The Dilemma of Moral Commitments in Addressing Inequality

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Abstract: The standard approach in law and economics is to ignore lay moral commitments to fairness and instead focus on adopting efficient policies to maximize the size of the economic pie and then redistributing with cash taxes and transfers. But many ordinary people do not think that way. Rather, they have policy-specific moral commitments. This Article discusses the dilemma these moral commitments create for policy to address income inequality. Many traditions suggest the importance of considering fairness in policy design. This Article argues that there are many reasons that law and economics, *as economics*, should consider moral commitments in policy design. Otherwise, with too narrow a view, law and economics is severely handicapped in helping to understand how to address today's crisis of inequality.

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Introduction

As policymakers confront widespread alarm[1] about inequality, law and economics has often not seemed up to the task. The standard law and economics cookbook is thin: first, adopt efficient non-tax policies to maximize the size of the economic pie and, second, redistribute with cash taxes and transfers. But many ordinary people do not think that way. Rather, they have policy-specific moral commitments:[2] durable, considered views that, for example, people have a right to health care, regulatory cost-benefit analysis should value all lives equally, and taxation should roughly reflect the benefit that taxpayers get from the government. This Article expands the law-and-economics cookbook. Evidence is accumulating that people care about the means distribution beyond cash income,[3] meaning that the typical analysis fundamentally misconceives the problem of inequality by driving moral commitments to fairness to the periphery rather than placing them at the core of the problem.[4] Trying to address inequality without considering laypeople's moral commitments to fairness is risky; rather, this Article explores how those commitments might matter for policy. The standard view has hamstrung economic analysis of the policy response to inequality by excluding all policy other than taxes and transfers from the

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[1] *See, e.g.*, PEW RESEARCH CENTER, THE GENERATIONAL GAP IN AMERICAN POLITICS 18 (2018), http://www.people-press.org/wp-content/uploads/sites/4/2018/03/03-01-18-Generations-release.pdf (noting that 62% of survey respondents felt that the U.S. economic system unfairly favors powerful interests, and 82% felt that income inequality in the U.S. was either a very big or moderately big problem); David Remnick, *Alexandria Ocasio-Cortez's Historic Win and the Future of the Democratic Party*, NEW YORKER (July 23, 2018), https://www.newyorker.com/magazine/2018/07/23/alexandria-ocasio-cortezs-historic-win-and-the-future-of-the-democratic-party (quoting Alexandria Ocasio-Cortez as saying, "I do think we are in a crisis of late-stage capitalism, where people are working sixty, eighty hours a week and they can't feed their families). Republicans, too, have increasingly expressed concern about rising inequality, even before President Trump's populist rhetoric during the 2016 campaign. For example, Mitt Romney, Jeb Bush, and Rand Paul all complained about the continuing rise in inequality during the Obama presidency. *See* Catherine Rampell, *Republicans Have Started to Care About Income Inequality*, WASH. POST (Jan. 22, 2015), https://www.washingtonpost.com/opinions/catherine-rampell-republicans-have-started-to-care-about-income-inequality/2015/01/22/f1ee7686-a276-11e4-903f-9f2faf7cd9fe_story.html?utm_term=.92d3a15e5c57.

[2] The Article focuses on moral commitments held by substantial numbers of laypeople in the population affected by a policy—enough to substantially affect well-being under the mechanisms described in the paper. But the aim of the Article is only to make coarse points about moral commitments; precise statements about questions such as how many laypeople need to hold a view for it to matter are beyond the scope of the Article.

[3] STEVE SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE (2013); Jimmy Charite, Ray Fisman, and Ilyana Kuziemko, *Reference Points and Redistributive Preferences: Experiment Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 21009, 2016); Ray Fisman, et al., *Do Americans Want To Tax Capital? Evidence from Online Surveys*, (Wash. Ctr. Econ. Growth, Working Paper, 2017); Matthew C. Weinzierl, *A Welfarist Role for Nonwelfarist Rules: An Example with Envy* (Harv. Bus. Sch. Working Paper No. 17-021, 2017); Matthew C. Weinzierl, *The Promise of Positive Optimal Taxation: Normative Diversity and a Role for Equal Sacrifice*. 118 J. PUB. ECON. 128 [p. #] (2014); Matthew C. Weinzierl, *Popular Acceptance of Inequality Due to Innate Brute Luck and Support for Classical Benefit-based Taxation,* 155 J. PUB. ECON 54 __ (2017).

[4] *See also* GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS 41-47 (2016) (arguing for the importance of merit goods in law and economics). This Article connects such sentiments—when they arise from lay moral commitments—to the literature on tax policy.

get-go. We are now awash in policy proposals to address income inequality that do not stick to the standard cookbook,[5] but are often without good economic tools to evaluate them. Considering moral commitments can help sort through the thicket.

Of course, law and economics has been critiqued at length from outside of economics for its narrow normative frame.[6] This Article argues that standard law and economics is misguided from the internal perspective of economics itself. In so doing, this Article puts in conversation two strands of the economics and legal literature. The first is the standard view in law and economics that cash is king for redistribution: all redistribution should take place through taxes and transfers—that is, cash. Economic policy analysis is typically framed as a tradeoff between equity and efficiency.[7] That analysis usually involves asking: among all policies, what policy best achieves distributional outcomes for a given cost to efficiency? The standard answer given by "optimal tax theory" is that cash taxes and transfers[8] are the most efficient at achieving redistributive goals by giving recipients the maximum choice over how to spend their resources. Thus, to create the biggest pie from which to redistribute, taxes should address distribution and all other policy should be "efficient."[9] That is, policy should maximize parties' willingness to pay given existing levels of wealth. For example, provide a service to people if and only if they would be willing to pay for them if charged—and, if people are unwilling to pay, then that's fine because they have fair resources through taxes and cash transfers. The issue is not that they are too poor to pay, but that they prefer not to spend on this particular service.[10].

The second strand is a growing literature on the economics of taxation demonstrating lay moral commitments inconsistent with the often-unacknowledged underbelly of law and economics: optimal tax theory[11]—that is, the cash transfers that would have to take place to achieve distributional goals. This new critical literature, heavily inflected with behavioral economics, is based principally on two observations: (1) We now have a more precise understanding of what "optimal taxes" would look like under the conventional economic

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[5] See, e.g., Paul Krugman, *Health Reform Myths*, NY TIMES (Mar. 11, 2010), https://www.nytimes.com/2010/03/12/opinion/12krugman.html (claiming that, from a policy perspective, Medicare-for-all – an in-kind benefit – would be preferable to a system of subsidized private insurance as created by Obamacare); Lawrence H. Summers, *It's Time to Balance the Power Between Workers and Employers*, WASH. POST (Sept. 3, 2017), https://www.washingtonpost.com/opinions/lawrence-summers-its-time-to-balance-the-power-between-workers-and-employers/2017/09/03/b1c9714e-901e-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.4b5851a9b7b2 (urging labor law reform as a tool to combat rising income inequality).

[6] *See, e.g.*, ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 9 (1996); 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); Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005).

[7] STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2-3 (2004); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 127 (2d ed. 1989); JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY __ (4th ed. 2014); ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975) (introducing the "leaky bucket").

[8] As the Article will explain, the standard claim is more than that cash taxes and transfers need to do the redistribution. It is actually furthermore that those cash taxes and transfers must be of a particular form. See __ infra.

[9] Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter *Redistributing Income*].

[10] But see Liscow, *Is Efficiency Biased?*.

[11] *See, e.g.,* Marc Fleurbaey and François Maniquet, *Optimal Income Taxation Theory and Principles of Fairness,* 56 J. ECON. LITERATURE 1029 (2018) (describing recent economics literature on how the social welfare function can incorporate principles of fairness into optimal tax theory).

reasoning—and how wildly far off from reality these predictions are. For example, one leading estimate suggests that every person should receive a $12,000 check from the government, which—notwithstanding recent discussion of a universal basic income—no developed country comes close to doing.[12] (2) Careful survey experiments suggest that not only does reality conflict with standard optimal tax theory but so do many people's considered moral views. People care about the process or means of distribution, not just how much money everyone ends up with in the end.[13] In particular, many people view fair taxes in part as those corresponding to the benefits that one receives from government, rather than as a tool of redistribution.[14]

The Article reassesses law and economics in light of this new evidence from the economics of taxation. In particular, if the tax policy needed to achieve fair distributive results conflicts with moral commitments limiting redistribution, then it is also worth considering policy-specific moral commitments in the panoply of *nontax* policies that could be used to address redistribution: health care spending, parental leave policies, regulatory cost-benefit analysis, tort law, and so on. In other words, if tax policy either should or does durably reflect moral commitments, then other legal rules should too. This may often mean that adopting in-kind nontax policies (e.g., government provision of healthcare, paid maternity leave, childcare benefits, transportation spending that is equal in rich and poor areas, etc.) that appear inefficient under the standard logic but that are fair according to lay moral commitments.

The path forward from this dilemma is not an easy one, but the Article explores three reasons to respect moral commitments. The first is that these category-specific moral commitments might be true preferences that deserve moral weight. For example, many may actually be willing to pay through a smaller pie to distribute health care instead of cash. Second, even when moral commitments result from bias or confusion, they might form durable political constraints on the means of redistribution, suggesting that some means are more politically feasible at achieving welfarist ends than others. For example, it may be sheer bias to give pretax income moral weight, but ignoring that common view in policy design could be welfare-decreasing. Third, in areas where the facts are unclear, lay views on fairness may reflect knowledge arising from the lives of ordinary people that can help inform experts. For example, they may sense from their own interactions with others that the unemployed search irrationally little for work or that they are too reluctant to gain health care on their own. Or it may simply be difficult to monitor politicians' aggregate behavior, justifying a focus on fairness on a policy-by-policy basis. Any of these grounds can provide a rationale for individuals' moral commitments mattering in policymaking. As a result, one can believe that moral commitments matter at a coarse level while remaining agnostic as to *why* they matter, even as the interpretation matters for the policy specifics.

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[12] James A. Mirrlees, *The Theory of Optimal Taxation*, in 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1197 (Kenneth J. Arrow & Michael D. Intriligator eds. 1986) (describing the classic treatment); N. Gregory Mankiw, Matthew Weinzierl, & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147 (2009) (summarizing the literature); Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: from Basic Research to Policy Recommendations*, 25 J. ECON PERSP. 165 (2011) (disagreeing with some aspects of Mankiw, Weinzierl & Yagan, but establishing many points of consensus).

[13] Jimmy Charite, Ray Fisman, and Ilyana Kuziemko, *Reference Points and Redistributive Preferences: Experiment Evidence*.(Nat'l Bureau of Econ. Research, Working Paper No. 21009, 2016); *see also* Richard H. Thaler, *Anomalies: Saving, Fungibility, and Mental Accounts*. 4 J. ECON. PERSP. 193 (1990) (arguing mental accounts prevent people from thinking about money as fungible across types of wealth).

[14] See sources cited in note 3, supra. *See also* ELAINE G. WALSTER, WILLIAM WALSTER & ELLEN BERSCHEID, EQUITY: THEORY AND RESEARCH 10 (1978).

The Article makes the uneasy case for incorporating moral commitments into the design of policy to address income inequality. There are two main implications: First, law and economics should be less certain about policy recommendations in the face of contrary widespread moral commitments. Second, where evidence is available of widespread moral commitments, policy should reflect that. And in particular non-tax tools traditionally considered inefficient means of addressing inequality become more palatable under this approach. This conclusion is uneasy, but this approach is better than the extreme alternatives of ignoring moral commitments in policy design or ignoring normative economic analysis altogether, since both ignore analysis of likely welfare-improving policy changes.

Before moving on, I need to make several things first clear. First, this Article adopts the standard utilitarian or welfarist perspective of economics. But I do not claim that the only moral principle is welfare. For example, egalitarian principles, like those against racism or sexism, are also important. But the relation of these other principles to welfare is beyond the scope of the Article. Second, I do not claim either that it is easy to discern deep moral commitments or that people even have well-defined deep moral commitments in all cases. Rather the claim is that there is a plausible case that *some* moral commitments can be discerned at a coarse level and that they can be discerned using a host of evidence, including survey experiments, deliberative polling, and existing institutions. Third, a maintained hypothesis underlies the argument: that these commitments to fairness are important to people. That is, to a large extent, an empirical claim—one on which more testing would be valuable. Finally, the goal here is not to supplant politicians but rather to improve the policy advice given to them by, where appropriate, incorporating moral commitments or, where appropriate, forbearing and acknowledging greater uncertainty about the best policy.

The Article proceeds as follows. Section I describes the standard view of the way to address distribution in law and economics: "optimally" redistributive taxes and efficient non-tax legal rules. Section II describes the puzzles created by common moral commitments that are inconsistent with the standard view. Section III discusses possible interpretations of moral commitments and the three reasons that they might matter for policy: as true preferences, political constraints, and embedded knowledge. Section IV discusses two possible responses to moral commitments that do not incorporate them and argues that incorporating them into policy to address income inequality is better. It also addresses concerns with doing so. Section V begins considering how to incorporate moral commitments into analysis.

I. The Standard View in Law and Economics: "One-Pieism"

The goal of the Article is to improve how law and economics recommends policies. It takes the standard economic perspective that the ultimate aim is maximizing welfare. In taking a "welfarist" or "utilitarian" perspective, I mean measuring societal well-being with reference to individuals' subjective well-being.[15] The method estimates each individual's well-being and aggregates those well-beings.[16] The goal is to neutrally aggregate people's preferences to

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[15] Ronald Dworkin draws a distinction between "psychological" and "preference" utilitarianism, the first (advanced by Bentham) based on subjective well-being and the second (advanced by many modern economists) based on satisfaction of preferences. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 233 (1977). I take the standard modern approach of focusing on preference satisfaction.

[16] *See* ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 117-22, 817-50 (1995).

recommend the solution that is best for society.[17] Much of the prestige and power of economics comes from the notion that it is not imposing its own value system, but rather respecting people's preferences and finding the policies most effective at satisfying them.[18] The idea is to look across all policies and figure out those that maximize well-being—to choose the "optimal" set of policies. This Article adopts this ultimate aim and this approach. The goal of the Article is to describe how to do it better. This Section describes how this analysis is typically conducted in law and economics now.

The standard approach to the analysis in economics, especially law and economics, is what I call "one-pieism"—the idea that there is one economic pie to be maximized consisting of perfectly commensurable stuff, rather than separate pies for cash transfers, health care, treatment by tort law, and the panoply of other in-kind government provisions and regulations. The goal of government policy is to find the most "efficient" way—across all possible means—to arrive at a just distributive end. In other words, all that matters are the size and distribution of the slices, not what's in the pie, since all policy ingredients to the pie are perfectly commensurable. In this framework, the standard argument is that taxes and transfers are the most efficient means of redistributing.[19] All other policies should be efficient.

The one-pieist argument proceeds in two steps—first, efficient non-tax policies, and second, "optimal" taxes. Efficient non-tax policies are those that maximize individuals' willingness to pay given the existing distribution of wealth.[20] When measuring efficiency, all that matters is each individual's atomistic willingness to pay to avoid harm and bring benefits to herself, and then the appropriate amount of public good is provided or penalty is enacted. Notions of "fairness" in process typically do not matter.[21] The most famous version of the argument in law and economics is that of Kaplow and Shavell, who argue that there is a "double distortion" whenever a legal rule deviates from being efficient.[22] They take the example of a torts rule and ask whether the rich and the poor should be treated differentially—for example, if a rich person harms a poor one, should damages be higher than if the situations were reversed—or whether instead the rule should be "efficient," with rich and poor treated alike. They argue that any deviation from the efficient rule would lead to a "double distortion" in that there are two distortions under the differential treatment of the rich and the poor. First, if the damages paid for the injury exceed the actual harm, then there will be inefficiently little of the harm. And, second, because the rich pay larger damages when they get richer, they de facto pay an income tax through the tax system. Thus, the two parties—rich and poor—should strike a Pareto-improving trade: an efficient tort rule that does not distort harm-causing behavior, and the rich will pay

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[17] N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 145 (7th ed. 2015); *see also* Marion Fourcade et al., *The Superiority of Economists*, 29 J. ECON. PERSP. 89, 107-08 (suggesting that economists tend to "mak[e] it their mission to maximize the welfare of ordinary people," with a "fix it" culture and "an orientation toward policy adjudication and advice, and a distinctive willingness, even eagerness to serve and intervene.").

[18] *See, e.g.*, Robert L. Heilbroner, *Economics as a "Value-Free" Science*, 40 SOC. RES. 129 (1973), http://www.jstor.org/stable/40970129. *But see* THE END OF VALUE-FREE ECONOMICS (Hilary Putnam & Vivan Walsh, eds., 2012).

[19] Kaplow and Shavell, *Redistributing Income*, *supra* note __. Even more stringently, the taxes need to be on labor income. Alan J. Auerback & James R. Hines Jr., *Taxation and Economic Efficiency*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1347 (Alan J. Auerbach & Martin Feldstein eds. 2002) (describing the Atkinson-Stiglitz result that, under a certain set of assumptions, there should be no taxes on capital).

[20] *See* Liscow, *Is Efficiency Biased?*, *supra* note __ at ___.

[21] Of course, there are exceptions. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy*, 2 AM. L. & ECON. REV. 223 (2000).

[22] Kaplow and Shavell, *Redistributing Income*, *supra* note __.

more in taxes that will be received by the poor. In other words, a deviation from the efficient policy gives the poor something that they are not willing to pay enough for—safety—relative to the amount that the rich would be willing to pay to the poor directly in cash through the tax system to avoid the deviation from the efficient rule. This two-step analysis has a more common lay description: it's best to maximize the size of the pie and then divide it up equitably. One sees such reasoning, for example, in the context of international trade: we should have free trade, maximize the size of the pie, and then divide up the pie to achieve a fair distribution.[23]

Deviating from this logic in the name of "fairness" of process would lead to Pareto failures, so the argument goes. Suppose people are deemed to have a "right" to healthcare or a clean environment. The response is that, if recipients would value health care or a better environment at less than the equivalent cash transfer, the government can make everyone better off by redistributing through a labor income tax instead.[24] The essential logic behind using taxes and transfers, rather than in-kind benefits, regulation, or other non-tax policies, is that—if people are willing to pay for something (and markets are working reasonably well), then they can buy it themselves with cash. Individuals can buy health insurance in a market or rent an apartment in an area with good environmental quality. To help out the poor through in-kind benefits is inefficient because they might value the cash more, since they might prefer to spend it on other things. Instead, non-tax policies should be efficient, and cash taxes and transfers should bear the full redistributive burden. Thus, cost-benefit analysis should allocate more pollution to poorer people because they are willing to pay less for environmental health. There should be no social spending (e.g. on health care) or regulations aimed at helping out poor people for non-efficiency reasons. And so on. In short, one-pieism leaves little room for law to address inequality—unless it's just an incident to increasing efficiency.

The standard story thus involves "one pie" in boiling down policy to a pie made up of the willingness to pay of an individual for the slice of harms, public goods, and income that she receives.[25] The moral commitments of the general population about what is in others' slices (health care and environmental health versus bananas and automobiles) do not affect the size of the slice. And the process by which the final arrangement comes about—whether people, say,

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[23] *See, e.g.*, N. Gregory Mankiw et al., *An Open Letter*, GREG MANKIW'S BLOG (Mar. 5, 2015), http://gregmankiw.blogspot.com/2015/03/an-open-letter.html (open letter from more than a dozen prominent economists to congressional leaders arguing that "[t]rade is beneficial for our society as a whole, but the benefits are unevenly distributed" yet "economy-wide benefits resulting from increased trade provide resources[,]" which can be used to "help[] those who are adversely affected"); Robert Whaples, *The Policy Views of American Economic Association Members: The Results of a New Survey*, 6 ECON. J. WATCH 337, 340 (2009) (finding support among economists for the position that the U.S. should continue to liberalize trade and increase support for affected workers).

[24] Though this is the dominant view, there have been a variety of internal critiques to this view as well. *See* Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2481 & n.7 (2013) (collecting citations); Chris Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View,* 29 J. LEGAL STUD. 797, 805-06 (2000); *see also* Chris Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001).

[25] Behavioral law and economics has already begun questioning the extent to which revealed preferences can be used as a means of uncovering individuals' "willingness to pay" for the purpose of measuring efficiency. See, e.g., Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471 (1998). However, there has been little work discussing how non-standard views affect distributive issues in the law. One exception is Christine Jolls's paper *Behavioral Economics Analysis of Redistributive Legal Rules*, which offers some examples of how behavioral failings might impact the design of redistributive legal rules. 51 VAND. L. REV. 1653 (1998). This Article, in contrast, develops the hypothesis that the entire approach to distribution in law and economics is flawed and begins developing an alternative paradigm.

have income because they worked for it or because they received it from the government[26]—also does not affect the size of the slice.

After those efficient non-tax policies, the second step is then to take the economic pie and divide it up equitably. This *overall distribution* of the economic pie is the one place where lay moral commitments are sometimes taken to matter.[27] "Optimal" taxes use a social welfare function that aggregates individuals' utilities to determine the taxes that each person pays based on that person's income. The goal is to raise a given amount of money for public goods while also "redistributing" income from the rich to the poor. The traditional logic then contains embedded in it a political assumption that these taxes and transfers actually do happen.[28] The "efficient non-tax policies" prescriptive element depends upon these taxes and transfers happening; if they do not, then it is welfare-maximizing to achieve income redistribution through legal rules as well, as legal rules are needed to help pick up the redistributive slack. The standard story thus requires "one pie" in a second way: the political process in fact treats distribution through various means the same way. Whether the pie consists of government-provided child care or taxes and transfers or guaranteed environmental quality, policy will ultimately arrive at the same distributional outcome, so that it makes sense to maximize the size of the pie before dividing it up.

Economics scholars have studied what it would actually take to achieve a utility-maximizing distribution of income, given the behavioral response to taxation,[29] though optimal taxation has received little notice in the legal literature outside of tax scholars themselves.[30] This section describes what the implications of achieving utility-maximizing redistribution through taxation alone would actually look like. Redistribution, as noted above, is driven by the poor's higher marginal utility of consumption. But redistribution does not fully equalize income because, under such a redistributive scheme, incentives to work would be so dulled that aggregate wealth, and therefore welfare, would actually decrease because there is less to redistribute to the poor. A key aspect of the "optimal" tax is that only two factors determine it: people care about their own income, and there is some social weight attached to redistributing income toward the poor. Of course, there is no exact agreement on what an "optimal" utilitarian income tax would look like.[31] However, there is broad agreement on several features.[32]

First, optimal tax theory typically predicts that there is a large cash "demogrant" (essentially, a universal basic income) of several thousand dollars, though the exact size is

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[26] Of course, the fact that working for money involves costly labor would be factored into the analysis. But the income itself would be treated the same.

[27] KAPLOW AND SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note __ at__ .

[28] Liscow, *Is Efficiency Biased?*, *supra* note __ at ___; Lee Anne Fennel & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2015).

[29] James A. Mirrlees, *The Theory of Optimal Taxation*, in 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1197 (Kenneth J. Arrow & Michael D. Intriligator eds. 1986) (describing the classic treatment); N. Gregory Mankiw, Matthew Weinzierl, & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147 (2009) (summarizing the literature); Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: from Basic Research to Policy Recommendations*, 25 J. ECON PERSP. 165 (2011) (disagreeing with some aspects of Mankiw, Weinzierl & Yagan, but establishing many points of consensus).

[30] For an example of tax scholars' discussion of optimal taxation, see Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987).

[31] See, for example, the debate between Mankiw, Weiznerl, and Yagan on one side and Diamond and Saez on the other. N. Mankiw, Weinzierl, & Yagan, *supra* note ___ at 155-59; Diamond & Saez, *supra* note ___ at 175-77.

[32] Mankiw, Weinzierl & Yagan, *supra* note ___ at 155-59; Diamond & Saez, *supra* note ___ at 175-77.

unclear.[33] This demogrant goes by many names, but receives support from the left and the right. For example, Milton Friedman long advocated for such a "negative income tax," a universal basic income by a different name.[34] Most recently, a sophisticated estimation by economist Emmanuel Saez suggest that there should be a demogrant of $11,900 (in 2018 dollars).[35]

Second, the demogrant is taxed away at fairly high marginal tax rates for low income-earners. The reason is that lots of taxpayers earn *at least* small amounts of income, so taxing this portion of the income of most taxpayers will raise a lot of money without distorting behavior, since most taxpayers will earn well beyond that amount in any case.[36] Nevertheless, this creates a large disincentive to work for low-income taxpayers—indeed, Saez estimates that there would be an unemployment rate of 13.8% because of the large demogrant and high taxes on the poor. The disincentive to work for lower-income earners is worth incurring because of the taxes collected on higher-income earners. In some models, marginal tax rates even go down somewhat for higher income-earners; high marginal taxes on the rich are a double-edged sword. On the one hand, the rich have a lower marginal utility of consumption, suggesting higher marginal taxes on the rich. On the other hand, high marginal taxes on high incomes raise money from few people (because few people earn high incomes), but still distort behavior, suggesting lower marginal tax rates on the rich.[37] Other models do not imply that taxes go down with income, but still have high taxes on lower-income workers; for example, Saez's model has 37% marginal tax rates on the poorest earners in a model that actually leans against high marginal tax rates on the poor.[38]

Third, optimal tax theory says that, as inequality increases, taxes should become more redistributive.[39] That is, as the share of income earned by those with the highest incomes goes up, their tax rates should go up.[40] This makes sense: as the rich get richer, their marginal utility of consumption declines yet more, making it worth taxing them more.

And, fourth, fixed attributes of people should be "tagged"[41] to observable characteristics correlated with earnings ability.[42] That is, for two taxpayers earning the same income, the one with the characteristics correlated with having higher "ability," like height, should be taxed more.[43] Taxation based on income distorts behavior because it incentivizes people to earn less than they otherwise would. In contrast, taxation based on *fixed* characteristics that are correlated

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[33] Emmanuel Saez, *Optimal Income Transfer Programs: Intensive versus Extensive Labor Supply Responses,* 117 Q. J. ECON. 1039, 1059-66 (2002).

[34] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962), http://circuloliberal.org/livros/capitalismo-e-liberdade.pdf; Robert Moffitt, *Welfare Work Requirements with Paternalistic Government Preferences*, 116 ECON. J. F441, F441 (2006).

[35] Saez, *supra* note ___ at 1060 tbl. 1 pnl. B (showing a guaranteed income of $7,300 in 1996 dollars). If anything, this demogrant estimate is small, given recent estimates. *See* Raj Chetty, *Bounds on Elasticities with Optimization Frictions: A Synthesis of Micro and Macro Evidence on Labor Supply*, 80 ECONOMETRICA 969, 1008 (2012) (showing that the average estimate of the extensive margin elasticity is 0.25, which would imply an even larger demogrant than the one described in text above).

[36] In technical terms, the best way to raise money from middle and high-income earners is to have high tax rates on their "inframarginal" earnings, the dollars that they earn that are far from their decision-making margin.

[37] Saez, *supra* note ___ at 1061; Mankiw, Weinzierl, & Yagan*, supra* note ___ .

[38] Saez, *supra* note ___ at 1061.

[39] Mankiw, Weinzierl, & Yagan*, supra* note ___ at 159-61; Diamond & Saez*, supra* note ___ at 189.

[40] SHEFFRIN, *supra* note ___ at 130-31(2013).

[41] The idea originally comes from George A. Akerlof, *The Economics of "Tagging" as Applied to the Optimal Income Tax, Welfare Programs and Manpower Planning*, 68 AM. ECON. REV. 8 (1978).

[42] Mankiw, Weinzierl, & Yagan*, supra* note ___ at 161-64; Diamond & Saez*, supra* note ___ at ___.

[43] N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution*, 2 AM. ECON. J.: ECON. POL'Y 155 (2010).

with earnings ability still partially taxes those who can earn more but reduces the distortion because the fixed characteristics cannot be changed. In the extreme, if the government were omniscient, it could tax based on knowledge of an individual's ability and not cause any distortion at all, since people would not be able to reduce their tax burden by changing their behavior.

The result of this two-step is what I call "one-pieism:" the idea that there is one economic pie to be maximized, and the goal of distributive government policy is to find the most "efficient" way to achieve a given distributive end. The goal is merely to have an efficient level of harm to atomistic individuals while achieving a fair ex post distribution of dollars among those atomistic individuals. In other words, it is the idea that tax and non-tax policies with the same distributive impact perfectly substitute for each other in solving the distributive problem because all that matters is the size of the slice of pie that each person has. The next Section shows how such a view leads to puzzles when confronted with commonly-held moral commitments.

II. The Distributive Problem with Moral Commitments: Some Puzzles

The standard view leads to puzzles when confronted with moral commitments to fairness.[44] Without attempting to be comprehensive, this Section describes some of those puzzles. First, it describes ways in which the standard optimal tax model conflicts with lay moral commitments. Then, it describes ways in which the standard efficiency view for legal rules can do so as well. These puzzles should make us uneasy about whether the dominant paradigm truly yields analysis that closely tracks social welfare and is helpful for solving the problem of inequality. Later sections return to potential ways to address these puzzles.

A. Moral Commitments and Taxation

The previous section described the standard approach in "optimal" taxation—the welfare-maximizing distribution through taxes under a set of one-pieist assumptions that then allows non-tax legal rules to be "efficient." This subsection describes the major ways in which the standard optimal tax model differs from common moral commitments to fairness. Evidence comes from two sources: first, survey experiments suggesting that large numbers of people do not have welfarist moral commitments regarding taxes, and second, existing institutions, which (though not unproblematically) can be taken to reflect moral commitments if durable and widespread enough.[45]

There are many moral commitments that are potentially important. Regarding taxes, one stands out: recent evidence from Matthew Weinzierl, Steve Sheffrin,[46] and others suggests that a lot of people don't view taxes in exclusively welfarist terms. Rather, many at least partly view taxes with a kind of "everyday libertarianism:" people should pay taxes because of the benefits they receive from the government, rather than only because the goal is to redistribute from the rich to the poor. Sheffrin writes,

> [o]ne clue to ordinary ideas of justice is that in their day-to-day lives, individuals often much more concerned about *process and procedure* than they are about

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[44] The evidence in this section is specific to U.S.-American moral commitments, unless otherwise noted.
[45] SHEFFRIN,*supra* note __ at 8-9 (2013) (describing "consonance" with existing policies).
[46] SHEFFRIN,*supra* note __.

> *purely distributional issues*, or "who gets what." Expert theories of justice inevitably focus on distribution. Folk justice may include distributional concerns, but also includes procedural concerns.[47]

In particular, behavior consistent with "equity theory"[48] in psychology may be helpful in understanding part of the typical American's moral commitments around taxation. The theory holds that "fair" outcomes are characterized by a rough proportionality between input and output.[49] In the case of taxes, that means a rough proportionality between the amount one pays in taxes and the benefits one receives from the government.

Matthew Weinzierl has helped revive a specific view of the goal of taxation called the "classical view of benefit-based taxation."[50] The view consists of two parts: first, that "taxes ought to be based on the benefit an individual obtains from the activities of the state," and, second, that "the best measure of that benefit is how much the state's activities increase the economic opportunities (i.e., the income-earning ability) of the individual)."[51] The one-pieist view holds that the only thing that matters for taxation is everyone's post-tax income. Benefits-based taxation, in contrast, holds that pre-tax income has some moral significance.[52] That is, even though government policy helps set pre-tax income, there is something about pretax income that is "owned" by individuals, generating resistance to taxation. Richer people should pay higher taxes not because of a declining marginal utility of consumption, but rather because the benefit that they received from government, as measured by their ability pay, is higher.

Similar reasoning is reflected in our political rhetoric. For example, even Democratic President Barack Obama said, "As a country that values fairness, wealthier individuals have traditionally borne a greater share of this [tax] burden than the middle class or those less fortunate. . . . [I]t's a basic reflection of our belief that those who've benefited most from our way of life can afford to give back a little bit more."[53] This quote again reflects a "benefits" principle: some people benefit more from society, as reflected in their ability to pay, so they should give back more. But Obama is not saying that the rich should pay more in taxes to redistribute to the poor, who have a higher marginal utility of consumption.

Adam Smith, father of economics, expressed similar sentiments. He wrote, "The subjects of every state ought to contribute toward the support of the government, as near as possible, in proportion to their respective abilities; that is in proportion to the revenue which they respectively enjoy under the protection of the state."[54] Like Obama, Smith discusses taxation in terms of the benefits received from the protection of the state, not exclusively in terms of redistribution.

Weinzierl developed a compelling survey to show the importance of the benefits-based logic.[55] He gives survey respondents a hypothetical in which two people end up with different

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[47] *Id.* at 3.
[48] *Id.* at 35.
[49] WALSTER, WALSTER & BERSCHEID, *supra* note ___ at 10.
[50] Matthew Weinzierl, *Revisiting the Classical View of Benefit-Based Taxation*, 128 ECON. J. F37 (2018); Weinzierl, *Popular Acceptance*, *supra* note ___.
[51] Weinzierl, *Popular Acceptance*, *supra* note ___ at 59.
[52] For a contrary philosophical view, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).
[53] President Barack Obama, Remarks by the President on Fiscal Policy (Apr. 13, 2011), *quoted in* Weinzierl, *Popular Acceptance*, *supra* note ___ at 59.
[54] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).
[55] Weinzierl, *Popular Acceptance*, *supra* note ___.

incomes solely because of brute luck: if two people together agree to jointly pay $18,000 for a public good, person A arbitrarily gets $60,000, and person B arbitrarily gets $30,000. This setup removes any possible incentive effects of taxation, since the parties are just given the money irrespective of behavior. Respondents are then asked how a tax and subsidy burden should be divided between the two individuals.[56] A typical social welfare function would suggest equalizing the incomes of the two people, since there is a declining marginal utility of income. That is, Person A should pay for the entire public good and also transfer $6,000 to person B, so that both end up with $36,000. However, a large majority of respondents—75%—stop short of full equalization.[57] Put differently, the entirely arbitrary initial allocation appeared to have moral weight.

Respondents still suggested transferring from the rich to the poor, and they were asked why it would make sense to tax the higher-income person more: 70% of respondents primarily explained their reasoning by choosing that "payments should be tied to how much each person benefits" rather than that "a dollar matters less in the hand of someone with more," and over 90% expressed at least some agreement with the benefits-related reasoning.[58] Of course, though Weinzierl produces a variety of robustness checks, the evidence can be interpreted in a variety of ways. And nothing in the experiment suggests that people are not also motivated in part by standard utilitarian concerns. Nevertheless, this evidence suggests that people have some moral commitments quite distinct from the utilitarian redistributionist ones that economists typically focus on. Pretax income—even if entirely arbitrary, like natural ability over which people have no control—appears to drive many people's views of fair taxation.

Given this evidence, perhaps it is unsurprising that real-world policy does not reflect the optimal tax ideal. Existing institutions provide additional evidence of the dissonance between supposedly "optimal" taxes and moral commitments to fairness, assuming that the real-world evolution of political institutions reflects those commitments to some extent. Indeed, no tax system even closely approximates the implications of one-pieist methodology.[59]

Recall the typical implications of optimal tax theory. The first two implications of optimal tax theory are that there should be a large demogrant that everyone receives that is then taxed away at fairly high marginal tax rates for those at low incomes. No developed country in the world gives out large demogrants.[60] And none have high marginal tax rates for the first dollars of income earned. This outcome is consistent with equity theory: the state does not give out money to those who do not work for it, without some strings attached. And to those who do work at low incomes, it would be unfair to have high tax rates because they would not be getting

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56 The interface clearly showed how much money each party ended up with given a proposed allocation, making outcomes salient. *Id.* at ___.

57 *Id.* at 56.

58 *Id.* at 60.

59 Mankiw, Weinzierl, & Yagan, *supra* note ___ at 159-61.

60 Note that some Gulf States have an "implicit government job guarantee" for nationals, but that is different from a demogrant because it involves work. Steffen Hertog, *The GCC's National Employment Challenge*, WASH. POST (July 31, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/31/the-gccs-national-employment-challenge/?utm_term=.01a5916a1fd3. As well, some Scandinavian countries have generous unemployment programs. For example, unemployment insurance in Denmark allows beneficiaries eligible to receive up to 90% of their previous salary. However, receipt of unemployment benefits is tied to active job searching, and a person is only entitled to benefits for 2 years within a 3-year period. *Denmark–Unemployment Benefit*, EUR. COMMISSION: EMP., SOC. AFFAIRS & INCLUSION, http://ec.europa.eu/social/main.jsp?catId=1107&langId=en&intPageId=4496. Again, this policy is not a demogrant because it is tied to work.

a fair share of output of their labor. Indeed, as suggested above, those high tax rates would discourage large numbers of people from working at all, eliminating their workplace contribution to the state altogether.

The third prediction of optimal tax theory is that, as inequality goes up, taxes become more redistributive. Yet, despite the well-documented rise in income inequality,[61] nothing of the sort has happened. A striking piece of evidence consists of the relatively low support for high taxes on the rich: recent surveys show only roughly half of people want high taxes on the rich.[62] The large numbers of relatively poor people who do not want higher taxes on the rich is especially striking, with 26% earning less than $25,000 opposing higher taxes on the rich and an additional 17% neutral.[63] This result is also consistent with equity theory: people get what they deserve. And, if inequality goes up, that does not necessarily mean that they should pay more because their benefit from the state may not have increased.

A fourth implication of optimal tax theory is that people's features should be "tagged." There should be a tax on height, for example. In practice, we do not see taxation based on "tags" like height. Nor does a tax based on height seem like a plausible thing to do. To many, it would seem unfair to tax two people differently if they earn the same income, but one is taller than the other. And, indeed, evidence from survey experiments confirms that very few people believe that tagging is appropriate in tax policy.[64] This result is also consistent with equity theory. If two people produce the same amount, they should be treated the same by the state, even if one is tall and one is short.

Of course, inferring moral commitments from existing policies while trying to offer recommendations to improve policy leads to a circularity problem.[65] Policies could look the way they do for many reasons, including political capture.[66] Nevertheless, the difference between what taxes would need to do under optimal tax theory and what they in fact do is remarkably gaping. This is especially so because there are no technological barriers to any of the implications of optimal taxes: a demogrant, high marginal tax rates for low-income earners, or

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[61] Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913 – 1998*, 118 Q. J. ECON. 1 (2003). The extent of the rise is disputed. *E.g.* Richard Burkhauser et al., *Recent Trends in Top Income Shares in the United States: Reconciling Estimates from March CPS and IRS Tax Return Data*, 94 REV. ECON. & STAT. 371 (2012); Alan J. Auerbach, Laurence J. Kotlikoff, and Darryl R. Koehler, *U.S. Inequality, Fiscal Progressivity, and Work Disincentives: An Intragenerational Accounting* (Nat'l Bureau of Econ. Research, Working Paper No. 22032, 2016).

[62] Emmanuel Saez & Stefanie Stantcheva, *Generalized Social Marginal Welfare Weights for Optimal Tax Theory*, 106 AM. ECON. REV. 24 Appendix p. __ (2016) (presenting survey evidence suggesting that virtually no one supports tagging in a particular context); Karlyn Bowman & Andrew Rugg, *Public Opinion on Taxes: 1937 to Today,* AM. ENTERPRISE INST. 25 (Apr. 2012), http://www.aei.org/wp-content/uploads/2012/04/-aei-public-opinion-study-on-taxes-2012_082833686158.pdf; SHEFFRIN, *supra* note ___ at 119-20.

[63] Rebbecca Reed-Arthurs & Steve Sheffrin, *Windows into Public Attitudes Towards Redistribution*, 102 PROC. OF THE NAT'L TAX ASS'N 165 (2009).

[64] Emmanuel Saez & Stefanie Stantcheva, *Generalized Social Marginal Welfare Weights for Optimal Tax Theory*, 106 AM. ECON. REV. 24 33 (2016).

[65] *See, e.g.*, RAYMOND GUESS, PHILOSOPHY AND REAL POLITICS 49-50 (2008).

[66] *See, e.g.*, Philip Bump, *Who Actually Wants Congressional Republicans to Pass Trump's Tax Bill?*, WASH. POST (Nov. 2, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/02/who-actually-wants-congressional-republicans-to-pass-trumps-tax-bill; Marissa Schultz, *GOP's Big Donors Threaten to Close Wallets if Tax Reform Isn't Passed*, N.Y. POST (Nov. 6, 2017), https://nypost.com/2017/11/06/gops-big-donors-threaten-to-close-wallets-if-tax-reform-isnt-passed; Dylan Scott, *House Republican: My Donors Told Me to Pass the Tax Bill or "Don't Ever Call Me Again*, VOX (Nov. 7, 2017), https://www.vox.com/policy-and-politics/2017/11/7/16618038/house-republicans-tax-bill-donors-chris-collins

taxation based on tags. We have just chosen not to do those things, along with the rest of the world. Maybe asking the tax code to provide the redistribution necessary for a just society is simply asking ordinary people to accept something inconsistent with their moral commitments.

More broadly, we are left with a major puzzle: One of the two foundations for the law and economics two-step is imposing an "optimal" tax. Yet, people appear to hold moral commitments at odds with the implications of the view, and current policy is far off from those implications. Later Parts will return to potential policy implications of this dissonance. For now, the key point is that it raises doubts about the appropriateness of this pillar of economic analysis of the law.

B. Moral Commitments and Legal Rules

"Legal rules," or all policies outside of tax policy, are multifaceted. As such, this Section uses a few illustrative examples to show how widely-held moral commitments conflict with the implications of the one-pie "efficient" policy formula. Many people already implicitly assume that efficiency should not rule all areas of law, that there is an area on the fringe where other principles apply. For example, rational, well-informed people may wish to sell themselves (or even their children) into slavery or indentured servitude.[67] Or the poor may wish to sell votes for something they value more highly.[68] Or the rich could buy their way out of the obligation to serve on a jury or go to jail. However, many people just do not want to live in a society with indentured servitude or vote-trading.[69] And the widespread acceptance of bright-line, "inefficient" rules in some cases suggests that, even in more "mainstream" policy domains, common moral commitments may conflict with standard notions of efficiency.

This Section presents three such areas: cost-benefit analysis, health care, and torts. People do not tolerate valuing the lives of the rich more highly than the lives of the poor for the purpose of cost-benefit analysis—which would be required in any efficient regime, since the rich are willing to pay more for their lives. In another example, many believe that others have a "right" to health care, perhaps as a way of ensuring equality of opportunity. In both cases, traditional efficiency analysis suggests a possible Pareto improvement: everyone would be better off if people unwilling to pay for life-saving regulations or health care instead received money through the tax system. A third example presses the logic of one-pieism by asking how tort rules should handle political constraints on taxation, a case in which standard utilitarian logic would suggest redistributing through torts in ways that may conflict with moral commitments.

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[67] *See, e.g.,* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*. 8 J. LEGAL STUD. 103, 134 (1979) (noting that selling oneself into slavery could be rational). For a critique of this mode of analysis, see, for example, Margaret Jane Radin, *From Baby-selling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market*, 54 OSGOODE HALL L.J. 339 (2016). *See also* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 91 (1984) (discussing Posner's failure to argue for the evil of slavery beyond the assurance that, "so long as the dollar value of our free labor as free persons is higher than our dollar value as slaves, we have nothing to fear from the great good Efficiency!"). *See also* ERIC POSNER & GLEN WEYL, RADICAL MARKETS (2017) (presenting a recent proposal for something akin to indentured servitude for immigrants).

[68] See recent argument for this in ERIC GLEN WEYL & ERIC POSNER, RADICAL MARKETS: UPROOTING CAPITALIMS AND DEMOCRACY FOR A JUST SOCIETY (2017). For a critique of Posner & Weyl's "quadratic voting" proposal, see, for example, Tyler Cowen, *My thoughts on quadratic voting and politics as education*, MARGINAL REVOLUTION (Jan. 3, 2015, 1:50 AM), https://marginalrevolution.com/marginalrevolution/2015/01/my-thoughts-on-quadratic-voting-and-politics-as-education.html.

[69] *See also* OKUN, *supra* note ___ , at 6-20 Tradeoff (describing the limits of one-pieist reasoning in a limited set of cases); James Tobin, *supra* note ___ (similar).

1. Cost-Benefit Analysis

Cost-benefit analysis is an embarrassment to standard one-pie theory, which makes a stark prescription: the government should value the lives of the rich more highly than the lives of the poor.[70] Otherwise, there are available Pareto improvements that could make everyone better off. Suppose, for example, that the government could save 100 lives in two equally-sized communities—one rich and one poor—by spending $300 million to clean up two toxic waste sites as part of the Superfund program.[71] Should the government pay to clean up one, both, or neither of the sites? Suppose that the poor people would only be willing to pay $100 million for the saved lives, while the rich people would be willing to pay $600 million. After all, poor people tend to have less willingness to pay just because they are poor.[72] By one-pie logic, the government can make the poor community better off by giving it $200 million instead of providing the cleanup, while providing the cleanup for the rich community. In doing so, the government would implicitly value the lives of the rich more highly than those of the poor.[73]

That's not how federal cost-benefit analysis works, even though efficiency is the main (though not sole) goal of the regulatory process.[74] In practice, agencies do not differentiate between rich and poor people for the "value of statistical life" (VSL), the value that agencies place on a life saved to measure the benefits of regulatory interventions. They do not do so "for policy reasons," according to government regulatory documents.[75] Why the caginess? Are there political constraints? If so, what would those be? Is this just redistribution that is somehow easier through cost-benefit analysis than through Congress? If so, why not redistribute through cost-benefit analysis elsewhere too—say, by increasing transfers to the poor through regulation? Or, at least, why not count the time of the poor as less valuable than that of the rich when conducting cost-benefit analysis on transportation improvements?[76] What may be going on here is that it is morally abhorrent to many people for the government to literally place a higher value

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[70] Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 231 & n.98 (2004) ("Unless there is some informational problem, poor people are not helped when regulation forces them to pay $200 for a benefit that is worth only $50 to them. In such cases, perhaps government should impose regulation but subsidize poor people to ensure that they do not have to pay for it.").

[71] *See* Michael Greenstone & Justin Gallagher, *Does Hazardous Waste Matter? Evidence from the Housing Market and the Superfund Program*, 123 Q. J. ECON. 951 (2008) (providing an example of empirical work in economics valuing environmental amenities by willingness to pay).

[72] Liscow, *Is Efficiency Biased?*, *supra* note __ at ___ (collecting citations).

[73] Some welfarist scholars argue that the appropriate notion of welfare is "idealized"—that is, removing the impacts of people's wealth on their preferences. *See* MATTHEW D. ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS, 130-31, 142-46, 152 (2006) (discussing adjustments to willingness to pay to compensate for parties' different incomes and potential objections to such an approach); *see also* THE OXFORD HANDBOOK ON WELL-BEING (Matthew D. Adler & Marc Fleurbaey, eds. 2016) (describing a variety of approaches). But this alternative is not the standard approach, and it ignores the possibility of Pareto improvements as described in text.

[74] See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994) (requiring cost-benefit analysis based on efficiency in federal agencies); *see also* Michael A. Livermore & Richard L. Resvesz, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 83-84 (2008) (arguing that "a cost-benefit analysis using an average value of a statistical life is unmoored from its economic justification").

[75] *See* U.S. Dep't of Transp. Revised Departmental Guidance 2016: Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses 1, 3 (2014), https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf

[76] *See* Liscow, *Is Efficiency Biased?*, *supra* note __ at ___ (collecting citations).

of life on the rich than the poor.[77] That is, people may resist the notion that all that matters is the universal solvent of each individual's willingness to pay for regulation, public goods, and cash income, without regard to what constitutes the pieces of pie for which people are willing to pay or how the pieces of pie arrived at their ultimate compositions. The "policy reason" is that the process it is morally abhorrent. Indeed, non-welfarists such as egalitarians have critiqued the notion of placing higher values on the lives of the rich than the lives of the poor.[78] Arguments against valuing lives differently are probably not fringe positions, but rather quite widespread. This moral commitment to fairness in valuing lives is something that policy may want to account for.

2. Health Care

Second, many regard health care as a "right."[79] Indeed, in the United States, large majorities of people support universal provision of health care.[80] Of course, there could be efficiency-based reasons for this support.[81] But those reasons are unlikely to explain support for the provision of high-cost healthcare to very low-income people—and would not explain the rights-oriented language. This language perhaps reflects the goal of equality of opportunity for all citizens, which also may motivate universal provision of other goods viewed as essential for opportunity, like education. Indeed, by the lights of one-pieism, it is a remarkable feature of the developed world that every single country except for the United States has near-universal health care.[82]

The puzzle for traditional economics is that a policy of universal provision of health care introduces possible Pareto failures: for example, if it costs $10,000 to provide health care to a person who would be willing to pay only $5,000, then this health care provision may be considered bad policy—relative to a $7,000 tax transfer to the poor. The standard story is that, of

[77] The political system also appears resistant to altering the value of statistical life for those over 65. See Ryan C. Bosworth, Alecia Hunter, & Ahsan Kibria, *The Value of Statistical Life: Economics and Politics*, STRATA 20 (Mar. 2017), https://strata.org/pdf/2017/vsl-full-report.pdf (describing the political opposition to the "senior death discount"). This shows the depth of opposition to adopting anything but a uniform VSL.
[78] Adam M. Samaha, *Death and Paperwork Reduction,* 65 Duke L.J. 279 (2015); Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189, 189 (2000).
[79] *Healthcare System*, GALLUP (June 2018), http://news.gallup.com/poll/4708/healthcare-system.aspx (providing polling evidence showing that an increasing percentage of Americans believes that there is a government responsibility to provide health care); Mark Joseph Stern & Perry Grossman, *Americans Now View Health Care as a Right. Republicans Can't Change That.*, SLATE: OUTWARD (May 5, 2017), http://www.slate.com/blogs/outward/2017/05/05/americans_now_view_health_care_as_a_right_republicans_can_t_change_that.html (highlighting public comments by Republican Sen. Bill Cassidy); Dylan Scott, *These Are the Trump Voters Who Believe in Universal Health Care*, VOX (Feb. 23, 2018), https://www.vox.com/policy-and-politics/2018/2/23/16643790/is-health-care-a-right-republicans-single-payer-medicare-for-all (describing evidence from two focus groups of Trump voters).
[80] Megan Keller, *Seventy percent of Americans support "Medicare for all" in new poll*, THE HILL (Aug. 23, 2018, 11:16 AM), http://thehill.com/policy/healthcare/403248-poll-seventy-percent-of-americans-support-medicare-for-all
[81] See, e.g., Ben Southwood, *On Health Care, Most People Don't Know What They're Talking About*, NATIONAL REVIEW (Apr. 4, 2017), https://www.nationalreview.com/2017/04/american-health-care-system-has-good-results-high-expenses.
[82] See, e.g., Max Fisher, *Here's a Map of the Countries That Provide Universal Health Care (America's Still Not on It)*, THE ATLANTIC (June 28, 2012), https://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153.

course, the poor should not receive the health care; they should receive the money.[83] However, in the eyes of many, health care and taxes may be in qualitatively different categories—and are therefore imperfectly commensurable for comparing equity-efficiency tradeoffs. And, indeed, if those views on healthcare are seen as social preferences themselves (more on that later), then the tax option may not in fact represent a Pareto failure once those social preferences are taken into account. Such reasoning opens up the possibility of redistributing through healthcare.

3. Torts with Political Constraints

A third situation in which the one-pieist result may conflict with many people's moral commitments is when politics prevent or limit redistribution through taxation. The example is more complex than the cases of regulatory cost-benefit analysis and health care, but nonetheless telling. Suppose that the goal is the same as in the standard story: to maximize social welfare by maximizing the atomistic willingness-to-pay pie and then redistributing through cash taxes and transfers. But, in contrast to the standard story, suppose as well that there are exogenous political constraints on taxation so that insufficient redistribution takes place through taxes.[84] Under these conditions—the one-piest assumptions with just one change—the most efficient welfare-maximizing policy response involves redistribution through non-tax means. Social welfare demands redistribution and, if taxes are imperfectly available for achieving it, then it is worth bearing some efficiency cost to redistribute through other means. One such means is economic damages in a tort.

To see how this would play out, suppose that there are two laundromats identical except for their owners: one owner is rich, and the other owner is poor. Suppose as well that a nearby factory negligently pollutes on each, requiring the purchase of a $10,000 air purifier that eliminates the harm—and thereby causes $10,000 in economic harm. The efficient tort rule is for the factory to pay $10,000 to each laundromat owner, since doing so will encourage decisions that maximize aggregate willingness to pay.

Standard utilitarian logic,[85] with political constraints on taxation, arguably leads to a puzzle, since the efficient legal rule should be modified to treat apparently similarly-situated laundromat owners differently. There is insufficient redistribution through taxes, so other legal rules should be modified to incur some inefficiency with the goal of redistributing to those with a higher marginal utility of consumption. As a result, although the cases are identical in every respect except for the income of the owners, the rich laundromat owner should receive lower economic damages (say, $8,000) than the poor laundromat owner (say, $12,000).[86] There likely are framings of this problem that would yield different interactions with moral commitments (for example, keeping the defendant the same, but having two possible polluters—one a rich

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[83] One response in parts of philosophy and economics is to conduct analysis using preferences "laundered" of attributes like income, thereby eliminating any differential policy treatment by income. *See* MATTHEW ADLER & ERIC POSNER, NEW FOUNDATONS OF COST-BENEFIT ANALYSIS 130-31, 142-46, 152 (2006) (discussing adjustments to willingness to pay to compensate for parties' different incomes and potential objections to such an approach). See also Marc Fleurbaey. However, this response is nonstandard, perhaps because it leaves Pareto failures like those described here.

[84] Liscow, *Is Efficiency Biased*, *supra* note_, at 13

[85] For a technical description of how to do this, *see* Nathaniel Hendren, *The Inequality Deflator: Interpersonal Comparisons Without a Social Welfare Function* (Nat'l Bureau of Econ. Res., Working Paper No. 20351, 2014).

[86] There is actually some evidence that punitive damages can function in this fashion. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263 (2004).

corporation and the other a struggling small business). And this argument is admittedly speculative. Nevertheless, I suspect that many people—including many law and economics adherents—would find that such a result conflicts with their moral commitments.[87] After all, both laundromats received the exact same harm, and it seems a violation of "horizontal equity" (i.e., treating like parties in like ways)[88] between the two laundromats that one should receive more. In other words, the torts process has its own internal moral logic. And people have views about which means are appropriate for redistribution.

Ultimately, this example suggests that, for much of economic analysis of the law, the normative appeal of efficient legal rules may be more grounded in notions of fairness than in the two-step logic of law and economics. Adding one assumption about politics may make the standard logic fall apart. Perhaps even law and economics folks have deeper moral commitments than typically realized.

C. Summary

Many people view distribution in very different terms than economists do. Economists tend to view welfare maximization as beginning with one big pie, containing taxes, environmental health,[89] health care, education, transportation spending,[90] minimum wage laws, etc., that can be distributed with perfect commensurability across policies as the social planner sees fit. But that is not how a lot of people think. Rather, many people view distributional issues on a category-by-category basis. People have their distributional views on taxes (which are often not about redistributing from the rich to the poor). They have views about rights in health care[92]

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[87] *See, e.g.*, Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449, 449-50 (observing that the "dominant view" among advocates of the corrective justice theory of tort law is one that "regards corrective justice as involving a limited moral relationship that holds only between injurer and victim"). A broader redistributive use of tort law, such as in the example provided above, would conflict with such views.

[88] *See* Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 1989 NAT'L TAX J. 139 (arguing that horizontal equity is not a reasonable welfarist principle). This violation of horizontal equity relates to the same point about only outcomes, not process, mattering.

[89] Maureen Cropper, Alan Krupnick & William Raich, *Preferences for Equality in Environmental Outcomes*. (Nat'l Bureau of Econ. Res., Working Paper 22644, 2016).

[90] *See, e.g.,* Todd Litman, *Evaluating Transportation Equity 2*, VICTORIA POL'Y INSTIT. (July 24, 2018), http://www.vtpi.org/equity.pdf (calling "[t]ransportation equity analysis" both "important and unavoidable" because "transport planning decisions often have significant equity impacts, and equity concerns often influence planning debates").

[92] Larry Bye & Alyssa Ghirardeli, American Health Values Survey 5, ROBERT WOOD JOHNSON FOUND., https://www.rwjf.org/content/dam/farm/reports/reports/2016/rwjf437263 (finding that an overwhelming majority of Americans believe that "[e]nsuring that low income Americans have the same chance to get good quality health care as those who are better off financially" should be a "top" or "high" priority) [*Healthcare System*, Gallup, https://news.gallup.com/poll/4708/healthcare-system.aspx (showing that since the beginning of the poll in the late 1990s, large numbers of Americans—up to 69%, but never less than 42%--thought that "it is the responsibility of the federal government to make sure that all Americans have healthcare coverage"); Mark Joseph Stern & Perry Grossman, *Americans Now View Health Care as a Right. Republicans Can't Change That.*, Slate: Outward (May 5, 2017), http://www.slate.com/blogs/outward/2017/05/05/americans_now_view_health_care_as_a_right_republicans_can_t_change_that.html (highlighting public comments by Republican Sen. Bill Cassidy); Dylan Scott, *These Are the Trump Voters Who Believe in Universal Health Care*, Vox (Feb. 23, 2018), https://www.vox.com/policy-and-politics/2018/2/23/16643790/is-health-care-a-right-republicans-single-payer-medicare-for-all (describing evidence from two focus groups of Trump voters).

and education spending.[93] They have views about desert after being harmed by trade deals. And just because a person gets more in one category does not mean that people think that the person should get less in another category: that's how economists think, but often not non-experts. These category-specific moral commitments about fairness could have major implications for the right policy to adopt in a given real-world situation. I address such implications in Part IV, but first turn to possible interpretations of these moral commitments.

III. Interpretations of Moral Commitments and Why They Might Matter

A. Possible Interpretations

The Article has so far described examples of ordinary people's moral commitments that are at odds with the one-pieist methodology of economics. There are several possible grounds on which these views might matter for policy analysis. But, at the heart of the dilemma for economics is that it is difficult to know whether any given moral commitment reflects: (1) a biased, mistaken, or poorly-considered belief,[94] (2) a "true" preference,[95] or (3) a nonstandard but possibly true view about economics or politics. This ambiguity makes policy analysis difficult, but is a little less concerning than it may at first seem because of the variety of grounds on which such considerations might matter for analysis.

Take the example of the minimum wage: traditionally economists have said that an expanded earned income tax credit (EITC) is superior to a minimum wage because it is more efficient,[96] notwithstanding the widespread support—even in conservative states—for expanding the minimum wage.[97] That support could reflect any combination of these three possible interpretations. First, it could be a mistaken belief or bias. An example of a mistaken belief is confusion about how the economy works—for example, an unawareness that neoclassical models of economics show that the minimum wage leads to inefficient unemployment.[98] An example of a bias is that outlays cost money while the minimum wage does not and thus does not

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[93] *But see* Lara J. Bernardo, & Kenneth Shores, Identifying Preferences for Efficiency, Income Equality and Equal Opportunity (2017) (unpublished manuscript) (accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996575) (finding conflicting evidence).

[94] Cass Sunstein studies similar issues in the context of views about "bad deaths" rather than the distributive issues. Cass Sunstein, *Bad Deaths*, 14 J. RISK & UNCERTAINTY 259, 267-76 (1997) (arguing that viewing deaths differently because of dread or unfair distribution is reasonable, while taking into account dislike of involuntary or uncontrollable risks raises "special concerns").

[95] This is often called a "normative" preference in the behavioral economics literature. See John Beshears et al, *How Choices Are Revealed*, 92 J. PUB. ECON 1787 (2008) (discussing how behavioral economics can use multiple sources of evidence to disentangle normative preferences from biases).

[96] *See, e.g.*, Tim Worstall, *Warren Buffett's Right But Not Correct; Raise the EITC, Not The Minimum Wage*, FORBES (May 25, 2015), https://www.forbes.com/sites/timworstall/2015/05/25/warren-buffetts-right-but-not-correct-raise-the-eitc-not-the-minimum-wage/#68354aa27ac5.

[97] *See* Grace Donnelly, *The Minimum Wage Will Increase on January 1 for 18 States and 20 Cities*, FORTUNE (Dec. 20, 2017), http://fortune.com/2017/12/20/minimum-wage-increases-jan-2018.

[98] *Cf. Should the Government Raise the Federal Minimum Wage?*, I SIDE WITH, https://www.isidewith.com/poll/965649 (reporting internet polling results; none of the reasons proffered relate to unemployment).

cost anyone anything.[99] Many biases are well-documented.[100] For example, people exhibit framing biases such as being more supportive of policies framed as bonuses rather than penalties (e.g., a child "bonus" versus a childlessness "penalty").[101] Lots of evidence suggests that salience affects behavior: people are more responsive to tax-inclusive taxes than tax-exclusive taxes like a sales tax.[102] Or the belief could just come from hearing a political leader that one otherwise supports make the argument.[103] Ordinary people typically do not spend long hours thinking through policy.

The view could also reflect a "true" preference. For example, one could have preferences for distribution through non-tax means, like the minimum wage—"predistribution"[104] to achieve a "fair wage" through a regulated market rather than "redistribution" through taxes. A priori, as economists respectful of people's preferences, we cannot rule out the existence of deeply-held fairness preferences. As described above, we have all sorts of restrictions on apparently potentially efficiency-enhancing transactions (e.g., jury-duty-selling, child-selling, indentured servitude, etc.). Durable institutional features of the industrialized democracies—like the provision of healthcare and education, and the absence of a demogrant—suggest other deep-seated social preferences.

Third, these lay policy views could reflect positive views about economics or politics that are nonstandard for experts, but are still possibly true. For example, the neoclassical models underlying traditional analysis on the minimum wage may just be wrong; after dozens of high-quality economic studies, the question of the employment impacts of a minimum wage remains

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[99] *See, e.g.*, Bryce Covert, *Hate Government Spending? Here's Why You Should Love A Higher Minimum Wage*, THINK PROGRESS (Oct. 17, 2014), https://thinkprogress.org/hate-government-spending-heres-why-you-should-love-a-higher-minimum-wage-897f95ae239b.

[100] *See also* Sheffrin, *Tax Fairness*, *supra* note _, at 22-25 (describing various "biases" in the context of tax policy).

[101] Edward J. McCaffery and Jonathan Barron, *Thinking About Tax*, 12 PSYCHOL., PUB. POL'Y & L. 116, 115 (2006).

[102] *See, e.g.*, Raj Chetty, Adam Looney & Kory Kroft, *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145 (2009)

[103] *See, e.g.*, Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. Personality & Soc. Psychol. 808, 808 (2003) (studying policy preferences of both Democratic and Republican subjects and finding that "[e]ven under conditions of effortful processing, attitudes toward a social policy depended almost exclusively upon the stated position of one's political party" and that "[t]his effect overwhelmed the impact of both the policy's objective content and participants' ideological beliefs."). Further support for this proposition can be seen in Republican voters' reaction to President Trump's deviations from conservative orthodoxy. *See, e.g.*, Bradley Jones, *Support for Free Trade Agreements Rebounds Modestly, but Wide Partisan Differences Remain*, Pew Research Center (Apr. 25, 2017), http://www.pewresearch.org/fact-tank/2017/04/25/support-for-free-trade-agreements-rebounds-modestly-but-wide-partisan-differences-remain (noting that Republican support for free-trade agreements dropped from 56% to 29% between early 2015 and October 2016); Ari Swift, *Putin's Image Rises in U.S., Mostly Among Republicans*, Gallup (Feb. 21, 2017), https://news.gallup.com/poll/204191/putin-image-rises-mostly-among-republicans.aspx (noting that President Vladimir Putin's favorability rating among Republicans rose from 12% to 32% between 2015 and 2017).

[104] *See* Jacob S. Hacker, *The Institutional Foundations Of Middle-Class Democracy*, POLICY NETWORK (May 6, 2011), http://www.policy-network.net/pno_detail.aspx?ID=3998&title=The+institutional+foundations+of+middle-class+democracy (coining the term "predistribution"; "[E]xcessive reliance on redistribution fosters backlash, making taxes more salient and feeding into the conservative critique that government simply meddles with 'natural' market rewards."). *See also* EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS 364-5 (2014) (arguing that it is more politically feasible to have a less progressive tax system and more progressive spending in part by showing that, among rich countries, the progressivity of taxes is negatively related to the overall distributional impact of the government's fiscal system).

open.[105] Alternatively, the political assumptions underlying the one-pieist two-step may be wrong: there may be no tradeoff between the minimum wage and the EITC.[106] And, though the EITC could be the superior policy, it may be more politically difficult to achieve (e.g., because of organized interests or even because they believe that other people have the above biases), so that the inefficiency caused by the minimum wage is worth bearing.

The next Section discusses why these moral commitments might change the best policy to adopt at a given time and place, under these various possible interpretations—without insisting that any necessarily applies in a given case.

B. Reasons Moral Commitments To Fairness May Affect Analysis

1. Social Preferences

First, one can interpret moral commitments to fairness as social preferences that ought to be respected—that is, they deserve direct weight in social welfare functions as true preferences, or beliefs that deserve normative weight.[107] In other words, there is not just one economic pie because people have preferences over different processes (e.g., health care provision versus cash transfer) of distribution. The appeal to this approach is straightforward: normative economics is typically in the business of maximizing preference satisfaction, and moral commitments to fairness are just preferences whose satisfaction is to be maximized subject to the constraint of the resources available to the government. By this reasoning, similar to the way that one cares about his own consumption, one also cares about others receiving healthcare or having a cost-benefit analysis technique that values all lives equally. Indeed, if social preferences matter, then the notion of "efficiency" itself needs to be revised because people have a willingness to pay for the process by which others arrive at their outcomes. The argument for a broader consideration of social preferences is all the stronger given the fundamental unobservability of "welfare." Such unobservability suggests value in gleaning information from a variety of sources in measurement, as Amartya Sen has argued.[108] Many non-utilitarian traditions argue for a host of moral considerations; this approach merely says that, to the extent that people believe those arguments, they should be included as contributors to social welfare.

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[105] *See, e.g.*, David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 Am. Econ. Rev. 772 (1994); Jeffrey Clemens & Michael Wither, *The Minimum Wage and the Great Recession: Evidence of Effects on the Employment and Income Trajectories of Los-Skilled Workers*, NBER Working Paper No. 20724 (2014), http://www.nber.org/papers/w20724.pdf; Arindrajit Dube et. al., *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945 (2010).

[106] *See* Liscow, *Is Efficiency Biased*, *supra* note _.

[107] The standard "welfarist" view is that welfare is only a function of individual utilities and ignores all nonutility information, such as the process by which outcomes are arrived at, not to mention social preferences. Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 469 (1979) (defining welfare as such). However, there is an increasingly large literature on social preferences, such as altruism, in economics. *See* Saez and Stantcheva, *supra* note_ (for a formal way of incorporating social preferences based on features of individuals into social welfare weights for taxation); Andrew Postlewaite, *Social Norms and Preferences*, *in* HANDBOOK OF SOCIAL ECONOMICS 31 (Jess Benhabib et. al. eds., 2011). However, while this literature has been incorporated into the design of taxation (indeed, this Article is building on that), it has not yet been incorporated into the design of legal rules, much less the relationship between legal rules and taxation, the subjects of this Article.

[108] Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349 (1999).

This approach has difficulties though. First, there are major measurement challenges. It is hard to know when people have durable preferences, let alone quantify the tradeoffs people are willing to make. Second, malicious preferences, such as racist preferences, are also problematic.[109] Malicious preferences are not so much a problem for social preferences as they are a problem for welfarism more generally. There is a large literature[110] on the extent to which distaste for income redistribution may be driven by ethno-racial animus. Accounting for moral commitments as social preferences merely says that, when designing policy to redistribute, social preferences for the *means* of redistribution should be taken into account. Those preferences over means—beyond preferences for overall redistribution—could also be inflected with malicious preferences. However, this concern is not avoided by using traditional law and economics welfarist reasoning.

Nevertheless, probably few would be willing to accept malicious preferences driving a modification of the standard welfare model. But welfarism—even in an expanded form—need not be the only principle driving policy. So there is nothing inconsistent between a substantial role for social preferences and ignoring malicious preferences (as true preferences) in policymaking.[111] But it is likely hard to solve the line-drawing problems of what modifications to pure welfarism are acceptable —and, in any case, those problems are beyond the scope of the Article.

2. Political Constraints

A second reason that moral commitments to fairness might matter for analysis is that any of the three bases for belief—including biases and mistakes—can impose political constraints, so long as politics respond to lay moral commitments. In other words, there is not just one economic pie because not all means of distribution fare equally in the political process. For example, the minimum wage may be a more politically feasible means of achieving good distributive outcomes than the EITC.[112] One can be agnostic about the reasons for these views; it

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[109] *See, e.g.*, Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle,* 110 YALE L.J. 173, 178 (2000) (responding in part to this objection).

[110] *See, e.g.*, Allison Harell et. al., *Race, Prejudice and Attitudes Towards Redistribution: A Comparative* Approach, 55 EUR. J. POL. RES. 723 (2016); Vincent L. Hutchings, *Change or More of the Same? Evaluating Racial Attitudes in the Obama Era*, 73 PUB. OPINION Q. 917 (2009); Michael Tesler, *The Spillover of Racialization into Health Care: How President Obama Polarized Public Opinion by Racial Attitudes and Race*, 56 AM. J. POL. SCI. 690 (2012).

[111] This Article makes the welfarist assumption that maximizing aggregate well-being is the goal. But non-welfarist political theory with preferences should count for policymaking. *See* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980) (adopting a neutrality principle precluding anyone from justifying a legal regime because "his conception of the good is better than that asserted by any of his fellow citizen" or because "he is intrinsically superior to one or more of his fellow citizens"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 234 (1977) (distinguishing between "personal" preferences, which do count, and "external" preferences, which don't). *See also* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 842 (1970); C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381, 386 (1978) (confronting similar issues). So long as one's political theory pays attention to political feasibility or social preferences matter to some extent, the question of lay views may be relevant to the details of program choice and design.

[112] For other arguments for addressing distributive issues through regulation of the market instead through taxes and transfers, see DEAN BAKER, THE END OF LOSER LIBERALISM: MAKING MARKETS PROGRESSIVE (2011). Another example here is that social programs could be designed as social insurance schemes benefitting everyone rather than as welfare schemes aimed at only the poorest. *See* Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313 (2011) (on designing programs as social insurance).

could be a mistake, a true preference, or embedded knowledge. All point in the same direction: if one wants more redistribution, the minimum wage is a more politically feasible way to accomplish it. And, given limited political capital to achieve distributive goals, this politically popular route may be the best way to accomplish those goals at a given point in time. To take another example, steeply progressive marginal tax rates just might not be politically feasible, in which case the distributive burden should be taken up by more progressive spending programs. The upside of considering political constraints is policy analysis that is more useful for the real world, where I take policy-relevant law and economics to be operating.

There are multiple downsides to the approach. Most basically, the relationship between lay moral commitments to fairness and political constraints remains unclear. For example, some argue that the policy preferences of none but the richest drive policy.[113] A further downside is that politics can change rapidly. And, at least if followed broadly, the principle that policy analysis should consider political constraints can lead to a variety of absurd conclusions. For example, because of the existence of the U.S. Senate, should economic analysis give additional weight to the preferences of residents of Wyoming? Surely, the political process—warts and all—can use the knowledge produced by economic experts without the experts themselves hewing to such constraints.

As well, the durability of political constraints begs the question of whether people actually hold social preferences for which they are willing to pay. One might think that taxes and transfers just aren't enough and never will be as a matter of politically feasibility, leading to the desire to address distribution through other means. But that view requires some unpacking. For the same distributional consequences, why would it necessarily be the case that the political forces arrayed against the change would be more difficult to overcome for redistribution through the tax code than redistribution through other means, especially if those other means have associated inefficiencies? That argument requires some account of psychology, politics, or economics that distinguishes politics surrounding taxes and transfers from politics surrounding other forms of redistribution. Of course, a variety of biases or misconceptions could explain the differences. But unless one holds the strong view that those entirely explains the difference, then—if one peels back what's behind durable differences in the political feasibility of one policy over another—one may begin to think that that durability says something about the strength of people's social preferences.

3. Embedded Knowledge

Third and most speculatively, nonexperts may have wisdom from their life experience as employees, citizens, or otherwise about how politics or economics empirically work: for example, how employers[114] or politicians[115] are likely to act in response to a minimum wage

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[113] *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE (2014) (showing that lay views correlate with policymaking—but that, conditional of the views of the well-off, the views of the poor show no relationship with actual policy); *see also* Omar S. Bashir, *Testing Inferences about American Politics: A Review of the "Oligarchy" Result*, 2 RES. & POL. 1 (2015) (criticizing the conclusion that politics is dominated by the preferences of the wealthy); J. Alexander Branham et al., *When do the Rich Win?*, 132 Pol. Sci. Q. 43 (2017) (making the same argument); Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSP. ON POL. 1053 (2015) (finding that the preferences of the middle class exert influence over policy).

[114] For example, will they cut wages?

[115] For example, will this crowd out the EITC?

hike.[116] In other words, it may be the case that economists are mistaken about the size of a slice of the economic pie or how the political process is likely to treat different types of pie differently. Of course, people hold many demonstrably false beliefs.[117] And deference should not be paid to false beliefs as embedded knowledge. But examples (admittedly cherry-picked) in which economic experts turned out to be wrong and popular beliefs right are not hard to find; one need only look to behavioral economics.

For decades, economists insisted on rationality as a basis for policy design.[118] While evidence on popular beliefs about rationality is limited, it is not unreasonable to think that many non-economists shared the view of sociologists like Pierre Bourdieu that people are frequently irrational.[119] Indeed, the introduction of much policy appears to be based at least in part on the notion of imperfect rationality. For example, part of the motivation for instituting Social Security in the 1930s was that people might irrationally save too little.[120]

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[116] In other words, unless one views non-experts as entirely ignorant, they should shift experts' views by simple Bayesian inference. For a popular treatment, see JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005). *See also The Future's Rubbish*, ECONOMIST (Nov. 17, 2011), https://www.economist.com/node/21537930 (documenting a 1984 experiment in which garbagemen predicted economic conditions more accurately than did finance ministers); Kay Blaufas et al., *How Will the Court Decide? – Tax Experts' versus Laymen's Predictions*, 25 EUR. ACCT. REV. 771 (2013) (finding that laymen were more accurate (though not in a statistically significant sense) than experts at predicting tax court judgments in Germany).

[117] Biana Dijulio et al., *Data Note: Americans' Views on the U.S. Role in Global Health*, KAISER FAM. FOUND. (JAN. 23, 2015), https://www.kff.org/global-health-policy/poll-finding/data-note-americans-views-on-the-u-s-role-in-global-health (noting that only 5 percent of Americans know that the U.S. spends less than 1 percent of its budget on foreign aid); Emily Guskin & Scott Clement, *Poll: Nearly Half of Americans Say Voter Fraud Occurs Often*, WASH. POST: THE FIX (Sep. 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often (noting that almost half of Americans believe voter fraud occurs often); Megan Brenan & Lydia Saad, *Global Warming Concern Steady Despite Some Partisan Shifts*, GALLUP (MAR. 28, 2018), https://news.gallup.com/poll/231530/global-warming-concern-steady-despite-partisan-shifts.aspx (showing skepticism about climate change).

[118] One exemplar of neoclassical economics is the permanent income hypothesis – a theory that assumes the ends of maximizing utility through consumption, and also assumes that people will be able to rationally achieve this goal through perfect foresight and recognition of the fungibility of money. Milton Friedman, *The Permanent Income Hypothesis*, in A THEORY OF CONSUMPTION FUNCTION 20 (1957). In response, behavioral economists pointed out that many low-income people "saved too little." *E.g.* B. Douglas Bernheim & John Karl Scholz, *Private Saving and Public Policy*, 7 TAX POL'Y & ECON. 73 (1993). While behavioral economics also assumes the ends of maximizing utility through consumption, it recognizes that people do not have perfect foresight and do not treat their money as perfectly fungible.

[119] *See generally* PIERRE BOURDIEU, THE SOCIAL STRUCTURES OF THE ECONOMY (2005) (arguing that a sociological understanding of economic processes should replace the traditional rationality-based model).

[120] For example, the creators of Social Security were concerned that Americans did not save enough. *See, e.g.*, DANIEL BÉLAND, SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE 52-53 (2005) (noting how Isaac Rubiner, an advocate for public pension plans, argued that personal saving was an inadequate source of old-age security in part because the remoteness of old age prevented people from saving enough in their early years); DAVID A. MOSS, SOCIALIZING SECURITY: PROGRESSIVE-ERA ECONOMISTS AND THE ORIGINS OF AMERICAN SOCIAL POLICY 63 (1996) (summarizing social insurance advocates' argument that workplace hazards were insufficiently reflected in wage contracts, in part because of asymmetric information and asymmetric rationality between employees and employers). Similarly, President Lyndon Johnson, in advocating for the passage of Medicare legislation, noted that even people who save carefully might see their money "eaten away" on health care costs for themselves or their elderly loved ones. THEODOR R. MARMER ET. AL., SOCIAL INSURANCE: AMERICA'S NEGLECTED HERITAGE AND CONTESTED FUTURE 61 (2014). Like the reformers who advocated for Social Security, President Johnson seems to have realized that people are almost never able to save in an intertemporally perfectly rational manner.

Other forms of embedded knowledge could be about politics. For example, while the standard law and economics analysis assumes offset of the distributional consequences of new policies, people may disagree with that empirical prediction. An important question in the two-step economics analysis is whether taxes and transfers actually adjust to compensate for the distributional consequences of legal rules.[121] It's an open empirical question. One study shows that the distributional consequences of court orders in school finance are essentially not offset at all, which is inconsistent with this view.[122] But some other evidence conflicts.[123] People may have views from living in the world that have a positive correlation to reality on this matter—for example, from observing the limited extent to which the distributional consequences of trade deals have been offset.[124] Alternatively, it may simply be difficult to monitor politicians—and especially difficult to monitor the overall activities of politicians. So, people may use proxies, like fairness within each policy, as a proxy for how fair policy is overall (even at the cost of losing out on between-policy tradeoffs).[125] So then maybe "moral" commitment is partly a misnomer, and people support non-standard policies because of accurate non-standard views about individual or political behavior.[126]

IV. Incorporating Category-Specific Moral Commitments

There are at multiple possible policy responses to the presence of moral commitments to fairness. One is to ignore normative questions altogether, which I call the "positive economics" approach. A second is to continue the one-pieist paradigm, which I call "business as usual." I explain why both of these are poor responses. I then turn to how category-specific moral commitments can be applied.

A. Positive Economics

One response to moral commitments to fairness would be to radically restrict the claims that economic analysis is asked to make: no more normative statements, and instead a focus on

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[121] *See* Liscow, *Is Efficiency Biased?*, *supra* note_.
[122] Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 J. Empirical Legal Stud. 4 (2018).
[123] *See* Richard T. Boylan & Naci Mocan, *Intended and Unintended Consequences of Prison Reform*, 30 J.L. ECON. & ORG. 558 (2013) (showing that increases in correctional expenditures correlate with decreases in welfare cash expenditures).
[124] David H. Autor et. al., *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2151 (examining the distributional effects of import competition from China and finding that "rising transfer income offsets only a small part of the decline in household earnings.").
[125] There are two components to monitoring: information gathering about each policy and use of that information to compare policy platforms. Citizens neither gather an equal amount of information about every policy nor consider each policy dimension of a platform when comparing platforms. People are more likely to access information for issues that they care about. Iyengar, Shanto, Kyu S. Hahn, Jon A. Krosnick, and John Walker. "Selective exposure to campaign communication: The role of anticipated agreement and issue public membership." *The Journal of Politics* 70, no. 1 (2008): 186-200. And when facing a difficult decision among party platforms, citizens often use "noncompensatory" strategies, "where either some alternatives are given little consideration or some attributes are more or less ignored," and therefore ignore many relevant between-policy tradeoffs. LAU, RICHARD R., AND DAVID P. REDLAWSK. HOW VOTERS DECIDE: INFORMATION PROCESSING IN ELECTION CAMPAIGNS, 257 (2006).
[126] Hayek's analysis on local and tacit knowledge are particularly instructive. *See generally* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (Ronald Hamowy ed., 2011). For a lucid summary of Hayek's views on these subjects, see Fuat Oguz, *Hayek on Tacit Knowledge*, 6 J. INST. ECON. 145, 159 (2010).

descriptive and predictive theory and empirics motivated by—but not answering—externally-provided normative questions. I call this the "positive economics" approach. A benefit of such an approach is that economics would be closer to the science that it has long aspired to be.[127] It could avoid making misleading normative claims. Instead, it could throw facts into the political process, which could then use such facts: The income distribution has changed by a certain amount. A tax bill is expected to decrease revenue by a given amount.[128] The revenue impacts of a bill are expected to be a certain amount. Charter schools lead to higher reading test scores for girls. Even, the revenue-maximizing tax rate is 70%.[129] Indeed, economics has been moving in this direction for a couple of decades, with top journals publishing an increased share of empirical work.[130]

The downsides of such an approach are twofold. First, it may be insufficient and impractical. Economically-inflected policy experts currently occupy a place in society in which they are constantly asked to give normative policy advice, as producers of cost-benefit analyses in government agencies, members of the White House Council of Economic Advisers, pundits on TV, participants on expert panels, and advisors to presidential campaigns and congressional offices. There is little reason to think that such a demand is likely to evaporate. And, even apparently simple positive questions quickly turn normative once one looks more deeply. For example, behavioral economics has conducted much useful research about what leads to higher savings rates.[131] One could just ask, "What's a good way to increase savings?" But there is considerable uncertainty about whether savings rates are in fact too high or too low.[132] While empirical evidence can speak to the benefits in increased savings, a normative model is needed to compare those benefits with the costs of each solution – in foregone consumption, autonomy, or otherwise. Thus even seemingly cabined questions quickly become normative because policy recommendations require a normative model.

Second and relatedly, there are good reasons that a demand for normative policy advice from economists exists. Economists are experts at linking evidence with normative models. Take the example of the "elasticity of taxable income," or how much people's income changes as their taxes change.[133] Few people know what this means. But, under certain assumptions, it is the key ingredient in understanding how high taxes should be to best achieve certain distributional objectives, since it reveals how much distortion a given tax rate causes.[134] Such analysis would be lost with a totally positive economics approach.

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[127] For further details on this approach, see Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3 (1966). *See also* Raj Chetty, *Yes, Economics is a Science*, N.Y. TIMES (Oct. 20, 2013), https://www.nytimes.com/2013/10/21/opinion/yes-economics-is-a-science.html.
[128] Of course, that prediction is always done with error. *See CBO's Economics Forecasting Record: 2017 Update*, CONGRESSIONAL BUDGET OFFICE (Oct. 2, 2017), https://www.cbo.gov/publication/53090 (showing the Congressional Budget Office's misprediction of growth).
[129] Diamond & Saez, *supra* note __ at 171.
[130] Joshua Angrist et. al., *Economic Research Evolves: Fields and Styles*, 107 AM. ECON. REV. 293 (2017).
[131] *See Behavioral Household Finance*, *in* HANDBOOK OF BEHAVIORAL ECONOMICS – FOUNDATIONS AND APPLICATIONS, https://www.elsevier.com/books/handbook-of-behavioral-economics-foundations-and-applications-1/bernheim/978-0-444-63374-3# (forthcoming Oct. 2018).
[132] *Id.*
[133] *See generally* Martin Feldstein, *Tax Avoidance and the Deadweight Loss of the Income Tax*, 81 REV. ECON. & STAT. 674 (1999); Martin Feldstein, *The Effect of Marginal Tax Rates on Taxable Income: A Panel Study of the 1986 Tax Reform Act*, 103 J. POL. ECON. 551 (1995).
[134] *See* Raj Chetty, *Is the Taxable Income Elasticity Sufficient to Calculate Deadweight Loss? The Implications of Evasion and Avoidance*, 1 AM. ECON. J.: ECON. POL'Y 31, 31-33 (2009).

B. Business as Usual

Another approach to the presence of moral commitments contrary to one-pieism is to ignore them and carry on as usual. One may believe that moral commitments are poorly thought through and thus are both unstable and poor representations of what people really care about.[135] For example, people decide whom to vote for, but many may put more thought into what breakfast cereal to buy.[136] Thus, one can interpret moral commitments as entirely or largely misguided and continue the decades-long neoliberal project of teaching the population that only outcomes, not means, matter in the distributive problem.[137] The goal is to either inform people of their biases or reframe policies so that they conform with moral commitments.[138] This method has the virtue of simplicity.[139] A careful consideration of moral preferences could considerably complicate welfarist analysis, even without the huge issues of measuring and interpreting those moral commitments.

More generally, the basic Pareto-like logic underling the one-pieist view may remain compelling to many: that is, one may think that violations of the standard thinking are misguided at their core. One *should* be able to trade the requirement to participate in jury duty. And, even with more empirical evidence of strongly-held moral commitments, some may not be persuaded that such thinking is rational. As Louis Kaplow and Steven Shavell argue, just because social norms of fairness play a useful role in promoting cooperation in everyday behavior does not mean that they ought to have independent weight in evaluating social policy.[140] The moral

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[135] See KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note_, for a skeptical take on the extent of people's true preferences for fairness (p. 275-80), but acknowledging that true tastes for fairness should in principle play a role in welfare analysis (p 431-36), though not on grounds of political constraints (p. 392); *see also* CHRISTOPHER ACHEN & LARRY BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2016) (describing evidence that voters have incoherent preferences); Sean Illing, *Two Eminent Political Scientists: The Problem with Democracy Is Voters*, Vox (June 24, 2017), https://www.vox.com/policy-and-politics/2017/6/1/15515820/donald-trump-democracy-brexit-2016-election-europe (interview with the authors).

[136] Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies (2008). *But see* Vanessa Williamson, *Public Ignorance or Elitist Jargon? Reconsidering Americans' Overestimates of Government Waste and Foreign Aid*, AM. POL. RES. 1 (2018) (arguing that voters' "ignorance" of government policies is a result of the jargon employed by elites). *See also* David Schleicher, *Federalism and State Democracy*, 95 Tex. L. Rev. 763, 764-766 (2017) (describing how voters seem to fail to pay attention to local issues); Diana Furchtgott-Roth, *Presidential-Election Winner To Be Decided by 2016 Economy*, MARKETWATCH (Jan. 30, 2016), https://www.marketwatch.com/story/presidential-election-comes-down-to-are-you-better-off-now-than-you-were-last-year-2016-01-28 (arguing that GDP growth the year before an election is predictive of the winner). *But see* Nate Silver, *What Do Economic Models Really Tell Us About Elections?*, FIVETHIRTYEIGHT (Jun. 3, 2011), https://fivethirtyeight.com/features/what-do-economic-models-really-tell-us-about-elections (arguing that economic indicators are only somewhat predictive).

[137] See eg David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 LAW AND CONTEMPORARY PROBLEMS 1, 7 (2015) ("One premise of neoliberalism is a pessimistic denial that democratic politics and public institutions can successfully shape and discipline economic affairs—a supposition, in short, that alternatives to the "market-fundamentalist" agenda are futile and likely to backfire, even if market-fundamentalist programs fail to deliver on their advertised promises.")

[138] For example, proponents of a universal basic income propose reframing the policy from "welfare," which conflicts with moral commitments, to a "social dividend," which is more consistent with them.

[139] *See, e.g.*, JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1999) (offering compelling examples of overbearing government planning that led to disasters).

[140] KAPLOW AND SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note _, at 69-81

commitments developed by the evolution of hunter-gatherers may often be irrelevant for policymaking in modern states.[141]

But the approach also has considerable downsides. If those moral commitments to fairness deserve normative weight because people truly value these processes, then policy analysis—and therefore likely policy— under this approach would more poorly reflect welfare. If those moral commitments are political constraints with some durability, then again economic analysis may be less effective at achieving optimal outcomes. And whatever embedded information is included in those moral commitments would be lost.

More deeply, though, normative law and economics analysis in practice *already incorporates* moral commitments, often implicitly and thus without explicit justification. That is current economic analysis—in ways typically unrecognized—is already that which it criticizes. The problem is that it primarily incorporates elite moral commitments. At a basic level, because utility is not observable, welfarism always requires more political theory than it may appear on its face. Take the example of the so-called "utility monster." Robert Nozick explains: "Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater sums of utility from any sacrifice of others than these others lose . . . the theory seems to require that we all be sacrificed in the monster's maw, in order to increase total utility."[142] In other words, incorporating moral commitments is unavoidable. How in practice does welfarist analysis deal with this objection? Essentially by ignoring the possibility of a utility monster, assuming it away.[143] Economic policy analysis that recognizes the possibility of a utility monster is rare.

Expert moral commitments thus are already incorporated into expert welfare analysis. Economists simply do not acknowledge them. One may argue that it is safe to trust expert judgment. But arguably it is not. Experts and nonexperts are different.[144] Experts face different incentives (e.g., many consult)[145] and are far richer than average Americans, with an average salary of $103,000 and top 10% of $160,000.[146] Broadly, there is also significant evidence that the preferences of economic elites differ from those of others, suggesting that a failure to account for non-elite preferences may deviate substantially from the social welfare optimum.[147] More pertinently, survey evidence suggests that economists and non-economists have different policy

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[141] *Id.* at 70.

[142] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974).

[143] Arguably one prominent exception is RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 639 (9th ed. 2014) (arguing on these grounds against the possibility of knowing that redistribution would increase welfare).

[144] Another concern is that experts may covertly import their political preferences via their analysis. *See* Zubin Jelveh et. al., *Political Language in Economics* (2014), https://wp.nyu.edu/zj292/wp-content/uploads/sites/1011/2014/12/political_language_in_economics.pdf (finding suggestive evidence "that political ideology influences the results of economic research"—namely, using natural language processing and machine learning to show a correlation between the observed political behavior and language of economists on the one hand and their empirical results on the other). *See also* Adam Bonica et. al., *The Legal Academy's Ideological Uniformity,* 47 J. LEGAL STUD. 1 (2018) (showing that law professors have political views that are non-representative of lawyers overall).

[145] Glen Wyl, *Finance and the Common Good*, *Conclusion* to APRÈS LE DÉLUGE: FINANCE AND THE COMMON GOOD AFTER THE CRISIS (Edward Glaeser, Tano Santos & Glen Weyl eds., forthcoming).

[146] Fourcade et. al., *supra* note_, at 107.

[147] *See, e.g.*, Raymond Fisman et. al., *The Distributional Preferences of an Elite*, 349 SCIENCE aab0096-1 (2015); *see also* Adam Grant, *Does Studying Economics Breed Greed?*, PSYCHOL. TODAY: GIVE AND TAKE (Oct. 22, 2013), https://www.psychologytoday.com/us/blog/give-and-take/201310/does-studying-economics-breed-greed (citing academic work finding differing preferences between economists and non-economists and that studying economics can change students' preferences). Fisman's et al. found that elite subjects were "substantially more efficiency-focused" than were other non-elites. Fisman et al., *supra*, at aab0096-1.

preferences, even after the non-economists have been informed of relevant facts.[148] Whether because of selection into economics or treatment of the training, a range of evidence suggests that economists are different in a variety of ways: showing less willingness to contribute to public good,[149] less cooperation,[150] and less willingness to make voluntary student contributions even before choosing economics as a field.[151] Economists even insulate themselves from other social sciences, with far higher rates of within-field citation than other social sciences[152] and greater distaste for interdisciplinary knowledge.[153] Consequently, economics-driven policy may be unduly focused on efficiency as opposed to other values, like fairness. Using expert moral judgment may yield policy analysis far from what can fairly be considered welfare-maximizing.

Of course, there is nothing wrong with experts, in economics or otherwise, inserting themselves into public debates or internal government policy processes as part of the market of ideas. The concern comes when elite discourse—and the problems to which experts set themselves to solve—diverges substantially from the deep moral commitments of ordinary Americans. Policy is not produced in a vacuum. There is a complex production process in which experts play a role. And there is a real risk that that process will produce problematic outcomes if not deployed properly. Furthermore experts influenced by economics—rulemakers, judges, and the like—have direct policy impacts. And a mis-deployment of economic expertise can further yield policy that is not welfare-maximizing.

C. Incorporating Moral Commitments into Policy to Address Inequality

It is beyond the scope of this Article to work out in detail the appropriate approach to moral commitments. A better option than the previous two options is the combination of two things: (1) where appropriate, incorporating category-specific moral commitments about fairness into economic analysis and (2) recognizing the difficulty of understanding the presence or absence moral commitments, adopting a more agnostic stance toward optimal policy. The analyst could incorporate information from deliberative polling, enacted policies, and survey and lab experiments—and take the evidence as a literal reflection of political constraints, if not full-blown preferences. This approach has the benefit of incorporating potentially relevant information about welfare for the reasons described above: as true preferences, political constraints, and embedded knowledge. And, to the extent that all three reasons push in the same direction—for consideration of moral commitments about fairness—one may remain agnostic as to interpretation. Yet this approach still uses the law and economics tools—such as program evaluation and measuring behavioral responses—to be helpful in effectively achieving the normative goals presented by moral commitments.

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[148] Paola Sapienza & Luigi Zingales, *Economic Experts versus Average Americans*, 103 AM. ECON. REV. 636, 637-39 (2013). *See also* Christopher D. Johnston & Andrew O. Ballard, *Economists and Public Opinion: Expert Consensus and Economic Policy Judgments*, 78 J. POL. 443 (2016).
[149] Gerald Marwell & Ruth E. Ames, *Economists Free Ride, Does Anyone Else?*, 15 J. PUB. ECON. 295 (1981).
[150] Robert H. Frank et. al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993).
[151] Bruno S. Frey & Stephan Meier, *Selfish and Indoctrinated Economists?*, 19 EUR. J.L. & ECON. 165 (2005).
[152] Fourcade et al., *supra* note_, at 93 (showing 81% within-field citation versus between 52% and 59% for sociology, anthropology, and political science (citing Jerry A. Jacobs, In Defense of Disciplines: Interdisciplinarity and Specialization in the Research University 82 (2015)).
[153] Fourcade et. al., *supra* note_, at 95 (showing only 42% agreement with the proposition that "In general, interdisciplinary knowledge is better than knowledge obtained by a single discipline," versus between 60% and 87% in other fields).

This approach follows from the standard goals in welfare economics: where we have evidence of ways of increasing well-being, we alter policy recommendations accordingly. Positive economics, in contrast, does not because it fails to use the economic tools of making policy recommendations. Its approach is flawed because economics can play a useful role in not only providing facts but also in analyzing them, using obscure data to make meaningful statements, comparing costs and benefits, and the like. And business as usual does not maximize well-being because it does not incorporate the values, political constraints, and information reflected in moral commitments.

Though measurement of moral commitments is challenging, evidence can come from a variety of sources. There are two dimensions of importance: level of generality and means of measurement. Many types of evidence could be useful to varying degrees, but four in particular stand out. A first useful type of evidence is polling. On the upside, polling is widely-available. But it can undergo wild swings, partly because it typically does not require respondents to think carefully about their responses and partly because it does not try to understand people's deeper moral commitments.[154] As a result, standard political polling rarely will say much about moral commitments.

A second type of evidence is carefully-conducted surveys by psychologists, economists, political scientists, and other social scientists. These allow for controlled settings, though they may lack real-world contexts. An example of this type of survey is the one conducted by Matthew Weinzerl on moral commitments about taxation on the basis of benefits received rather than to redistribute. A carefully-designed hypothetical was posed to participants, they made a choice, and then the reason for their choice was explored.[155]

A third type of evidence is "deliberative polling," first described by James Fishkin in 1988.[156] In this method, citizens are randomly chosen to engage in active deliberation in small group discussions with competing experts. Doing so allows both reflection and information. Since then, hundreds of such polls have been conducted. There are several downsides. These polls are more expensive, and thus more difficult to conduct. They may lack representativeness.[157] And they are typically aimed at policy issues rather than basic commitments at a higher level of generality.

A fourth type of evidence is existing institutions. As discussed earlier, there are obvious circularity problems with inferring anything about how policy should look from how policy does look. Nevertheless, the presence or absence of longstanding, widespread institutions—like the presence of government provision of healthcare and the absence of government provision of a demogrant that is taxed away at high rates—might say something about deep moral commitments.

The aim of this Article is not to adjudicate precisely what type of evidence is best. Rather, the point is to show that evidence—imperfect evidence admittedly—exists, and that there is content to the idea that ordinary people do not think like economists in accepting all Pareto improvements ignoring moral commitments: that people would not be happy trading votes, allowing indentured servitude, or systematically polluting more on poor people, even if there

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[154] *See* Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U. L. Rev. 1875, 1933-35).
[155] Weinzierl, *Popular Acceptance*, *supra* note ___
[156] *See* JAMES S. FISHKIN, DEMOCRACY: WHEN THE PEOPLE ARE THINKING (2018); *What is Deliberative Polling?*, CTR FOR DELIBERATIVE POLLING, http://cdd.stanford.edu/what-is-deliberative-polling.
[157] Dietram A. Scheufele, *Modern Citizenship or Policy Dead End? Evaluating the Need for Public Participation in Science Policy Making, and Why Public Meetings May Not Be the Answer*, JOAN SHORENSTEIN CTR. ON THE PRESS, POL. & PUB. POL'Y RES. 1 (2011).

were taxes and transfers to compensate. Nor is the aim of the Article to say that incorporating category-specific moral commitments is unproblematic. The aim is merely to say that doing so is better than the alternatives.

Here is the case that doing so is better. Puzzles motivate this Article. This Article cannot offer a method to fully resolve them. But it can move in the direction of resolution. The Article takes as its premise that at least one purpose of economic policy analysis is situational: to analyze whether a given policy is good or bad in a given situation. It deals less in Platonic ideals than in the muddle of reality. Return then to the issue of economic inequality, and consider how a law and economics analysis that incorporates moral commitments would respond. Recognizing the importance of moral commitments increases epistemic modesty:[158] this is a tough question. Any certain solution is likely missing a part of the picture. But economics has tools that can help solve the problem of how to best achieve redistribution. People will differ on the response, but here is one possible reaction:

An accumulation of evidence suggests that, for those concerned about welfare, the standard one-piest approach is unlikely to achieve distributive justice. Real-world institutions do not resemble the structure of taxes that the standard theory proposes. Survey experiments suggest that people do not think about taxes the way that economists do. And, working from the edge cases (selling jury duty or slavery), it is clear that nearly everyone subscribes to at least some of the view that more matters to policy than the one-piest logic of maximizing efficiency and using cash transfers would suggest. Other principles matter. As a result, a theory that relies entirely on taxes to redistribute is likely to fail. Call the views rational or call them irrational. They likely impose durable political constraints, at minimum. The neoliberal era suggests that persuasion will not convince people that nothing other than efficiency and the ultimate distribution of outcome matter. And, if you peel back those views, you are likely to find deeply-held views that many (though not all) may consider moral commitments deserving of independent normative weight. This reasoning suggests that the most redistributive part of economics—optimal taxation— actually impedes distributive justice, because it loads all distributive goals into a means poorly-equipped to achieve them.

Of course, traditional notions of efficiency still matter. Getting income in the hands of the poor still matters. And cash has the virtue of allowing choice. But that's not all that matters. So, we should look elsewhere for tools to achieve distributive justice. It may at first seem like every possible area of law is a potential area for redistribution. For example, judges can give larger economic damages to poor business owners than to otherwise-identical rich business owners. But here again moral commitments limit what is acceptable. It is a violation of horizontal equity to give larger economic damages to similarly-situated laundromat owners who differ only because they are poor. On the other hand, spending on health care for the poor starts to look more desirable,[159] as does protecting environmental health and providing transportation services[160] for the poor. Times might change. And, when they do, the analysis changes. After the U.S. has a $11,900 per person universal basic income, then perhaps fairness concerns can fade away from the design of legal rules. For now—for the utilitarian—the need to address inequality is too pressing to wait for one-pieist views to take hold among the population.

Or, at least that is one take that is consistent with the evidence and consistent with the principle that well-being matters.

[158] One can think of this as a problem of Bayesian reasoning.
[159] There may be efficiency-based reasons to spend on the poor as well, but equity pushes further in that direction.
[160] Liscow, *Is Efficiency Biased?*, *supra* note_, at 20.

i. Responses to Concerns

There are, of course, reasonable concerns about incorporating moral commitments. First, as discussed earlier, while data exist, it is difficult to know whether stated views represent deeply-held views, misapprehensions, temporary views, tribal ones, or a host of other interpretations. There are many reasons to be skeptical of lay moral commitments. And, even taking the presence of a moral commitment literally—and even taking for granted that it reflects a true preference—it is difficult to know the magnitude of the preference and the willingness to trade off with other things. Policies consistent with moral commitments typically are not for sale in a market, making it difficult to directly observe revealed behavior that would indicate something about willingness to pay for distribution through a given means. That doesn't mean that the commitments aren't real, but it does mean that quantification is difficult.

Second, there are conceptual difficulties with the incorporation of moral commitments. For example, without additional political theory added onto the utilitarian superstructure, accepting moral commitments as preferences could lead to openly racist policy. Consideration of politics leads to ad absurdum results like weighting the preferences of people from Wyoming more heavily because of their extra weight in the U.S. Senate. And it is very difficult to assess how much embedded information is included in moral commitments because the entire value of the embedded knowledge is that experts are not properly attuned to its presence.

Third, the political process is often where values are adjudicated—and, indeed, often where they are formed in the first place.[161] And attentiveness to today's moral commitments could slow that process of change. Good examples are the current social experiments on the effect of a universal basic income (UBI) on labor supply.[162] For many, a concern about a UBI is that it will discourage work and—should the experiments show otherwise—such doubters may become more supportive. This might at first seem like a reason to put a thumb on the scale against incorporating moral commitments. However, that begs the question of

A fourth concern is that incorporating moral commitments into policy recommendations risks supplanting the political process. But that concern misunderstands the nature of the enterprise. Normative economic analysis has been incorporated into college curricula, law school curricula, judicial decision-making, and administrative cost-benefit analysis, among many other places. There's power to how economics structures thinking, especially that of the socio-political elite. Frequently, standard analysis works well enough, either because standard assumptions work well enough or because simplicity is enough of a virtue on its own. Elsewhere, though, welfare analysis may be fundamentally misleading without the incorporation of moral commitments. The question of the appropriate means by which to address distributive questions may often take this form. The goal of economic welfare analysis is to use available evidence to make the policy recommendations that most enhance welfare. This Article is merely arguing for improving that analysis in one way.

A fifth concern is the reduction in analytical clarity by incorporating moral commitments. Incorporating moral commitments can muddle analysis. Partly for that reason, there's nothing wrong with the analysis in the business as usual approach, properly caveated. But economics has

[161] *See, e.g.*, Reva Siegel, Constitutional Culture, *Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).
[162] *See, e.g.*, Peter S. Goodman, *Free Cash to Fight Income Inequality? California City Is First in U.S. to Try*, N.Y. TIMES (May 30, 2018), https://www.nytimes.com/2018/05/30/business/stockton-basic-income.html.

the tools to incorporate moral commitments and, if the goal is to maximize welfare, it should do that, not hold back out of a fear of complexity. There were similar fears with the advent of behavioral economics. Now many see how the insights are essential for understanding well-being, complexity or not.[163] And, indeed, incorporating moral commitments is just an extension of the standard behavioral economics paradigms of non-standard preferences and biases to the arena of policy aimed at reducing inequality. Just like individuals have non-standard preferences, biases, and errors regarding their own behavior, they also have them regarding the processes and outcomes to which others are subjected.

A sixth concern is that of malicious preferences, such as when people are motivated by racism.[164] There are three responses. First, malicious preferences are not so much a problem for this Article as they are a problem for welfarism more generally. There is a large literature[165] on the extent to which preferences against redistribution may be driven by ethno-racial animus. This Article merely argues that, when choosing which specific policies to use to redistribute, moral commitments should be taken into account. While those commitments could also be inflected with malicious preferences, the concern is not avoided by using traditional law and economics welfarist reasoning because the preferences for overall distribution could also be inflected by racism. Second, as noted earlier,[166] this Article does not claim that well-being is the only normative goal, but merely that—if welfare is the goal—then these implications follow. Third, that said, if the goal is to achieve a more just distribution of resources, then the fact that the public's beliefs might act as political constraints—the second reason for paying attention to them—suggests that means-specific preferences should play some role in program design: for example, creating programs as social insurance schemes that present as benefitting everyone rather than as welfare schemes that may trigger malicious beliefs.[167]

V. Incorporating Category-Specific Moral Commitments: A Tentative Exploration

A. Information Useful for Incorporating Moral Commitments

Working out exactly when and how to apply incorporate moral commitments is beyond the scope of the Article. Nevertheless, there are several factors that could influence the appropriate location of analysis on the two dimensions in Figure 1 on the extent of (1) consideration of lay moral commitments and (2) normative modesty. Regarding consideration of lay moral commitments, evidence on both their presence in general and the three reasons that moral commitments might matter—preferences, politics, and knowledge—is relevant. The

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[163] See, for example, the Nobel Prize awarded to Richard Thaler, partly for his work on policy responses to behavioral economics.
[164] *See, e.g.*, Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle,* 110 YALE L.J. 173 (2000) (responding in part to this objection).
[165] *See, e.g.*, Harell, Allison, Stuart Soroka, and Shanto Iyengar. "Race, prejudice and attitudes toward redistribution: A comparative experimental approach." *European Journal of Political Research* 55, no. 4 (2016): 723-744, https://onlinelibrary.wiley.com/doi/pdf/10.1111/1475-6765.12158; Hutchings, Vincent L. "Change or more of the same? Evaluating racial attitudes in the Obama era." *Public Opinion Quarterly* 73, no. 5 (2009): 917-942; Tesler, Michael. "The spillover of racialization into health care: How President Obama polarized public opinion by racial attitudes and race." *American Journal of Political Science* 56, no. 3 (2012): 690-704. See also Glaeser/Schleifer
[166] Supra Section III.B.1.
[167] See Gillian Lester, Joe the Plumber, Tax Law Review (on designing programs as social insurance).

degree of normative modesty then depends upon how strong the overall evidence is on both lay moral commitments and the standard economics questions.

As to lay moral commitments, the first question is how much evidence there is in favor of the importance of moral commitments in general relative to standard economic concerns. The first factor for answering this question is the amount and variety of evidence that points toward the presence, strength, and durability of moral commitments: widespread and long-lasting political institutions, polling evidence, survey experiments, and the like. Without such evidence, the standard view looks stronger. Evidence is accumulating, but much work remains. A second factor is the size of the stakes on standard questions in economics: How big are the efficiency costs (defined in the standard way) of following moral commitments? And, given a goal of addressing income inequality, what are the distributional consequences on income of following moral commitments in policy design? The bigger the standard inefficiency and the bigger the risk of harming the intended beneficiaries, the greater the strength of business as usual over populist law and economics.

We could then try to understand the evidence for and against each of the three potential mechanisms that justify accounting for moral commitments. The first rationale is that moral commitments represent true preferences. The validity of this argument turns on people's willingness to give up efficiency (in the standard sense of willingness to pay) to gain a fairer process of distribution. Survey and lab experiments can help measure this quantity, and are beginning to do so.[168] The stronger the evidence of willingness to pay, the greater the value of the populist approach.

The second rationale is that moral commitments impose political constraints. A preliminary question here is the extent to which lay moral commitments actually impact policy, an ongoing debate since it is unclear how much the policy preferences of non-elites impact policy choices.[169] The question then turns on whether there really is one pie in economic policy—that is, whether the distributional consequences of one policy are offset by changes in distributional consequences in other policies, justifying the one pie two-step because the overall distribution will soon yield a distribution of income favored by the population like in the median voter theorem.[170] If so, then the standard law and economics analysis makes relatively more sense because the specific policies adopted do not matter for the ultimate distribution of income, so adopting the policies that maximize the overall size of the pie is more sensible.[171] In other words, is there really a tradeoff between policies reflecting complete commensurability between them as in the standard story? Or, are the distributional impacts of policies sticky because of policy-by-policy moral commitments or for other reasons, like inertia?[172] If the latter, then the populist approach has greater value because achieving a socially desirable distribution of income is likely to require attention to the types of policies we adopt.

A subsidiary question on the politics question is on the extent to which "political debiasing" has worked. As described earlier, part of the neoliberal program has been economics training to debias people: to teach them about the efficiency-equity tradeoff and help them learn the most efficient ways to redistribute. If one interprets moral commitments as reflecting biases,

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[168] *See, e.g.*, Weinzierl, *Popular Acceptance*, *supra* note ___Ilyana Kuziemko et. al., *How Elastic Are Preferences for Redistribution? Evidence from Randomized Survey Experiments*, 105 Am. Econ. Rev. 1478 (2015); Fisman et. al., *supra* note_.

[169] *See* GILENS, *supra* note_ and associated notes *supra*.

[170] *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 51-74 (1957).

[171] Liscow, *Is Efficiency Biased?*, *supra* note_, at 12-13; Liscow, *School Finance*, *supra* note_, at 5.

[172] Liscow, *Is Efficiency Biased?*, *supra* note_, at 13; Fennell & McAdams, *supra* note_.

then what is the evidence that such biases have actually been overcome with years of efforts? Has economics education "worked"? The more that it has, the more that moral commitments about fairness look like vestiges standing in the way of growth and efficient redistribution, rather than key ingredients in policy design.

The third rationale is embedded knowledge. One question here is whether the type of knowledge is amenable to lay expertise. For example, it is more plausible that nonexperts have embedded knowledge about the functioning of politics, the presence of behavioral biases, or how employers actually set wages than that they have knowledge about the presence or causes of climate change or the revenue effects of a tax bill.

More generally, case studies abound of elite technical expertise going seriously awry.[173] But the question here is different: what are circumstances under which paying attention to moral commitments to fairness would have averted these mishaps? Returning to the example of behavioral economics, what evidence is there that ordinary people understood things that economic experts did not? And what evidence is there that that knowledge could be expressed in a way that would be accessible to policymakers? The inevitable ignorance of experts is often taken as a reason for taking a minimalist approach to government intervention in the economy.[174] Moral commitments containing embedded knowledge need not militate toward nonintervention, but—the more evidence there is of lay expertise in a particular area in forms accessible to experts—the more value there is in attention to those sentiments in policy design.

The second implication of the presence of moral commitments is normative modesty. The appropriate place along this dimension is determined primarily by the extent of certainty about the above questions on moral commitments and standard economic concerns like efficiency and incidence. It is not the case that, because we are uncertain about moral commitments and have a little evidence on standard economics concerns, we should adopt conventional analysis; or that, because we have a little evidence on moral commitments and are uncertain about standard economics concerns, the populist approach makes sense. Rather, we can be more or less sure about how strong that evidence is overall. That is, we may know little either way—about both moral commitments and standard economics values—in which case positive economics makes relatively more sense. Alternatively, the stronger the evidence in favor of either moral commitments to fairness or standard economics, the more justification in moving in the normative direction.

At this point, there is little enough evidence that it is generally not possible to make claims on anything at more than a coarse level. And, in the absence of evidence, one's beliefs about what people care about, how politics works, and what ordinary people know must play a significant role in policy design. But we can make two points here. One is on epistemic modesty: making exact, certain claims about the welfare-maximizing policy in a given context in the real world is harder than law and economics one-pieism typically makes it seem. And, second, moral commitments to fairness should not be checked at the door, but rather considered alongside standard economic concepts like traditional notions of efficiency. More broadly, a benefit of viewing policy when considering moral commitments is that it helps direct research toward questions to help understand the magnitude of the benefits of attention to moral commitments relative to standard efficiency costs.

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[173] *See, e.g.*, SCOTT, SEEING LIKE A STATE, *supra* note_.
[174] *E.g.* F.A. Hayek, *The Use of Information in Society*, 35 AM. ECON. REV. 519 (1945).

B. Applications

[Note to readers: I intend to develop a thorough example, comparing welfare under the business as usual approach to that of an approach incorporating moral commitments and also showing how the approach of merely adopting limited taxes as a political constraint without further attentiveness to moral commitments is unsatisfying. For now, here are a few brief examples.]

Finally, consider the application of moral commitments to three specific policies. First, consider a proposal to tax large businesses based on the extent to which their employees are the recipients of government services.[175] It is worth considering a broad range of moral commitments—anti-corporate sentiment[176] and notions of fairness that could make such a bill politically palatable. That anti-corporate sentiment could reflect true preferences for which people actually have a willingness to pay. Or such an approach could reflect embedded knowledge about how norms play a role in wage-setting—that a bill like this could help shame corporate executives into paying higher wages, without reducing employment even if the legislation is not adopted.[177] These considerations would be set beside the evidence for traditional economics concept of "economic incidence,"[178] the idea that the party on whom a tax is statutorily levied is not necessarily the party that will end up paying the tax economically. When a tax is levied on an employer for employing workers low-wage enough to receive government benefits, employers may respond by hiring fewer low-skilled workers, instead replacing those individuals with machines or high-skilled workers, or scaling back their operations. Employer responses reduce demand for low-skilled workers, driving down the wage of low-skilled workers, thereby turning a tax on Amazon and Walmart into a tax on the low-skilled workers themselves and harming those that the policy is intended to benefit. A review of the evidence suggests overwhelmingly that a tax of this sort would be largely passed onto workers, making this proposal likely to actually worsen inequality.[179] Of course, deference to political views should not be blind, but rather should broad the considerations in economic policy design, which can easily be overwhelmed by the traditional considerations.

Second, consider how moral commitments might alter the analysis of work requirements attached to low-income support programs. Traditional economic analysis says that the poor have

[175] Senator Bernie Sanders (D-VT) and Representative Ro Khanna (D-CA) have introduced such legislation in the Senate and House, respectively. *See generally* Stop Bad Employers by Zeroing Out Subsidies Act, S._, 115th Cong. (2018); Corporate Responsibility and Taxpayer Protection Act of 2017, H.R. 2814, 115th Cong. (2017).
[176] Frank Newport, *Business Gets Bigger Even as Americans Prefer Small*, Gallup (Aug. 22, 2017), https://news.gallup.com/opinion/polling-matters/216674/business-gets-bigger-even-americans-prefer-small.aspx (finding that only 21% of respondents had a "great deal" of confidence in big business).
[177] Emily Stewart, *Bernie Sanders' BEZOS Bill Takes Aim at How Amazon Pays Workers*, VOX (Sep. 5, 2018), https://www.vox.com/policy-and-politics/2018/9/5/17822810/bernie-sanders-bill-bezos-amazon-ro-khanna (quoting Senator Bernie Sanders' spokesman as saying, "The basic message of this bill is billionaires should get off welfare, but it is an attempt to expose the way that our economy works."). And, indeed, subsequent to this proposal, Amazon did change its wage policy, which some attributed partly to the proposal. https://www.wsj.com/articles/why-amazon-needed-to-pay-up-1538507116?mod=hp_lead_pos2
[178] *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY (5th ed. 2015).
[179] Jesse Rothstein, *Is the EITC as Good as an NIT? Conditional Cash Transfers and Tax Incidence*, 2 Am. Econ. J.: Econ. Pol'y 177 (2010). Juan Carlos Suarez Serrato, *Who Benefits from State Corporate Tax Cuts? A Local Labor Markets Approach with Heterogeneous Firms* (Nat'l Bureau of Econ. Res., Working Paper No. 20289, 2014).

a high marginal utility of consumption, so they ought to be helped.[180] Indeed, traditional analysis suggests that there should be a demogrant available to everyone, untied to work.[181] The traditional analysis holds that people dislike work, so it would be inefficient to needlessly encourage them to engage in work.[182] That logic may be sound. But we should ask several other questions. For example: How significant are the social preferences for seeing people working and against having people unemployed?[183] What basis is there for the belief that the unemployed put "irrationally" little effort into finding jobs and that they might be better off with some extra incentive to work—and could moral commitments on the subject represent embedded knowledge?[184] How about for the social impact of working role models? Or for the legitimacy-undermining role of many people in society feeling like others are "cutting in line"?[185] Of course, none of this is to say that these factors predominate over the desire to help the poor—and the goal of reducing inequality is in tension, to say the least, with using administrative hassle to reduce welfare expenditures. Furthermore, views on unconditional cash grants could change with time and experience.[186] But such concerns ought not be parked at the door for economic analysis oriented around some kind of well-being.

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[180] See GRUBER, PUBLIC FINANCE AND PUBLIC POLICY, *supra* note_ (providing a standard treatment). *But see* EDMUND S. PHELPS, REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE (providing an alternative view).

[181] Saez, *supra* note_.

[182] Of course, following the "tagging" logic described earlier, it can be efficient to try to sort people based on ability and give preferential treatment to those who manifest features of higher ability.

[183] Daniel T. Lichter & Martha L. Crowley, *Poverty in America: Beyond Welfare Reform*, 57 POPULATION BULLETING 1, 19 (2002), https://www.prb.org/wp-content/uploads/2002/06/57.2PovertyInAmerica.pdf ("Surveys also indicate that the poor prefer work to receiving help from the government or from family members."); David Lauter, *How do Americans View Poverty? Many Blue Collar Whites, Key to Trump, Criticize Poor People as Lazy and Content to Stay on Welfare*, L.A. TIMES (Aug. 14, 2016), http://www.latimes.com/projects/la-na-pol-poverty-poll. *See also* RJ Reinhart, Public Split on Basic Income for Workers Replaced by Robots, GALLUP (Feb. 26, 2018), https://news.gallup.com/poll/228194/public-split-basic-income-workers-replaced-robots.aspx.

[184] KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 104 (describing how workers have experience unexpectedly large social benefits from working); Alan B. Krueger & Andreas Mueller, *Job Search, Emotional Well-Being, and Job Finding in a Period of Mass Unemployment: Evidence from High-Frequency Longitudinal Data*, 2011 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1 (describing evidence, including increased sadness with longer job searches, consistent with a feeling of discouragement about finding jobs); Benjamin Lockwood, *Optimal Income Taxation with Present Bias* (Working Paper, 2016).

[185] *See* ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND (describing resentment due to people "cutting in line" without working); Jason DeParle, *Why Do People Who Need Help From the Government Hate It So Much?*, N.Y. Times (Sept. 19, 2016), https://www.nytimes.com/2016/09/25/books/review/strangers-in-their-own-land-arlie-russell-hochschild.html.

[186] Some countries are experimenting with a universal basic income. *See* Jon Henly, *Finland to End Basic Income Trial After Two Years*, GUARDIAN (Apr. 23, 2018), https://www.theguardian.com/world/2018/apr/23/finland-to-end-basic-income-trial-after-two-years (remarking that the government "plans stricter benefits rules"). A similar program has proven popular and durable in Alaska, where the oil revenues are used to effectively create a universal basic income. *See* Michael J. Coren, Alaska Shows Even People in the Most Conservative States Prefer a Basic Income to Lower Taxes, QUARTZ (June 30, 2017), https://qz.com/1018413/new-survey-by-the-economic-security-project-finds-alaska-residents-strongly-support-preserving-a-universal-basic-income-ubi-from-the-alaska-permanent-fund-dividend-rather-than-cut-taxes. Cash transfers have also worked well in some developing countries. *See* Annie Lowrey, *The Future of Not Working*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/magazine/universal-income-global-inequality.html (reviewing the Kenya UBI experiment). *See also* Byrd Pinkerton & Sarah Kliff, *The Case For and Against a Universal Basic Income in the United States*, VOX (May 12, 2017), https://www.vox.com/2017/5/12/13954182/case-for-and-against-universal-basic-income-united-states (describing a debate between Andy Stern and Robert Greenstein argue over whether a UBI is politically feasible).

Third, consider how to analyze question of capital income taxation versus labor income taxation. Traditional economic analysis suggests that the right way to analyze the relative rate structure of the two is as one big pie to maximize welfare. Recent survey evidence calls such a view into question.[187] Many people do not view income taxes (labor or capital) as a means of maximizing welfare.[188] Many instead view taxes as a means of paying in proportion to the "benefits" that one receives from government. So, Bill Gates should pay more in taxes than the poor—not to maximize welfare, but rather because he receives more benefits.[189] Similarly, other evidence suggests that, notwithstanding potential inefficiencies, people view it as fair to have high tax rates on capital income. One can hold a variety of views about the ends of government policy and the sophistication of the views of the survey respondents, but to brush those views aside as meaningless creates the risk of not achieving the goals—efficiency, utility maximization, or otherwise—that policy analysts claim to have. Consideration of moral commitments thus makes higher capital income tax rates more desirable.

Conclusion

I do not mean to suggest that considering policy-specific moral commitments loses nothing. There is great value in having a clear set of assumptions that can yield clear policy implications that, appropriately contextualized, can be taken as one among many inputs notwithstanding the "optimal policy" jargon. But that likely misunderstands the social meaning of economists' expertise. When economists are asked as experts whether trade deals or cuts in pension benefits increase welfare, that sounds like asking experts whether they think a policy is good or not: who favors decreasing welfare? Still, allowing for more complex motivations yields less definitive results and could result in less input from economics—in other words, unless empirical estimates of behavioral effects are clearly translated into summary measures of impacts on "welfare," their importance may be lost.

But there is another possibility: that more openness to incorporating moral commitments as much unshackles economic methodology as cabins it. We live in an age of both a populist revolt against economic experts and also a flowering of empirical work aimed at addressing social ills.[190] That work can be put to use learning how best to navigate the trade-offs needed to pursue the goals that people, in all their diversity, have to make the world a better place. The ultimate target here is changing policy, but the proximate target is making economic analysis better at what it's already trying to do. The way that economics-inflected scholars and analysts do our work affects outcomes by shaping what policies get analyzed, what gets measured, and the views of economic experts in the room at the time of policymaking:[191] scholarship, teaching, and ideas matter. Something is not working very well with the standard expertise. The standard

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[187] Raymond Fisman, et al, *Do Americans Want to Tax Capital? Evidence From Online Surveys*, (Nat'l Bureau of Econ. Res., Working Paper No. 23907, 2017).
[188] Matthew Weinzierl, *Revisiting the Classical View of Benefits-Based Taxation*, 128 Econ. J. F37 (2018).
[189] *Id.*
[190] *See Government Data are Ever More Important to Economic Research*, ECONOMIST (May 16, 2018), https://www.economist.com/international/2018/05/26/government-data-are-ever-more-important-to-economic-research.
[191] See Daniel Hirschman & Elizabeth Popp Berman, *Do Economists Make Policies? On the Political Effects of Economics*, 12 SOCIO-ECON. REV. 779 (describing the ways in which economics influences policy); Fourcade et. al., *supra* note_, at 109-10 (same).

economic expertise of the past few decades has yielded neither robust economic growth[192] nor greater economic equality.[193] It may be time to try something a little different.

Ultimately, the real payoff of considering moral commitments is an economics that is truer to what the discipline can actually say and more effective at addressing social problems. In the lead-up to and aftermath of the 2016 election, there's been an explosion of policy proposals for addressing inequality, raising the question of the role of economics in sorting between them. A recognition of the limits and the possibilities of economics may help open up space for the means-ends reasoning at which economics excels to address issues of distributive justice without the blinkers of narrow preconceptions.

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[192] The causes of reduced growth are myriad (*see, e.g.*, Robert Gordon, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 7-8 (2016) (arguing that the pace of innovation since 1970 has not been as broad or as deep as that spurred by the innovations" of the century before), and the contribution of economic policy is unclear.

[193] Piketty & Saez, *supra* note_. But see [Harvard psych professor] (arguing that, in many ways, outcomes in the world are improving).