeterminate and, more importantly, by taking as given existing distributions of wealth, income, and legal entitlements, is indefensibly conservative. See, e.g., C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 *Phil. & Pub. Aff.* 3 (1975); Ronald Dworkin, *Is Wealth a Value?*, 9 *J. Legal Stud.* 191 (1980); Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 *Hofstra L. Rev.* 671 (1980); Duncan Kennedy, [Cost-Benefit Analysis of Entitlement Problems: A Critique](#), 33 *Stan. L. Rev.* 387 (1981); Richard Posner, [The Problematics of Moral and Legal Theory](#), 111 *Harv. L. Rev.* 1637, 1670 & n.62 (1998). To be sure, the utilitarian metric also faces criticisms, which we consider below. However, as we hope to show, those criticisms are fewer and, in the present context, less persuasive.

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

⁴¹ For the locus classicus, see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns & H.L.A. Hart eds., 1996) (1789) [hereinafter *Bentham, Morals and Legislation*]. For other classic treatments, see generally Mill, *supra* note 14; Henry Sidgwick, *The Methods of Ethics* 411-509 (7th ed. 1907). The "greatest happiness of the greatest number" formulation was Bentham's early version of the principle, one which Bentham seems to have adopted from Beccaria, although he himself sometimes attributed it, seemingly mistakenly, to Joseph Priestley. Jeremy Bentham, *A Fragment on Government* (1823), reprinted in *Collected Works of Jeremy Bentham: A Comment on the Commentaries and a Fragment on Government*, at 393 (J.H. Burns & H.L.A. Hart eds., 1977); see W.R. Sorely, *Bentham and the Early Utilitarians*, in 11 *The Cambridge History of English Literature: The Period of the French Revolution* 63, 63-85 (A.W. Ward & A.R. Waller eds., 1914); Robert Shackleton, *The Greatest Happiness of the Greatest Number: The History of Bentham's Phrase*, 90 *Stud. on Voltaire & Eighteenth Cent.* 1461, 1462-63 (1972). We should note that John Rawls has suggested that ultimate credit should likely go to Frances Hutcheson for being the first, in 1725, "to state clearly the principle of utility," which Hutcheson framed as requiring the "the greatest happiness for the greatest numbers." See John Rawls, *A Theory of Justice* § 5, at 20 n.9 (revised ed., Belknap Press 1999) (1971) [hereinafter *Rawls, Theory of Justice*]. Although Bentham himself later adopted a simpler "greatest happiness principle," (see Sorely, *supra*) we use the earlier formulation here to highlight the fact that the application of utilitarian reasoning we deploy focuses on achieving a wide distribution of utility among individuals, rather than simply a large aggregate total. This version, in our view, most faithfully tracks the intuition that gives utilitarianism much of its power-- the idea that, everything else being equal, numbers do matter in ethical deliberation--without lapsing into the error of pursuing the maximization of an aggregate utility total as a goal in itself, which would be senseless given that there is no agent that experiences the pleasure from any such maximized total. Cf. Rawls, *Theory of Justice*, *supra*, § 5, at 20-24.

⁴² See R.M. Hare, *Justice and Equality*, in *Justice and Economic Distribution* 118, 126-27 (J. Arthur & W. Shaw eds., 2d ed. 1991) (1978); Richard D. Brandt, *A Theory of the Good and the Right* 311 (1979). Of course, this conclusion must be qualified by the possibility that there are incentive-based reasons for departing from a statically maximizing egalitarian distribution, whereby permitting inequality would lead to higher overall output and hence possibly greater dynamic aggregate welfare. In Part II, we examined many dimensions of this static/dynamic tradeoff in the context of specific reform proposals. By contrast, the impact of the modest aggregate redistribution of wealth with which we are concerned in this Part will almost surely be too small to offset materially the overall utilitarian argument in favor of egalitarianism.

apparent implication of that tendency is that the residents of countries that currently enjoy a disproportionate share of the world's income, wealth, and other social goods should contribute disproportionately to the cost of creating and distributing drugs that would prevent, cure, or manage the infectious diseases that afflict the poorer nations. That implication is, however, subject to a host of objections, complications, and refinements. We take them up in the following stages: In section 1, below, we flesh out the basic utilitarian argument. In section 2, we consider how it bears on the question of who should pay for healthcare research and development (R&D). In section 3, we consider in more detail how the argument bears on the questions of how much money should be spent on R&D and how that money should be allocated. Finally, in section 4, we flag some important limitations on the utilitarian approach in general.

1. The Basic Reasoning

An essential, and relatively uncontroversial, component of the standard utilitarian argument for egalitarianism is the principle of diminishing marginal utility, which supposes that the less an individual has of a given good, the more benefit she derives from obtaining an additional amount (and vice versa), at least in general and for most goods, including income-wealth.⁴³ If we could further assume that all individuals have the same utility function, then we could be sure that wealth transfers from the rich to the poor would, *ceteris paribus*, augment aggregate utility.⁴⁴ But it is precisely this further assumption that opponents of such wealth transfers dispute. The opponents argue that, given the likelihood that individuals vary, perhaps significantly, in their utility curves, and given that we do not have sufficient knowledge to make interpersonal comparisons of utility, there exists no "theoretical basis for the conclusion that . . . a transfer of money from a wealthy man to a poor one is likely to increase the sum of the two men's utilities."⁴⁵ However, this overlooks the point forcefully made by Abba Lerner: all that is needed to justify redistribution on utilitarian grounds is that we be able to assume, in addition to the general principle of diminishing marginal utility, that specific utility curves are distributed randomly.⁴⁶ If this is

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

⁴⁴ This was Bentham's own view with respect to the static effects of egalitarian redistribution. See Jeremy Bentham, *The Theory of Legislation* 102- 09 (C.K. Ogden ed., 1987) (1789). Bentham did of course go on to attend to dynamic considerations of the sort discussed in note ____, above, and argued for the need to check egalitarian redistributions against the potentially damaging "future" effects they may cause by eroding people's "security" and, thus, their incentives to produce. *Id.* at 96-97, 109-20.

⁴⁵ Richard Posner, *Economic Analysis of Law* 216 (1st ed. 1972); see also Allan Feldman, *Pareto Optimality*, in 3 *The New Palgrave Dictionary of Economics and the Law* 5 (Peter Newman ed., 1998).

⁴⁶ Abba Ptachya Lerner, *The Economics of Control: Principles of Welfare Economics* 20-40 (Augustus M. Kelley Publishers 1970) (1944). Our discussion draws on Ed Baker's explication and extension of Lerner's argument in response to the objection in Posner, *supra* note 45, at 215-17. See Baker, *supra* note 40, at 27-32.

so, then, despite the fact that individual utilities cannot be compared, we know that equalizing holdings will, as a statistical matter, maximize probable utility. This is because for any specific individual utility curve, while there is an equal chance that a person with that curve will lose or gain the wealth from the equalizing transfer, the harm of a loss (to a well-off person with that utility function) will be outweighed by the benefit (to a worse-off person with that curve).

There are only two cases in which the assumption of random distribution is not plausible. The first, which rarely obtains, is where we actually have enough knowledge of individuals' specific utility curves so as to tailor distribution more precisely (by equalizing everyone's marginal utility, which may lead to widely divergent total utilities). The second is where, although we do not have detailed knowledge of individuals' curves, there are plausible grounds for believing that there exists a particular correlation between people's holdings and their utility functions. If, for example, we thought that "the rich are inherently better able to derive satisfaction from wealth than are other people," we should tolerate or even (depending on the degree to which the rich are superior utility generators) increase the existing inequality of wealth.⁴⁷ Although there has been some speculation along those lines among utilitarian theorists, none of those ruminations is empirically grounded. Until such evidence is forthcoming, the basic utilitarian argument seems strong.

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

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

⁴⁷ Baker, *supra* note 40, at 30 (internal footnote omitted). As Baker points out, to justify deviations from the egalitarian principle, it is necessary that the differences in utility-generating powers be inherent. It would not suffice, in other words, if people in developed countries today were more dependent on material goods for happiness or had a more highly developed awareness of the pleasures that could be provided by goods above a basic minimum. This is because "[i]f it is not an inherent ability, then presumably increasing the wealth of the poor would increase their ability to derive satisfaction from wealth; at most, if the capacity is not inherent but acquired through experience, we have an argument for equalizing income gradually." *Id.* at 30. This last consideration, if relevant at all, would only apply to redistribution of substantially greater income and wealth of the developed world, and for substantially less pressing needs of the developing, than is the case for our aims. Hence we leave it aside.

⁴⁸ We rely here on the World Bank, whose figures are broken down by three regions: low income, middle income, and high income countries. These correspond quite closely to the regional divisions we have been using throughout our analysis for the breakdown of disease burdens and pharmaceutical markets, *i.e.*, the WHO's taxonomy of high mortality developing countries, low mortality developing countries, and developed countries. The Bank provides figures for 208 countries, of which 55 are classified as "high income" and 153 are classified as "low and middle income." The respective population shares of the two groups are 16% and 84%. World Bank Group, *World Development Indicators 2006: The World by Income*, <http://devdata.worldbank.org/wdi2006/contents/income.htm> (last visited Jan. 30, 2007). The WHO provides figures

TABLE 2: GROSS NATIONAL INCOME BY REGION, YEAR 2004					
	Per Capita GNI (Exchange Rate) ⁴⁹	Total GNI (Exchange Rate) (billions)	Population (billions)	Per Capita GNI (PPP) ⁵⁰	Total GNI (PPPs) (billions)
Developing Region	\$1,502	\$8,051 (20%)	5.36 (84%)	\$4,726	\$25,334
Low-income countries	\$507	\$1,188 (3%)	2.34 (37%)	\$2,258	(45%)
Middle-income countries	\$2,274	\$6,863 (17%)	3.02 (47%)	\$6,644	\$5,291 (10%)
					\$20,051 (35%)
Developed Region	\$32,112	\$32,245 (80%)	1.00 (16%)	\$31,009	\$31,138 (55%)
Global Figures ⁵¹	\$6,329	\$40,282	6.36	\$8,844	\$56,289
<i>Source:</i> WORLD BANK, WORLD DEVELOPMENT INDICATORS 2006, Table 1.1					

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

for 192 countries, of which 60 are classified as "developed" and 132 are classified as "developing." The respective population shares of the two groups are 19% and 81%. World Health Organization, *supra* note 1, at 156-57. Maps showing the alignment of the two schemes are available at the following website: <http://www.tfisher.org/countries.htm>.

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

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

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

current PPP approach is likely to underestimate inequality substantially.⁵² Consequently, we provide both metrics as poles. By either measure, we can see that the inequality between developing and developed worlds is stark: residents of developed countries enjoy on average an annual income anywhere from 6.6 to 21 times as large of those in the developing world; although developed country residents comprise only 16% of the global population, they receive between 55% and 80% of the world's annual income.

In fact, these figures understate the actual extent of global inequality (irrespective of whether exchange rate or PPP dollars are used), because they only compare inequalities across countries. Mean per capita GNI figures ignore how each country's total income is distributed among its population. As we saw in Chapter 6, in many developing countries, that stratification is severe.

The foregoing observation points toward a powerful potential objection to the nation-based approach that we have thus far been assuming: why should we assess global distribution in terms of countries; should we not instead focus on inequality among individuals or households across all countries? While determining the latter has long been difficult (because it cannot be surmised from aggregate GDP data), recent work by Branko Milanovic and his colleagues (based on data from household income surveys) has begun to fill the gap.⁵³ Some significant differences between the per capita and household measures are revealed by Table 3, which sets out the results of Milanovic's most comprehensive and recent analysis of global income distribution (based on 1998 survey data from 122 countries).

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

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

TABLE 3: GLOBAL INEQUALITY – COMPARING DISTRIBUTION ACROSS COUNTRIES VERSUS ACROSS INDIVIDUALS (YEAR 1998)

Income Level ⁵⁴	Mean Per Capita Income (% of World Population Living in Countries at this Average Per Capita Income Level)	Actual Individual Income (% of World's Individuals at this Per Capita Income Level)
Poor (Below PPP \$3987)	70.1%	77.4%
Middle-class (PPP \$3987 – \$6060)	13.9%	6.7%
Rich (Above PPP \$6060) (Share taken by North Atlantic & Oceania)	16.0% (13.0%)	15.9% (10.0%)
Total	100%	100%

*Source: Adapted from Table 10.1 in Branko Milanovic, *Worlds Apart: Measuring International And Global Inequality* (2005)*

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

These observations have important implications for the utilitarian argument we have developed thus far. If the root of the case for egalitarianism is the principle of the diminishing marginal utility of wealth, then it would seem that responsibility for bearing a portion of global pharmaceutical R&D costs should vary by individual or household -- or, less precisely, perhaps by income-wealth deciles across the world. This would better fit facts such as that the richest 1% of the world (50 million people) receive as much income as the bottom 57% (2.7 billion), or that the top 10% of the U.S. population (25 million) has an

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

aggregate income equal to that of the poorest 43% of the world (just under 2 billion).⁵⁵ Reorienting our argument along these lines might even have some political advantages, on the hypothesis that a scheme that factored in distributive considerations internal to a country like the United States might have more supporters than one that ignores the current ferment against high drug costs for the domestic U.S. population.

Sensitivity to these considerations underlay our suggestion, near the end of Chapter 3, that we consider legal reforms that would facilitate differential pricing systems, not just among countries, and not just within developing countries, but also within developed countries, such as the United States. However, the reforms with we are now primarily concerned – namely, the prize system proposed in Chapter 5 and the regulatory system proposed in Chapter 6 – would respect national boundaries, in the sense that they would be adopted by developed countries, would be financed by the residents of developed countries, and would redound primarily to the benefit of the residents of developing countries. The following considerations incline us to maintain those limitations, despite the plausible utilitarian argument for the effacement of national boundaries: (a) The funds necessary to implement these reforms would most likely be raised through progressive taxation systems. As a result, the financial burdens would be allocated within developing countries roughly in proportion to household income. (b) Some reforms premised on geographic segmentation can be undertaken by developing country governments acting alone or in unison, requiring little assistance from the developed world, making these options substantially more likely to enjoy the necessary political will. (c) Finally and most importantly, notwithstanding the fact of intra-country inequality, it remains the case that the vast bulk of global inequality among individuals is rooted in differences between countries.⁵⁶ Thus, the second-best here is in fact a rather good approximation of the ideal.

3. Allocation of Global R&D Resources

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

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

⁵⁶ One salient fact in this regard is that the average income of someone in the bottom decile of the United States is higher than that of two-thirds of the world's people. *Id.* at 89.

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

is appropriate. As we saw in Chapter 2, in the United States, this comes roughly to 75 billion dollars annually. The U.S. market is almost exactly half of the world's, so a rough approximation of the global total is 150 billion dollars.

This leaves for our consideration a much narrower, but still important question: how much of the 150 billion dollars should be spent developing vaccines or cures for the diseases that afflict developing countries? The utilitarian answer to that question is, in principle, straightforward: R&D dollars should of course be allocated in the manner that will produce the greatest good of the greatest number. If we assume for the moment that research devoted to every disease is (1) equally likely to result in scientific discoveries that (2) lead to equally effective treatments, then the application of that principle is also straightforward: we should devote to each ailment a percentage of our total R&D budget equal to the proportion of the world's total disease burden attributable to that ailment. From the DALY data compiled by the WHO, we know that neglected diseases account for 16.4% of the global disease burden. Yet, the portion of global R&D expenditures that is comprised of research directed at those diseases is in the range of 2-3%.⁵⁸ To correct the imbalance, plainly we would need to increase R&D spending on neglected diseases sharply, either by devoting extra resources to those diseases⁵⁹ or by shifting to them some of the money currently spent on non-neglected diseases.⁶⁰ (Which of these courses is preferable depends upon whether we are currently spending too much, too little, or the right amount on pharmaceutical research in general – a matter on which, as indicated above, we express no opinion.)

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

4. The Vulnerabilities of Utilitarianism

This concludes our application of utilitarianism. Our development of the utilitarian argument has attempted to save it from many of the criticisms often leveled against the

⁵⁸ This estimate is based on a combination of the following sources: Bernard Pecoul et al., *Access to Essential Drugs in Poor Countries: A Lost Battle?*, 281 *J. Am. Med. Ass'n.* 361, 364-65 (1999); Patrice Trouiller et al., *Drug Development for Neglected Diseases: A Deficient Market and a Public-Health Policy Failure*, 359 *Lancet* 2188, 2189 (2002).

⁵⁹ The amount necessary would be roughly \$16.6 billion, calculated as follows: divide the neglected, disease share of the global burden (16.4%) by the non-neglected disease share (83.6%) and multiply the quotient (19.6%) by the current level of R & D on non-neglected diseases (\$97.5 billion, or 97.5%, of \$100 billion) to arrive at target amount of \$19.12 billion, from which current amount (\$2.5 billion, or 2.5%, of \$100 billion) is subtracted.

⁶⁰ The amount necessary would be roughly \$14.2 billion, calculated as follows: subtract the current neglected-disease portion of total R & D (2.5%) from the ideal (16.4%), divide the difference (13.9%) by the portion of R & D taken by non-neglected diseases (97.5%), and multiply the quotient (14.2%) by the current level of aggregate R & D (\$100 billion).

theory.⁶¹ Our aspiration has been both (1) to show why readers committed to utilitarianism ought to support a substantial increase in the amount that the residents of developed countries pay to support pharmaceutical research designed to benefit developing countries, and (2) to persuade readers skeptical of utilitarianism as a comprehensive ethical theory that, appropriately qualified and supplemented, it may nevertheless assist us in determining our ethical commitments in this area.⁶² However, even this version of utilitarianism – the best we have been able to construct – remains vulnerable to criticism on three grounds.⁶³

First, some critics contend that utilitarianism ultimately fails to capture what justice is about, either because its account of what impartiality requires fails, or because the form of justice in question is best thought of not in terms of impartiality but of, say, fairness, "fit," or basic rights.⁶⁴ In our view, this criticism is well taken. In Section D, below, we will turn to a family of arguments whose conceptions of justice are ultimately more defensible.

⁶¹ These include criticisms based on a misplaced pursuit of a meaningless aggregate, see *supra* note 40, and contentions that an exclusive focus on current subjective preferences or end-states fails to take seriously possible deficiencies in how these are formed, how they may contain internal conflicts between first- and higher-order preferences, and how they may diverge from people's well-being. The latter set of contentions are developed powerfully in the writings of, among others, Marx, Elster, and Sen. See generally Richard W. Miller, *Marx and Aristotle: A Kind of Consequentialism*, in *Marx and Aristotle: Nineteenth-Century German Social Theory and Classical Antiquity* 275 (George McCarthy ed., 1992); Jon Elster, *Sour Grapes* (1983); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures* 1984, 82 *J. Phil.* 169 (1985). They are addressed by the "deliberative utilitarian" approach to health outlined above at *supra* notes 71-75. Going further in an objectivist direction would unnecessarily, and probably deservedly, open us to the charge of misplaced paternalism.

Other criticisms of utilitarianism that are powerful in general but not so in this setting include the argument that utilitarianism's focus on pleasure and satiation fails to connect with our deeper understanding of what makes a human life worth living, see Bernard Williams, *A Critique of Utilitarianism*, in *Utilitarianism: For and Against* 77, 110-14 (J.J.C. Smart & Bernard Williams eds., 1973); Nozick, *supra* note 18, at 42-45, and the claim that utilitarianism favors "utility monsters," people who either derive disproportionate pleasure from the suffering of others, see *id.* 41, or seek to indulge offensive (typically because anti-social) or otherwise inappropriate preferences, see Rawls, *Theory of Justice*, *supra* note 41, § 6, at 27; Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 *Phil. & Pub. Aff.* 185, 198-204 (1981).

⁶² Cf. Jonathan Wolff, *Making the World Safe for Utilitarianism*, Royal Institute of Philosophy Lectures (forthcoming), available at <http://www.homepages.ucl.ac.uk/~uctyjow/unpublished.htm>.

⁶³ One commonly voiced, fundamental objection to utilitarianism does not seem to us to have much force. It is often alleged that a key difficulty facing utilitarianism is trouble in getting the argument motivated from the start, since it does not posit any reason why people should care about overall social utility to begin with. In our judgment, however, so long as the argument is understood as one about impartiality, then utilitarianism enjoys a basis that is little different from contractarian or rights theories: appeals to what a rational agent would find persuasive on grounds of what reason, understood here as the consistent application of general norms, would require. That is, if rights arguments are premised on "what is a right for you as a rational agent must be a right for other rational agents," see generally Alan Gewirth, *Reason and Morality* (1978), and contractarian arguments are premised on "what general principles would you, as a reasonable and rational person, agree to be governed by with other reasonable and rational persons in a situation of equal information and non-coercion," see generally T.M. Scanlon, *What We Owe to Each Other* (1998), then the utilitarian argument is analogous: "what do you, as a rational person, think is right to accord others assuming that they are, in relevant respects, like you." While some argue that utilitarianism has deeper roots than the idea of justice-as-impartiality--namely, concerns of fellow-feeling or benevolence--the impartiality premise is all that is required here. For motives from fellow-feeling, see Mill, *Utilitarianism*, *supra* note 14, at 28-34. For the benevolence interpretation, see Bernard Williams, *Ethics and the Limits of Philosophy* 76, 81-82 (1985); Rawls, *Theory of Justice*, *supra* note 41, § 29, at 155. We thank Roni Mann for drawing our attention to the Williams passages.

⁶⁴ See, e.g., John Rawls, *Justice as Fairness: A Restatement* § 14.50 (2001) [hereinafter Rawls, *Justice as Fairness*]. For Rawls, utilitarianism may be appropriate for "allocative justice," which refers to allocating

The second objection is a variation on the first. Utilitarian reasoning, it is sometimes argued, is inattentive to the history of situations, oblivious to the fact that justice requires attending not only (if at all) to ends or outcomes but also (and perhaps only) to the sequence of events that led up to them. In legal theory, this argument most often finds expression in the claim that some economic analyses--specifically, those that urge judges to make decisions based solely on forward-looking considerations of social welfare--are inappropriately insensitive to justice considerations arising out of parties' prior behavior (such as whether someone broke a promise in "bad faith," or whether a driver took reasonable care).⁶⁵ In philosophy, the argument has been made most powerfully by Friedrich Hayek and Nozick, both of whom contend that, as long as current economic holdings are legitimate in terms of the procedural history giving rise to them, there is no normative basis for a social intervention to alter their arrangement in order to achieve any desirable "patterned outcome."⁶⁶ In our judgment, this concern is frequently overstated. In particular, the contention that a transfer of wealth from A to B not justified by A's misconduct in the past illegitimately interferes with A's liberty, neglects the fact that the exercise of individual liberties, including many so-called "negative" ones, is often socially enabled and negotiated, and is best preserved not by ignoring the constraints each person faces, but by confronting, evaluating, and then reforming or affirming them.⁶⁷ But we agree that the objection retains

among a group shares of some goods that the group has no connection with, or just happens upon (they "have not cooperated in any way to produce those commodities"). *Id.* Nevertheless, it cannot, Rawls argues, settle questions of "distributive justice," which deal with how to distribute the proceeds of a cooperative scheme: "Citizens are seen as cooperating to produce the social resources on which their claims are made." *Id.*

⁶⁵ See, e.g., Jules Coleman, [The Structure of Tort Law, 97 Yale L.J. 1233, 1240-53 \(1988\)](#) (reviewing Richard Posner & William Landes, *The Economic Structure of Tort Law* (1987) and Steven Shavell, *Economic Analysis of Accident Law* (1987)); Arthur Ripstein, *Critical Notice: Too Much Invested to Quit*, 20 *Econ. & Phil.* 185, 186, 193-96 (2004) (reviewing Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (2002)).

⁶⁶ See 2 Friedrich A. Hayek, *Law, Legislation and Liberty: The Mirage of Social Justice* 67-100 (1976); Nozick, *supra* note 18, at 150-60.

⁶⁷ See 1 Aristotle, *The Politics*, Bk. I, ch. 2, at 35-38 (Carnes Lord ed. & trans., 1984) (stating that human development is inescapably social and political phenomenon); G.W.F. Hegel, *Phenomenology of Spirit* 111-19 (A.V. Miller trans., 1952) (1807) (stating that social recognition is fundamental element of one's self-understanding and personhood); G. W.F. Hegel, *Philosophy of Right* §§ 34-40; 105-18 (T.M. Knox ed., 1952) (1821) (stating that real freedom begins with recognition of necessity); see also *infra* note 96 (noting that one ground for liberal-egalitarian departure from libertarianism is its acceptance of development of these Aristotelian and Hegelian themes by social theorists in line of Marx and Weber). We note that an attenuated version of this point was affirmed by Hayek, who recognized that preserving competitive liberty may require periodic government intervention in the market, and who accepted that assuring some basic provisions for livelihood and health may be a justified reinforcement of the fairness of the rules of the game. For the first point, see F.A. Hayek, *The Road to Serfdom* 39 (1944). But cf. 3 Friedrich A. Hayek, *Law, Legislation, and Liberty: The Political Order of a Free People* 65-97 (1979). The second point is made in the following passage:

"There is no reason why in a society which has reached the general level of wealth that ours has attained, the first kind of security ["against severe physical privation, the certainty of a given minimum of sustenance for all"] should not be guaranteed to all without endangering general freedom. There are difficult questions about the precise standard which should thus be assured; ... but there can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody....

Nor is there any reason why the state should not assist the individuals in providing for those common hazards of life against which, because of their uncertainty, few individuals can make adequate provision. Where, as in the case of sickness and accident, neither the desire to avoid such calamities nor the efforts to overcome their consequences are as a rule

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

The third objection, and the most significant for our argument, is that the utilitarian indifference to national borders is an untenable normative position, one reflecting a more general flaw in the utilitarian outlook. In fact, our rather sanguine extension of the principles of social welfare beyond national borders, to recommend the diversion of a substantial portion of U.S. pharmaceutical R&D spending in order to address better the needs of the developing world, may strike some readers as a perfect illustration of where utilitarian reasoning goes awry. Our recommendation ignores, it could be argued, the special and stronger force of particular claims, claims that cannot be sacrificed on the altar of a universalist ethos, and which derive from the concentric circles of family, friends, given and chosen communities, fellow nationals, and compatriots.

There are three distinguishable versions of this disquiet. The first simply states that utilitarianism is too ethically demanding; its ceaseless recognition of strangers' claims puts too high a "strain on our commitments."⁶⁸ The second is a more political-philosophical dissent, advanced by "political liberals" who argue that socio-economic justice is, by and large, a matter internal to the sovereign borders of a nation-state, due to the special nature of reciprocal obligations derived from membership in a polity and subjection to its laws.⁶⁹ The third is a communitarian critique, rooted in a commitment to give ethical priority to the obligations that derive from one's particular, and partly "constitutive," relations to a given family, clan, community association, profession, city, tribe, and nation.⁷⁰ The "particular social identity" formed by these relations is seen to reside at the core of one's personhood,

weakened by the provision of assistance, where, in short, we deal with genuinely insurable risks, the case for the state helping to organize a comprehensive system of social insurance is very strong. There are many points of detail But there is no incompatibility in principle between the state's providing greater security in this way and the preservation of individual freedom."

Hayek, *Road to Serfdom*, supra, at 124-25 (internal footnote omitted).

⁶⁸ We borrow here Rawls's phrase, "strain of commitments," using it in a somewhat different sense than Rawls himself does in his own criticism of utilitarianism. Rawls, *Theory of Justice*, supra note 41, § 29, at 153-54. For Rawls, utilitarianism requires, on the part of those worse off, too much sympathetic identification with those better off (as compared to Rawls's difference principle. See infra notes 98-99 and accompanying text). Id. § 29, at 155. Our use is meant to capture the more general charge of simply requiring too much identification with, and commitment to, the good of others, period, along the lines advanced in Charles Fried, *Right and Wrong* 13-14, 36-38 (1978).

⁶⁹ Different versions of this claim are advanced in John Rawls, *Law of Peoples* (1999); David Miller, *The Limits of Cosmopolitan Justice*, in *International Society: Diverse Ethical Perspectives* 164 (David R. Mapel & Terry Nardin eds., 1998); Michael Blake, *Distributive Justice, State Coercion and Autonomy*, 30 *Phil. & Pub. Aff.* 257 (2001); Risse, supra note 31.

⁷⁰ A representative critique is Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 338-51 (1996) [hereinafter Sandel, *Democracy's Discontent*]. The "constitutive" character of given, particular, and communal relations (and of the obligations deriving therefrom) is in Michael Sandel, *Liberalism and the Limits of Justice* 149-52, 172-73 (2d ed. 1998) [hereinafter Sandel, *Liberalism and the Limits of Justice*]. The latter part of the sentence in the text (beginning with "a given family") is paraphrased from MacIntyre, supra note 39, at 220.

"encumbering" oneself with ties and associations that provide much of life's meaning, making these obligations one's "moral starting point."⁷¹

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

D. Distributive Justice in Healthcare

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

1. Deontological Theories

Deontological political philosophies assert that "the right," or considerations of "justice," is prior to "the good," or considerations of human welfare or "excellence."⁷² This

⁷¹ See MacIntyre, *supra* note 39, at 220 (referencing "particular social identity" and "moral starting points"); Sandel, *Liberalism and the Limits of Justice*, *supra* note 91, at 160-61, 172, 178-83 ("encumbered self"). This last criticism is distinguishable from each of the former two. Unlike the first, the argument is not that utilitarian impartiality, whatever its ideal appeal, is humanly unrealizable, but rather that it is simply an incorrect ethical ideal. Unlike the second, the argument is not limited to the fact of compatriotism (i.e., joint membership, somewhat chosen, in a polity), but explicitly embraces nationalism (i.e., joint belonging, somewhat given, to a cultural-linguistic-ethnic group).

⁷² See John Rawls, *Theory of Justice*, *supra* note 41, § 6, at 26-28 (advancing deontological theory in which "the concept of right is prior to that of the good"); Ronald Dworkin, *Liberalism*, in *A Matter of Principle* 181, 191 (1985) ("[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."); Ronald Dworkin, *Philosophy and Politics: Dialogue with Ronald Dworkin*, in *Men of Ideas* 240, 255 (Bryan Magee ed., 1978) ("[L]iberalism is the theory that makes the content of justice independent of any particular theory of human virtue or excellence."). This conception of deontology is somewhat distinct from one common in moral philosophy, where the emphasis is on a sharp contrast with "consequentialism," the former focusing solely, or at least primarily, on consequence-independent notions of right and wrong intrinsic to an act, and the latter concerned solely with outcomes or states of affairs. Both Rawls and Dworkin explicitly repudiate any commitment to a consequentially-neutral conception. See Rawls, *Theory of Justice*, *supra* note 41, § 6, at 26 ("[D]eontological theories are defined ... not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."); Ronald Dworkin, *Taking Rights Seriously* 294-330 (1977) (advancing account of rights where social costs are relevant to deciding what rights people have, although not, except in emergencies, justifying any compromise of those rights once they have been established).

means both that the content of justice is to be specified (as far as possible) independently of substantive conceptions of the good life or society, and that its claims have ethical priority over the good.⁷³ These theories are rooted in a liberal commitment to two values: individual liberty to pursue different ways of life, which is best respected by government's neutrality (or maximal pluralism) toward conceptions of the good; and the essential dignity, or at least political inviolability, of individuals, whose fundamental interests are not to be sacrificed for the sake of groups or the greater good.⁷⁴ Finally, these theories are liberal in the further sense that they are committed, as a basic requirement of justice, to some conception of either moral or political equality among individuals.⁷⁵

⁷³ See Sandel, *Liberalism and the Limits of Justice*, supra note 91, at x, 16-18 (discussing Rawls); Michael Sandel, *Introduction to Liberalism and Its Critics* 1, 1-7 (Michael Sandel ed., 1984) (discussing deontological or "Kantian" liberalism more generally). Samuel Freeman has pointed out that, strictly speaking, on Rawls's definitions a deontological approach is not the same as giving priority to the right over the good. Samuel Freeman, *Utilitarianism, Deontology, and the Priority of the Right*, 23 *Phil. & Pub. Aff.* 313, 317-18, 335-40 (1994). For Rawls, deontological theories are defined in contrast to teleological ones, which in his view have the following two features: defining the good independently of the right and adopting as the ethical desideratum the maximization of the good. Rawls, *Theory of Justice*, supra note 41, § 6, at 26. However, as indicated infra at note 135, our usage of these terms departs somewhat from Rawls's. One reason we do so is to highlight the following two features as key distinguishing marks of a family of liberal-deontological theories along the lines of Rawls and Dworkin: (1) the liberal insistence on adopting, in matters of political philosophy, neutrality toward, or at most a "thin theory of," the good, for Dworkin, see references cited in supra note 93; for Rawls, see *Theory of Justice*, supra note 41, § 60, at 347-50; for other examples of liberal neutrality, see Bruce A. Ackerman, *Social Justice in the Liberal State* 11 (1980); Charles E. Larmore, *Patterns of Moral Complexity* 42-44 (1987); and (2) the deontological insistence on the independent significance of the right, as a constraint on the pursuit of the good. See Rawls, *Theory of Justice*, supra note 41, § 6, at 27-28; Dworkin, *Taking Rights Seriously*, supra note 93, at 272-78.

⁷⁴ Utilitarians' emphasis on subjective preferences or pleasures is their manifestation of the first commitment to neutrality/pluralism grounded in individual liberty, something uniting welfare theorists with deontological theorists as liberals. See Roberto Mangabeira Unger, *Knowledge and Politics* 76-88 (1975). Welfarists have tried to reflect the second commitment by using Pareto criteria (forbidding inter-personal tradeoffs) instead of utilitarian ones. The problem with that, as discussed supra at note 40, is that social tradeoffs are inevitable, and the advantage of deontological liberals is that, unlike Paretians, they recognize that what is at issue is whether "fundamental" interests are jeopardized or not.

⁷⁵ As we will soon see, disagreement among liberals concerning the content and entailments of the correct conception of equality is central to the issues addressed in this Part. One point worth clarifying at the outset, however, is that their disagreement on this score does not reach to the issue of whether considerations of equality apply to spheres of economic and social life beyond the "political" narrowly conceived (or, to activities in the "market" and "civil society" rather than just "state action"). See Karl Marx, *On the Jewish Question*, in *Deutsch-Französische Jahrbücher* (1843), reprinted in *The Marx-Engels Reader* 26 (Robert Tucker ed., 2d ed. 1978). The following theories all accept some version of the critique of libertarianism that we summarize in Chapter 11, Section C, and they take the view that liberal concerns must extend to those background socio-economic conditions that pervasively constrain or enable individual liberty and are so heavily shaped by government action as to make resulting outcomes a necessary subject of evaluation from the perspective of equality. See pages ____, below (outlining normative and legal-realist critiques of libertarian adherence to strict state-market and public-private distinctions, and acceptance of some such critique by Rawls and Dworkin).

Note, Rawls also advances an additional reason for liberal justice to focus on background socio-economic conditions, one that is independent from those discussed at infra notes 255-57. On this argument, irrespective of the presence of state action, the fact that the "social world" has a "profound and pervasive influence" on "citizens' life-prospects" is its own reason for it to be the part of the subject of justice. Rawls, *Justice as Fairness*, supra note 83, § 16.1, at 55; see also Rawls, *Theory of Justice*, supra note 41, § 2, at 7, § 41, at 229. In the assessment of a leading theorist in this area, Rawls's "incorporation of this notion of social structure into his theory represents the coming of age of liberal political philosophy. For the first time, a major figure in the broadly individualist tradition has taken into account the legacy of Marx and Weber by recognizing

The two most influential deontological theories, those of John Rawls and Ronald Dworkin, both advance an egalitarian conception of the distribution of income-wealth, whose implications with respect to healthcare largely overlap with those of the restricted and qualified utilitarianism that we have developed in the preceding section.⁷⁶ Rawls adopts a contractarian approach to determining what justice requires, asking what free and equal persons would agree to as the reasonable terms for a system of social cooperation.⁷⁷ He argues that such persons, when properly motivated and informed (so as to adopt an impartial view marked by mutual respect), would affirm a conception of "justice as fairness," one that places heavy emphasis on reciprocity and that includes the following "difference principle" of distributive justice: inequalities of social and economic "primary goods" (income, wealth, positions of authority or responsibility, and the social bases of self-respect) are justified only if they work to the greatest benefit of the least-advantaged group in society.⁷⁸

It seems clear that the neither of the extant inequalities with which we are concerned in this book (namely, in access to existing medicines and in the allocation of resources for future drugs) meets Rawls's criterion.⁷⁹ With respect to the first issue, application of Rawls's

explicitly that societies have patterns of inequality that persist over time and systematic ways of allocating people to positions within their hierarchies of power, status and money. It is depressing evidence of the social-scientific illiteracy of so many philosophers that someone like Nozick, who is in these terms the equivalent of a pre-Copernican astronomer, should ever have been taken so seriously." Brian Barry, *Justice as Impartiality* 214 (1995).

⁷⁶ Strictly speaking, utilitarianism does not share the liberals' focus on distributive justice. See Rawls, *Theory of Justice*, supra note 41, § 5, at 23 (stating that distributive concerns are instrumental, not intrinsic, to utilitarian perspective); Sen, supra note 80, at 201-02 (noting that utilitarian equality is accidental, not essential). However, as we have developed it here, when the utilitarian commitment to impartiality is combined with certain plausible assumptions, there is clearly a tendency toward equality, a point often made by defenders of the perspective. See, e.g., Stephen Ball, *Economic Equality: Rawls Versus Utilitarianism*, 2 *Econ. & Phil.* 225, 225 (1986).

⁷⁷ Persons are regarded, in their capacity as citizens, to be "free" in the sense (primarily and roughly) of possessing the moral power to determine and pursue their own personal conceptions of the good; and "equal" in the sense of being presumed to possess both the previous power and the moral power of the capacity for a sense of justice each "to the requisite minimum degree ... that enables us to take part fully in the cooperative life of society." Thus conceived, persons as citizens are able to give, and are entitled to receive, reasonable arguments accessible to all regarding terms of social cooperation that are both mutually beneficial or rationally advantageous and fair. Rawls, *Justice as Fairness*, supra note 83, § 7.3, at 20.

⁷⁸ Rawls, *Theory of Justice*, supra note 41, § 46, at 266, § 11, at 54- 56; Rawls, *Justice as Fairness*, supra note 83, § 13, at 42-43, 49, § 17, at 58- 59. For a review of some of the reasons Rawls advances for this conclusion, see infra notes 241-43 and accompanying text. Rawls's other main arguments for this conclusion focus on what rational and reasonable people would choose in an "original position" behind the "veil of ignorance." See Rawls, *Theory of Justice*, supra note 41, § 13, at 65-73, § 26, at 130-31; Joshua Cohen, *Democratic Equality*, 99 *Ethics* 727 (1989).

⁷⁹ Rawls makes clear that healthcare may be included in "the index of primary goods" that is relevant to questions of distributive justice, falling under that part of income and wealth that is not private but rather consists of the package of "various personal goods and services to which we are entitled" as citizens to be provided by government. Rawls, *Justice as Fairness*, supra note 98, § 51.5, at 172. We leave aside two complications here. First, as emphasized by Rawls and others, the difference principle is not to be considered in isolation of the lexically prior principle of a scheme of fully adequate equal basic liberties and rights for all (and their fair political value) and the lexically prior requirement of fair equality of opportunity attaching to all

difference principle to the issue of how the cost-burden of pharmaceutical R&D should be distributed generates an egalitarian impulse identical to the one that we have argued is entailed by utilitarianism.⁸⁰ With respect to the second issue, Rawls's own brief remarks about how his two principles of justice would apply to healthcare seem to require something quite similar to the combination of egalitarian prioritization and political deliberation set out above, with one difference: whereas the utilitarian argument provides no clear guidance concerning whether fair treatment of the healthcare needs of the developing world should be achieved either by increasing R&D on neglected diseases while keeping the rest of our R&D budget constant or by reallocating funds from developed country diseases to neglected diseases, Rawls's argument seems to favor the former.⁸¹ Another, less well-known aspect of Rawls's argument reinforces these inferences: at one point, Rawls suggests that his first principle of equal basic liberties "may be preceded by a lexically prior principle requiring that

offices and positions of political and socio-economic life. See *id.* § 13.5, at 46 n.10, 61; cf. Cohen, *supra* note 99, at 727-31 (emphasizing importance of evaluating difference principle as part of more general "'democratic conception' of equality"). We assume that there are no adverse effects on these other principles from the measures advanced here to pursue justice in health care. Second, for Rawls, ideally the principles of justice are not to be implemented piecemeal through specific acts of legislation or policy but rather are to structure and regulate the basic institutions of social life, setting up overarching public rules in light of which people are free to manage their affairs and accrue legitimate entitlements and expectations over the course of a life. Nevertheless, we follow a common practice in applied political philosophy of evaluating what the difference principle would require in a specific policy context. Cf. Rawls, *Justice as Fairness*, *supra* note 83, § 5.1, at 13 ("[I]deal theory ... should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct."); Rawls, *Theory of Justice*, *supra* note 41, § 46, at 267.

⁸⁰ As often observed, for the limited purposes of distribution of socio-economic goods, Rawls's theory may produce results quite close to an egalitarian version of utilitarianism of the sort we deployed in Part I.C. Both start with the presumption of an equal distribution and then allow for deviations that increase overall productivity. The key difference is that Rawls stipulates that such deviations are only justified if the gains from productivity redound to the greatest benefit of the least-advantaged group, whereas utilitarianism would allow any deviations that increased average utility (or, in its more stringent Paretian form, that did so without making anyone worse off). These differences are significant both in their distributive effects and in their meaning and justification. See Rawls, *Justice as Fairness*, *supra* note 83, §§ 35-37, at 120-26; Cohen, *supra* note 99. However, they do not arise here because we assume that a progressive scheme for spreading the costs of pharmaceutical R & D will have little appreciable impact on overall social productivity, and hence there is little reason to depart from the egalitarian reasoning that undergirds it.

⁸¹ Focusing on the "likely medical needs" of the least-advantaged group, Rawls states: "Within the guidelines of the difference principle, provisions can be made for covering these needs up to the point where further provision would lower the expectations of the least advantaged." Rawls, *Justice as Fairness*, *supra* note 83, § 51, at 173. He further observes that "what sets an upper bound to the fraction of the social product spent on medical and health needs are the other essential expenditures society must make," a balance to be struck at the legislative stage by political "representatives of citizens" implementing one of a number of possible interpretations of what the principles of justice constitutionally mandate. *Id.* at 173-74. Rawls takes care to clarify that the "provision of medical care is [not] merely to supplement the income of the least advantaged" for the sake of distributive justice according to the difference principle, but is also aimed at "meet[ing] the needs and requirements of citizens as free and equal," such that it is part of ensuring the fair value of the political liberties and fair equality of opportunity (both of which are lexically prior to the difference principle). *Id.* at 174. For further development of Rawls's theory in this area, see Norman Daniels, *Just Health Care* (1985); Norman Daniels, *Just Health: A Population View* (forthcoming). When we add to these two considerations (of fair value of liberty and fair equality of opportunity) the argument founded on his "basic-needs" principle (see text following this note), we see that Rawls advances three different grounds for giving the provision of basic healthcare a priority among socio-economic goods to be distributed. It is for this reason that we contend that Rawlsian justice would, everything else being equal, push in favor of increased, rather than shifted, spending. As we suggest below, Rawls's argument might also be used to argue that each individual's interest in healthcare is sufficiently fundamental to be considered a "right."

basic needs be met, as least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties."⁸² Arguably, health constitutes just such a "basic need"; if so, meeting that need for all citizens would assume even greater importance.

Dworkin's variant of liberalism is quite different, but, with respect to healthcare, at least, it terminates in similar recommendations. Two aspects of his argument are germane. First, Dworkin contends that a government must show "equal concern" for the fate of all its citizens.⁸³ Second, governments must abide by what he calls the ethical "principle of equal importance: it is crucial, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from that objective point of view, for each human life."⁸⁴ (The distinction between these foundations will become relevant when we consider grounds for extending distributive justice beyond national borders.) In Dworkin's view, the best interpretation of what liberal equality requires is an "equality of resources," whereby people are provided with roughly equal, although suitably differentiated, means to pursue effectively their different life projects. He argues that equality of this sort retains individual responsibility for one's preferences, ambitions, and prudent management of one's affairs (unlike, say, equality of condition or welfare), but corrects for those circumstances and conditions that are reasonably understood to be beyond an individual's control, such as inequalities stemming from differences in how markets value one's innate and socially enabled capacities (unlike, say, equality of opportunity).⁸⁵

Applying this conception to issues of justice in healthcare, Dworkin suggests that governments should seek to approximate the ideal allocation and distribution of resources that would result from the well-informed choices of individuals acting in the healthcare

⁸² Rawls, *Justice as Fairness*, supra note 83, § 13, at 44 n.7.

⁸³ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality 1* (2000) ("No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance."); see also Dworkin, *Taking Rights Seriously*, supra note 93, at 180 ("[I]ndividuals have a right to equal concern and respect in the design and administration of the political institutions that govern them."); id. at 272-73 ("Government must not only treat people with concern and respect, but with equal concern and respect.").

⁸⁴ Dworkin, *Sovereign Virtue*, supra note 104, at 5. Dworkin states that this is one of two "principles of ethical individualism" that are "fundamental to any ... comprehensive liberal theory." (The other is the "principle of special responsibility" that each individual bears for her or his own life.) Id. Note, Dworkin's discussion of when the principle of equal importance may and may not require equal concern (that is, when it may be qualified and when it has force) suggests that, for our purposes, there may in fact be little difference for him between it and the political-liberal basis for liberal equality, since the more universalist principle of equal importance may be fully operative only in the context of "[a] political community that exercises dominion over its own citizens," making "[e]qual concern ... the special and indispensable virtue of sovereigns." Id. at 6.

⁸⁵ See Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 *Phil. & Pub. Aff.* 283 (1981); Dworkin, supra note 80, reprinted as chapters 2 and 1, respectively, in Dworkin, *Sovereign Virtue*, supra note 104, at 65-119, 11-64. The method of determining what this requires is to imagine the outcome of a hypothetical auction whereby individuals, provided equal initial entitlements, bid against each other for resources (bids based on their assessments of what personal preferences are best to pursue given their respective costs, as determined by overall resource level and others' choices). Participants are also allowed to insure themselves against the possibility of being disadvantaged by factors outside their control (or the result of "brute luck"), such as illnesses, disabilities, or lack of marketable skills. The outcome of this process then serves as a "counterfactual guide" to assess, and adjust, real world distributions. See Dworkin, *Sovereign Virtue*, supra note 104, at 68-99.

market against the background of a just distribution of general resources.⁸⁶ In our view, the qualified DALY method for determining aggregate R&D expenditures that we have already outlined satisfies Dworkin's requirement, even though it diverges from Dworkin's own insistence that, ideally, individual market choices should be the final arbiter of both the quantity of any single person's healthcare consumption and, through aggregation, the amount and composition of a society's total resource allocation for healthcare. Dworkin himself recognizes that, absent both a just background distribution of resources and appropriate conditions for individual reflection,⁸⁷ public agencies will be needed to correct for market failures and, in so doing, will have to substitute their judgments for those of individual consumers. He advises decisionmakers in these situations to employ a "prudent insurance test" – in other words, to seek to replicate whatever insurance package an imagined prudent individual, acting on her or his own specific preferences and ambitions but possessed of the knowledge of a good doctor, would choose to purchase for her or himself.⁸⁸

With one significant caveat, the DALY scheme we have proposed seems to approximate this quite well, for reasons outlined above.⁸⁹ The caveat is that, as we saw in Chapter 2, in the exercises by which the DALY weights were derived, participants were asked to imagine themselves not as individuals afflicted with the different conditions, but as policymakers confronted with alternative people-disease-duration situations.⁹⁰ Dworkin would likely object to this procedure on the ground that ideal social outcomes are those resulting solely from the aggregation of budget-constrained individual consumer choices (well-informed, against a just background distribution), through a market-like process that allows individuals to adjust their preferences and choices in light of information about their

⁸⁶ See Dworkin, *Sovereign Virtue*, supra note 104, at 307-19. Dworkin's ideal situation aims to address three of the current market failures in healthcare that we discuss below (in the paragraph accompanying note 260): (1) that consumers are price insensitive due to subsidized insurance, (2) that consumers are often ill-informed regarding health risks and medical options, and (3) that absent a just distribution of background resources and entitlements, reliance on willingness and ability to pay is an unjustified metric of distributing healthcare. *Id.* at 310-12. We leave aside a further refinement that is tangential to our purpose: Dworkin's scenario also stipulates constraints designed to prevent health insurance firms from unjustly discriminating among purchasers. Unfortunately, those constraints create risks of moral hazard that Dworkin acknowledges but does not take up. *Id.* at 312, 491 n.4.

⁸⁷ Among the necessary conditions are that individuals be as well-informed as good doctors and that insurance be non-discriminatory. *Id.* at 311-12.

⁸⁸ *Id.* at 313.

⁸⁹ See discussion at supra notes 71-74 and accompanying text. The fact (discussed in Chapter 4) that the DALY's exercises promoted reflective and deliberative reconsideration of initial preferences is not a worry, since Dworkin's own illustrative discussion of how to apply his test to different examples leans heavily on the "prudence" and "well-informed" nature of the hypothetical individual judgments. Dworkin, *Sovereign Virtue*, supra note 104, at 313. In addition, Dworkin proffers a "minor qualification" to his position for those cases where "some paternalistic interference might be necessary to protect people from imprudent insurance decisions, particularly when they are young." *Id.* at 492 n.6. A DALY-like approach also finds some support from the combination of Dworkin's view that in a just and well-informed system, individuals would quickly sort themselves into different preference-based insurance pools, *id.* at 312 & 492 n.5, and Arti Rai's argument that the most feasible and defensible approach to health insurance is individual choice, against a fair background system, between insurance schemes that compete based on the different preference-tailored menus they offer of health benefit maximization using QALYs. Rai, supra note 69, at 1030-77.

⁹⁰ Chapter 4, Section C (describing use in DALY's exercises of person tradeoffs rather than time tradeoffs).

social opportunity costs.⁹¹ Whatever the merits of Dworkin's preferred deliberative procedure in general, it seems especially ill-suited to determining healthcare policies, because it fails to consider situations of market failure that would remain even if the distributional and informational concerns he identifies were to be addressed. Specifically, the negative and positive externalities associated with each individual's health, and the public-goods features of drug research, all necessitate some political determination even with a just background distribution.⁹² Consequently, we submit, in these circumstances it is entirely appropriate for those deliberating to place themselves in the shoes of cost-constrained policymakers, or citizens, rather than cost-constrained individual consumers.

In sum, the arguments of the two leading liberal distributive justice theorists – Rawls and Dworkin – point toward guidelines for healthcare policy that closely resemble the guidelines that issue from utilitarianism. To be sure, the convergence is not complete. Both Rawls and Dworkin place a high value on preventing the sacrifice of fundamental individual or minority interests to those of the majority or aggregate.⁹³ The formula that we proposed in Chapter 5 for weighting the health benefits of drugs whose developers seek governmental prizes is designed to respond to those concerns to some degree – but probably not as much as Rawls or Dworkin would prefer. Putting this qualification to one side, Rawls and Dworkin can both be counted as strong supporters of the reform agenda we have offered.

Our visit to the liberal camp is far from over, however. Not all theorists who affirm the importance of equal respect and who recognize the need to look at background conditions agree with Rawls, Dworkin, and others that liberal distributive justice should have a strongly egalitarian guiding principle.⁹⁴ One prominent line of criticism, advanced by

⁹¹ See Dworkin, *supra* note 104, at 66-71, 313.

⁹² Taking into account such negative and positive externalities (i.e., seeing them as remediable instances of market failure) should be compatible with Dworkin's criticism of welfarist theories for factoring in, when evaluating market outcomes, people's "external preferences," or preferences regarding the goods or opportunities that others enjoy. On Dworkin's view, the role of the market (and the corresponding scope for remediable market failures) should be more circumscribed: it is a device for feeding individuals information about the social costs of their personal preferences and choices in light of other individuals' personal preferences and choices, where "personal preferences" are limited to one's own goods and opportunities and specifically exclude "external preferences." Nevertheless, it seems sensible to assume that individuals would have personal preferences regarding the chances of contracting illnesses from others that would make such chances part of the provisionally priced outputs that individuals ideally would receive information on and factor in when making their decisions.

⁹³ See, e.g., Rawls, *Theory of Justice*, *supra* note 41, § 1, at 3-4, § 68, at 395; Dworkin, *Taking Rights Seriously*, *supra* note 93, at xi, 90-91, 272- 78. Rawlsian liberals may also be concerned with protecting certain fundamental individual interests from being over-ridden by other individual interests that are deemed less fundamental. We take up this concern *infra* at note 143 and accompanying text.

⁹⁴ For other prominent versions of strongly egalitarian conceptions of justice based on broadly liberal premises, see generally Richard J. Arneson, *Equality and Equal of Opportunity for Welfare*, 56 *Phil. Stud.* 77 (1989); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *Ethics* 906 (1989); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 *Phil. & Pub. Aff.* 146 (1993). These accounts differ from Rawls, Dworkin, and each other regarding, *inter alia*: what good(s) should be the focus for, or "space" or "currency" of, distribution (e.g., welfare, primary goods, resources); what should be the measure of an egalitarian distribution, and in particular what types of individual differences or other grounds justify deviations from an equal distribution (e.g., incentives, differences in ambitions or effort, differential needs/tastes); and what, if any, constraints should exist on such distribution due to individual rights or other normative considerations. Nevertheless, for our purposes, their recommendations largely converge.

Derek Parfit and Harry Frankfurt, urges that the egalitarian focus on comparisons between people's holdings (or relative well-being) is simply misplaced, and that instead the focus should be on the level of individuals' holdings in absolute terms.⁹⁵ For "prioritarians" such as Parfit, once this shift in perspective is adopted, many of the policies or forms of redistribution advocated by egalitarians may still be justified, but now on the "priority view" that states that "[b]enefiting people matters more the worse off these people are."⁹⁶ That is, while the underlying justification has changed, prioritarianism maintains that we still "might be especially concerned with those people who are worse off," but now "only because these people are at a lower absolute level," not because "these people are worse off than others."⁹⁷ This preference for the worse off can be upheld even in the face of greater utility benefits to be had for the better off, on the reasoning that there is a "law of diminishing moral goodness" according to which there is increasingly less moral (as opposed to hedonic) value in providing additional benefits to someone who is already at a high level of welfare.⁹⁸ Thus, for our purposes it suffices to observe that, while the variant of utilitarianism we set out above justifies redistribution on the assumption that greater marginal utility will be experienced by the worse off from the provision of additional units of the relevant goods, prioritarianism favors the worse off even in cases where the better off would experience more utility.⁹⁹ While the priority principle need not be absolute, the circumstances in which it would be modified do not arise for our case.¹⁰⁰ It also does not matter for our purposes

⁹⁵ See Harry G. Frankfurt, *Equality as a Moral Ideal*, 98 *Ethics* 21 (1987); Derek Parfit, *Lindley Lecture at the University of Kansas: Equality or Priority?* (Nov. 21, 1991). Note, for Parfit, this criticism does not require ignoring that how people fare relative to others can be quite important to their self-respect and their experience of well-being generally. Where such relational aspects are present, then there is a case for concern with relative well-being, but in these cases equality serves an instrumental purpose, in pursuit of absolute well-being. Parfit attacks only the view that achieving equality in distribution is in itself important, i.e., that it has intrinsic value (even if only as one among other values). Parfit, *supra*, at 5-6. Frankfurt, on the other hand, is less sympathetic to this relational aspect of well-being. Part of his critique of equality as a goal in its own right is that it tends to focus people's attention on their circumstances and status relative to others. Frankfurt, *supra*, at 22-23.

⁹⁶ Parfit, *supra* note 116, at 19. Parfit's main concern is to show that the impulse of prioritizing the lot of those worse off can and should be disentangled from the principle often advanced to justify it, the "principle of equality" that states that "[i]t is in itself bad if some people are worse off than others." *Id.* at 4. In his judgment, this principle is subject to a forceful objection (one that the priority view escapes): it is committed to the view that leveling down the holdings of those who are better off, without in any way improving the lot of those who are worse off, does in itself have value (even if in many cases that value will be outweighed by other normative considerations).

⁹⁷ *Id.* at 23.

⁹⁸ *Id.* at 24.

⁹⁹ "While Utilitarians claim that we should give [worse off] people priority when, and because, we can help them more, this [prioritarian] view claims that we should give them priority, even when we can help them less." And: "[f]or Utilitarians, the moral importance of each benefit depends only on how great this benefit would be. For Prioritarians, it also depends on how well off the person is to whom this benefit comes. We should not give equal weight to equal benefits, whoever receives them. Benefits to the worse off should be given more weight." *Id.* at 19-20.

¹⁰⁰ "[The prioritarian view] does not tell us how much priority we should give to those who are worse off. On this view, benefits to the worse off could be morally outweighed by sufficient benefits to the better off. To decide what would be sufficient, we must simply use our judgment." *Id.* at 20. In a later, abbreviated and revised, version of the essay, Parfit advances the following reformulation of this point: "The priority is not, however, absolute. On this view, benefits to the worse off could be morally outweighed by sufficiently great benefits to the better off. If we ask what would be sufficient, there may not always be a precise answer. But there would be many cases in which the answer would be clear." Derek Parfit, *Equality and Priority*, 10 *Ratio* 202, 213 (1997).

what the exact form of implementation should be, i.e., whether an "absolute" or a "weighted" version of the principle is more appropriate.¹⁰¹

For "sufficientists" such as Frankfurt, the practical implications of this criticism of egalitarianism are more significant, leading to greater divergence from egalitarian prescriptions. The sufficientist view is that what matters from the point of view of the equal moral worth of persons is not that everyone should have roughly the same of something (whether it be resources, primary goods, welfare, or something else), but rather that everyone should have enough, the basics necessary for a minimally decent life; above this threshold, inequalities should not disturb us much or at all.¹⁰² Sufficientists are not concerned with those who are relatively "worse off," only with those who are truly "badly off."¹⁰³ This narrowing of concern is balanced by an increase in the intensity of concern: people who fall below the "badly off" threshold get an "absolute priority" claim on the resources necessary to pull them above it.¹⁰⁴ The implications of this view for our problem seem straightforward: decent healthcare seems an essential component of the package of goods necessary to sustain a life that is "good enough" (whether understood in terms of freedom, dignity, preference-satisfaction, happiness, or flourishing).¹⁰⁵

One other liberal position, similar to but distinct from Frankfurt's sufficientism, bears mention. Elizabeth Anderson argues against "luck egalitarianism" and in favor of what she calls "democratic equality" as the best understanding of what liberal equality (namely,

¹⁰¹ For detailed exploration of these issues, see Campbell Brown, *Priority or Sufficiency ... or Both?*, 21 *Econ. & Phil.* 199 (2005).

¹⁰² See Frankfurt, *supra* note 116, at 21 ("With respect to the distribution of economic assets, what is important from the point of view of morality is not that everyone should have the same but that each should have enough. If everyone had enough, it would be of no moral consequence whether some had more than others."); Roger Crisp, *Equality, Priority, and Compassion*, 113 *Ethics* 745, 758 (2003) ("[A]bsolute priority is to be given to benefits to those below the threshold.... Above the threshold, or in cases concerning only trivial benefits below the threshold, no priority is to be given."); cf. Brown, *supra* note 122, at 199 (advancing "hybrid" of prioritarianism and sufficientism, which he calls "threshold prioritarianism," where some concern for worse off exists even when they are above threshold).

¹⁰³ Frankfurt, *supra* note 116, at 35 n.19 ("The only morally compelling reason for trying to make the worse off better off is, in my judgment, that their lives are in some degree bad lives."); Parfit, *supra* note 116, at 19.

¹⁰⁴ See Crisp, *supra* note 123, at 758.

¹⁰⁵ Frankfurt does not specify what counts as a decent minimum, but does provide the following guideposts: To say that a person has enough money means that he is content, or that it is reasonable for him to be content, with having no more money than he has. And to say this is, in turn, to say something like the following: the person does not (or cannot reasonably) regard whatever (if anything) is unsatisfying or distressing about his life as due to his having too little money. Frankfurt, *supra* note 116, at 37. "It is essential to understand that having enough money differs from merely having enough to get along or enough to make life marginally tolerable. People are not generally content with living on the brink." *Id.* at 38. Yet, at the same time, it is important to recognize that one could be reasonably content while still benefiting from more; the point is that in these cases, having more would not be an "active interest" but rather a sort of bonus, "inessential to his being satisfied with his life." *Id.* at 39. For Crisp, the level of the minimum is to be set by imagining what would be required by the sense of compassion of an impartial spectator. Crisp, *supra* note 123, at 756-63. For Thomas Pogge's more fully developed account of what counts as a decent minimum, see *infra* notes 157-60 and accompanying text. Cf. Hayek's remarks, in the passage cited above in *supra* note 88, regarding the compatibility of libertarianism with the assurance that everybody has "some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work."

"equal respect and concern for all citizens") requires.¹⁰⁶ By "luck egalitarianism" she means the many variants of liberalism that seek to correct for all differences owing to circumstances and conditions that are morally arbitrary in the sense that they stem from factors for which the individual is not responsible.¹⁰⁷ Adducing a number of troubling aspects and implications of this approach,¹⁰⁸ Anderson argues that "[t]he proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed."¹⁰⁹ Further, liberal justice has a positive aim, that of ensuring that all individuals are equipped with "the social conditions of freedom," the freedom necessary for citizenship in a community of (moral) equals.¹¹⁰

Anderson's account of how to satisfy these aims is, like Frankfurt's sufficientism, quite compatible with our proposed reforms, because it includes a threshold level of basic health goods similar to that advocated by the other theorists we canvass.¹¹¹ However, her emphasis on democracy and a shared moral community as the basis of liberal equality can be and has been taken as support for restricting – more sharply than is suggested by most of the foregoing liberal theories – considerations of distributive justice to the domestic setting of a national polity.¹¹² We will address political-liberal arguments along these lines in the following chapter. Here, we simply wish to identify how Anderson's theory, while developing a strong social-relational dimension to moral equality that is prized by political liberals, nevertheless differs from many of them with regard to the question of supra-national distributive justice. The difference is rooted in her characterization of the economy "as a system of cooperative, joint production" between people as workers, not as citizens.

¹⁰⁶ Elizabeth S. Anderson, *What is the Point of Equality?*, 109 *Ethics* 287, 289 (1999).

¹⁰⁷ Examples of luck egalitarianism include the theories of Dworkin and the other egalitarians mentioned supra in note 115. On some interpretations, the egalitarian version of the "capabilities" approach of Sen and Nussbaum may also fit the label. See infra notes 144-47 and accompanying text. While many might also include Rawls's theory in this group, Anderson does not, and in fact seems to see her own conception of liberal "democratic equality" as, overall, compatible with Rawls's approach. See Anderson, supra note 127, at 312 n.71, 326 n.89, 330 n.94 and accompanying text.

¹⁰⁸ These include luck egalitarianism's harshness toward imprudent individuals (who, in the extreme case, must live with the consequences of earlier decisions no matter how dire), Anderson, supra note 148, at 295-96; its stigmatization of "unlucky" individuals (who are treated as pitiable characters needing state assistance), id. at 304-06; its tendency to reinforce unattractive feelings of condescension and charity (on the part of those deemed naturally better off) and of envy and inferiority (on the part of those deemed naturally worse off), id. at 306-07; and its detachment from the actual concerns of people and movements working for social justice (who are motivated less by various forms of "natural" ill-fortune than by forms of systemic political and social domination and oppression), id. at 288, 312-14.

¹⁰⁹ Id. at 288.

¹¹⁰ Id. at 326-27.

¹¹¹ In filling out her account of effective freedoms, Anderson draws heavily on the framework of Amartya Sen, discussed infra at notes 144-47 and accompanying text, which identifies "capabilities" that individuals must be equipped with in order to achieve desired "functionings." She points to the following dimensions along which an individual ought to be capable of effective functioning: as a human being with needs of biology, rational agency, and moral-psychological selfhood; as a member of civil society and participant in an economy; and as a citizen in the polity. Her list of goods under the first dimension includes "effective access to ... food, shelter, clothing, medical care." Anderson, supra note 127, at 16-18. The account, then, has much in common with those of Nussbaum, see infra notes 145-49 and 156 and accompanying text, and Pogge, see infra notes 157-60 and accompanying text.

¹¹² See Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is there Magic in the Pronoun "My" ?*, 110 *Ethics* 537, 546-47 (2000).

The shift from citizens to workers is significant, she argues, because the "moral implications" of the economy (i.e., whatever is entailed by the requirement of equal participation in a cooperative venture) may "cross international boundaries" to the extent that "the economy becomes global."¹¹³

2. Teleological Theories

Teleological approaches to political philosophy differ from the deontological by emphasizing the specific "ends" or purposes that it is the aim of politics to secure or pursue.¹¹⁴ There are two main variants relevant to our focus, each having roots in the writings of Aristotle. In the first, distributive justice entails ensuring that the distribution of the relevant goods "fits" the most appropriate or honorable purpose of the relevant practice or institution.¹¹⁵ How that purpose is to be determined varies, but a common and influential approach is to adopt an interpretive perspective and ask what is required by the "best reading" of the institution in light of the overall norms, customs, and practices of one's "constitutive" community, while at the same time striving to avoid mere conventionalism.¹¹⁶ The second approach asks what are the essential attributes or components of a flourishing human life, and then tries to determine the distribution of goods and services that would make such a life universally available.¹¹⁷

¹¹³ Anderson, *supra* note 127, at 321 n.78.

¹¹⁴ Our use of "teleological" departs from Rawls's conception, which groups under a single umbrella of goal-driven conceptions all variants of utilitarianism, along with Aristotelian and Nietzschean perfectionist theories. Rawls, *Theory of Justice*, *supra* note 41, § 5, at 22-23. All these terms are somewhat controverted in the literature. We adopt for the purposes of this essay the following usage: (1) "deontological" theories are concerned with the right, as prior to the good; (2) "consequentialist" theories are concerned with maximizing the good as constituting the right; (3) "welfarist" theories, the main subset of consequentialist theories, adopt a subjectivist conception of the good; and (4) "teleological" theories are concerned with achieving the right "ends," which may depart from consequentialism in either of the following ways: (a) given the importance of virtues as human ends for many teleological theorists, the focus may be not just on the results or consequences, but also on the character of actions and institutions; or (b) the ends themselves not only go beyond current subjective utilities (and hence beyond the welfarist variants of consequentialism), but typically are irreducibly plural, with category distinctions drawn between types of intrinsically valuable goods, making maximization along a single scale incoherent. Teleological accounts of virtues and goods are typically anchored either in values organic to a historically evolving community (communitarianism), or in appeals to notions of human flourishing (eudaimonism) or perfectionist ideals. According to this usage, the approach of Nussbaum and Sen as outlined in this section is best understood as "pluralist" rather than strictly teleological, as they combine teleological considerations of human flourishing with a deontological emphasis on the intrinsic or independent significance of equality.

¹¹⁵ See 3 Aristotle, *supra* note 88, 103-04.

¹¹⁶ See generally Michael Walzer, *Spheres of Justice* (1983) [hereinafter Walzer, *Spheres of Justice*] (exemplifying this mode); Sandel, *Liberalism and the Limits of Justice*, *supra* note 91, at 147-52 (emphasizing "constitutive" conception of community as distinct from "instrumental" and "sentimental" conceptions). For discussion of the problem of conventionalism, see Sandel, *Preface to the Second Edition of Sandel*, *supra* note 91, at ix-xi, and the exchange between Ronald Dworkin and Michael Walzer: Ronald Dworkin, *To Each His Own*, N.Y. Rev. Books, Apr. 14, 1983, at 4; Michael Walzer, "Spheres of Justice": An Exchange, N.Y. Rev. Books, July 21, 1983, at 43 [hereinafter Walzer, "Spheres of Justice": An Exchange].

¹¹⁷ See, e.g., Martha Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *Pol. Theory* 202 (1992). One of us has previously argued that an approach of this general sort provides the best tool for reforming various dimensions of intellectual-property law, see William W. Fisher III, "The Implications for Law of User Innovation," 94 *Minn. L. Rev.* 1417, 1463-72 (2010); *idem*, "Reconstructing the

The first approach is best illustrated by the "spheres of justice" account of communitarian theorist Michael Walzer. Walzer adopts a purposive pluralism, arguing that sharply different principles of justice do and should shape different realms of activity in American society.¹¹⁸ The sphere of healthcare, he contends, is and should be governed by needs-based regulative criteria.¹¹⁹

Walzer's approach, though promising, leaves important questions unanswered. In the face of potentially bottomless health needs, given modern technological options, we need a way of prioritizing between health and other social claims and, within health needs, among states of ill-health and among individuals.¹²⁰ The DALY approach, with refinements of the sort we have suggested, seems particularly well-suited to that task.

However, this reassuring conclusion should probably be qualified in one respect: Walzer emphasizes what he calls "incommensurability," by which he means qualitative differences between various sphere-specific goods, and the potential of money-based markets, with their universalized medium of exchange, to run roughshod over these goods (a potential reflected in the utilitarian calculus).¹²¹ Full accommodation of Walzer's concern might require a further check on the DALY's utilitarian quantitative tendencies, specifically by adding "lexical" hierarchies, or category distinctions, among types of ill-health, making resources non-transferable from one category to another (so that, for example, no number of headaches cured could substitute for the development of an effective cancer treatment).¹²² This would go significantly further than the "weighting" method we advocated in Chapter 5.

The most prominent version of the second approach has been developed by Amartya Sen and Martha Nussbaum, who argue roughly as follows: first, we should determine what "functionings" are central to a flourishing human life; next, we should discern what "capabilities" are necessary to be able to attain those functionings; and, finally, we should identify and rectify those differences among people's natural and social situations that create important deviations from an egalitarian ideal of "universal basic capability."¹²³ In

Fair Use Doctrine," 101 Harv. L. Rev. 1661, 1746-51 (1988), and hopes to elaborate the argument into a more general theory at some point in the future.

¹¹⁸ Walzer, *Spheres of Justice*, supra note 137, at 3-4.

¹¹⁹ Id. at 86-91.

¹²⁰ See Einer Elhauge, [Allocating Health Care Morally](#), 82 Cal. L. Rev. 1449, 1459 (1994) ("Most knowledgeable observers believe we could today easily spend 100% of our GNP on health care without running out of services that would provide some positive health benefit to some patient.").

¹²¹ Walzer, *Spheres of Justice*, supra note 137, at 95-103; see also Karl Marx & Friedrich Engels, *The German Ideology*, in *Karl Marx: Selected Writings*, supra note 80, at 175, 201-05 (advancing linked critiques of money, market, and utilitarianism); Mill, supra note 14, at 6-26 (amending Benthamite utilitarianism to account for qualitative differences).

¹²² Such lexical hierarchies were famously proposed by Rawls as a way to ensure that certain fundamental individual interests (in basic liberties and opportunities) were protected not only from aggregate interests but also from other, non-fundamental, individual interests (e.g., material prosperity). See Rawls, *Theory of Justice*, supra note 41, § 8, at 37-38 n.23 and accompanying text. Thus, there might be a need on Rawlsian liberal grounds to impose lexical distinctions among any use of DALY categories that touch on those aspects of access to healthcare that, for a Rawlsian liberal, go beyond issues of distributive justice in social and economic goods and into concerns of basic liberties and opportunities.

¹²³ See generally Amartya Sen, *Inequality Reexamined* (1992); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2002). The phrase "universal basic capability" is taken from G.A.

Nussbaum's¹²⁴ version of this approach (one that is "open-ended and subject to ongoing revision and rethinking"),¹²⁵ the first two essential capabilities that emerge from the process of reflection are those for "life" and "basic health"; justice, she argues, requires that all persons be effectively equipped to have these.¹²⁶ As with the sufficientist approach to liberal justice, a plausible account of the public policies necessary to satisfy this requirement would justify the majority of the reforms we propose.

Among the contributions of Nussbaum's and Sen's approach is sensitivity to the potential for utilitarianism and its cousins to be inattentive to interpersonal differences of capability, and specifically to the possibility of discrimination toward those with disabilities.¹²⁷ Addressing this concern might require some additional adjustments in the DALY approach. For example, when measuring the health benefits of a vaccine or therapy that either prevents or cures a particular disability, it would be appropriate, for reasons we have already considered, to take into account the diminution in quality of life suffered by those subject to the disability. By contrast, when measuring the health benefits of a treatment that either extends the life of a disabled person or deals with an unrelated disability, we may wish to ignore the diminished quality of life of the disabled beneficiaries. Otherwise, we risk channeling resources away from research that benefits diabetics, the blind, and so forth, and toward research that benefits the able-bodied. But with these minor adjustments, the Sen/Nussbaum approach, like Walzer's theory, seems fully compatible with the slate of institutional modifications we have proposed.

3. A "Right to Health"

The claim that there is a universal "human right to health" is often advanced by scholars and activists working in the field of health policy.¹²⁸ It is also enshrined in numerous international agreements, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.¹²⁹ What, if anything, does the language of "rights" add to the analyses we have considered thus far?

Cohen, who persuasively offers it as a more precise rendering of Sen's aim than Sen's own "basic capability equality." G.A. Cohen, Amartya Sen's Unequal World, 203 *New Left Rev.* 117, 118 n.4 (1994). As stated in *supra* note 135, given the independent significance of a conception of equality in their theories, Sen and Nussbaum are perhaps best understood as pluralists rather than strictly teleological theorists.

¹²⁴ We emphasize that this is Nussbaum's account alone, as Sen has been reluctant to commit to any single account of what the basic capabilities required by justice are. See Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *Feminist Econ.* 33, 40-50 (2003).

¹²⁵ *Id.* at 42.

¹²⁶ "Life" means "[b]eing able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living," and "bodily health" means "[b]eing able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter." *Id.* at 41.

¹²⁷ See, e.g., Sen, *Equality of What*, *supra* note 80, at 203-04, 217-18.

¹²⁸ See generally *Economic and Social Rights and the Right to Health*, Interdisciplinary Discussion at Harvard Law School (1993) (remarks of, *inter alia*, Henry Steiner, Troyen Brennan, Paul Farmer, Martha Minow, Ken Anderson, Martha Nussbaum, Roberto Unger, and Albie Sachs.) This way of framing the normative issue has been frequently advanced at health policy-related workshops and conferences attended by the authors.

¹²⁹ See Universal Declaration of Human Rights, G.A. Res. 217 (III), at 76, U.N. Doc. A/RES/217A(III) (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for ... health and well-being of himself and his family, including food, clothing, housing, medical care and the right to security in the event of ... sickness, disability Motherhood and childhood are entitled to special care and assistance."); International Covenant

To answer that question we need first to consider the potential sources of a "right to health." Some of its advocates make a straightforward, absolutist claim: certain norms are simply given by the commands of reason (or nature or God) and are so fundamental that their abrogation is a violation of the sanctity of reason (or of nature or divine will). A right to health (like many other human rights) is thus self-evident, needing little by way of explicit justification or formulation.¹³⁰ This position, though undoubtedly compelling to its proponents, has no grip for those (like us) who lack the faith upon which it rests. We therefore put it to one side.

Another common approach emphasizes the legal status of the right to health. Its proponents point out that, as indicated above, such a right has been recognized in positive international law and then argue that its enforcement has whatever normative justification one thinks any (international) legal entitlement deserves simply by virtue of fidelity to existing (international) legal rules. For our purposes, this approach has two main weaknesses. First, by tying a right to health strictly to what is recognized in legal documents, the analysis limits its scope of protection to claims against governments acting within their own sovereign territories (and, perhaps, only to certain types of "negative" claims).¹³¹ Second, implementing the right requires knowing what its substantive requirements should be and how tradeoffs with other rights or priorities are to be made, and to answer those questions adequately we need to draw on extra-legal normative considerations.

An altogether different approach views the language of rights as simply a terminological convenience. From this standpoint, to say that a person has a "right" is simply a shorthand way of identifying a normative claim that one thinks should be recognized as compelling; for the justification, interpretation, and application of the right, one must look elsewhere. If we adopted this approach, we would likely root a right to health in one or more of three arguments already reviewed: the argument that the equal respect and concern owed to all persons requires some form of egalitarian distribution, such as "equality of resources"; the argument that justice in health is needs-based; or the argument that

on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 51, U.N. Doc. A/RES/2200A (Dec. 16, 1966) ("The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."). A helpful compendium of provisions in international treaties, conventions and agreements making declarations of, or related to, a human right to health has been prepared by Professor Vernellia R. Randall. Vernellia R. Randall, *The Human Right to Health*, <http://academic.udayton.edu/health/07HumanRights/health.htm> (last visited Feb 1, 2007).

¹³⁰ Cf. Allen Buchanan et al., *From Chance to Choice: Genetics & Justice* 381 (2000) (contrasting "rights-based" approach to one that "regard(s) rights-principles as something that must be argued to, using the method of wide reflective equilibrium and in such a way as to emphasize the importance of rights as protectors for certain crucial interests").

¹³¹ See G.A. Res. 2200 (XXI), *supra* note 150, at 51; Comm. on Econ., Soc. & Cultural Rts., General Comment 14: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Art. 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000). We emphasize that such possible limitations would derive from specific, positive legal provisions, not from any necessary feature of rights as being only claims against domestic government intervention. As we discuss below, in order effectively to realize morally grounded rights it may be justified to require government assistance, as well as to evaluate the relations between rights-bearers and non-state actors. It is also important to note that not all international legal declarations are so limited. Article 28 of the Universal Declaration of Human Rights, for example, explicitly states that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." G.A. Res. 217 (III), *supra* note 150, at 76.

effective capability for health is a basic requirement of human flourishing.¹³² This of course raises the further question: is there any benefit to framing as a "right" a normative claim derived on other grounds? An affirmative answer would point to two potential advantages: First, encasing complex normative claims within the familiar and influential language of rights may increase their effectiveness for the purposes of legal and political argument. Second, the trappings of rights may give such claims an air of heightened normative status, by "import[ing]," as Nussbaum has put it, from rights discourse the idea of an "urgent claim based on justice."¹³³ However, those benefits would arise by smuggling through the back door precisely those features of rights that this line of analysis eschews. In our view, therefore, it has little to recommend it.

The last and, in our judgment, most defensible of the approaches conceives of rights as protecting certain especially fundamental individual interests, the establishment of which may involve consideration of various social costs and benefits, but which, once established, cannot be abrogated except in extreme circumstances. On this understanding, a right enjoys a higher status than other, non-rights-based human interests or goals (even if the original justification for the right were goal-based), and it works as a "side-constraint" on, or "trump" over, these other interests.¹³⁴ Three of the arguments considered previously in this section could provide justification for an individual right to health along these lines: the claim that some level of basic capability for health is among the most fundamental of capabilities essential to human flourishing, one enjoying a category priority over many others; the sufficientist argument regarding the absolute priority to be given the provision of basic goods to anyone whose possession of them is below the threshold necessary for a decent life; and the Rawlsian argument for a higher priority accorded to healthcare when it is necessary for the effective enjoyment of basic liberties and opportunities that are lexically prior to social and economic well-being in general.¹³⁵ Each of these arguments derives

¹³² See *supra* notes 104-14, 139-43, 144-47, and accompanying text.

¹³³ Nussbaum, *supra* note 145, at 39. A more fully developed treatment of these issues can be found in Martha Nussbaum, [Capabilities and Human Rights](#), 66 *Fordham L. Rev.* 273, 295-96 (1997).

¹³⁴ For rights as side-constraints, see Nozick, *supra* note 18, at 28- 33; as trumps, see Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 153, 153-67 (Jeremy Waldron ed., 1984). For an argument that the two conceptions, while "associated with rather different normative theories" nevertheless "amount to one and the same analytical thesis," see Philip Pettit, *Rights, Constraints and Trumps*, 47 *Analysis* 8 (1987). The formulation in the text aims to be neutral between Dworkin's own theory of rights, which is that they work to block certain types of illiberal reasons from influencing government action, see Dworkin, *Taking Rights Seriously*, *supra* note 93, at 277, and a divergent theory commonly associated with his terminology of "trumps," which sees rights "as rendering certain individual interests as such impervious to considerations of the general good." Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 *J. Leg. Stud.* 301, 303 (2000). Nussbaum has endorsed the rights-as-side-constraints conception as appropriate for the status of capabilities that are deemed rights. Nussbaum, *supra* note 154, at 297-300.

¹³⁵ See *supra* notes 144-47, 123-26, and 102-03, and accompanying text. Note, Nussbaum does not clearly assert that the capability for health (which is listed second out of ten) is more fundamental than the others in the sense outlined in the text. And while the capability argument does not, strictly speaking, require that claim, without it all the essential capabilities would need to be conceived as rights. And while this may be correct, there are some difficulties in subsuming Nussbaum's overall approach within a rights-based framework. In favor of that tack is the fact that Nussbaum does claim that her entire list of "central capabilities" essential to human flourishing is meant to provide the basis for what should be fundamental human entitlements that are to enjoy a "central and non-negotiable" status (even if the list itself is revisable). Nussbaum, *supra* note 145, at 40, 43. And, further, she does indicate that "one way of using" her approach is "as a basis for constitutional accounts of fundamental entitlements of all citizens." *Id.* at 57 n.6. Nevertheless, her account of the essential

authority, not merely from considerations of distributive justice, but rather from more fundamental aspects of political justice. However, because any effective implementation of such a right will raise questions of distribution, we will treat it as a special claim under the broad umbrella of distributive justice.

A prominent version of this last approach to rights has been developed by Thomas Pogge, who combines elements of sufficientist and flourishing justifications to advance three central claims culminating in the assertion of a set of basic and universal human rights. Pogge's argument begins with the observation that a "broad range of plausible conceptions of human flourishing" identify the following as "elementary basic goods" of which a "minimally adequate" share is necessary for a "minimally worthwhile life": basic personal liberties (of thought and association) and rights of political participation; physical integrity; subsistence supplies of food, drink, clothing, shelter, and basic healthcare; freedom of movement and action; basic education; and economic participation.¹³⁶ Individuals' interests in such goods, he then argues, make a "weighty moral demand," one that "should normally trump or outweigh other moral and nonmoral concerns and considerations"; in this sense access to each good should be deemed a "human right."¹³⁷ Finally, Pogge proposes an institutional understanding of human rights whereby "the postulate of a human right to X is tantamount to the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X."¹³⁸ The conclusion he draws from these claims is that the following comprises "an internationally acceptable core criterion of basic justice":

The preeminent requirement on all coercive institutional schemes is that they afford each human being secure access to minimally adequate shares of basic freedoms and participation, of food, drink, clothing, shelter, education and health care.¹³⁹

Assume that, through one or another of these routes, one were able to establish to one's satisfaction a fundamental "right to health." In what, more precisely, would such a right consist? Presumably, it would have both "negative" and "positive" dimensions--roughly, "freedom from" coercion and "freedom to" effectively pursue one's ends, respectively.¹⁴⁰ The negative dimension means that, just as government is under an

capabilities includes many for which there is no clear set of corresponding "fundamental" entitlements or rights (e.g., play and interaction with other species), and in general, her account seems too rich, complex, and proactive to serve in its entirety as the basis of a list of basic rights that constrain or trump other concerns. *Id.* at 5, 10, 14. A thinner and more minimalist conception, more compatible with the rights framework, is advanced by Pogge. See generally Thomas Pogge, *World Poverty and Human Rights* (2002).

¹³⁶ Pogge, *supra* note 156, at 48-49.

¹³⁷ *Id.* at 54.

¹³⁸ *Id.* at 45-46. Pogge insists that the "security" in "secure access" is "always understood as especially sensitive to persons' risk of being denied X or deprived of X officially: by the government or its agents or officials." *Id.* at 64.

¹³⁹ *Id.* at 50-51.

¹⁴⁰ The terms "negative" and "positive" can be a source of confusion, partly because they can modify either "rights" or "freedoms/liberties," and partly because the terms are sometimes used inconsistently in the political-philosophical literature to track not one but two distinctions: first, the distinction between, roughly, rights/freedoms enabled by the absence of coercive interference ("negative rights") versus the rights/freedoms

obligation to refrain from violating people's right to free speech, so it is obligated to ensure that the various legal entitlements and requirements that it enforces (e.g., of patent rights over drugs, property rights over income and wealth, and taxation laws) do not obstruct exercise of the right to health.¹⁴¹ The positive dimension means that government is under an obligation to ensure that all persons have the "affirmative material and institutional support" necessary for the effective exercise of this right.¹⁴² Spelling out the content of the positive component requires attending to the fact that its fulfillment entails expending substantial social resources, raising questions of social tradeoffs. In adjudicating these, reliance on the DALY-based qualified utilitarian scheme developed above seems sensible.

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

enabled by the presence of the means for effective agency ("positive rights"); and, second, the distinction between, roughly, freedom as voluntariness and agency ("negative liberty") and freedom as self-determination ("positive liberty"). Thus, Isaiah Berlin's classic discussion of these topics is often interpreted to refer to the first distinction while in fact it primarily concerns the second. See Isaiah Berlin, *Two Concepts of Liberty* (1958), reprinted in *Liberty: Incorporating Four Essays on Liberty*, at 166 (Henry Hardy ed., 2d ed. 2002). As pointed out by Berlin and acknowledged by other non-libertarian liberal theorists, once we recognize the pervasive role of the state in structuring the "background conditions" of the private sphere, the conceptual and normative significance of the distinction between the government respecting so-called negative rights and enabling so-called positive rights is dramatically reduced. See *id.* at 170-72; Buchanan et al., *supra* note 151, at 380-81; Rawls, *Justice as Fairness*, *supra* note 83, §52.1, at 177. Nevertheless, there remains for many theorists a significant difference between the "negative liberty" that such rights together comprise and a notion of "positive liberty" that entails that one's ends be one's own in a deep sense, or self-determined in the sense of being reflectively adopted. The modern roots of the latter notion lie in Rousseau-Kantian conceptions of moral freedom as rational self-legislation (for Rousseau, "moral liberty" as distinct from "natural" and "civil" liberties; for Kant, "autonomy" as opposed to "heteronomy"). These conceptions were developed further by Hegel, Marx, and T.H. Green into notions of "real freedom" and "self-determination" that begin to shade into conceptions of objective well-being along lines of neo-Aristotelian flourishing. See Justin Schwartz, *What's Wrong with Exploitation?*, 29 *Noûs* 158, 169-76 (1995) (discussing Rousseau, Kant, Hegel, and Marx); Berlin, *supra*, at 180 n.1 (discussing T.H. Green). While a self-determination interpretation of positive liberty remains compatible with some liberal conceptions of autonomy, see Rawls, *Political Liberalism*, *supra* note 3, at 72; Buchanan et al., *supra* note 151, at 381, a notion relying on objective conceptions of well-being is less so. This is not a worry here, since the right to health is primarily a form of negative liberty. While some positive liberty aspects do arise (e.g., where there enter reflective and deliberative elements in determining what "health" requires), for our purposes the role of any quasi-objective aspects, which is primarily what trouble liberal theorists, is limited to what is necessitated by practical considerations of implementing the right under some reforms.

¹⁴¹ In American law, the recognition of this equivalence is typically associated with one specific moment, the 1948 case of *Shelley v. Kraemer*, in which the U.S. Supreme Court, influenced by the legal-realist critique of the public/private distinction, accepted that judicial enforcement of a racially restrictive covenant constituted state action. [Shelley v. Kraemer, 334 U.S. 1, 19-21 \(1948\)](#). The Court reasoned that although the seller's own actions were private and thus did not trigger the Fourteenth Amendment's requirement of "equal protection," for a court to enforce the restrictive covenant would constitute public or state action sufficient to raise constitutional questions. *Id.* The case since then has been contained in its impact in numerous ways, but its reasoning remains powerful. See, e.g., Gary Peller & Mark Tushnet, [State Action and a New Birth of Freedom](#), 92 *Geo. L.J.* 779 (2004).

¹⁴² Nussbaum, *supra* note 145, at 38.

lives (through, for example, emergency surgery or the provision of anti-retroviral drugs). The first argument casts doubt on the version of the DALY metric we have proposed, which places death on a continuum with other adverse health states. The second would likely require modification of the DALY approach in order to take into account the greater weight that should be accorded the preservation of identifiable lives. Our own view is that neither intuition survives critical reflective deliberation. The first expresses an unattractive moral absolutism about life. The second makes reference to morally indefensible cognitive biases in an effort to resolve social tradeoffs.¹⁴³ We will therefore not pursue either further.

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The first segment of our tour is now complete. As we have seen, several of the groups of theorists we have visited would likely quibble with some aspects of the combination of institutional reforms we have proposed. But on the fundamental question – namely, whether developed countries have obligations to increase substantially the resources they devote to alleviating the health crisis in the developing world – all would or should lend us their support.

It would be comforting if we could stop here, but we cannot. Another set of theorists approach the question of distributive justice from radically different angles. Those perspectives are far less congenial to our program. We take them up in the next chapter.

¹⁴³ Cf. Elhauge, *supra* note 141, at 1464 (lamenting destructive effects of moral absolutism on deliberations regarding health policy); Dworkin, *Sovereign Virtue*, *supra* note 104, at 309-10 (criticizing widely held "rescue principle" of justice in medicine).