POLITICS AND JUSTICE II

EQUALITY OF RESOURCES, MARKET LUCK, AND THE JUSTIFICATION OF ADJUSTED MARKET DISTRIBUTIONS

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INTRODUCTION

Ronald Dworkin's account of distributive justice, equality of resources, is among the most powerful statements we have of the contemporary liberal democratic ideal of economic justice.[1] It describes a thoroughly decent and humane view of social and economic relations among equals.[2] In many respects, it captures better than any alternative philosophical account the ideal of the modern Western welfare state that grew out of Roosevelt's New Deal, an ideal that has been under severe attack by forces from the Right for the past thirty years and which only now is beginning once again to reassert itself in American politics.

As a practical matter, there is little in Dworkin's account that I can find to disagree with. Were his account fully institutionalized in American political and economic life, I believe it would be as close as we could come to an ideal

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[1] For a full account of "Equality of Resources," see RONALD DWORKIN, SOVEREIGN VIRTUE 65-119 (2000), especially Chapters 1, 2, 7-9. In *Justice for Hedgehogs,* Professor Dworkin briefly summarizes his account of equality of resources as set forth in *Sovereign Virtue* and incorporates its discussion. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 208, 221-27, on file with the Boston University Law Review).

[2] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 221-27).

of justice that is compatible with American political ideals and culture. On the political side, Dworkin has long been recognized as the preeminent philosophical champion of liberal constitutionalism in the United States. His regular commentaries on the Supreme Court and its decisions over the past thirty-five years have provided profound insights into the ideals of freedom and equality implicit in our Constitution and have served as guidelines for informed liberal public opinion. Moreover, one of the greatest strengths of his account of distributive justice (more so than Rawls's view)[3] is that it describes an account of economic justice that is potentially achievable within American society, given our basic political and economic values. For in addition to being fair-minded, Americans are individualistic, and their self-understanding thrives on vigorous property rights conjoined with opportunities for economic creativity and bold entrepreneurship, which in turn requires robust freedoms of contract and economic exchange. Dworkin's account of economic justice finds a place for these American values while at the same time mitigating the effects of individual misfortune and providing for a social minimum that guarantees individuals their economic independence along with fair opportunities to develop their capacities and compete with others for favorable social positions. Equality of resources does not simply take the rough edges off of American capitalism; rather, it thoroughly humanizes it, as much as we can realistically hope for in the "real real world" of American politics.[4]

In this Article, however, I will be concerned with Dworkin's "ideal real world," and more generally with the ideal theory that is to supply the basic standards of economic justice by which we are to critically assess the real world.[5] Dworkin's equality of resources has been categorized as a "luck egalitarian" view (to use Elizabeth Anderson's term), along with positions held by G.A. Cohen, John Roemer, Richard Arneson, Philippe van Parijs, and many others.[6] "Luck egalitarianism" by itself is an unfortunate term to use in Dworkin's case, for it fails to recognize the crucial role of personal responsibility that is also at the heart of his view. All "luck equalizing/responsibility-based" positions (as I will call them) aim to eliminate or at least neutralize, so far as possible, the effects of accidents of birth and

[3] *See* JOHN RAWLS, A THEORY OF JUSTICE 274 (1971) (identifying the "choice of a social system" as the "main problem of distributive justice").

[4] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 172.

[5] *See id.*

[6] *See, e.g.*, G.A. COHEN, RESCUING JUSTICE AND EQUALITY 300 (2008) (embracing "luck egalitarianism . . . the view that identifies distributive justice with an allocation which extinguishes inequalities that are due to luck rather than to choice"); Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES IN L. 239, 241 (2008) (critiquing luck egalitarianism and instead promoting "a democratic egalitarian approach to market risks"); Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 340 (2000) (defending some features of luck egalitarianism against Elizabeth Anderson's critique, ultimately stating that it emerges as "superior to the 'democratic equality' conception of egalitarian justice").

circumstance – "brute luck" in Dworkin's terms[7] – in the distribution of income and wealth in society. These accidents primarily include the social class a person is born into as well as one's natural talents and position in the "natural lottery." They also include the many misfortunes of circumstance that inevitably can occur during a person's lifetime (from tragic accidents to unemployment due to the business cycle). The common theme of luck equalizing/personal responsibility views is that undeserved inequalities should be equalized so far as is morally feasible, and that that those who are disadvantaged by "brute bad luck" should be compensated for their misfortune.[8]

Where luck equalizing/responsibility-based positions mainly disagree is in their interpretation of personal responsibility and the bearing it should have on economic distributions. Thus, G.A. Cohen holds (roughly) that once the effects of accidents of birth and circumstance are eliminated and the proceeds are equally distributed (according to welfarist criteria), people should be rewarded according to their *efforts* and the arduousness of their positions (including such factors as labor time expended, and the degree of stress, danger, unpleasantness, and inconvenience of one's employment).[9] Cohen's responsibility-based principle of reward – in effect, "[t]o each according to effort" – fits with a luck-equalizing/personal responsibility view. For a person's efforts are to a large degree within his or her personal control (once we discount the effects of chance on the ability to exert efforts), and people can freely decide how many hours they want to work, the degree of stress, danger, and unpleasantness they want to tolerate in their careers, etc. But for Cohen, to reward people and allow inequalities for reasons other than effort, broadly construed, is to allow for undeserved inequalities based on accidents of circumstance. This account of just distribution fits nicely with Cohen's socialism, for it implies that, once everyone is compensated for the accidents of fortune and their basic needs are met, only those who labor have a legitimate claim on the income and wealth that result from economic activity. Rentier income and other "unearned" returns to private property, the major sources of egregious inequality, are therefore unjust.

Dworkin, however, has a very different understanding of the distributive consequences of holding individuals responsible for their actions and ends. He assigns a significant role to market distributions. In *Justice for Hedgehogs*, he says:

> We can show both the right concern for people's lives and the right *respect for personal responsibility* only if we reject ex post theories like utilitarianism and Rawls's difference principle. We must also reject any form of command or socialist economy that is based on collective fixing of prices, wages and production. A free market is not alien to equality on

[7] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 73.

[8] *See id.* at 74.

[9] COHEN, *supra* note 6, at 181.

> this understanding, but indispensible to it; *an egalitarian economy is a basically capitalist economy*.[10]

Dworkin does not mean "capitalism" in the traditional sense. He explicitly rejects the doctrine of laissez-faire and allows for market regulations for the public good as well as substantial market redistributions required to pay for public goods and the many social insurance plans required by his hypothetical insurance model.[11] The role of the market in settling distributions applies only once all these questions are settled and adjustments to market income are made.

In this Article I raise the question whether Dworkin's requirement that people assume responsibility for their choices justifies relying on markets as (one of) the fundamental criteria for determining the distributive shares people are justly entitled to. Is market luck itself a permissible basis for economic inequalities? In the first Part, I contend that the reasons Dworkin provides in earlier works for the justice of market distributions, namely that people should pay the opportunity costs to others for their choices, does not justify market distributions or any other principle of distributive justice. Then I consider other grounds to which Dworkin might appeal in contending that market distributions and rewarding market luck are required by justice and equality. Part II discusses the most common argument for a presumptive right to a full return on one's market contribution, namely the marginal productivity theory of just distributions relied upon at various points by Robert Nozick, David Gauthier, and others who defend the justice of market distributions.[12] In Part III, I consider other arguments and considerations Dworkin might invoke in order to argue for the justice of market distributions and rewarding market luck. None of these are sufficient justifications for market distributions either. I conclude that markets and market luck at most play an instrumental role in establishing just distributions, the criteria for which ultimately is determined by non-market principles of distributive justice.

I. MARKETS AND PAYING ONE'S OPPORTUNITY COSTS

Dworkin's commitment to the market ideal is evident from the outset in his explication of equality of resources.[13] Dworkin imagines a nascent immigrant

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[10] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 224) (emphasis added).

[11] *Id*. (manuscript at 226-27).

[12] *See, e.g.*, DAVID GAUTHIER, MORALS BY AGREEMENT 90-92 (1986); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 187-88 (1974).

[13] "I argue that an equal division of resources presupposes an economic market of some form, mainly as an analytical device but also, to a certain extent, as an actual political institution." DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 66. Also,

> Under equality of resources the market . . . is endorsed by the concept of equality, as the best means of enforcing, at least up to a point, the fundamental requirement that

society in an "ideal ideal world" that is not plagued by disability and other misfortunes, or by inequality of natural and social endowments.[14] An artificial means of exchange (clamshells) are equally distributed among this society's members, and they are then allowed to bid for and purchase land, resources, and other goods in an ideal "equal auction."[15] At the end of this process, no one should have reason to envy the goods and resources that others now legitimately claim.[16] We then have a fair initial distribution of income, wealth, goods, and resources among society's members.

Given this fair initial distribution, it may seem that markets are adequate to determine, not just future production decisions and trade relations, but subsequent economic distributions as well. The problem, Dworkin maintains, is that in any imaginable but still realistic world, people inevitably differ in their native and other endowments, and many people suffer from natural disabilities and other misfortunes.[17] Equality "requires that no one have less income simply in consequence of less native talent."[18] Equality of resources must then take account of differences in natural talent and other arbitrary contingencies.[19] To bring his ideal auction model closer to the real world and deal with these and other undeserved inequalities, Dworkin imagines a hypothetical or "ideal real" world with efficient insurance markets.[20] Inhabitants of this hypothetical world are put behind a thin veil of ignorance where they are ignorant of their particular characteristics and personal endowments.[21] They make their own decisions about how much insurance to purchase to protect themselves from natural and other misfortunes, such as lack of marketable talents or disabilities.[22] Then they purchase with their equal shares of clamshells the level of insurance each deems prudent in order to protect themselves against the consequences of potential misfortune.[23]

> only an equal share of social resources be devoted to the lives of each of its members, as measured by the opportunity costs of such resources to others.

Id. at 112.

[14] *Id.* at 66-74 (creating this world from "shipwreck survivors . . . washed up on a desert island that has abundant resources and no native population" without a chance of rescue in the short term).

[15] *Id.* at 68-72.

[16] The "envy test" says: "No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle." *Id.* at 67; *see also id.* at 139.

[17] *Id.* at 73 (recognizing that once the auction ends and people are left alone "to produce and trade as they wish . . . the envy test will shortly fail").

[18] *Id.* at 102.

[19] *Id.* at 73.

[20] *Id.* at 73-83.

[21] *Id.*

[22] *Id.*

[23] *Id.*

The hypothetical insurance market is not a replacement for but rather is a realization of an ideal of market distributions, brought in to deal with arbitrary inequalities of talent and circumstance that are the result of what Dworkin calls "brute luck."[24] It is not the role of hypothetical insurance to insure people against the consequences of their "option luck," or the results of their having freely undertaken gambles and risks inevitably involved in many market choices.[25] Rather, insurance transforms brute luck into option luck, or as Dworkin says: "Insurance, so far as it is available, provides a link between brute and option luck, because the decision to buy or reject catastrophe insurance is a calculated gamble."[26] That people should be held responsible for the consequences of option luck, including the risks and gambles of their market choices, is a consequence of equality, Dworkin contends.[27] Otherwise, people would not pay the opportunity costs of their choices to others, which violates equality of resources. Assuming equality of resources as a background condition of market activity, there are no grounds to object to those who have more, or less, as a result of risks and gambles they undertake in market contexts.[28] For those who end up with less, the possibility of loss was "the fair price of the possibility of gain."[29]

Given the severity of misfortune that many people have to suffer in life, there is of course no way that the effects of fortune, bad or good, can be equalized in a society.[30] But Dworkin contends that his ideal auction and hypothetical insurance markets come as close as we can come, within ideal theory, to a model of what a society would look like if the resources that people initially have are equalized in these hypothetical ways. The practical consequence, Dworkin says, is that "[w]e can use the idea we formed in the ideal real world, of a defensible distribution, to judge our performance so far in the real real world[; w]e criticize ourselves . . . because we have not achieved,

[24] *Id.* at 73 (defining "brute luck" as a "matter of how risks fall out that are not . . . deliberate gambles").

[25] "Option luck is a matter of how deliberate and calculated gambles turn out – whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined." *Id.*

[26] *Id.* at 74.

[27] *Id.*

[28] *Id.* ("[P]eople should pay the price of the life they have decided to lead.").

[29] *Id.* at 75. Dworkin also writes:

> If winners were made to share their winnings with losers, then no one would gamble, as individuals, and the kind of life preferred by both those who in the end win and those who lose would be unavailable. . . . [T]he chance of losing is the correct price, measured on the metric we have been using, of a life that includes gambles with a chance of gain.

Id.

[30] *See id.* at 103-05 ("The brute fact remains that some people have much more than others of what both desire, through no reason connected with choice.").

or even approached, a defensible distribution for us" as defined by the market ideal implicit in equality of resources.[31]

It bears emphasizing that Dworkin's ideal models of equality are entirely market-driven.[32] Both the equal auction and the hypothetical insurance markets are idealized market events. There is no need to posit among ideal conditions the existence of a hypothetical social contract or political constitution with the normal powers of government, or a complicated legal system, to provide background conditions for the ideal distributions of the hypothetical auction and insurance markets. The nature of property, contracts, and other conventional institutions necessary to the hypothetical auction and insurance market are all assumed to be either in place or uncontroversial.[33] Of course, in the "real real world" there is an indispensable role for political authority and the legal system, to put into place and enforce the necessary political and economic institutions that are needed to realize the ideals of equality of resources in the existing world, including whatever redistribution is required from actual market activities. One of the roles of democratic legislators is to try to approximate, as closely as possible, the protections and distributions of resources that would result from the hypothetical insurance market in their deliberations on social insurance programs.

In *Sovereign Virtue*, Dworkin clarifies his position regarding the role of markets in distributing resources in the "real real world" as follows. He says that, in spite of their many differences, "both Nozick's theory and equality of resources . . . give a prominent place to the idea of a market, and *recommend the distribution that is achieved by a market suitably defined and constrained*."[34] Modifying Nozick's famous Wilt Chamberlain example, Dworkin says that, starting out with equal shares:

> [E]ach of many people pays a small sum to watch Chamberlain play basketball, after which he grows rich and wealth is no longer equal. Equality of resources would not denounce that result, considered in itself.

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[31] *Id.* at 172-73.

[32] Thus, Dworkin says, "[I]n the circumstances described, in which talents are equal, efficiency simply is fairness, at least as fairness is conceived under equality of resources." *Id.* at 84. He continues:

> It would therefore violate equality of resources if the community were to redistribute Adrian's wealth, say, at the end of each year. If everyone had equal talents (as we have been assuming just now [in applying the envy test diachronically]), the initial auction would produce continuing equality of resources even though bank-account wealth became more and more unequal as years passed.

Id. at 85.

[33] I return to this point below. *See infra* Part III.

[34] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 111 (emphasis added).

> Chamberlain's wealth reflects the *value to others* of his leading his life as he does.[35]

This suggests that, as in Dworkin's ideal worlds, people in this world should have a presumptive right to what they gain on the market, assuming, in the ideal case, that "people enter the market on equal terms,"[36] and assuming, in the real world, that they have been duly compensated for accidental natural and social inequalities and other contingencies. (Dworkin also assumes that markets are functioning fairly and that people will pay their fair share to fund the social insurance scheme, public goods, and other requirements of equality of resources.) I will call this feature of equality of resources (for lack of a better term) a person's "right to (his or her) adjusted market distribution."

The reason Dworkin gives in *Justice for Hedgehogs* for this right to one's adjusted market distribution is as follows:

> We respect that responsibility [people's responsibility for their own lives] only if we design our economy so that someone can identify and pay the true costs to other people of the choices he makes. That is why a community that shows both equal concern and equal respect for its members must put carefully regulated markets at the core of its distributional strategy.[37]

This echoes his argument in *Sovereign Virtue* for the right to adjusted market distributions:

> [W]e must, on pain of violating equality, allow *the distribution of resources* at any particular moment to be . . . ambition-sensitive. *It must . . . reflect the cost or benefit to others of the choices people make* so that, for example, *those who choose to invest rather than consume . . . or to work in more rather than less profitable ways must be permitted to retain the gains that flow from these decisions* in an equal auction followed by free trade. But . . . we must not allow the distribution of resources at any moment to be endowment-sensitive, that is, to be affected by differences in ability of the sort that produce income differences in a laissez-faire economy.[38]

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[35] *Id.* (emphasis added). At the conference, Dworkin said that the Wilt Chamberlain example needs updating for a new generation of readers, and that Kobe Bryant should now be brought in as a substitute for Chamberlain. *See* Ronald Dworkin, Final Response at *Justice for Hedgehogs*: A Conference on Ronald Dworkin's Forthcoming Book 9 (Sept. 25-26, 2009) (transcript on file with the Boston University Law Review).

[36] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 70.

[37] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 226).

[38] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 89 (emphasis added). Dworkin also says,

> [P]eople should pay the price of the life they have decided to lead, measured in what others give up in order that they can do so. That was the point of the auction as a device to establish initial equality of resources. . . . So we have no reason to object,

I question the connection Dworkin sees between taking personal responsibility for one's choices and the justice of adjusted market distributions. A wide range of economic systems can meet the requirement that people take responsibility for their choices by paying their opportunity costs to others as measured by their market value. Below, I argue that the question of which of these economic systems is required by justice is not to be decided by looking to the idea of paying one's opportunity costs and taking personal responsibility for choices.[39] Rather it is a question of the justice of property relations and other background economic institutions.

In general, markets and the price system can play several different roles within an economic and social system. To begin with, (a) market prices may have the role of allocating scarce productive resources or "factors of production," by setting the price of labor, land, capital, and any other productive resources that entrepreneurs or economic agents must use to engage in production of economic goods. In addition to this allocative role in production, (b) market prices may be used to determine the price of consumer goods as well, and thus the prices that consumers have to pay for the goods that are produced pursuant to (a) (or some variation thereof). Price supports of various kinds would be ruled out by (a) and (b), as would most government subsidies tied to sales or consumption of a particular good (such as agriculture subsidies or government rebates for purchasing new cars). Finally, (c) market prices may be relied upon to decide how much of the combined social product particular person(s) are due as a matter of distributive justice. In that case, market distributions of income and wealth serve as fundamental criteria of the distributive shares to which people ultimately are entitled.

The argument for (a) – the allocative role of markets – is that the price system allocates labor and productive resources efficiently, putting them to their most productive uses in light of peoples' preferences for their resulting products. The argument for (b) – the more extensive use of markets to determine not only the prices producers must pay but also prices for consumer goods and services – is that it requires that people pay the opportunity costs or value to others of their choices. The benefit in this is that people are required to take responsibility for their choices since they have to live within what economists call their "budget constraints," and also, assuming a just distribution, within the limits imposed by their fair share of income and wealth.

None of this (neither (a) nor (b) nor their conjunction) seems to imply anything in particular about (c), how people's distributive shares of income and wealth are to be determined. So long as producers are required to pay the market price of the productive resources they employ and consumers likewise pay the price for goods and services they consume, then they pay their

> against the background of our earlier decisions, to a result in which those who decline to gamble have less than some of those who do not.

Id. at 74.

[39] *See infra* Part III.

opportunity costs to others and thereby take responsibility for their choices. Of course, an economic system that constantly replenished any income people expended on consumer goods would not in effect hold them responsible for their choices and would only encourage profligacy. But that is not the issue here. The issue, rather, is whether there is any necessary connection between paying the costs of one's choices to others as determined by their market value and market-based distributions of income and wealth. My claim is that there is not. Paying the opportunity costs of one's choices does not seem to imply anything in particular regarding (c) who should be on the receiving end and benefit from these payments, or who should have property rights to the income that is paid out in the course of people paying for their opportunity costs. Thus, if I pay for a ticket to watch Kobe Bryant play basketball, or to fly to Los Angeles to see him play, I am paying my opportunity costs to others, regardless which persons ultimately have rights to receive that income – whether it be Kobe, Kobe's mother due to a promise he made her, the owners of the Los Angeles Lakers pursuant to contractual agreement, shareholders in a private venture, or for that matter the government or some combination of public and private owners. Taking responsibility for one's choices does not then require that there must be specific individuals who have property rights in the market income paid out for sale of services or property in goods and resources.[40]

Of course, people should receive a fair return for the sale of their goods, services, and productive resources, as well as for their assumption of market risks. It is the role of a conception of distributive justice to determine what a fair return is on the sale of these things and for engaging in risky market activities. There may be a range of possibilities here, each of which might be compatible with using the price system to determine the price of goods, services, and resources, and with the requirement that people take responsibility for their choices (including the difference principle and market socialist arrangements, as well as equality of resources).[41] Any conception of distributive justice that relies upon markets to allocate resources and determine prices for goods and services will have to decide what role, if any, markets should play in the final distribution to individuals of income and wealth.[42]

Suppose then the classical liberal ideal of a world where an unskilled laborer receives a minimum market wage (e.g., five dollars per hour), which is

[40] I also argue more specifically against Dworkin's position and contend that this is true, even after market income has been adjusted by recipients paying their fair share of social insurance and other public goods under equality of resources; here my concern is only to establish the more general point. *See infra* Part III.

[41] *See, e.g.*, JOHN E. ROEMER, A FUTURE FOR SOCIALISM 28-36 (1994); *see also* RAWLS, *supra* note 3, at 76-80.

[42] My own view is that markets should play only an instrumental role in establishing distributions whose justice is determined by other criteria; but more on this later. *See infra* Part III.

woefully low and hard for anyone with dependents to decently live on today. This constitutes, we will assume, the value to others of the services that this worker provides. Now to contend that this is all that this worker has a right to, as a matter of distributive justice, is to assume that any person's fair share is to be wholly decided by the value of his or her "contribution" to economic output (in addition to what he or she may gain by gifts, bequest, gambling, etc.). This is the position of libertarians and classical liberal advocates of market distributions. They say that it is unfair to others for government to institute "welfare payments" or even wage supplements (such as the earned income tax credit), since this requires taxing more advantaged people to pay for transfers to those who cannot afford to pay for themselves and their own economic choices. Poorer people who receive these transfers, classical liberals may say, are in fact *not* being held responsible for their opportunity costs and value of their choices to others, for they are allowed to profit at the expense of others' economic contributions and legitimate entitlements.

In the next Part, I will consider a more sophisticated version of this argument, which equates a person's responsibility for productive output with the marginal contribution that their labor and property in resources makes to the final product. However, for now I only want to consider how Dworkin might respond to the simpler version of the classical liberal argument I briefly sketched above. Dworkin would not accept this argument, at least not in this unqualified form. For his position implies that in a laissez-faire economy of the kind that the argument assumes, there are many people whose purported "contributions" are purely the consequence of "brute luck" resulting from natural, social, and other contingencies, and for which they do not deserve any return.[43] Thus, on Dworkin's account, the rich person who gains extraordinary wealth from an inheritance and the income it provides does not deserve all that he inherits, for it is purely a matter of brute luck that he is the sole surviving descendant of a rich second cousin who died intestate. Similarly, the brilliant cosmetic surgeon who earns over three million dollars per year adjusting the bodies of Hollywood stars does not deserve all her income, at least not that portion which is due to having been born with exceptional natural talents others do not have. Distributive shares must be "endowment insensitive" according to "Equality of Resources," and discount that part of each person's market contribution to economic activity resulting from natural and social contingencies and pure accident. Since people do not deserve such brute good luck or its consequences, it might be said that for Dworkin, any contribution made by such accidents of fortune are not really *their contributions* at all. People can only be said to contribute those things they have rights and legitimate claims to, and we do not have legitimate claims to the products of brute good fortune, just as we do not deserve brute misfortune or its consequences. Thus, Dworkin would contend that in order to determine people's real contributions, the effects of brute good and bad luck must first be

[43] *See* Dworkin, SOVEREIGN VIRTUE, *supra* note 1, at 73-74.

neutralized by taxation and social transfers required by his hypothetical insurance scheme.[44]

This is, I believe, a fair representation of the implications of Dworkin's position regarding laissez-faire and libertarian arguments – that people have complete rights to income and wealth they receive from market and other consensual activities. If so, then equality of resources itself implies that taking responsibility for one's choices does not imply that one is also to be regarded as fully responsible for generating the benefits that result from others' choosing one's "contribution" of goods or services to market activity. By the same token, however, one should also *not* be held fully responsible for the social disadvantages that stem from others' *not* choosing the goods or services one has to provide. Just as the rich heir and rich surgeon cannot be said to be wholly responsible for, or deserving of, all the income they gain as a result of their social and natural endowments, neither can the poor minimum wage worker be held entirely responsible for the fact that his labor is not in sufficient demand to enable him to earn an income that is adequate to care for his and his family's basic needs. The income resulting from his market contribution alone is not then an adequate measure of the distributive shares that are owed to the unskilled worker as a matter of justice.

This too is compatible with Dworkin's position, to a degree. Just as he rejects the laissez-faire position that taking responsibility for one's choices entitles a talented person to full market returns, so he should be able to accept that the unskilled worker whose market wage is diminished because he was born without natural talents cannot be held fully responsible for the fact that he does not adequately benefit from others' choices of his services. Dworkin then can reject the laissez-faire view that taking responsibility for one's choices and paying one's opportunity costs requires that one must take full responsibility for *not* being the beneficiary of others' choices and not being adequately compensated (as with unskilled laborers). Final market distributions reflects only to some degree people's entitlements and distributive shares; to the extent they are influenced by a lack of talent that is regarded as a form of brute bad luck, Dworkin should be open to allowing workers, whose lack of skill is not their choice, certain rights to non-market compensation.

The problem, I believe, is that Dworkin's account does not go far enough. He still allows the contingencies of markets and market luck, a form of option luck, a fundamental role in determining the distributive shares that are due workers, skilled and unskilled, as well as investors, landlords, and owners of

[44] This suggests the more general point, which I will develop *infra* in Part II, namely, that the idea that each individual ought to be rewarded according to his or her contributions to productive output presupposes just background conditions. In particular, determining a person's "contributions" to productive activity depends upon having in place beforehand an account of property rights that presupposes a separate criterion of distributive justice. I will contend in Part III that Dworkin's idea of personal responsibility for one's product and one's choices itself presupposes, like the idea of a person's contributions, a framework of just background institutions, including a just specification of the incidents of property.

productive resources. Even assuming compensation for the naturally untalented, why should unskilled workers' income rights hinge upon others' willingness or unwillingness to purchase products of their labor? Here Dworkin might reply that, assuming equality of opportunities with liberal educational benefits for all, individuals have a choice whether or not to train their capacities. Since most individuals can then choose to be skilled or unskilled, taking responsibility for one's career choices requires that a person's wages should be determined by how much he or she can command on the market for services rendered. But the fact that I freely choose to work in a low paying job when I might have continued my education and chosen a higher paying career does not itself imply that I am only entitled to the market wages I receive as determined by others' demand for my services. For in an economic system where income subsidies are paid by government, according to an egalitarian principle such as the difference principle, there will be differences in wages too, and peoples' income will differ depending on the career paths they choose. Here too, it can be said that a person has to take responsibility for his or her career choice, yet this does not imply that income should be determined by market wage rates.

This raises the question, to which I return in Part III, about the role of market luck in determining just distributions of income and wealth. Before discussing this issue further, I consider next a more complicated argument for the proposition that markets should be used as the foundation for determining distributive shares since they reflect what people are responsible for in contributing to economic output.

II. RESPONSIBILITY FOR PRODUCT AND MARGINAL CONTRIBUTIONS TO OUTPUT

How are we to make sense of Dworkin's claim that adjusted market distributions within a capitalist economy serve as an appropriate measure of individuals' responsibility and therefore their entitlements? In this Part, I examine one common way in which economic agents are said to be personally responsible for economic output, which in turn is relied upon to justify market distributions of income and wealth. This argument is found in Nozick, Gauthier, and many others who argue for market distributions on grounds of personal responsibility.[45] Dworkin does not rule out this argument, though he does not explicitly endorse it either. My aim here is to suggest that the argument is not one he should rely upon to demonstrate the justice of market distributions adjusted to compensate for brute luck.

The argument in support of market distributions appeals to marginal productivity theory in economics.[46] Each participant in a joint economic

[45] *See* GAUTHIER, *supra* note 12, at 92; NOZICK, *supra* note 12, at 149 ("There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out.").

[46] *See* NOZICK, *supra* note 12, at 187-88.

enterprise is said to contribute his or her share of factors of production (labor, land and raw materials, or capital, both real and liquid) toward final product. According to standard microeconomic theory, we can measure the economic value of each of the inputs to production by determining its marginal contribution to final product.[47] The *marginal product* of each factor that each participant owns and controls is then (it is said) what he or she can be said to contribute toward final output. Since each participant is responsible for what he or she contributes, then in accordance with the precept of justice, "To each according to his or her contribution," economic agents *ought* to share in the distribution of income and wealth proportionate to the value of their marginal product.[48]

This is a popular way of thinking among many people, especially those who are wealthier. They make a claim to all the profits, interest, and economic rent that result from their investment of capital – exclusive of others who may have contributed as well as those who did not – because profits, interest, and rent measure the marginal product of their contribution. This argument is often used to justify the enormous inequalities that result from a largely unregulated capitalist economy. But economists from Marx to Sen have long remarked (to little avail) on the fundamental problem with the argument for market distributions on grounds of marginal productivity theory.[49] One way to put the problem is that there is a genuine naturalistic sense in which workers can be said to contribute their labor toward productive output, as well as a naturalistic sense in which land, raw materials, and real capital make a contribution. For it is a natural fact, regardless of the form taken by social institutions, that nothing could be produced in the absence of labor (including the exercise and application of knowledge), land, natural resources, and the instruments of production created by their combination. This is not to say that these inputs to production exclusively cause productive output. For clearly owners of capital

[47] *See id.* at 187.

[48] Robert Nozick relies on marginal productivity theory for a similar argument: "People transfer their holdings or labor in free markets. . . . If marginal productivity theory is reasonably adequate, people will be receiving, in these voluntary transfers of holdings, roughly *their* marginal products." *Id.* at 187-88 (emphasis added); *see also id.* at 301-02, 304-05. In Nozick's "Utopia," "each person receives his marginal contribution to the world." *Id.* at 302. Similarly, David Gauthier maintains: "In the free exchanges of the market each may expect a return equal in value to her contribution. Thus the income each receives . . . is equal to the contribution she makes, or the marginal difference she adds to the value of the total product." GAUTHIER, *supra* note 12, at 91-92. "The equation of income with marginal contribution ensures just this impartiality. . . . [E]ach benefits from and only from the contribution she makes." *Id.* at 97.

[49] *See* KARL MARX, CAPITAL 557-855 (Samuel Moore & Edward Aveling trans., Frederick Engels ed., Random House, Inc. 1906) (1867); Amartya Sen, *The Moral Standing of the Market*, *in* ETHICS AND ECONOMICS 1, 15-16 (Fred D. Miller, Jr., Ellen Frankel Paul & Jeffrey Paul eds., 1985); *see also* KARL MARX: SELECTED WRITINGS 415, 415-506 (David McLellan ed., 1977).

and other resources are also causal agents in the production process due to their ownership and control of means of production (and sometimes labor, in slave economies or under serfdom). But the sense in which owners of *any* of these factors of production make a real "contribution" is notional when compared to the contribution made by the factors of production themselves; it is a manner of speaking that is entirely dependent upon the rights of ownership and control they enjoy by virtue of legal and other conventional arrangements. Thus, in a slave economy, while it is clear that the slaves in a sugar plantation make a substantial contribution toward agricultural product, to say that the *owners* of the slaves also make their "contribution" of labor ("after all, they own it") is to use that word in a very different sense than when we say, "workers contribute their labor." Owners of slaves or serfs "contribute" the labor of those persons they own in this notional sense; it is (to use Jeremy Bentham's term) a "legal fiction." This much seems obvious.

Generalizing, the *same notional sense of "contribution"* is at work when it is said that owners of land, real capital, liquid capital, and any other resources "contribute" to economic output. What they contribute may be causally necessary within the social context, but it is on a different par with the substantial contribution that labor itself makes, just as it is on a different par with the substantial contribution that natural and artificial resources make to productive output. The contribution made by the owners of productive resources is (like that of slave-owners and lords of serfs) of a non-natural order. It is a "contribution" that is made only by virtue of the rights and powers that owners of capital resources are recognized as having by the legal system and other members of a society.

Here, some might be tempted to say that owners of land and capital do not make a "real contribution." I am not saying that, for they do make a legal contribution of the rights and powers over resources that they control. Legal contributions are socially "real;" without them, little would be produced in any economic system. My claim, rather, is they make no "substantial contribution," for that is made by labor, land, capital, and other productive resources. I also am not saying here simply that owners' contributions are purely "conventional." Money is conventional, but makes a substantial contribution of a different order toward productive output. But what contribution does the owner of that money make, other than the institutionally defined legal contribution?

Here economists may say that the capitalist makes a "substantial contribution" for he or she contributes his or her "abstinence" or "waiting to consume." Owners of wealth and capital could consume what they possess, but do not, and instead invest their resources and undertake risks most others are unwilling to take. By undergoing this sacrifice, owners benefit society by capital formation. Had someone not saved, there would be no capital for workers to labor on.[50]

It is true, of course, that owners of resources could consume their wealth, but in the same sense, so too could any thief that can get his hands on the same capital. Does the thief then make a contribution too by refusing to steal? The reason the capitalist can be said to contribute his or her "waiting to consume" is, once again, that he or she is legally entitled and has a *right* to consume – thus reenters the need to invoke legal and other normative concepts to explain the "contribution" made by owners of capital. The same applies to the claim that owners of capital assume risks that others do not, and that this assumption of risk is their contribution to productive output. It is not the real capital or natural resources that are put at risk, for barring disaster they will survive even bankruptcy; rather, it is the entrepreneurs' legally recognized *property rights* that are put at risk. The contribution of assumption of risk remains the product of a "legal fiction."

The general point here is that the argument from marginal productivity theory for market distributions depends upon an ambiguity involved in using the term "contribution" to productive output. In a slave economy, the ambiguity is clear, for then it can be said that both slaves and slave-owners "contribute" labor to the production process, but do so in an entirely different sense. So it might be said that slaves in fact contribute (albeit involuntarily) their labor (a de facto contribution), and slave-owners contribute their legal rights to own and control others' labor and the income and wealth derived from it (a de jure contribution). It is this ambiguity between the de facto and de jure sense of "contribution to" (or "worker's vs. owner's responsibility for") final product that is played upon by the argument for market distributions based on the marginal product of each parties' "contribution."[51]

In defense of the claim that owners of capital make a real contribution to production, it is often argued that private property in productive resources serves an important function. Without private ownership of productive resources, much of the productive surplus that is created by labor likely would

[50] For a discussion of the "abstinence theory," as well as the idea that capital is a secondary factor deriving from the primary factor service of "waiting to consume," see MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 193-94, 516-18 (4th ed., Cambridge Univ. Press 1985).

[51] Marx, in effect, remarks on this conflation of different senses of "contribution" in Volume III of *Capital*. He says:

> [C]apital is merely an "economic appellation" for these means of production; and so, in itself land is by nature the earth monopolized by a certain number of landowners. Just as products confront the producer as an independent force in capital and capitalists – who actually are but the personification of capital – so land becomes personified in the landlord and likewise gets on its hind legs to demand, as an independent force, its share of the product created with its help. Thus, not the land receives its due portion of the product for the restoration and improvement of its productivity, but instead the landlord takes a share of this product to chaffer away and squander.

MARX, SELECTED WRITINGS, *supra* note 49, at 500.

be consumed if it were distributed to workers, and would not then be saved and reinvested. By allowing for private property in productive resources, a society creates the strategic position of owners, which provides an effective way to both shepherd resources and save and reinvest the productive surplus. Allowing private ownership and control of productive resources creates a group of people who are willing to save their surplus income (profits and interest) and take risks on investments that lead to development of new products and services. If we did not allow people some kind of market return on the risks they undertake with their wealth, then (as Dworkin contends in a similar context) they would not undertake these risks, and new innovations and other benefits of undertaking market risks would not be realized within a society.[52]

If this argument is sound, then it argues for some kind of market economy with private ownership of productive resources and some degree of market returns for their use (as opposed to market socialism where the public owns the means of production and receives the return on their use). Still the functional argument for private ownership just stated does not justify capitalism in the traditional sense because not all private property market economies are capitalist.[53] And even assuming the argument justifies capitalism, that justification has little to do with owners of capital *themselves* making a substantial contribution to production. Rather, it has to do with the instrumental effects of private ownership of the means of production. Perhaps these instrumental effects that the legal institution of private ownership itself makes are a "functional contribution" to the economic system as a whole. However, this contribution cannot be attributed to particular owners in the way that marginal productivity theory of just distributions contends. The functional contribution made is not made by particular individuals or even by the particular marginal product resulting from use of an owner's wealth. Rather, the functional contribution made by private ownership is realized by the institution of private property in productive resources and the way in which this institution creates strategic positions of individual owners who are put in

[52] *See* DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 225); *infra* Part III.B; *see also* DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 105; *infra* note 67.

[53] Here I use the term "capitalism" in the traditional sense of an economic system where ownership of capital is private and capital is held by a class that is largely distinct from labor; in this regard not all private property market economies are capitalist. For example, Rawls's property-owning democracy, which he contrasts with welfare-state capitalism, structures institutions to encourage workers' private ownership and control of their industries. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 135-40 (Erin Kelly ed., 2001); *see also* EDMUND S. PHELPS, REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE 103-43 (1997) (remedying the problems of the welfare-state with a "market-based solution" that includes rewarding work via wage-subsidies); MARTIN L. WEITZMAN, THE SHARE ECONOMY: CONQUERING STAGFLATION 2-4, 96-99 (1984) (advocating a share system as a means to beating stagflation).

control of means of production, and are thereby enabled to take risks with the capital that their strategic position allows them to control and benefit from.

Therefore, whatever role marginal productivity theory plays in explaining economic phenomena and the market price of labor and productive resources, that theory cannot be used to justify full market distributions of income and wealth going to the private persons who legally own productive resources. To begin with, there is the problem of defining individuals' contributions: once we go beyond the natural contribution made by workers' labor, the idea of a particular person's "contribution" toward productive output, like that of his or her "responsibility" for it, cannot be specified independent of the structure of property relations within an economic system. When it comes to productive resources other than labor, individuals' "contribution to" and "responsibility for" social product is institutionally dependent and indefinable outside an institutional and normally legal context. Second, there is the problem of justice. Namely, assuming that for any legal system that is in place we can specify the legal or de jure contribution that owners are conventionally regarded as making toward production, this still cannot morally justify market distributions according to each party's legally recognized contributions. Clearly, that would beg the question: since their contribution is not substantial but is an institutional artifact, why should owners receive the entire income or marginal product of the resources they own in the form of profits, interest, and rent? The argument for market distributions of marginal product must depend upon something other than marginal productivity theory; it depends instead upon a robust theory of property rights that contends that people should have complete rights to income generated by the use of economic resources they legally own and control.[54] Some such argument is presupposed by the contention that individuals are due the marginal product of resources they own.

If this is correct, then it suggests that the question whether individuals should be rewarded according to their contributions cannot be settled

[54] Thus, Robert Nozick devotes a substantial amount of space to discussing the state of nature and a right of initial appropriation of "unowned" things, subject to a "Lockean proviso." *See* NOZICK, *supra* note 12, at 167-82. Locke himself assumed initial common ownership of the world in a state of nature; common ownership underpins his proviso that we can appropriate land by improving it with our labor so long as "enough, and as good" is left for others. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 114 ¶ 33 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). Nozick conveniently eschews Locke's assumption of common ownership and does not condition initial appropriation upon the improvement of land by labor. NOZICK, *supra* note 12, at 174-82. Many have remarked on the inadequacies of Nozick's account, including Nozick's failure to address the question of how absolute ownership rights (as opposed to more qualified rights) follow from the act of merely claiming and appropriating unowned land and natural resources as one's own. See the critical discussions by Thomas Scanlon, Samuel Scheffler, Thomas Nagel, Onora O'Neill, and David Lyons, READING NOZICK: ESSAYS ON ANARCHY, STATE, AND UTOPIA 107-28, 148-66, 191-203, 305-21, 355-78 (Jeffrey Paul ed., 1981).

independent of questions regarding the justice of the economic system and system of property relations that is in place. The adage, "To each according to his or her contribution," is at best a secondary precept, which presupposes some more fundamental account of economic justice. This is a generalization of the point made in the previous section when discussing Dworkin's criticism of laissez-faire. Dworkin's view implies that the portion of economic agents' marginal product that is the result of brute luck cannot legitimately be regarded as their contribution, for they have no responsibility for it. People are, and can only be held, responsible for the outcomes of their free choices, including those that result from their market (or option) luck. In the next Part, I return to discuss Dworkin's theory more directly and address the question whether his account of individual responsibility is adequate to justify a right to adjusted market distributions that are the consequence of market luck.

III. MARKET CONTINGENCIES AND DISTRIBUTIVE JUSTICE

Equality of resources rejects the libertarian/laissez-faire position, which says that individuals are to be regarded as fully responsible for, and rewarded according to, their contributions to market outcomes. The libertarian/laissez faire view ignores the effects of individuals' initial "endowments," for which they are not responsible and which result from "brute luck." Still, "equality of resources . . . give[s] a prominent place to the idea of a market, and recommend[s] the distribution that is achieved by a market suitably defined and constrained."[55] People should enjoy a market return that is "suitably defined and constrained"[56] by their obligations to pay taxes to contribute toward social insurance, public goods, and other requirements of equality of resources. This makes markets at least one among the *fundamental criteria* of distributive justice, along with the luck-neutralizing measures implicit in Dworkin's hypothetical insurance model. It assigns to markets a primary role in deciding a fair return for one's contributions to production and market activities. In this Part, I contend that to allow the contingencies of markets to play such a fundamental role in deciding just distributions creates tensions with Dworkin's attempt to neutralize arbitrary contingencies and the effects of luck. Dworkin seeks to resolve these tensions by distinguishing "brute luck" from "option luck" and contends that part of our taking responsibility for our choices is that we take responsibility for the option luck that our market choices involve. I will consider whether the distinction between brute and option luck can bear the weight that Dworkin imposes upon it. I will also consider several ways that personal responsibility might require or justify distributions based in market luck, and contend that none of them are satisfactory. As fair as equality of resources may be, the right to the adjusted market returns on one's investments is not required by taking responsibility for one's choices. Taking responsibility for one's choices is compatible with

[55] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 111.
[56] *Id.*

several other accounts of distributive justice, including Rawls's difference principle.[57] In the end, the justification of market or any other distribution must appeal to a deeper theory of justice that addresses the justice of economic relations and of the background institutions, including property, that enable and sustain economic production and consumption.

A. *Markets and Market Luck*

One problem with relying upon markets to determine distributive shares – especially for a luck equalizing/responsibility-based view – is that prices (including the price of labor) and distributions resulting from market choices are, like being a beneficiary of others' gifts and gambling, often as much a matter of chance and even indirect brute luck (such as the effects of bad weather) as are accidents of social class and the natural lottery. Consider, for example, the veritable "windfall" to mobile home makers after Hurricane Katrina, when the government bought or leased over 120,000 units;[58] or consider the nearly hundredfold increase in the price of modest homes built in Palo Alto after WWII.[59] An elderly couple retires to Palm Springs in 2005, after selling for $2,000,000 the tract house and lot they bought in Palo Alto (or at the shore in Avalon, New Jersey) in 1955, for $20,000. A similarly situated couple in Gary, Indiana bought the same tract home on land that was similarly valued at the time, but now cannot afford to move since their same model home and lot is worth much less in real terms than they paid in 1960. There is nothing wrong with requiring recent purchasers of the Palo Alto properties to pay the value to others ($2,000,000) of their choices, but this does not imply that the elderly couple and others who are the main beneficiaries of these sales are in any way personally responsible for the enormous rewards reaped from others' choices. Rather, the enormous rewards are the result of the combined effects of many individuals' demand for the scarce supply of houses in Palo Alto and its environs, and the confluence of many other forces. Taking responsibility for one's choices does not seem by itself to imply that the fortunate homeowners have a fundamental right to the full, or even the "constrained" market return[60] on the sale of their modest but now extremely

[57] *See* RAWLS, *supra* note 53, at 77-79.

[58] Federal Emergency Management Agency, *Frequently Requested National Statistics Hurricane Katrina – One Year Later: Fact Sheet*, http://www.fema.gov/hazard/hurricane/2005katrina/anniversary_factsheet.shtm (June 4, 2009). Specifically, "121,922 travel trailers and mobile homes have served as temporary housing for Hurricane Katrina victims, outnumbering any housing mission in FEMA's history." *Id.*

[59] Diane Sussman, *The 1950's: So Long Sleepy Town*, PALO ALTO ONLINE, Apr. 13, 1994, http://www.paloaltoonline.com/news_features/centennial/1950SA.php ("By 1950, 40 percent of the city's housing had been built; during the next 10 years another 35 percent was added. The population more than doubled in the '50s, as more than 26,000 new residents moved in.").

[60] DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 111.

expensive home. After all, these extraordinary returns are simply a matter of good fortune.

B. *Investment Luck and Responsibility*

In *Justice for Hedgehogs*, Dworkin addresses this issue more directly. He introduces the idea of "investment luck" as a form of option luck[61] and contends that allowing people to profit from their investments is necessary if people are to take responsibility for their choices. Dworkin says:

> Investment luck, broadly understood, is an important reason why people's income and wealth differ. You and I study financial charts with equal care and make equally intelligent though different choices. Your stocks thrive and mine wither; you are rich and I am poor and this is only because your luck has been better than mine. But if our political community undertook to erase this consequence of luck, it would undermine the responsibility each of us exercised; if it made our investment choices pointless in that way, we will cease to invest.[62]

Granted, allowing people to profit from their investments to some degree is necessary if we are going to hold people responsible for their investment choices. If people were not allowed to profit at all, then of course they would not undertake the risks of loss involved in making investments, and a society could not gain the benefits of certain people assuming the inevitable risks of investment activity that others do not want to undertake. This I assume is what Dworkin means above in saying that our investment choices would be "pointless in that way" if people were not allowed to benefit from investment luck.[63] If so, then Dworkin here makes the reasonable point that a world in which individuals are able to assume risks and profit from investment luck encourages individuals' freedom to undertake risks that indirectly benefit others more than does a world where investment risks are not rewarded. Greater overall wealth is created within a private property market system that rewards individuals for taking investment risks, and this accrues (we will assume) to everyone's benefit by providing a wider range of opportunities and options for choice. But this argument only suggests that individuals should have *some* rights to market returns on their investments, not complete rights or even rights adjusted to take brute luck into account. Like the concept of a person's contribution to total output, there is nothing about the concept of responsibility for (investment) choices that says how much people should be allowed to profit from their investments. Nor does Dworkin's point imply that investment luck itself should be in any way a benchmark for legitimate claims

[61] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 225) (explaining that communities that prevent our fate from intertwining with our investment gambles inevitably cripple "our own responsibility for our choices").

[62] *Id*.

[63] *Id.*

and just distributions. Dworkin also may be correct when he says (later in the same paragraph):

> If the community aimed to insure that our fate *in no way* depended on how any such investment gamble fares – if it guarantees that we are equal in wealth whether or not our choice of career turned out to be suited to our tastes or talents or market conditions – it would end by crippling our own responsibility for our choices.[64]

Perhaps this argument tells against the position of G.A. Cohen and other egalitarians who would eliminate entirely the place of luck in economic distributions and *in no way* would allow individuals returns on investment luck (by, for example, instituting public ownership of the means of production).[65] But once again, if true, this does not provide reason for the claim that we should gain the *full measure* of our investment returns, or even the suitably adjusted measure of market return that remains after paying our fair share for social insurance against brute misfortune.[66] Just as (Dworkin himself maintains) people can be held responsible for their investment choices without their being guaranteed full market returns, they can also be held responsible if they do not receive all adjusted market returns that result from investment luck. For example, Rawls's difference principle rewards people for taking investment risks and allows for a reasonable rate of return without permitting investment luck *itself* to be a criterion for just distributions. We still are in need of some way to bridge the gap between taking responsibility for one's (investment) choices and allowing the contingencies of markets themselves to play a fundamental role in determining distributive shares.[67]

The most common way to justify market returns due to investment luck is by way of a theory of robust property and contract rights that originate in a

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[64] *Id.* (emphasis added).

[65] *See, e.g.*, COHEN, *supra* note 6, at 2.

[66] Nor does it follow that (as Dworkin concludes in the next sentence), "So any plausible version of an ex post approach would have to draw a distinction between investment and other forms of luck and *rule out the former as a ground for redistribution*." DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 225) (emphasis added). We can tax the product of good investment luck to some degree, according to the difference principle for example, and still preserve individuals' responsibility for their investment choices.

[67] As this is true of investment luck, it is also true of other forms of market luck. Dworkin says: "If . . . no one can earn movie-star wages, people who wish to watch movies may perhaps find very different fare available which, rightly or wrongly, they will not regard as highly as what they now have." DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 105. This may be true; movie stars indeed may make fewer films if their income is taxed substantially more rather than less. On the other hand, they might make more movies, to earn enough to pay for buying and maintaining multiple homes. Whether they make more or fewer movies, this is a point about the income effects and substitution effects that stem from different taxation rates. It has little directly to do with people taking responsibility for their choices, and it does not establish anyone's full right to his or her income on labor even if adjusted to discount the effects of brute luck.

"state of nature." Libertarians argue that people should have absolute rights to *all* the profits gained from their investments, the entire "marginal product," whether the product of brute luck or investment luck.[68] We have seen that, in the absence of a theory of property rights, marginal product cannot sensibly be equated with a person's "contribution" or what he or she is responsible for. What really carries the brunt of the load in Nozick's argument that individuals are due the entire marginal product of their investments is a libertarian conception of absolute property rights and unconstrained freedom of contract.[69] It says that, even if one's profits are entirely the result of a combination of fortunate brute and investment luck, a person has full rights to the entire return since (barring contractual agreement) no one else has any basis for a legitimate claim to any portion of the income causally generated by one's property. Dworkin clearly rejects the libertarian conception of absolute property and contract rights.[70] He thinks there are reasons for taxing, constraining, and regulating the use, transfer, and disposal of property rights, primary among these being brute luck.[71] But subtracting the portion of market returns due to brute luck and that is necessary to pay for social insurance and public goods does not itself show why a person should have rights to the amount that remains, which is due to investment luck. There is not in place an account of property and contract rights and other background institutions that is sufficient to fill the gap that needs to be bridged if Dworkin is to justify distributions that are ultimately grounded in market contingencies and investment luck.

Here, classical liberal utilitarians (such as Richard Posner) deal with this problem by contending that the rate of return on investments should be decided by considerations of economic efficiency and what is most likely to maximize economic output and the satisfaction of consumers' economic preferences.[72] This is purely a functional argument and there is no effort to connect the concept of rights of return on investment with responsibility for one's choices. Similarly, Rawlsians argue that the extent of one's rights to income from investment choices ultimately should be settled by establishing a system of economic rules and regulations that maximally benefit the least advantaged members of society over a lifetime; once again, the concept of responsibility plays no direct role in deciding fair returns on investments.[73] Dworkin says

[68] *See* William Ewald, *On a New Theory of Justice*, 82 CAL. L. REV. 231, 240 (1994).

[69] *See* NOZICK, *supra* note 12, at 150-82 (supporting "the entitlement theory" as the proper theory of distributive justice, based in part on Lockean principles).

[70] *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 111 ("There is no place in a theory such as Nozick's for anything like the idea of an equal distribution of abstract economic power over all the goods under social control.").

[71] *Id.* at 111-12 (using the "famous Wilt Chamberlain example" to make this point).

[72] *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103-05 (1979).

[73] *See* RAWLS, *supra* note 53, at 42-43.

that the problem with utilitarianism and the difference principle is that they are "ex post theories": "We can show both the right concern for people's lives and the right respect for personal responsibility only if we reject ex post theories like utilitarianism and Rawls's difference principle."[74] But how would an economic system that relies on the difference principle to regulate investments and determine their rate of taxation undermine individuals' responsibility any more (or less) than the economic system advocated by Dworkin which decides these questions on the basis of market luck (discounted by paying one's share for social insurance and public goods)? What does taking responsibility for one's choices have to do with the specific rate of return one is entitled to as a result of investment luck and other forms of market luck? So long as investors understand ahead of time the rate of taxation on and the regulations applicable to their investments (and are not compensated for their losses), then they should be able to responsibly form their expectations and make rational investment choices, regardless whether the rate of taxation is decided by the difference principle, the principle of utility, or equality of resources. Each of these three accounts allows investors to gain, not all, but still *some* degree of the market returns on their investments (with classical liberal utilitarianism allowing the greatest return, equality of resources perhaps the next greatest, and the difference principle probably the least). Each account then rewards (or penalizes) investors for outcomes for which they are not directly responsible but where the risks of gain or loss are freely assumed. What is unclear is how or why any of these differing rates of return on investments permitted by the three views (as determined by general utility, by the difference principle, and by investment luck under equality of resources) would be more, or less, favored by respect for personal responsibility.[75]

Perhaps one way to make the argument that respect for personal responsibility supports a market return of the kind Dworkin envisions is to contend that the market return provided by equality of resources is more likely to promote the development and exercise of citizens' capacities to take responsibility for their actions and life choices. Rawls makes an argument of this nature in justifying the basic liberties protected by his first principle of justice.[76] He contends that the liberties that are to be regarded as basic are those which are necessary to the exercise and development of the moral

[74] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 224).

[75] Compare responsibility for the returns from investment luck with taking responsibility for gambling luck: Suppose the rate of taxation on gambling profits is set at 33%. A gambler knows that any winnings he has will be taxed at this rate. How can he be said to be any more or less responsible for the return on his winnings if the taxation rate is set at 33% rather than at 25% or at 50%?

[76] *See* JOHN RAWLS, *Lecture VIII: The Basic Liberties and Their Priority*, *in* POLITICAL LIBERALISM: EXPANDED EDITION 289, 290 (Columbia Univ. Press 2005) (explaining "how the basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods").

powers to be rational and reasonable.[77] Since the moral powers are capacities for practical reasoning and for moral and rational agency, it could be said that the basic liberties are those that fully promote individuals' capacities to be responsible agents and take responsibility for their choices. Rawls, in his argument for distributive justice and the difference principle, does not make any such argument that directly refers to optimal conditions for development and exercise of the moral powers.[78] Nor do I detect any suggestion of this kind of argument for market distributions based on investment luck in Dworkin's texts. For example, Dworkin clearly is not proposing a scalar account of the degrees of individual responsibility and contending that this measure is maximized only when investors receive the full market returns due to investment luck. In any case, I do not think this could be a successful argument. For once an adequate social minimum is provided enabling people to take responsibility for their choices and their lives, as it is in both Dworkin's and Rawls's accounts, the idea of optimal conditions for exercising the capacities for agency and responsibility does not seem to be fine-tuned enough to choose between alternative liberal theories of distributive justice.

We still lack a definite connection between taking responsibility for one's choices and a fundamental right to the product of investment choices and one's adjusted market return. I argued earlier that paying the value or opportunity costs to others of one's choices is not adequate to forge this connection.[79] We pay our opportunity costs so long as the market is used to allocate factors of production and determine prices of goods and services. Taking responsibility for and paying the costs to others for one's choices does not then uniquely single out a particular theory of distributive justice (though it may exclude a wide range). It is compatible with equality of resources and the capitalist welfare state Dworkin defends, but also with a property-owning democracy or liberal socialist system that satisfies the difference principle, and perhaps even a classical liberal system set up to satisfy the principle of utility. If paying one's opportunity costs cannot provide sufficient justification for adjusted market distributions and a person can be made to pay the costs of her choices to others in a range of economic systems, then it is difficult to see what there can be about a "patterned" or (purportedly) "ex post" principle, like the difference principle, that fails to guarantee the "right respect for personal responsibility."[80]

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[77] *Id.* at 293.

[78] Rather, to justify the difference principle, Rawls relies on considerations of reciprocity and stability of cooperation among free and equal citizens in a democratic society. *See* RAWLS, *supra* note 53, at 122-26.

[79] *See supra* Part I.

[80] Here it is important to distinguish the difference principle from the principle of utility. Dworkin calls them both "ex post" theories. DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1 (manuscript at 224). He might mean that they are both "end-state" principles, in Nozick's sense, in that they describe a state of affairs that is to be promoted or maximized (subject to

To conclude this discussion, Dworkin contends that, since market prices are the combined effect of peoples' choices, then, unlike the good or bad brute luck that nature or accidental circumstance imposes upon us, the option luck of market outcomes should define "the parameters of justice."[81] I have raised the question: Why should distributions to people that exceed Dworkin's socially assured baseline be entirely the product of their option luck in the market (plus proceeds from gifts and gambles) any more than the product of their brute luck? Like libertarianism (though clearly in a more humane way), Dworkin allows distributions after a point to be decided by the accidental accumulated results of many separate and ostensibly fair transactions, social trends, historical contingencies, and the sum of innumerable historical choices. This does not mean that "option luck" should not affect distributions. People should be free to take economic risks, and for most risks they choose, they should be held responsible for the outcome, even if they did not desire it and are met with misfortune. Taking risks and accepting the consequences is a normal part of life. Thus if a person wants to gamble away the income she is entitled to once she has received her fair distributive shares, or spend all her income for some expensive good in high demand like plovers' eggs (Dworkin's famous example), she should be held responsible and should not be compensated for her foolishness or expensive tastes.[82] (This assumes her basic needs for nutrition, shelter, and medical care are met.) The point rather is that the *benchmark* for the distributive shares and entitlements that each person is due as a matter of distributive justice should not be determined by market contingencies and the accidents of whether or how much one is chosen – or not

relevant constraints, such as Rawls's principle of equal basic liberties). *See* NOZICK, *supra* note 12, at 153-55, 172. But to regard the difference principle in this way is a misconception. Rawls says that the difference principle is part of a "social process" account, which makes distributive justice a matter of "pure procedural justice." *See* JOHN RAWLS, *Lecture VII: The Basic Structure as Subject*, *in* POLITICAL LIBERALISM: EXPANDED EDITION, *supra* note 76, at 282. It specifies a system of economic procedures and institutional rules, which, once complied with, result in distributions that satisfy the difference principle. Unlike "ex post" or "end-state" principles such as the principle of utility or other consequentialist principles, the difference principle does not say that we should go back ex post and readjust distributions that result from this process at the end of each term so as to correct them by maximizing the amount going to the least advantaged. Rawls contrasts his "ideal social process" conception with the "ideal historical process" view of Nozick, which says that whatever distribution results from market and other consensual activity is just, and requires no adjustments over time or even across generations. *See* RAWLS, *supra* note 53, at 52-53. Dworkin's equality of resources, since it allows for the regulation of markets and adjustment of market distributions, also seems to be a social process view like Rawls's, rather than an historical process view like Nozick's.

81 DWORKIN, SOVEREIGN VIRTUE, *supra* note 1, at 298-99 ("Other people's needs and opinions are not resources that can be justly or unjustly distributed among us; they are . . . part of what we must take into account in judging what injustice is or what justice requires.").

82 *See id.* at 49-52.

chosen – by others in market transactions, any more than it should be determined by natural contingencies and other fixed "endowments" or contingencies resulting from "brute luck." If there is sufficient reason to allow people to profit from undeserved inequalities and contingencies (as there is, for example, under Rawls's difference principle) then it seems to matter little whether these inequalities are the result of market contingencies and other forms of option luck, or natural endowments and other kinds of brute luck. The concept of personal responsibility for choices, I have argued, is not sufficiently robust to supply reasons that justify rewarding or holding people responsible for whatever happens as a result of option luck but not for the consequences of brute luck.

CONCLUSION: PERSONAL RESPONSIBILITY AND THE BASIC STRUCTURE

Dworkin's equality of resources is the most sophisticated justification we have of democratic welfare state capitalism. Unlike utilitarian and other consequentialist arguments, Dworkin secures equality of democratic political rights and civil liberties, and social and economic opportunities, in a way that guarantees that no one's rights will be compromised. Moreover, as opposed to libertarian and classical liberal positions, he humanizes capitalism by protecting people against unfortunate consequences of natural and social contingencies, as well as providing for a wide range of public goods. Our nation would be far more just if it realized equality of resources in its political and economic institutions. My concern has not been to question any of these primary features of Dworkin's egalitarian vision, but rather to raise some questions regarding the permissible bases for economic inequalities of income and wealth that he allows. Unlike libertarians and classical liberals, Dworkin does not try to justify the permissible inequalities of market distributions by appealing to an account of absolute property and contract rights (Nozick, et al.),[83] or economic efficiency and maximizing economic output (Posner, Gauthier, et al.).[84] Rather he appeals to the concept of personal responsibility and holding people responsible for their choices. Since the free market system allows freedoms of occupation, contract, entrepreneurship, and consumer choice, and also requires people to pay the cost of their economic choices to others, it holds economic agents responsible for their choices in a way that is unmatched by any other economic system. My primary claim has been that, all this can be true, and still the concepts of personal responsibility and holding people responsible for their choices do not justify using markets and market contingencies as a benchmark for determining permissible inequalities and just distributions of income and wealth.

I have argued then that holding people responsible for their market choices does not mean that they should be assigned income rights to returns on

[83] *See, e.g.*, NOZICK, *supra* note 12, at 171 ("My property rights in my knife allow me to leave it where I will, but not in your chest."); *see also* sources cited *supra* note 6.

[84] *See, e.g.*, Posner, *supra* note 72, at 105; *see also* GAUTHIER, *supra* note 12.

whatever good investment luck or other forms of option luck they enjoy; nor should they be held wholly responsible for whatever bad economic consequences result or transpire as a matter of their market choices and bad market luck. Dworkin has not yet forged a link between personal responsibility and market distributions, and it is hard to see how it can be done with the idea of taking responsibility for one's choices alone. For like the idea of each person's "contribution" to market activity, the idea of what each is responsible for is a secondary concept that presupposes a legal and institutional background which itself requires justification. There are different conceptions of taking personal responsibility for one's economic choices provided by differing institutional arrangements. People in laissez-faire capitalist, welfare state capitalist, property-owning democracy, and liberal socialist economies all are expected to take responsibility for their own lives and choices within the market framework provided by those systems; each can have different economic rights and powers, duties and responsibilities that follow from their economic choices depending upon the specification of property rights and duties and other institutional arrangements. It is an institutional artifact of the property rules of capitalist economies that gives to owners of economic assets full or adjusted rights to the income that stems from their investment luck, just as it is an institutional fact about capitalist (or other) economies that determines the rights of gamblers to full or adjusted returns from their gambling luck.

In any economic system with private property in productive resources, the decision has to be made regarding what share of investment income on assets should go to those who are legally regarded as owners. This question cannot be answered, I believe, by focusing on the concept of individuals' responsibility for their economic choices. The important question rather is: What is the institutional framework and other background conditions within which individuals choices are made, and what are their consequences for members of society? This is why the specification of the rights and other incidents of property in its many forms, including rights of income that stem from market activities, should be among the first questions of justice.