

RETHINKING GLOBAL DISTRIBUTIVE JUSTICE: LEGAL AND ECONOMIC NORMS ADDRESSING CRISES OF GLOBAL HEALTH, HUNGER, AND SUSTAINABILITY

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ABSTRACT

The increasingly global nature of the events impacting society globally call for a reconsideration of global distributive justice. Distributive justice, a matter of domestic concern, has a long history spanning millennia. It has become a particular concern with the advent of wide-spread private property and capitalism. While a concerted focus on distributive justice commenced in the mid-twentieth century, it is urgent that global distributive justice garners increased attention due to recent events spanning the past decade along with modern political ideologies and jurisprudence. This Article contests purist theoretical positions by taking pragmatic approaches in reviewing legal and economic governance norms. We first review the dominant liberal and conservative political philosophies that drive the discussion with attention to the balance of individual and society. We then connect these philosophies with legal theories concerning the nature and role of property, including norms and pragmatic approaches. Conversation proceeds to consider the theories of economics, a major policy driver.

This Article argues that economic approaches to distributive justice are needed to address the collective action challenges faced by the current and future generations— namely health, hunger, and sustainability. Unlike economics, with its focus on wealth creation and efficiency, a central value of law and justice requires weighing all human beings fairly, regardless of location geographically or in time. This Article contributes to overarching legal discussion on property by placing a focus on three emerging and increasingly important global issues that remain inadequately addressed by current economic and legal approaches to distributions. We argue that a rebalancing of internationally-focused legal norms and economics is overdue and that a shift favoring justice foundations over economic wealth and efficiency as the normative foundations is required. Our argument proceeds

by drawing on emerging ideas of global distributive justice, non-market institutional economics, and new pragmatic theories of property law to contribute to realizing global distributive justice at this specific, critical juncture in history.

I. INTRODUCTION

The COVID-19 (COVID) pandemic has upended the existing order around the globe. Global dialogue, from the inane level of social media discourse to revaluations of basic research agendas, has challenged assumptions about how people should live—including issues associated with global food security, health services, and sustainability. In fact, the “new normal” is far from settled in many areas of activity. For example, the World Health Organization’s “COVID-19 Vaccine Global Access” (COVAX) Facility, first proposed in September 2020,¹ struggled to deliver enough COVID vaccines to those in need because of intellectual property (IP) rights,² economics and politics, and different positions taken by countries on these issues labeled as “wicked problems” related to the distribution of vaccines.³ Issues, such as a global vaccine distribution initiative, are simply a recent urgent example of the larger long-standing challenge of politics, law, and economics—namely, the issue of distributive justice.

Politics, law, and economics take different approaches to the organization of society and its institutions, including institutions around production and distribution. Further, all three use rights as a core unit of analysis and use institutions in their analytical frameworks. Particularly, each of the disciplines approaches the social organization problem differently.

Politics provides philosophical analyses and justifications for society and the related distributions of power through the creation, distribution, and cessation of rights.⁴ Law, which provides society’s institutional infrastructure, addresses norm creation by referencing more or less universal beliefs about justice and fairness and analyzes how proposed norms fit into existing systems of rights and duties.⁵ The law provides normative frameworks and arguments for analyzing and addressing fairness, including in distributions and in society in a more general sense.⁶ Economics examines how society can best organize the creation and distribution of rights predicated on certain value assumptions,

¹ WHO, *Fair Allocation Mechanism for COVID-19 Vaccines through the COVAX Facility* (Sept. 9, 2020), <https://www.who.int/publications/m/item/fair-allocation-mechanism-for-covid-19-vaccines-through-the-covax-facility>.

² WHO, *COVAX Calls for Urgent Action to Close Vaccine Equity Gap* (May 20, 2022), <https://www.who.int/news/item/20-05-2022-covax-calls-for-urgent-action-to-close-vaccine-equity-gap>; see also *infra* note 311.

³ Elvin H. Geng et al., *COVID-19 and Global Equity for Health: The Good, the Bad, and the Wicked*, 18 PLOS MED. 1, 1 (2021), <https://doi.org/10.1371/journal.pmed.1003797>; see also, e.g., *A Patent Waiver on COVID Vaccines is Right and Fair*, 593 NATURE 478, 478 (2022).

⁴ REX MARTIN, A SYSTEM OF RIGHTS 1-4 (1993).

⁵ Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 97 (1991).

⁶ Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 249 (1998).

with a special emphasis on the transactional value of rights and a default preference for the institution of the market and individual preference as the preferred unit of analysis. As American political scientist Harold Lasswell stated, all three disciplines deal with the distributive justice issues of “who gets what, when, [and] how,”⁷ and all elements are founded upon divergent political philosophies, which provide foundations for and find soundings in law.

Taking Lasswell’s framework—“who . . . [,] what, when, [and] how”—we focus on the issues concerning “who” the recipients should be, “what” items they are to receive, and “how” the goods and services are to be distributed, and in the instance of sustainability, the issue of “when.” Briefly, as to the first question of recipients of the resources, the “who” question is framed as the following: Will all of humanity be eligible and considered for these resources or will only some group-based category—such as membership in a particular family, political party, or some other type of ranking on a preferred characteristic determined meritorious—be eligible for resources.⁸ Traditionally, the scope of distributive justice concerns is limited to a national or subnational level.⁹ Different political philosophies will support their own preferred candidates, whether these candidates are all of humanity, members of some particular religion or race, or some other social characteristic of value such as class, education, or effort.

With the major issues challenging humanity being natural phenomena—such as hunger, pandemics, and ecological sustainability, which do not take account of political borders—the traditional restrictions on consideration of who should be the beneficiaries/recipients can no longer stand. Similarly, these events preclude traditional prioritization of individuals and private property rights. Thus, foundational issues in the distributive justice debate are the conflict between nation-state-focused justice and global issues, and the rights and interests of the individual versus the rights and interests of the larger group.

Concerning Lasswell’s second question of “what” is to be distributed, there is again a wide range of views. These views range from ensuring a relatively equitable lifestyle around the globe, to providing what is necessary for dignity to all, to the most basic level of sustenance necessary to sustain individual life.¹⁰

Further, distributions can be considered in terms of scale—at different levels from the individual to the sub-national, national, and even global

⁷ See generally HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

⁸ See, e.g., DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 44 (2011).

⁹ Michael Blake, *Global Distributive Justice: Why Political Philosophy Needs Political Science*, 15 ANN. REV. POLIT. SCI. 121, 131 (2012).

¹⁰ *Id.*

levels.¹¹ Given that human survival at a species level is at stake, we argue for basic sustenance, basic health services, and global ecological sustainability.

In terms of Lasswell's third question, the "when," we argue for an ongoing rebalancing or redistribution. Human history is replete with redistributions whether driven by climate change, conquest, or the vicissitudes of economic markets. In this dynamic environment, political agendas must continually address redistributions.

Finally, concerning Lasswell's "how" to carry out distribution, we argue in the negative—that markets alone are institutionally unsuited to the challenges posed. Indeed, market failures contribute to all three of the major global disasters (global health, global hunger, and sustainability) and related injustices that eventuated. These injustices, in part, require a rebalancing.

This Article examines distributive justice as a matter of global imperatives by responding to global needs, challenging purist theories in property law and economics in favor of pragmatic actions, and differentiating and reflecting the relevant legal and economic norms. We first address the underlying political philosophies, challenging the idea of global distributive justice at polar ends of the political spectrum—conservatives who focus on individual rights and the progressives who focus on the societal, group rights. We then turn to consider how these philosophies are expressed in law and economic theory. Lastly, we explore these issues, positions, and arguments in the context of three case studies: global health issues (using the COVID vaccine inequality as an example),¹² global hunger,¹³ and sustainability.¹⁴

Our argument is part of the effort to avoid the outcome that stems from the current mis-governance of the planet's resources—where the planet's large population (fueled by the actions of individuals), and the growing impact of humanity on the ecology, is on track to create conditions of abject scarcity.¹⁵

¹¹ FOX O'MAHONY L AND ROARK, "SCALING PROPERTY LAW," IN FOX O'MAHONY L AND ROARK ML, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* 165-66 (CAMBRIDGE UNIVERSITY PRESS 2022).

¹² See generally Ezekiel J. Emanuel et al., *An Ethical Framework for Global Vaccine Allocation*, 369 *SCI.* 1309 (2020).

¹³ See generally Benedict Sheehy & Ying Chen, *Let Them Eat Rights: Re-Framing the Food Insecurity Problem Using a Rights-Based Approach*, 43 *MICH. J. INT'L L.* 631 (2022).

¹⁴ See Jochen von Bernstorff, *International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization*, 26 *EUR. J. INT'L L.* 279, 279-293 (2015), <https://doi.org/10.1093/ejil/chv012>.

¹⁵ See, e.g., Keith Slack, *Digging Out from Neoliberalism: Responses to Environmental (Mis)governance of the Mining Sector in Latin America*, in *BEYOND NEOLIBERALISM IN LATIN AMERICA?* 117-134 (John Burdick, Philip Oxhorn & Kenneth M. Roberts eds., Palgrave Macmillan 2009) (discussing environmental misgovernance of the mining sector in Latin America); see also Paul Williams, *Global (Mis)Governance of Regional Water Relations*, 40 *INT'L POL.* 149, 149-58 (2003) (discussing the misgovernance of water resources).

Through ethically better distributions of legal, economic, and ecological resources, it is possible to avoid worse conditions in which justice is even harder to pursue both nationally and globally. Despite liberalism's prioritization of the individual, the individual is not atomistic. Indeed, we argue with philosopher John Rawls' justification for redistribution. "[A]n injustice is tolerable only when it is necessary to avoid an even greater injustice."¹⁶

This Article is divided into seven parts following this introductory section. Part II sets out the background for discussing the problem of global distributive justice. Part III studies the different political theories and their responses to global distributive justice, using Lasswell's "who," "what," "how," and "when" framework. Part IV examines legal theories of property, and Part V examines the two main economic approaches to distributive justice. Part VI proceeds to investigate global drivers of the global distributive justice debate, specifically through the examination of the three areas critical to human survival and development: health services including COVID vaccines, access to food and nutrition, and sustainability. Part VII analyzes the limitations of economics theories in addressing justice in distributions. In particular, it utilizes the concept of market failure and its application to the three areas of analysis: health services in the era of the COVID pandemic and beyond, hunger, and sustainability. Part VIII addresses the importance of re-balancing individual rights and collective rights and further proposes several public policy choices for distributive justice. The conclusion restates our support for the application of the principles of distributive justice at the global level.

II. BACKGROUND

Contemporary society is a great paradox. On the one hand, a significant majority of the planet has benefited from great improvements in living conditions.¹⁷ These gains are due in large part to an environment of capitalist economic systems, particularly through the use of the legal institution embracing private property and the economic institution of markets.¹⁸ On the other hand, the current situation is one in which there are increasing threats to survival of the human species globally as a result of issues such as health

¹⁶ Marcus G. Singer, *Justice, Theory, and a Theory of Justice*, 44 PHIL. SCI. 594, 595 (1977) (citing JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971)).

¹⁷ See generally INDUR M. GOKLANY, THE IMPROVING STATE OF THE WORLD: WHY WE'RE LIVING LONGER, HEALTHIER, MORE COMFORTABLE LIVES ON A CLEANER PLANET (2007) (Goklany argues that "economic growth, technological change and free trade helped to power a cycle of progress that in the last two centuries enabled unprecedented improvements in every objective measurement of human well-being.").

¹⁸ Andrew Mason, *The State, National Identity and Distributive Justice*, 21 J. OF ETHNIC & MIGRATION STUD. 241, 241-54 (1995).

services during the COVID pandemic (likely to be repeated), global food insecurity, and climate change.¹⁹ As a result, there is a need to reconsider the consequences, both benefits and costs of those institutions as well as reforms which may be needed.²⁰ In this context, it is timely to reconsider the foundational principles of political philosophy, legal norms, and economic institutions which underpin the problems and solutions concerning distributive justice.

Global issues, such as the pandemic, are problematic for locally focused politicians. As the International Science Council report on the pandemic observes: “Policy-makers often have a very short-term perspective when responding to the immediate crisis and may be unaware of the impact of their decisions on other domains. They have also focused predominantly on national solutions, even though a global crisis requires global cooperation and solutions.”²¹

In this regard, the COVID pandemic has been a poignant reminder, driving home the point that concerns about global justice are not simply an ethical concern for the morally fragile. Rather, concern for global justice is driven by the real and pressing need for global policy responses to changes in the global ecology—changes that are occurring on a global scale.²² The pandemic has demonstrated that it is not possible to ignore matters beyond one’s borders—to shut out what one does not wish to consider—if it ever was.²³ We do not live in a closed system.

In the context of worldwide problems, global distributive justice is a good starting point to find solutions. Distributive justice initially commenced as a debate within the context of the nation-state. For nation-states, distributive justice reflects a basic position in political philosophy reflected in the legal

¹⁹ E.g., see Charis M. Galanakis, *The “Vertigo” of the Food Sector within the Triangle of Climate Change, the Post-Pandemic World, and the Russian-Ukrainian War*, 12 *FOODS* 721 (2023), <https://doi.org/10.3390/foods12040721> (noting that “over the past few years, the world has been facing dramatic changes due to a condensed period of multiple crises, including climate change, the COVID-19 pandemic, and the Russian–Ukrainian war.”); see also Simon Caney, *Review Article: International Distributive Justice*, 49 *POL. STUD.* 974, 974-97 (2001) (discussing global distributive justice in general).

²⁰ Benedict Sheehy & Federica Farneti, *Corporate Social Responsibility, Sustainability, Sustainable Development and Corporate Sustainability: What Is the Difference, and Does It Matter?*, 13 *SUSTAINABILITY* 1, 14 (2021).

²¹ International Science Council, *Unprecedented & Unfinished: COVID-19 and Implications for National and Global Policy* (2022), <https://council.science/wp-content/uploads/2020/06/UnprecedentedAndUnfinished-OnlineVersionLight.pdf>, at 19.

²² See generally Simon Caney, *Global Distributive Justice and the State*, 56 *POL. STUD.* 487 (2008).

²³ João Nunes, *The COVID-19 Pandemic: Securitization, Neoliberal Crisis, and Global Vulnerabilization*, 36 *CAD. SAÚDE PÚB.* 1, 3 (2020) (Braz.), <https://doi.org/10.1590/0102-311X00063120>.

principle of equality of persons.²⁴ The rallying cry of the French Revolution, “liberté, égalité, fraternité,” found itself echoed not only by classical liberal political philosophers in liberal democracies, but in fact by revolutionaries of all types and stripes from international Marxists, to nationalists around the world.²⁵ Indeed, the international legal system is premised on the basis of innate equality of all human beings.²⁶ Liberalism as currently practiced has focused on the “liberté” to the neglect of the “égalité, fraternité—” the equality and fraternity of humankind.²⁷

The idea of equality in liberal political philosophies, however, immediately encounters obstacles when the pragmatic challenges of implementation through the legal institutions come into focus. When considered in the context of the institutions of capitalism—a political choice about organization of the economy—and related legal institutions, distribution is a consequence of private property rights distributed through markets.²⁸ As a legal foundation, while such property rights are considered private law (i.e. rights which support the choices, aspirations and liberties of individuals in their private affairs), the rights themselves do not exist in nature.²⁹ Rather, they are a product of collective societies, and require both their creation as rights, related duties, and limitations as, for example, through duties to respect competing rights. They rely on the development of the political system itself.³⁰ Private property rights, however, are equally critical to development. Economist Douglass Cecil North and others have demonstrated that

²⁴ See generally Ronald L. Cohen, *Distributive Justice: Theory and Research*, 1 SOC. JUST. RSCH. 19 (1987).

²⁵ Paula Casal, *Distributive Justice and Human Nature*, in THE OXFORD HANDBOOK OF DISTRIBUTIVE JUSTICE 259, 261-64 (Serena Olsaretti ed., 2018); See, e.g., Dmitry Shlapentokh, *A Problem in Self-Identity: Russian Intellectual Thought in the Context of the French Revolution*, 26 J. Eur. Stud. 61, 61-76 (1996), doi:10.1177/004724419602600104 (the idea as foundational for the French Revolution); Amartya Sen, *What Do We Want from A Theory of Justice?*, 103 J. PHIL. 215, 221 (2006) (noting the usefulness of Rawlsian transcendent theory as “grand revolutionary’s complete handbook”).

²⁶ See generally Geoff Gordon, *Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law*, in 43 NETH. Y.B. INT’L L. 183 (Janne E. Nijman & Wouter G. Werner eds., 2013).

²⁷ LEONARD TRELAWNY HOBHOUSE, LIBERALISM 11-22 (1911), <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hobhouse/liberalism.pdf>.

²⁸ See generally Ernesto Screpanti, *Capitalist Forms and the Essence of Capitalism*, 6 REV. INT’L POL. ECON. 1 (1999).

²⁹ See generally RAOUL VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 1-125 (D. E. L. Johnston trans. 1992).

³⁰ See generally J. M. Elegido, *Intrinsic Limitations of Property Rights*, 14 J. BUS. ETHICS 411 (1995).

“institutions which promote property rights and the quality of governance encourage innovation and growth.”³¹

It is critical to note that society is collective with the ultimate aim of sustaining itself.³² In this context, the need to place limits on the individual for the good of the collective is something philosophers of all ages have understood, including classical liberal political philosophers such as John Locke, commonly known as the “Father of Liberalism,”³³ and Adam Smith, hailed as the founder of modern economics.³⁴ In these aspects, political philosophers and economists had to address the curtailment of liberties and the distributions necessary to create and sustain the institutions necessary for a society. What has occurred over the intervening centuries is an explosion of innovation, development, and rising quality of life (at least in material terms); however, over the last several decades the costs of these radical changes have become increasingly clear.

Although nation-states developed the contemporary discussion of distributive justice, the issues are now global.³⁵ In the eighteenth century, the ethicist Immanuel Kant observed: “The peoples of the earth have . . . entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere.”³⁶ The COVID pandemic, global hunger, and climate change have brought a stark reality to John Donne’s poem, reading, “never send to know for whom the bell tolls; it tolls for thee.”³⁷ Humanity no longer lives in isolated communities and jurisdictions that were removed and insulated from others (and indeed it never did).³⁸ These facts require revisiting the implications of liberal institutions, including a hard look at the “liberté, égalité, fraternité,” the equality of what goods, and the fraternal “who” dimensions of distributive justice. Further coinciding with the understanding of the global issues, an

³¹ Joseph P. Joyce, *What’s Fair? Legitimacy and Distributive Justice in the Global Economy* (2007), https://www.un.org/esa/socdev/social/meetings/egm6_social_integration/documents/SOCIALJUSTICE.GLOBALECONOMY.pdf, at 6 (citing DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990), and Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 *ECON. POL.* 207 (1995)).

³² See generally G.A. Res. 70/1 (Sept. 25, 2015).

³³ JAMES TULLY, *Preface to A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES*, x (1980) (noting that “Locke became the spokesman for limited private property and, more recently, for unlimited private property”).

³⁴ Raymond De Roover, *Scholastic Economics: Survival and Lasting Influence from the Sixteenth Century to Adam Smith*, 69 *Q. J. ECON.* 161, 186 (1955).

³⁵ Caney, *supra* note 22.

³⁶ IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* 138 (1795).

³⁷ JOHN DONNE, *DEVOTIONS UPON EMERGENT OCCASIONS, MEDITATION XVII* (1624).

³⁸ See generally DAVID GRAEBER & DAVID WENGROW, *THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY* (2021).

interest in global distributive justice has developed and increased exponentially over the last decade or so.³⁹ This coalescence in fact and theory, however, has not been thoroughly explored in the legal literature and our aim is to contribute to this scholarship in law.⁴⁰

III. A NOTE ON THEORY AND METHOD: IDEALISM VS. PRAGMATISM

Different disciplines rest on distinct assumptions and theories. The disciplines of political philosophy, economics, and law are no different. They have developed, and largely adopted, ideal models as foundations. Disciplinary theories are helpful approaches to the subject matter of the various disciplines and inform methodological decisions. However, when faced with problems that extend beyond the scope of disciplinary research agendas, the limits of theories and related solutions become important. Particularly in the case of “wicked problems” (i.e., problems for which any solution creates new problems of equal or greater magnitude) such disciplinary purity becomes an obstacle to achieving solutions.⁴¹ Under these circumstances, interdisciplinary pragmatic approaches are preferable.⁴² As axiological truth claims, such interdisciplinary approaches are more appropriate and as critical realist in their epistemological approach, provide a more malleable, potentially helpful, responsive standpoint which is particularly useful in dynamic situations such as the issues at hand.

Professor Kok-Chor Tan identified two core theoretical approaches to global distributive justice.⁴³ These approaches to defining and identifying justice are a paradigmatic based approach which starts with a concept of justice in a nation-state and then looks for whether and how it might be applied globally. And second, a problem-based approach, which Tan argues “holds as a default that any acceptable account of why equality matters should be able to interpret global inequality as a problem of justice.”⁴⁴ Rather than following a purist, paradigmatic approach, we take a problem-based approach starting with the global problems of health services, hunger, and sustainability.

In contrasting the two, Tan points out the problem of theoretical and doctrinal purity in the face of complex reality. He adopts a Dewey-esque

³⁹ Blake, *supra* note 9, at 131.

⁴⁰ For example, a search of Google Scholar for the exact phrase “global distributive justice” produced 175 hits.

⁴¹ Roark & Fox O’Mahony, *supra* note 11 (highlighting the necessity of dealing with property on scale as a solution to wicked problems).

⁴² Benedict Sheehy, *Paradigms of Legal Scholarship: Connecting Theories, Methods and Problems in Doctrinal, Realist and Non-Law Focused Research* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4309144.

⁴³ Kok-Chor Tan, *Global Justice and the Problems of Humanity*, 49 J. SOC. PHIL. 415 (2018).

⁴⁴ *Id.* at 418.

pragmatic solution which he describes as an “approach [that] prioritizes the problem over (domestic) theory preservation.”⁴⁵ Similarly, while we consider the challenges of ideal theories in terms of property law and economics, we adopt a pragmatic approach using Professors Marc L. Roark, and Lorna Fox O’Mahony’s Resilient Property Theory—a theory of property based on observations of actual property law regimes at work.⁴⁶

This issue of disciplinary purity in models, as opposed to the messier factual situation, finds itself in international relations. As Katja Freistein et al. note:

[T]he dominant perspective in the literature . . . International Relations . . . has been challenged by the turn towards global governance, yet still informs many current diagnoses of gridlock in global cooperation. We argue that these analytical assumptions . . . inform an overly narrow view of global cooperation that neglects historical as well as ongoing processes of its pluralization and politicization and thereby limits our understanding—and imagining—of global cooperation.⁴⁷

It is important to note that in the use of the term “global cooperation,” Freistein et al. are referring to a process beyond codified interactions and governance to “ways of collaborating with regard to perceived global problems that fall outside of established authority relations.”⁴⁸ They draw attention to the process itself as a desirable activity which facilitates collaborations apart from the intended outcome metrics. In sum, these disciplinary approaches, while critical in disciplinary terms, are inadequate for the messier task of providing useful frameworks for thinking about these complex, messy, and real worldly problems.

Finally, prior to delving further into the global distributive justice discussion, it is important to note that the ideal disciplinary theories in political philosophy, economics, and law may reflect political commitments. The underlying philosophies tend to bookend the debate. The analysis which follows, however, requires readers to challenge these prior philosophical commitments. As Roark and Fox O’Mahony note:

[O]ppositional structure—epitomized in the bifurcation of legal realism into law-and-society on the left and law-and-economics on the right—has a tendency to generate politically polarized analyses, with all the risks and perils that

⁴⁵ *Id.* at 415.

⁴⁶ Marc L. Roark & Lorna Fox O’Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789, 798 (2022).

⁴⁷ KATJA FREISTEIN, ET AL., IMAGINING PATHWAYS FOR GLOBAL COOPERATION 2 (2022).

⁴⁸ *Id.* at 5.

follow when scholarly discourse splits into “a fairly distinct right and left that mostly talk past each other”⁴⁹

In order to avoid this pitfall of mutually exclusive monologues, an open-minded consideration of the arguments is necessary, a recognition that legitimate legal scholarship may follow a variety of paradigms.⁵⁰

Both political conservatives and political liberals share underlying moral beliefs about the importance of addressing harm and compassion. Neither is inherently morally defective. Rather, their differences are to be found more in other value areas, such as the role of authority.⁵¹ All of these values—harm, compassion, and the role of authority—have a place in the value frameworks of adherents to the relevant philosophical persuasions. These value preferences provide a foundation for the justification, nature, and scope of global distributive justice, and in the section which follows, we turn to analyze these philosophies in some detail.

In terms of theory, the disciplines of politics, law, and economics have a significant intersection where all societies share: ecology; global institutions of international law; and banking, investment, and finance. These global law regimes and economic linkages continue to grow substantially and pragmatically, even during times of extreme strife, in contradiction to purist theory. For example, Russia continues to pay Ukraine for gas deliveries despite the invasion.⁵² The interconnectedness of global finance results in a situation where a failure of any major participant carries significant impacts on the rest of the world—such as the current Russian invasion of Ukraine and resulting inflation and economic downturn.⁵³

Accordingly, to assess the issue of global distributive justice, we address these different disciplines as necessary contributors to the discussion.

IV. DISTRIBUTIVE JUSTICE AND GLOBAL DISTRIBUTIVE JUSTICE

Since the time of Rawls’ foundational work, which was focused on distributive justice within the nation state, the debate has expanded, and the

⁴⁹ Roark & Fox O’Mahony, *supra* note 46, at 798 (quoting Steven L. Winter, *The Next Century of Legal Thought*, 22 *CARDOZO L. REV.* 747, 748 (2001)).

⁵⁰ Benedict Sheehy, *Paradigms of Legal Scholarship that Connect Theories, Methods and Problems: When and How to use Doctrinal, Realist and Non-Law Focused Legal Research* (Dec. 22, 2022), <https://ssrn.com/abstract=4309144>

⁵¹ See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

⁵² *Russia’s Gas Transit Payment Goes Through After Oil Glitch*, *BLOOMBERG NEWS* (Aug. 15, 2022, 4:28 AM EDT), <https://www.bloomberg.com/news/articles/2022-08-15/russia-s-gas-transit-payment-goes-through-after-oil-glitch>.

⁵³ Ruth Endam Mbah & Divine Forcha Wasum, *Russian-Ukraine 2022 War: A Review of the Economic Impact of Russian-Ukraine Crisis on the USA, UK, Canada, and Europe*, 9 *ADVANCES SOC. SCIS. RSCH. J.* 144, 147-149 (2022).

idea of global distributive justice has become an increasingly important topic of debate.⁵⁴ As the debate has expanded, a variety of issues and perspectives have been taken up by proponents of various positions. Tan provides a useful summary of the debate over the last fifty years.⁵⁵ He notes that the early period of the debate was focused on whether the argument for global justice was able to address state-based interest within a closed legal system. A second period can be identified in which scholars focused on the place and role of patriotic nationalism that followed. The concern was how to take account of national priorities and still prioritize the demands of global justice. The third and current period has returned to a reconsideration of the initial issue of national borders and, hence, whether global justice is an issue at all.⁵⁶

The demand for renewed consideration of the issue of global distributive justice comes from the fact of globalization itself—its political, economic, cultural, and technological (including social media) dimensions. All of these dimensions have increasingly tested the ability of governments to both limit the impact of other actors—whether other governments or multinationals, including finance and social media companies—on themselves and their citizens, and so challenge their ability to limit the scope of their own concerns to their own territory and jurisdiction.

There are three critical issues in the global distributive debate. First, it is the recognition of the ethical nature of global distributive justice, rather than an economic issue. Accordingly, the first basic issue is identifying ethically relevant criteria. Philosopher Brian Barry observes that “the core idea of universalism – that place and time do not provide a morally relevant basis on which to differentiate the weight to be given to the interests of different people” is a helpful starting point.⁵⁷ The foundational argument of distributive justice is that no one’s lot in life—a life of pain, suffering, and scarcity or a life of health, happiness, and plenty—should be wholly determined by chance. In consequence, the argument can be made that boundaries set by political institutions are irrelevant.⁵⁸ The American Declaration of Independence can be read as the rejection of institutional boundaries as determinative of one’s fate and the endorsement of promoting “Life, Liberty and the pursuit of Happiness”⁵⁹—the moral justification for its violent rebellion against the Great Britain.

⁵⁴ Blake, *supra* note 9, at 122-124; *see also* ANDRÁS MIKLÓS, INSTITUTIONS IN GLOBAL DISTRIBUTIVE JUSTICE 1 (Thom Brooks ed., 2013).

⁵⁵ Kok-Chor Tan, *Nationalism and Global Justice: A Survey of Some Challenges*, in SOVEREIGN JUSTICE: GLOBAL JUSTICE IN A WORLD OF NATIONS, 9-23 (Diogo P. Aurélio et al. eds., 2011).

⁵⁶ *Id.* at 10.

⁵⁷ Brian Barry, *Sustainability and Intergenerational Justice*, 89 THEORIA 43, 49 (1997).

⁵⁸ Such a radical view calls for radical changes—something they justify on the radical inequality by most measures of human well-being globally.

⁵⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

A second critical foundational issue is whether distributive justice principles created for the nation-state can or should extend beyond the nation-state. Rawls' earlier national focus precludes global distributive justice because, by definition, the unit of analysis is a national or subnational government.⁶⁰ In subsequent writing, however, Rawls referred to a category of nation-state denominated a "burdened societ[y]." He argued that "burdened societies' lack the ability to function at a level of economic activity which allows their citizens to secure the minimum levels of subsistence, shelter, health care, etc."⁶¹ In that situation, Rawls argued that "the 'well-ordered' societies have a duty to assist these burdened nations."⁶² Interestingly, Rawls stated that, "the duty is not a distributive one; rather, the goal of assistance . . . is to help [burdened societies] manage their own affairs so that they can enter . . . the 'Society of well-ordered Peoples.'"⁶³ As Joseph P. Joyce observes, however, "[t]he nature of the assistance that countries can extend to benefit the burdened societies is not specified."⁶⁴ In other words, Rawls' argument is incomplete for lack of specificity.

Michael Walzer claims that arguments for global distributive justice are misdirected.⁶⁵ Each nation is pursuing its own vision for a just society that follows its own values, priorities, and meanings in its own cultural project.⁶⁶ Further, any effort to produce distributive justice by external parties is illegitimate as "an attempt to impose an external conception of distributive justice, with the result that the integrity of the indigenous process will be undermined."⁶⁷

Further, a focus primarily on economic distributions as opposed to other distributions poses significant and deep challenges for schools of thought such as global egalitarians that look for justifications for re-distributions across borders.

Broadly considered, examining the state as the unit of analysis provides a vital juncture in the debate about distributive justice. The issue at play is the ethical significance or normative importance of a national border.⁶⁸ As the philosopher and legal scholar Martha Nussbaum argues:

⁶⁰ Joyce, *supra* note 31, at 2-4 (commenting on John Rawls).

⁶¹ *Id.* at 3 (quoting JOHN RAWLS, *THE LAW OF PEOPLES* 111 (2001)).

⁶² *Id.*

⁶³ *Id.* at 3-4.

⁶⁴ *Id.* at 4.

⁶⁵ See generally MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (Basic Books, Inc. 1984).

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 1461 (3d ed., Oxford University Press 2008)).

⁶⁸ Tan, *supra* note 55, at 12 (noting that Rawls has been criticized on this issue).

Why should these values [such as justice and dignity], which instruct us to join hands across boundaries of ethnicity, lose steam when they get to the borders of the nation? By conceding that a morally arbitrary boundary such as the boundary of the nation has a deep and formative role in our deliberations, we seem to deprive ourselves of any principled way of persuading citizens they should in fact join hands across these other barriers.⁶⁹

A third foundational argument in the discussion of global distributive justice is when to prioritize it. The basic position is that it takes precedence over national justice in conditions of moderate scarcity. In conditions of abject scarcity, the argument is that the nation-state has no obligation to consider or contribute to global justice. Rather, as a matter of priorities, Tan describes it as follows: “[T]he priority of justice means . . . that nation-states under conditions of moderate global scarcity may engage in a variety of nationalistic projects and commitments *but only* so long as they do their fair share with respect to the demands of global egalitarianism.”⁷⁰

The idea of global distributive justice is not without criticism. Its critics rightly point out a number of issues with the idea, from the fundamental concerns about the legitimacy, the nature, and role of patriotic nationalism, to the critical pragmatic questions of whether and what institutions have the authority and ability to administer global justice and how they would do so.⁷¹ Finally, critics evaluate the interaction between national and international law regimes and challenge the basic issue of whether fairness requires global distributive justice at all.⁷²

Dealing with the first issue of nationalism, those who argue for the state borders as the legitimate boundary for distributive justice concerns are referred to as “nationalists.”⁷³ As Tan summarizes the nationalist position:

[W]hen the demands of global justice compete with the demands of national justice, one cannot assume that the default is to grant primacy to

⁶⁹ Blake, *supra* note 9, at 127 (quoting Martha Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY?* 14 (Martha C. Nussbaum & Joshua Cohen eds., 1996)); *see also* Tan, *supra* note 43, at 418 (stating support for Nussbaum’s general position).

⁷⁰ Tan, *supra* note 55, at 14-15.

⁷¹ Blake, *supra* note 9; *see also* Lea Ypi, *Justice and Morality Beyond Naïve Cosmopolitanism*, 3 *ETHICS & GLOB. POL.* 171, 189 (2010) (“in the absence of legitimate collective authorities able to produce determinate claims and to enforce compliance, cosmopolitanism can produce only wide rather than strict obligations.”).

⁷² *See generally* Kok-Chor Tan, *Global Justice, Luck, and Human Needs: Reflections on Gu and Liu*, 12 *FUDAN J. HUMAN. & SOC. SCIS.* 255, 255-61 (2019). Tan explains the debate between himself, Gu and Liu, setting out the other two’s position that “both believe that global redistributive demands unfairly impose on those who are expected to contribute.” *Id.* at 255.

⁷³ *See, e.g.*, DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* 1-320 (Oxford Univ. Press 2007).

global demands. To the contrary, there are good special reasons, reasons having to do with the ideal of the nation-state, for giving preference to national demands.⁷⁴

The basic argument is that national priorities trump global priorities. The issue then becomes, when do global priorities trump national priorities? We believe that there can be little objection to the position that in national affairs, national interests need to take priority; however, we argue that when national priorities impinge on matters of immediate global concern, such as the physical phenomena of pandemics, global hunger, and climate change, they must take a backseat to those global concerns.

Those who argue against nationalists are referred to as “cosmopolitans.”⁷⁵ Cosmopolitans take the individual as the starting point (rather than the state). In Professor Lea Ypi’s summary, cosmopolitans “believe that every individual in the world is a valid source of equal moral claims; that such claims generate clearly identifiable principles of global justice, and that states play a very limited, if any, role in establishing the content of these principles and their mode of application.”⁷⁶ This is an ethically founded argument, an argument based on ideal principles—and as will be argued below, an obstacle to a pragmatic solution to the real problem posed by the physical challenges addressed in this Article.

This difference between nationalist and cosmopolitans is not as stark as it seems. Indeed, as national advocate Professor David Miller, professor of political theory at the University of Oxford, observes, a weaker cosmopolitanism includes most people: “[I]t is hard to think of anyone who does not qualify as a cosmopolitan . . . [as does] Anyone who subscribes to the Universal Declaration of Human Rights”⁷⁷ The core argument for nationalists is that people with shared institutions should be the beneficiaries of state policy.⁷⁸ Citizens have a duty to one another to ensure sufficient fairness to maintain the legitimacy of their institutions.⁷⁹

Taking the notion of obligation among people sharing institutions seriously, we adopt Professor Darrel Moellendorf’s view. Moellendorf argues that normative claims for distributive justice exist where people are associated in large institutions that are: “(i) relatively strong, (ii) largely non-voluntary, (iii) constitutive of a significant part of the background rules for the various relationships of their public lives and (iv) governed by norms that can be

⁷⁴ Tan, *supra* note 55, at 13.

⁷⁵ See generally CHRIS RUMFORD, *COSMOPOLITAN BORDERS* (2014).

⁷⁶ Ypi, *supra* note 71, at 171.

⁷⁷ David Miller, Debate, *Caney’s ‘International Distributive Justice’: A Response*, 50 *POL. STUD.* 974, 975 (2002).

⁷⁸ See generally Jeffrey Friedman, *Nationalism in Theory and Reality*, 10 *CRITICAL REV.* 155 (1996).

⁷⁹ *Id.*

subject to human control.”⁸⁰ We argue that the institutions by which people are increasingly bound are economic. Through global finance, through various media including social media, and as physical beings sharing the ecosystem, we share the impact of the global ecology on our societies in terms of sustainability and pandemics, to a large extent, these are all involuntary. Further, the shared rule-making bodies, like the United Nations (“UN”) and Bretton-Woods institutions, create rules for public life, such as access to health services, use of the natural environment, and hunger. Finally, it is clear that all of these institutions are subject to human agency. Accordingly, elements of both the nationalist and cosmopolitan concerns can be addressed when acknowledging the global nature of the fundamental institutions for contemporary life and the global nature of the challenges to human life posed by a global natural environment.

Adding nuance to the argument, cosmopolitans do not disagree with the nationalists on the core position: the state does have significance and it has a role to play. In terms of its significance, Tan observes that a citizen of a state “has special concerns and commitments to fellow members that one need not have towards strangers”⁸¹ In terms of the state’s role, it functions as location for the formation of political will and the development of what Ypi describes as “legitimate collective authorities able to produce determinate claims and enforce compliance”⁸² Yet, the state cannot be the ultimate objective or benchmark in pursuit of solutions to global problems. In the face of competing national and global justice demands, Tan argues “that national commitments cannot be justly discharged unless obligations of global justice have been met.”⁸³ The special concerns and commitments Tan refers to are addressed by the shared institutions, which form the basis of social cohesion.⁸⁴ In a globalized world in which the citizens and states of one country are touched by the policy decisions of others, the national shared institutions cannot operate in isolation.

Turning to the pragmatic concern of institutions with authority and ability to administer a global justice regime, again the role of the nation-state is obvious. The national legal regime is particularly important as property rights, the foundational rights affected by distributive justice claims, are the domain of national law. As such, any claim on property is a claim that needs to be dealt with by the national legal system using the rules set out by the legislature, and in common law jurisdiction, by the judiciary.

⁸⁰ DARREL MOELLENDORF, *GLOBAL INEQUALITY MATTERS* 45 (2009).

⁸¹ Tan, *supra* note 55, at 12.

⁸² Ypi, *supra* note 71, at 189.

⁸³ Tan, *supra* note 55, at 13.

⁸⁴ See generally Juli Ponce, *Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case*, 36 *THE URB. LAW.* 317, 317-40 (2004) (discussing the dual perspective of land use law in Spain: protection of property rights, and protection of other rights and values, such as housing rights of the poor).

This issue leads to consideration of the final issue of the interaction between the national and international legal systems. Nationalists are correct in raising this concern. The international tribunals, such as the International Tribunal for Law of the Sea, have limited power with respect to property claims and the alternative method of distribution—war—has its own myriad of justice issues.⁸⁵

The solution to this theoretical problem, as argued by Professor Simon Caney, is that universal human rights provide an appropriate, democratically developed basis for determining rights.⁸⁶ In other words, law's foundational constructs provide an adequate, pragmatic solution to the theoretical issues of what human entitlements are. We argue that these are found in international law, neither jurisdictionally based nor limited. They represent the international consensus on appropriate norms which ought to provide a baseline and inform decision-making at a global level. They promote the survival and well-being of the planet's people and the planet itself as necessary for survival. Taking this normative position as a foundation, that is to say, the foundational norm is the preservation of the species, the argument can move to the consideration of the overall concern of this Article—global distributive justice as a justification and method for achieving this global survivability goal.

Returning to Lasswell's framework of who, what, when and how in the context of global distributive justice, we conclude that the answer to the "who" aspect is all of humanity. As cosmopolitans argue, the ultimate beneficiaries of governance are all members of the human race—the basis of human rights⁸⁷—a normative foundation accepted by the nationalists as well.

In terms of Lasswell's question of "what is to be distributed," we again turn to the global factual context. While some cosmopolitans argue for a sustenance standard (survival), others argue for a relative standard—i.e., that the goods to be distributed are to be distributed relative to what every other beneficiary has.⁸⁸ We take as a starting position that overconsumption in the developed world is a major problem and driver of sustainability issues. Overconsumption cannot be sustained on a planet with limited resources and hence a relative standard of life as found in the developed world cannot and should not be the relative standard against which distributions are measured. Further, the different institutions, cultures, and other sources of disparity need

⁸⁵ See generally Ashleigh R. Shelver, *The Answer to Enforcing Multilateral Environmental Agreements:*

The International Tribunal for the Law of the Sea, 26 FLA. J. INT'L L. 347 (2014).

⁸⁶ See generally Simon Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 LEIDEN J. INT'L L. 747 (2005).

⁸⁷ See generally John Charvet, *The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights*, 27 J. INT'L STUD. 523 (1998).

⁸⁸ See generally Simon Caney, *Cosmopolitanism, Democracy and Distributive Justice*, 31 CAN. J. PHIL. SUPPL. VOL. 29 (2005).

to be taken into account—the matters of luck and national policy⁸⁹ as nationalists argue. In different national contexts, different goods create the status that drives desires beyond sustenance, and it is not the ethical obligation of all to meet the specific status or other particular desires of others.⁹⁰

In this regard, we follow Professor Harry Frankfurt's "the doctrine of sufficiency" as the baseline.⁹¹ Frankfurt argues that "[w]ith respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*."⁹² Frankfurt's position that "each should have enough"—that which is sufficient to the circumstance to mean that which is sufficient to survive⁹³—is a baseline for survival and at level is uncontroversial. Such primary goods, it has been argued, provide the foundation for life. Even such a limited baseline, however, is not without contest.⁹⁴ Although there is little controversy that people need food and health services, what precise type, for what purpose, and at what level are as hotly contested as they are socially informed. For purposes of this article, it is not necessary to make a hard determination. We are focused on the rights associated rather than their manifestation in behaviors.

Restricting global distributive justice to sustenance concerns does not deny the role of natural and social advantages. It allows for different natural geographical endowments and does not unnecessarily encroach on liberties with respect to cultures nor obviate choices, nor needlessly impose obligations and costs on others.⁹⁵ Finally, we argue that global distributive justice can only be wholly justified in the context of goods and services which are not constrained by political borders—those natural phenomena of pandemics, hunger, and ecological sustainability.⁹⁶

To achieve these goals, we adopt Tan's position, that national distributive justice is difficult to achieve without taking account of the global situation. Further, we note the important role of the nation-state. Thus, to implement

⁸⁹ For discussion, see generally Kok-Chor Tan, *Luck, Institutions, and Global Distributive Justice: A Defence of Global Luck Egalitarianism*, 10 EUR. J. POL. THEORY 394 (2011).

⁹⁰ See generally WILL STORR, *THE STATUS GAME: ON HUMAN LIFE AND HOW TO PLAY IT* (2021).

⁹¹ See generally HARRY G. FRANKFURT, *ON INEQUALITY* (2015).

⁹² Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21 (1987).

⁹³ *Id.*

⁹⁴ Stone, *supra* note 8 (see Stone's discussion in chapters 5 and 10 titled "Security" and "Interests" respectively).

⁹⁵ Joshua Cohen, *Philosophy, Social Science, Global Poverty*, in THOMAS POGGE AND HIS CRITICS 18, 18-45 (Alison M. Jaggar ed., 2010).

⁹⁶ Blake, *supra* note 9, at 128-29 (arguing that economic global distributive justice is a necessary outcome for the coercive imposition by the international regime on the rest of the world).

these principles and achieve sufficientarian goals, it is appropriate to protect national property rights systems up to the point where internationally significant natural phenomena are under consideration. In those instances, we believe it is appropriate to curb national property rights to some extent and expand some of these rights extraterritorially to address the pressing larger global issues (a matter of scale).⁹⁷

This approach is consistent with Miller's observation that all political philosophers are cosmopolitans to some degree. The difference between them is: "for one side, global inequality is a matter of concern in its own right; for the other, global inequality matters only insofar as it translates into poverty, exploitation, or other such non-distributive forms of injustice."⁹⁸ Further, Miller addresses balancing the issue of national and global priorities in line with the position taken in this Article. As stated above, global justice takes priority over national justice only in conditions of moderate scarcity and that where abject scarcity is the situation, the nation state has no obligation to consider or contribute to global justice.

In terms of Lasswell's "when," the issue with both sustainability and distributive justice is that they are ongoing. They are not only in the immediate present limited to some distant future. Neither one presents a once-and-for-all opportunity to resolve—a dilemma for Robert Nozick's "ahistorical" and "end-state" theories which requires that "the distribution of wealth in a society have a certain structure."⁹⁹ They are ongoing issues, and hence, need ongoing policy activity and institutional intervention and ultimately, institutional design.¹⁰⁰

When it comes to Lasswell's last element, the "how distribution is to be done," a negative answer is more certain than a positive. In the negative, it is clear that markets are of very limited use. Indeed, market failures often lie behind each of these inequities. For example, the argument has been made that the COVID-19 pandemic took hold and spread because of markets for vaccines.¹⁰¹ As observed by health scientists, "the largely market-based

⁹⁷ Roark & Fox O'Mahony, *supra* note 11.

⁹⁸ Miller, *supra* note 77, at 976.

⁹⁹ Edward Feser, *Robert Nozick (1938—2002)*, INTERNET ENCYC. OF PHIL., [https://iep.utm.edu/nozick/#:~:text=Standard%20theories%20of%20distributive%20justice,they%20have\)%3B%20or%20they](https://iep.utm.edu/nozick/#:~:text=Standard%20theories%20of%20distributive%20justice,they%20have)%3B%20or%20they) (last visited Feb. 4, 2023).

¹⁰⁰ See, e.g., Ying Chen & Benedict Sheehy, *Exporting Corporate Social Responsibility through Free Trade Agreements: Improving Coherence in The EU's New-Generation Trade and Sustainable Development FTAs*, 58 TEX. INT'L L. J. 173 (2003); Benedict Sheehy & Donald Feaver, *Designing Effective Regulation: A Normative Theory*, 38 UNSW L. J. 392 (2015).

¹⁰¹ George Abi Younes et al., *COVID-19: Insights from Innovation Economists*, 47 SCI. PUBLIC POLICY 733, 734 (2020); Liam Mannix, *Vaccine Development is A Case of 'Market Failure'. Here's Why* (Apr. 13, 2020), THE SYDNEY MORNING HERALD,

approach unfairly distributes vaccines on the basis of wealth and not COVID-19 burden.”¹⁰² This comment draws attention to the economic view of the issue.

Sustainability issues can be largely attributed to market failure. For example, greenhouse gas emissions are a negative externality—a well-recognized form of market failure.¹⁰³ Global hunger is a result of poorly functioning markets which are designed for profit rather than feeding the populations on the planet.¹⁰⁴ The positive challenge is that the power of the state to address people, policies, and property beyond its borders is limited by the doctrine of extra-territoriality. It precludes the very idea of global distributive justice. This pragmatic institutional concern, however, while legitimate, need not put an end to the discussion.¹⁰⁵ Rather, it requires creative investigation of the different institutional choices available.

V. POLITICAL PHILOSOPHY, THEORIES OF JUSTICE, AND DISTRIBUTIVE JUSTICE

The contemporary idea of distributive justice, defined as “the distribution of property, by the state, and for the needy,”¹⁰⁶ finds its foundation in ideas of equality. There are three elements to the definition that merit discussion. Distributive justice deals with property, state rights, and obligations, and it addresses the individual. These are all matters of concern to political philosophers.

In a society where people conceive of themselves as equals, distributions which do not reflect that equality and are not justified by accepted norms are considered unfair.¹⁰⁷ The basic idea is that people ought to have the “same level of material goods (including burdens) and services... most commonly justified on the grounds that people are morally equal and that equality in material goods and services is the best way to give effect to this moral ideal.”¹⁰⁸ This strict egalitarian view, however, has fundamental theoretical

<https://www.smh.com.au/national/vaccine-development-is-a-case-of-market-failure-here-s-why-20200413-p54jez.html>.

¹⁰² Ezekiel J. Emanuel et al., *What Are the Obligations of Pharmaceutical Companies in a Global Health Emergency?*, 398 LANCET 1015 (2021), [https://doi.org/10.1016/s0140-6736\(21\)01378-7](https://doi.org/10.1016/s0140-6736(21)01378-7).

¹⁰³ See generally Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J. L. & COM. 1 (2004).

¹⁰⁴ Sheehy & Chen, *supra* note 13.

¹⁰⁵ Blake, *supra* note 9; Miklós, *supra* note 54, at 1.

¹⁰⁶ SAMUEL FLEISCHACKER, *A SHORT HISTORY OF DISTRIBUTIVE JUSTICE* 5 (2005).

¹⁰⁷ See generally Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 283-345 (1981).

¹⁰⁸ Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYC. PHIL., Winter 2017, at 4, <https://plato.stanford.edu/archives/win2017/entries/justice-distributive/>.

problems in indexing (measuring) and time (as to the theoretical models and the collapse of all efforts to implement it by Marxist states), neither of which are considered in this Article.

Where people believe distributions do not follow fairness, they advance arguments to change the pattern of distribution to mirror a pattern conceived in the imagination, which more closely follows accepted norms. These ideas of equality and distributive norms underpin the discussion of distributive justice.¹⁰⁹

There are two basic approaches among political philosophers to distributive justice: a human equality or egalitarian approach associated with progressive or “liberal”¹¹⁰ political philosophies and a ranking or merit-based approach which is more associated with conservative political philosophies.¹¹¹ The two main camps of political theorists, thus, approach the problem of distributions from opposite ends of the spectrum.¹¹²

Political liberals emphasize distribution of a fair share of the resources necessary not only to survive but to flourish¹¹³—a positive liberty.¹¹⁴ People are free to develop themselves as they choose because they have the goods and services necessary to exercise their liberties. This may rely on the public provision of opportunities in the form of goods and services that markets fail to produce in adequate quantities, at affordable prices, or in accessible locations, to allow citizens to achieve the necessary capabilities to make meaningful choices in life. To achieve these positive liberties, redistributions become necessary on an ongoing basis.

By way of contrast, conservative political philosophers take the individual as their unit of analysis. The state has no interest and no business beyond providing the minimal security, property, and contracts necessary for individuals to satisfy their needs. Their focus is purely on liberty¹¹⁵—a negative liberty.¹¹⁶

¹⁰⁹ Jonathan Wolff, Review Article, *Equality: The Recent History of an Idea*, 4 J. MORAL PHIL. 125, 126 (2007).

¹¹⁰ The term “liberal” is a complex term. Both progressive and conservative approaches use the term “liberal” and do so appropriately. We use the term liberal to apply to the progressive side as it is currently the better use of term. *SEE GENERALLY*, ELLEN FRANKEL PAUL, ET AL., LIBERALISM: OLD AND NEW 1- 358 (2007); *see also* Shane D. Courtland, et al., *Liberalism*, STAN. ENCYC. PHIL. (Edward N. Zalta ed., 2022), <https://plato.stanford.edu/archives/spr2022/entries/liberalism/> (last accessed Aug. 26, 2023).

¹¹¹ *See generally* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY, 118-72 (1969) (discussing the “two concepts of liberty.”).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

These divergent political philosophies unsurprisingly find sounding in law. There are legal arguments about rights and duties supporting a positive liberty or “freedom to”—in economics initiated by Nobel laureate Amartya Sen¹¹⁷ and most fully developed in law by Professor Martha Nussbaum¹¹⁸ as the “central capabilities” approach.¹¹⁹ Supporting the development of all people’s capabilities requires an on-going redistribution to ensure that people born at a disadvantage are equally able to develop their capabilities. Equally, however, law contains arguments about rights and duties that oppose any such redistributions. These latter rights and duties are premised on and derived from laws constraining the rights of the collective as embodied in the state—a negative liberty, or “freedom from” state action.¹²⁰ We turn next to consider these political philosophies in some detail.

A. LIBERALISM AND RAWLS

For many thinkers in the liberal tradition, Rawls’ position on justice, a view which focuses on the “who” or recipient aspect of distributive justice, is unsurpassed. Rawls writes:

Justice is the first virtue of social institutions, as truth is of systems of thought... Each person possesses an inviolability founded on justice.... Therefore in a just society the liberties of equal citizenship are taken as settled.... The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice.¹²¹

If one adopts a liberal political philosophy, it is hard to imagine a better statement of the idea of justice and its centrality in the polity.¹²² This view is reflected in the Universal Declaration of Human Rights (“UDHR”).¹²³ Using

¹¹⁷ See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

¹¹⁸ MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33-34 (2011).

¹¹⁹ *Id.*; see also Maria Dimova-Cookson, *The Two Modern Liberties of Constant and Berlin*, 48 HIST. EUR. IDEAS 229, 230 (2022) (discussing positive liberty and negative liberty); see also Theodore L. Putterman, *Berlin’s Two Concepts of Liberty: A Reassessment and Revision*, 38 POLITY 416, 438-439 (2006).

¹²⁰ Berlin, *supra* note 111.

¹²¹ Singer, *supra* note 16, at 595 (citing JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971)).

¹²² There are, of course, no shortage of critics of Rawls. See, e.g., TOM CAMPBELL, JUSTICE 17-22 (1988); see also Antony Flew, *Inequality is Not Injustice*, 7 ECON. AFF., June/July 1987, at 34.

¹²³ G.A. Res. 217 (III) A, The Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (noting that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

Lasswell's category of "who," Rawls' recipients are "each person" based on "an inviolability found on justice."¹²⁴ In addressing the individual, more recent liberal politics have moved into identitarianism—a fetishization of individual identities and intersectionality and co-related demand that the populace as a whole society defer to individual claims and rearrange institutions to address the social identity of the individual.¹²⁵ This focus on identitarian politics of individuals undermines the power of the state to rally and unite its populace and gather resources to address matters of global concern.¹²⁶ Instead, it is stuck dealing with matters that, while certainly of individual importance and justice, derail the larger national and international agendas of societal survival.¹²⁷ As we shall see, liberal political philosophers are not alone in their obsession with the individual. The conservative side of politics suffers the same fetishization of the individual; however, it does so in a different manner.¹²⁸

In terms of Lasswell's "what" items are to be distributed, Rawls focuses on "social primary goods," such as the right to participate in the political process, wealth, and liberties.¹²⁹ The relationship between these ideas: "rights, wealth and liberties," and the physical necessities of food, health services, and a sustaining ecology is not articulated, presumably because Rawls' focus is within the nation-state and apparently those liberal states which are not struggling to address the challenges driving this Article.¹³⁰

In terms of Lasswell's "how," Rawls explicitly rejects economic competition as the basis for just distribution: "laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."¹³¹ In other words, he is not committed to market mechanisms, and advocates for justice as an outcome when rules and institutions are operating fairly for everyone.¹³² These rules and institutions are themselves the outcome of a process, a voluntary social contract negotiated from behind a "veil of

¹²⁴ Singer, *supra* note 16, at 595.

¹²⁵ See generally GÖRAN DAHL, *THE NATURE OF IDENTITARIANISM* (2023).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ STEVEN LUKES, *INDIVIDUALISM* 54 (ECPR PRESS 2006).

¹²⁹ Ingrid Robeyns & Harry Brighouse, Introduction, *in* MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES 1 – 14 (2010).

¹³⁰ See generally John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993)

(Rawls opposed extending distributive justice beyond the borders of the nation-state for many years, only addressing the issue later in his career through "The Law of Peoples.").

¹³¹ JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

¹³² See generally Aaron James, *A Theory of Fairness in Trade*, 1 *MORAL PHIL. & POL.* 177 (2014).

ignorance.”¹³³ Indeed, how one is to implement this Rawlsian situation in a society domestically or internationally is a highly controversial matter.¹³⁴

As to Laswell’s “when,” Rawls offers no explicit time frame. That is because Rawls does not recognise distributive justice as a once and for all matter. Rather, Rawls understands distribution as an on-going expression of policy. The governance system must provide for continual redistributions through tax and transfer or any other number of policy mechanisms.

We turn next to consider the opposite pole of the political spectrum: political conservatism.

B. CONSERVATISM AND NOZICK

Politically conservative philosophers take the opposite approach. Philosophical conservatives oppose distributive justice as a matter of principle. The case is put most forcefully by politically conservative, libertarian philosopher, Robert Nozick.¹³⁵ In terms of Lasswell’s framework, Nozick is not interested in the “who” or “what” dimensions; his interest is limited to the “how.” Arguing against advocates of distributive justice, he takes the position that the issue is not “distributive justice.” Rather it is an issue of redistribution,¹³⁶ and he opposes any such redistribution on two bases.¹³⁷

First, Nozick argues that an evaluation of the fairness of existing distributions or “justice in holdings” is dependent upon how those holdings came to be.¹³⁸ He proposes three criteria for determining whether there is “justice in holdings”: 1) examining the means of original acquisition, 2) examining the means of transfer, and 3) rectifying previously unjust original acquisitions or transfers.¹³⁹ Where historically the means of acquisition and transfer were fair, there can be no unfairness in any subsequent holdingkeys. Inequality which subsequently arises is nothing more than the expression of individual preferences. Given the right to allocate resources differently, humans will do so to suit their individual preferences. As a result of this allocation of resources over time, distributions will no longer be equal. This situation has two implications. First, any subsequent distributions which are

¹³³ See generally Karen Huang, et al., *Veil-of-ignorance Reasoning Favors the Greater Good*, 116 PSYCH. & COGNITIVE SCIS. 23989, 23989 (2019); see also R. M. Hare, *Review: Rawls’ Theory of Justice—I*, 23 PHIL. Q. 144 (1973).

¹³⁴ Rawls, *supra* note 130.

¹³⁵ See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

¹³⁶ Salahuddin A, *Robert Nozick’s Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation*, 7 J. CIV. LEGAL SCI. 1, 1 (2018).

¹³⁷ *Id.*

¹³⁸ Robert Nozick, *Distributive Justice*, 3 PHIL. & PUB. AFF., Autumn 1973, at 46.

¹³⁹ *Id.* at 47; see also Hal R. Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness*, 4 PHIL. & PUB. AFF., Spring 1975, at 224.

transacted freely in free markets are thus fair.¹⁴⁰ Secondly, if we are to live in a society in which fairness requires some level of equality or patterned distributive justice, there must be some periodic redistributions.¹⁴¹

Such redistributions, argues Nozick, are objectionable for two reasons of principle: the principle that individuals have a fundamental freedom to choose and express their values and a corollary principled commitment to property rights.¹⁴² Nozick identifies liberty as his core principle.¹⁴³ Liberty, he argues, will make all distributions unpatterned. People will choose what they want, and their wants are different.¹⁴⁴ Further, people will work for different ends with different amounts of effort according to their idiosyncratic preferences and, accordingly, the distributions will reflect their individual values and idiosyncrasies. He argues that to interfere with these outcomes, whether by increase or decrease, is to violate that person's values and liberties and hence is unjust.¹⁴⁵

This leads to our first criticism of the conservative position. It is hard to understand why liberty should be the first principle or value to be preferred over values such as being fed, having access to life-saving medicines and health services, or preserving an ecosystem which can support life. The argument is not that liberty is incompatible with supporting the greater public good.¹⁴⁶ Rather, in terms of our concern—the balance of individual and society—Nozick and conservatives more generally view the individual as an autonomous absolute and develop the argument without regard to the group.¹⁴⁷

This approach is the conservative's error in fetishization of the individual. Individuals require not only life sustaining items, but also life in a society—a community. As legal philosopher Joseph Raz argued in *The Morality of Freedom*, there is no potential for personal autonomy in the absence of some society.¹⁴⁸ Similarly, from a proprietary perspective, J.E. Penner argues that “our interest in the use of things is social. We have an interest in dealing with

¹⁴⁰ JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 78-80 (2002) (expressing the view that in a free market, the distribution will eventually sort itself out has proved wrong historically and theoretically. This justification for markets was demolished by John Maynard Keynes in his pithy quip, “In the long run, we’ll all be dead.”). JM KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923).

¹⁴¹ *Id.* at 107.

¹⁴² Varian, *supra* note 139, at 223-47.

¹⁴³ Berlin, *supra* note 111 (Liberty in Nozick's case, like libertarians generally, is “liberty from.”).

¹⁴⁴ See generally Haris Psarras, *A Critique of Robert Nozick's Critique of Patterned Principles of Justice*, 96 PHIL. L. & SOC. PHIL. 239 (2010).

¹⁴⁵ *Id.*

¹⁴⁶ See generally David O. Brink, *Mill's Deliberative Utilitarianism*, 21 PHIL. & PUB. AFF., Winter 1992, at 67 (1992).

¹⁴⁷ Psarras, *supra* note 144.

¹⁴⁸ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 205-06 (1988).

things largely so that, as social creatures, we can engage others in the way we want to make use of them.”¹⁴⁹ Few in number are those capable of living a solitary life off the land and even fewer still, among those who could, are those who would choose to do so.¹⁵⁰ Liberty and its exercise require more than mere food sustenance.¹⁵¹ We argue along with Joseph Raz,¹⁵² Dwight Newman,¹⁵³ Amartya Sen,¹⁵⁴ and others that in terms of liberty, humans rely on society and need first to be free from the tyrannies of hunger and of disease—before the other finer liberties of political philosophy matter.

A further objection to redistributions is raised by conservatives who argue, like Nozick, that “seizing the results of someone’s labor is equivalent to seizing hours from him,”¹⁵⁵ the essence of slavery. A basic criticism of Locke is his failure to explain why the goods should belong to the individual rather than the individual’s efforts belong to the commons¹⁵⁶, and why adding labor to the commons converts the commons to private property rather than converting the labor to the property of the commons. In fact, everyone comes into the world and grows as a result of “appropriating” other people’s labor—from pregnancy onwards. Indeed, individuals develop by the appropriation from the whole of society in terms of education, social and physical infrastructure, and institutions, all of which are necessary for labor to be fruitful. These are all appropriations of other people’s labor.¹⁵⁷ Nobel Prize-winning economist Paul Samuelson lamented that his individual-focused analysis failed to account for the maintenance of the system and the society

¹⁴⁹ J. E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV., 711, 743 (1996).

¹⁵⁰ Indigenous peoples capable of living off the land invariably live in communities. The fantasy “off the grid” people require all types of tools and equipment not of their own making and wholly beyond their capacity to make in any event. See, e.g., Catherine E. Burnette et al., “*Living off the Land*”: *How Subsistence Promotes Well-Being and Resilience Among Indigenous Peoples of the Southeastern United States*, 92 SOC. SERV. REV. 369 (2018).

¹⁵¹ Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE, 30-53 (Martha Nussbaum and Amartya Sen eds., 1993).

¹⁵² Raz, *supra* note 148, at 205-06.

¹⁵³ See generally DWIGHT NEWMAN, COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS (2011).

¹⁵⁴ Sen, *supra* note 151, at 30-53.

¹⁵⁵ Eric Mack, *Robert Nozick’s Political Philosophy*, STAN. ENCYC. PHIL., Summer 2022, at 20 (Edward N. Zalta ed.) (citing Nozick, *supra* note 135, at 172).

¹⁵⁶ Locke’s discussion does not address the initial matter of sequestering the commons or public property in the first place. See critique in Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?* 31 ARIZ. ST. L. J. 391 (1999).

¹⁵⁷ Raz, *supra* note 148, at 205-06; Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 158 (2004).

which allows individual parts of the system to productively express choices in the first place.¹⁵⁸

A final argument raised by Nozick is that people's expressions of free choices will result in unpatterned distributions—i.e., not all persons in a category will have a similar quantity and range of items.¹⁵⁹ From this argument, it can be implied that unpatterned distributions are just, and it follows that patterned justice is unjust. The issue here is that there are very clear patterns found in distributions. The maxim, “the rich get richer, and the poor get poorer,” is an epigrammatic statement that illustrates the pattern. Such distributional inequality evidences to a significant degree the consequence of unfair institutions—the institutions that both generate and distribute wealth.

Crucially, elaborating on Samuelson's point, distribution patterns reflect not only choices, but the context in which those choices occur.¹⁶⁰ After all, hardly anyone would choose to be raised in a poor or abusive household, or choose to reject a prestigious, fully paid Harvard education in favor of paying for a sales certificate from “podunk college”.¹⁶¹ Analyzing and evaluating the behavior behind the large disparities between rich and poor needs to be expanded beyond simple expression of preferences to include not only personal characteristics, such as ambition, hard work, and wise choices, but also a whole host of other social institutions which create or preclude opportunities, supporting behaviors, and structures.¹⁶²

Liberty, despite being a core value of modern society as Nozick argues, should not take priority over basic human needs, particularly when the world is facing crises that threaten human survival and development, such as access to food and nutrition, essential medicines, and health services.

C. ADDRESSING LASSWELL'S “WHO”, “WHAT”, “HOW”, AND “WHEN”

As noted, both liberal and conservative political philosophers contribute to the discussion categorized by Lasswell's “who,” “what,” “how,” and “when.” In terms of the question of “who” should be the recipients, political

¹⁵⁸ Paul Samuelson, *Two Gods That Fail*, 42 CHALLENGE, Sept.-Oct. 1999, at 29, 31.

¹⁵⁹ See generally Psarras, *supra* note 144, at 239-49.

¹⁶⁰ Amartya Sen, *Behaviour and the Concept of Preference*, 40 ECONOMICA: NEW SERIES 241, 241-42 (1973).

¹⁶¹ Julie Ray & Stephanie Marken, *Life in College Matters for Life After College* (May 6, 2014), <https://news.gallup.com/poll/168848/life-college-matters-life-college.aspx> (indicating that overall life happiness is more likely to be associated with avoiding Ivy Leagues in favor of smaller community colleges.); see also Ms. Smith, *Choosing Ivy League over Podunk College Won't Make You Happier in Life or Work* (May 7, 2014), <https://www.csoonline.com/article/2226861/choosing-ivy-league-over-podunk-college-won-t-make-you-happier-in-life-or-work.html>.

¹⁶² Sen, *supra* note 151, at 30-42.

conservatives begin, as noted, with the observation that people are different. Some people are smart, hard-working, of good character, deeply religious, nationalistic, or some other such meritorious disposition and so should be rewarded for these valued attributes. Distributions should be based on merit, and the categories of merit are distributed unequally in the first instance, and accordingly, the rewards ought to be distributed unequally as well. Liberal political philosophers pay less attention to the individual characteristics and more attention to the common value placed on all humans and the collective activity required to support human life.

In terms of the conservative merit argument, Joel Feinberg, American political and legal philosopher, identifies three distinct approaches.¹⁶³ These approaches focus on meritorious character and meritorious actions.¹⁶⁴ The first approach—of meritorious character—is a classical view that people of virtue are to be rewarded for their character. The second view based on action was popularized by the French philosopher, Pierre-Joseph Proudhon.¹⁶⁵ Proudhon's view was that people should receive according to their contribution to production.¹⁶⁶ Although Proudhon was initially used to support Marxist ideas, this view can be applied equally in support of capitalism.¹⁶⁷ Both Marxism and capitalism offer support for their preferred champions. Each argues that the contributions of their favored party—either the laborer, or the capitalist, respectively—merit a greater, unequal return. There are two issues with this view: first, they fail to address matters of chance—such as the socio-economic status into which a person is born—and second, they fail to address the contributions of society to the prerequisites permitting production in the first place—the matter of social context.¹⁶⁸ The second merit basis advanced for unequal distribution is effort, meaning each party receives a different distribution according to their different efforts. The English liberal political theorist and sociologist Leonard Trelawny Hobhouse observed the flaw in this approach, noting that any single individual's contribution to the overall value is insignificant as compared to the contribution of political, social, fortuitous, natural and inherited factors.¹⁶⁹

¹⁶³ DOUGLAS A. HICKS, *INEQUALITY AND CHRISTIAN ETHICS* 21 (2000) (discussing Feinberg's statement about the merit-based approaches).

¹⁶⁴ See generally Richard J. Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, 11 *LEGAL THEORY* 259 (2005); see also Christopher Heath Wellman, *Feinberg's Two Concepts of Rights*, 11 *LEGAL THEORY* 213, 213 (2005).

¹⁶⁵ John Friedmann, *Reviewing Two Centuries*, 26 *SOC'Y*, Nov.-Dec. 1988, at 8.

¹⁶⁶ See generally J. Salwyn Schapiro, *Pierre Joseph Proudhon, Harbinger of Fascism*, 50 *AM. HIST. REV.* 714, 720-21 (1945).

¹⁶⁷ Johannes Hilmer, *Two Views about Socialism: Why Karl Marx Shunned an Academic Debate with Pierre-Joseph Proudhon*, 6 *DEMOCRACY & NATURE* 85, 88 (2000).

¹⁶⁸ Jeppe von Platz, *The Principle of Merit and the Capital-Labour Split*, 38 *ECON. & PHIL.* 1, 11 (2022).

¹⁶⁹ LEONARD TRELAWNY HOBHOUSE, *THE ELEMENTS OF SOCIAL JUSTICE* 161-163 (1922).

When considering Lasswell's second issue—"what" items are to be distributed—there is further debate.¹⁷⁰ Will it be university degrees, food aid, or government-backed business and home loans? The justifications for these distributions are also a subject of dispute. Are people to be supported for needs, capabilities, opportunities, or some other criteria?¹⁷¹ While most people agree that humans require food and shelter, determining what specifically those basics entail and the standard that is to be used for evaluation is highly controversial. In contemporary global society, however, there is a general consensus that food, health services, and sustainability should be prioritized. Thus, the sufficientarian standard noted above is suitable.

With respect to Lasswell's third category, the "how" or the method by which distributions are to occur, there is controversy. People prefer institutions that align with their philosophical leanings. For example, some people prefer markets and related preferred institutions such as lottery, election, or competition.¹⁷² As noted throughout this part of the article, preferred conceptions and solutions tend to follow political philosophies.

Finally, with respect to Lasswell's "when," the issue is a consideration of the current populace, existing political interests, and the interests of future generations. This issue is particularly pertinent in terms of sustainability, which has a great impact on present and future generations.

This analysis of patterned distribution was especially relevant during the COVID-19 pandemic, which witnessed widening domestic economic inequality discussed as a "k-shaped" recovery. People in the top branch of the K did well (doubling or tripling their net worth) while those on the bottom branch did worse,¹⁷³ as exemplified by the problematic hoarding and deprivation of vaccines among the haves and have-nots of the world.¹⁷⁴ The real question to be addressed is not a simple patterned vs. unpatterned distribution, but rather which *pattern of change*—growing inequality or reducing inequality—we are, as a group, willing to accept as being just.

In sum, for purposes of our argument and in terms of the issues at hand, we take as answers to the question "who" the recipient should be by taking a cosmopolitan view, following international norms. The recipients ought to be humanity generally, without divisions based on rank or group membership. We recognize that all humans have equal, intrinsic value as expressed in the

¹⁷⁰ G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 906-944 (1989).

¹⁷¹ Wolff, *supra* note 109, at 125-136.

¹⁷² Stone, *supra* note 8, at 44.

¹⁷³ Michael Dalton et al., *The K-Shaped Recovery: Examining the Diverging Fortunes of Workers in the Recovery from the COVID-19 Pandemic Using Business and Household Survey Microdata*, 19 J. ECON. INEQ. 527, 527-550 (2021).

¹⁷⁴ Moosa Tatar et al., *International COVID-19 Vaccine Inequality Amid the Pandemic: Perpetuating a Global Crisis?*, 11 J. GLOB. HEALTH 1, 1-3 (2021).

UDHR. The second issue, the “what” items issue, is also settled: we focus on access to medicines (including vaccines) and health services generally, food, and a sustainable environment—those natural phenomena not limited by geographical or political borders. In analyzing the “how,” we focus on the norms of economics and law to evaluate how the balance between the individual and the group is best analyzed and implemented. In terms of “when,” we consider the need to balance the needs of the present with those of future generations.

Obviously, as noted, a critical aspect of global distributive justice relates to property rights and property law, and it is to that topic that we now turn.

VI. LEGAL THEORIES OF PROPERTY

Clearly, a fundamental legal issue underlying any discussion of distributive justice is the issue of property rights. At a philosophical level, it is necessary to establish the nature of property—whether property is truly an entity or simply legal rights. Further, it is necessary to determine whether property rights are objective, real, and innate to humanity—some fundamental building block of human cognition that entitles humans to eat, work, and vote—or merely socially constructed rights granted by the state—essentially the political allocations of socially significant privileges—supported by the formal institution of law.

The concept of property is foundational in law.¹⁷⁵ It underpins much of both public and private law and, as such, the legal system in general.¹⁷⁶ Despite its long history, the concept of property remains unsettled. This state of affairs exists for a variety of reasons. To some degree, it comes from different viewpoints about the evolution of society and related intellectual history. As Paul Mahoney notes, Adam Smith held an evolutionary view: “Property rights change as societies pass through those four stages: ‘It is easy to see that in these several [sic] ages of society, the laws and regulations with regard to property must be very different.’ In general, the scope of property rights increases at each succeeding stage.”¹⁷⁷ Thus, because of conceptual problems at law, history, political philosophy, and the implications of different views for the polis as a whole, there are foundational reasons for the uncertainty and indeed foundational disagreements about the fundamental characteristics of property.

¹⁷⁵ See generally, O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L. J. 441, 441-474 (2001).

¹⁷⁶ *Id.*

¹⁷⁷ Paul G. Mahoney, *Adam Smith, Prophet of Law and Economics*, 46 J. LEGAL STUD. 207, 210 (2017) (quoting ADAM SMITH, LECTURES ON JURISPRUDENCE 14-16 (R.L. Meek et al. eds., 1982) (1762-1763)).

This conceptualization of property allows consideration of the underlying distributional issues, which rest upon these ideas of property and justifications for granting one person more property than another. Regardless of the view taken and wherever one is located on Roark and Fox O'Mahony's "left-right, community-liberty, public-interest-private-rights spectrum,"¹⁷⁸ one must have a clear and critical understanding of these basic philosophical property issues. On the one hand, property rights are essential to individual expression and development. Yet, on the other, property rights pose a grave obstacle for people who are struggling to have their basic needs met (however such needs may be defined, up to and including the realization of Sen's capability potential).¹⁷⁹

A. FUNDAMENTALS OF PROPERTY RIGHTS

Property law forms the basis for claims concerning the control of resources, including financial capital and the means of production.¹⁸⁰ Property law is a notoriously difficult area of law, perhaps in part because it is an expression of deeply seated, highly emotive political views, and thus is potentially only subject to minimal reflection and debate by policy advocates.¹⁸¹ To delve deeper into the concept of property, this Article identifies the core of property and its general critiques, and examines in particular, a new pragmatic theory, Resilient Property Theory.¹⁸²

Perhaps the best place to start is with English jurist Sir William Blackstone's famous comment:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property: or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.¹⁸³

¹⁷⁸ Roark & Fox O'Mahony, *supra* note 46, at 797.

¹⁷⁹ Sen, *supra* note 151.

¹⁸⁰ Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 267 (1996) (the first of Rose's twelve propositions on property law is "private property rights are essential in a free-enterprise regime."); Clifford G. Holderness, *Joint Ownership and Alienability*, 23 INT'L REV. L. & ECON. 75, 77 (2003) (noting the observation of Berle and Means that "[the collocation of property rights is] the very foundation on which the economic order of the past three centuries has rested.").

¹⁸¹ See generally H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 175-91 (1955).

¹⁸² See, e.g., GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 1 (1989) (examining a law and economics approach analyzing property as "decision-making authority").

¹⁸³ WILLIAM BLACKSTONE, *COMMENTARY ON THE LAWS OF ENGLAND* 2 (1766).

There are three characteristics of property that arise from Blackstone's comment: property is absolute, property is exclusive, and property can be equated with a thing.¹⁸⁴ This little area of the universe over which a person has absolute dominion—or “the right of property” as Blackstone has it—in fact expresses views found roughly in his predecessor, Locke.¹⁸⁵ Further, this idea echoes in contemporary approaches like Nozick's, with significant implications for political philosophy and policies including redistributions.¹⁸⁶ Indeed, it has been argued that property is at the core of rule of law in American Jurisprudence at least.¹⁸⁷ What follows next is a consideration of these three Blackstonian conceptions in contemporary legal thought, which have relevant implications in global distributive justice.

B. IS PROPERTY ABSOLUTE?

If property is absolute, there can be no redistribution. An absolute requirement does not allow for redistribution. If property is not absolute, some may argue that the rule of law, foundations of most legal systems, is at risk and, consequently, serious issues may arise for the organization of society as a whole.¹⁸⁸

There are two approaches to addressing the question of whether property is absolute. First, the question may be addressed by considering the nature of the right. If property rights are some form of a natural right, they have within themselves their own naturally defined character and are not subjected to rearrangement. Nature provides property, and humans are not empowered to manage it to achieve socially and politically desirable outcomes. This natural law approach is hardly credible outside certain libertarian circles.¹⁸⁹

A second, more analytical approach to property rights provides more insight. Where property rights are not conceptualized as intrinsically unified, natural phenomenon, they are open to reconstructions and redistributions. In taking this stance, American jurist Wesley Newcomb Hohfeld's contribution is useful. His idea is that property is an aggregation of rights concerning *jural relations between parties*.¹⁹⁰ In other words, rather than being unified natural phenomena, property is but one type of the dynamic, socially created legal

¹⁸⁴ *Id.*

¹⁸⁵ See generally Walton H. Hamilton, *Property--According to Locke*, 41 YALE L. J. 864, 864-80 (1932).

¹⁸⁶ S. B. Drury, *Locke and Nozick on Property*, 30 POL. STUD. 28, 29 (1982).

¹⁸⁷ Aziz Z. Huq, *Property Against Legality: Takings After Cedar Point*, 109 VA. L. REV. 233 (2023).

¹⁸⁸ *Id.*

¹⁸⁹ Hart, *supra* note 181.

¹⁹⁰ Penner, *supra* note 149, at 731; see generally Juan Diaz-Granados, 'Standard Jural Relations of Ownership': *A New Theoretical Framework Informed by Wesley Hohfeld and Tony Honoré*, 49 MONASH UNIV. L. REV. (forthcoming).

relationships between people.¹⁹¹ That understanding admits to property rights being the work of human ingenuity, and as a result, their development, reconfiguration, and redistribution are matters of human concern.¹⁹² Hohfeld's relational approach to rights is helpful—thinking about essential medicines and health services, food, and the ecology as relationships between people allows us to see that property's value is not necessarily transactional. Rather, it is an expression of how people choose to relate to each other with respect to certain things.

C. IS PROPERTY EXCLUSIVE?

More recently, Penner has picked up on the second of Blackstone's elements of property—namely, exclusion.¹⁹³ Through his careful analysis with particular attention to the concepts of rights *in rem*, Penner argues that property owners hold the exclusive right to use and enjoy the “thing,”¹⁹⁴ and it is a universal duty for the world in general not to interfere.¹⁹⁵ The “thinghood”¹⁹⁶ is the object of property mediating between the owner and the world, the universal duty of non-interference between people and things.¹⁹⁷ Property, therefore, is a legal concept of things in a particular contingent circumstance in which we stand in a privileged position where the world in general owes us the duty to abstain from interference.¹⁹⁸

In terms of redistribution, Penner's theory is helpful. It is important to realize that the privilege of exclusion is extended by the state through political decisions to create and sustain such rights *in rem*. Further, of particular importance is that Penner's conception holds that property is not absolute. Rather, it is a socially created relation between people, mediated by things—tangible or intangible—and such things may be health or ecology related.¹⁹⁹

D. IS PROPERTY A “THING” OR AN “ENTITLEMENT”? PROPERTY VS. LIABILITY

Turning to Blackstone's last assertion, in which property is associated with things, a newer way of thinking drawn from law and economics scholars

¹⁹¹ Penner, *supra* note 149, at 731.

¹⁹² *Id.*

¹⁹³ *Id.* at 711-820.

¹⁹⁴ *Id.* at 807-813.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 802-807.

¹⁹⁷ *Id.* at 817-818.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 807-813; *see generally* JAMES PENNER, THE IDEA OF PROPERTY IN LAW 1 (2000).

Guido Calabresi and Douglas Melamed has come to prominence.²⁰⁰ Calabresi and Melamed's study focuses on "entitlements" and in particular, the inclination of legal systems to develop categories in terms of property, liability, and inalienability rules.²⁰¹ Their study indicates that property rights are preferred when transaction costs are low; in contrast, when transaction costs are high, the law prefers liability. Their analysis indicates that property rights and liability duties are merely opposite sides of the same entitlement coin and therefore potentially interchangeable.²⁰² Following the principal economic norm of efficiency, the difference between property (a permission right²⁰³) and liability (a coercion duty) is no more than a question of efficiency determined on the basis of transaction costs.²⁰⁴ A further distinction they make is helpful: to allocate to the property side of the coin, transactions must be voluntary; whereas on the liability side, the rules address involuntary transactions.²⁰⁵ If one accepts this description,²⁰⁶ the distinction makes it clear that distributive justice could be readily achieved by recategorizing the rules of entitlements by reducing transaction costs and changing property rules on certain medicines, food, and pollution to liability rules.

E. STATE AS THE ORIGIN AND SOURCE OF PROPERTY

Drawing from the above analysis, it is clear that property is not the result or recognition of the natural state of humanity. Further, it is a matter of ethereal rights and not physical things. Finally, the creation, possession, and distribution of those rights is a matter of state policy. As such, it is imperative to consider the role of the state in the active development, maintenance, and reform of those rights. That work has been developed in the recent property theory mentioned above, Resilient Property Theory.

²⁰⁰ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV., 1089 (1972); Updated and critiqued in Michael Krauss, *Property Rules vs. Liability Rules*, INT'L ENCYC. OF LAND ECON. (Boudewijn Bouckaert and Gerrit De Geest eds., 1999), <http://classweb.gmu.edu/mkrauss/prop-liab.htm>; Penner, *supra* note 149, at 736-37 (approving of Calabresi and Melamed's approach as a non-right to a thing theory but does not comment on it beyond that).

²⁰¹ Calabresi & Melamed, *supra* note 200.

²⁰² *Id.*

²⁰³ Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1299 (1996).

²⁰⁴ Calabresi & Melamed, *supra* note 200.

²⁰⁵ *Id.* (noting that property rights are transferred more or less at the time of payment, whereas liability rights are paid for post facto. This distinction is not significant for shareholders' rights discussion).

²⁰⁶ See generally Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53 (2015).

Roark and Fox O'Mahony develop their Resilient Theory of Property by focusing on what states actually do rather than the niceties associated with doctrinal purity. In a sense, their view provides a contemporary description of what Adam Smith first noted: the adaptation of a property rights regime to the contemporaneous problems of society. As Roark and Fox O'Mahony note, it is in crisis that:

States' responses to the problems of eviction, housing, and homelessness during the global financial crisis have reflected the changing factual and normative landscapes against which property problems are understood. They also, more fundamentally, reveal the roles that states play in shoring up the resilience of private property rights, owners, markets, and others, all while reflecting on the effectiveness and legitimacy of the state itself."²⁰⁷

They argue that states themselves are not neutral agents in the property system. Instead, governments use "[the] latent powers of liberal state institutions to direct the property system in ways that have significant implications for the resilience of individuals, institutions, and governments themselves."²⁰⁸ In other words, governments maintain property rights and related systems and adjust them to suit the exigences which present themselves for purposes including the stability, legitimacy, and survival of the state and its government. Thus, governments are well positioned to address society's needs regardless of and through the adjustment and reform of property rights. As such, the roles of the state in the creation and maintenance of property rights and related conceptions are foundational and malleable. Property, as described in Resilient Property Theory, is a public resource, and this idea can be used to create new thinking about property and its distribution.²⁰⁹ In sum, there is no natural or necessary basis for the exclusion of others from things necessary for survival, such as medicines, health services, food, and the ultimate necessity of ecological sustainability.

F. COLLECTIVE INTEREST VS. INDIVIDUAL RIGHTS AND THE LAW OF PROPERTY

The core challenge in the debate about property rests on the continuum of individual and group rights. Property rights—rights of the individual to exclude the rest of the world—are, as noted, the exemplar of individual

²⁰⁷ Roark & Fox O'Mahony, *supra* note 46, at 800.

²⁰⁸ *Id.*

²⁰⁹ J. Peter Byrne, *The Public Nature of Property Rights and the Property Nature of Public Law*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* 1-12 (Robin Paul Mallory & Michael Diamond eds., 2016).

rights.²¹⁰ Such rights, however, do not exist in the absence of the collective society. Consider that the lone shipwrecked mariner has no need of property rights. Such rights and interests are both part of and in opposition to the collective rights of society as a whole.²¹¹ Indeed, distributive justice of property only matters in cultures that do not have a norm of mutual aid and where personal liberties are curtailed.²¹²

Collective rights as group rights have a long history as an idea, stemming from antiquity in which the *polis* was established for the common good.²¹³ This idea finds an echo in the more modern Preamble to the American Constitution: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²¹⁴

As Smith observed above, property rights evolved to be suitable to the epoch and development.²¹⁵ It may be that economic development as an exploitation of the planet's resources has come to a critical juncture where property rights need to be reformed such that the optimization of non-financial wealth becomes essential.

In jurisprudential thought, collective rights are the focus of an emerging body of work. Taking economist Kenneth Arrow's Impossibility Theorem²¹⁶ and legal philosopher John Finnis' "common good"²¹⁷ as cardinal points, Newman argues against aggregative approaches to determining collective good.²¹⁸ He argues instead that there are certain kinds of goods which are not reducible to individual interests, and that these collective interests are those which justify constraint on individual liberties, including property.²¹⁹

²¹⁰ See generally Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816 (1965).

²¹¹ CARLA CALVO MAÑOSA, *GROUPS RIGHTS AND INDIVIDUAL RIGHTS – CAN THEY COEXIST?* 1 (2014) (noting that "arguments in favour of a complementary relation between group and individual rights purport that both pursue the same interests in most occasions, and that in fact, in order to enjoy individual rights sometimes it is necessary to enjoy a group right as well, such as cultural or linguistic ones.").

²¹² Graeber & Wengrow, *supra* note 38, at 30.

²¹³ Alejo José G. Sison & Joan Fontrodona, *The Common Good of the Firm in the Aristotelian-Thomistic Tradition*, 22 BUS. ETHICS Q. 211, 211-12 (2012).

²¹⁴ U.S. CONST. pmbl.

²¹⁵ See, e.g., Roark & Fox O'Mahony, *supra* note 46, at 800.

²¹⁶ See generally ERIC MASKIN & AMARTYA SEN, *THE ARROW IMPOSSIBILITY THEOREM* 1 (2014).

²¹⁷ George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44 (2013).

²¹⁸ Newman, *supra* note 157, at 128.

²¹⁹ *Id.* at 129.

A collective good to which Newman's argument could apply is the well-recognized public good: the legal constitution. A constitution creates the common institutions of governance which support the formation of the social fabric in which rights and duties of law and discussions of distributive justice arise.²²⁰ Such a view aligns with the concerns of distributive justice, namely, that a duty of fairness in distribution extends to all who share those institutions.²²¹

Concurring with Roark and O'Mahony's controversial position, we argue that where private property rights infringe on collective interests, state restriction of their exercise may be justified. As they note:

The dominance of politically polarized property theories in contemporary property discourse ... tends to privilege a unidirectional account of the nature and effects of state action or restraint on individuals and communities...[Indeed] the scope and legitimacy of state action vis-à-vis vested private property rights has become a lodestone of modern U.S. property discourse.²²²

In cases involving basic human needs, such as medicines, health services, hunger, and sustainability, constraints on the exercise of private property rights in favor of collective interests can be justified due to public costs. For example, social, ethical, and personal suffering due to systemic issues like illness, hunger, and climate change can result in the loss of human rights like dignity and can lead to further economic costs.

The exploration thus far sets the stage for the analysis and evaluation of the normative foundations and contributions of economics and law to the discussion of distributive justice.

VII. ECONOMICS: GENERAL CONCEPTS AND APPROACHES TO DISTRIBUTIVE JUSTICE

A. ECONOMICS AS A DISCIPLINE

While early economists oddly believed it to be a natural science,²²³ it is a social science and has a vast array of philosophical perspectives informing it,

²²⁰ See generally Vanessa A. MacDonnell, *The Constitution as Framework for Governance*, 63 U. TORONTO L. J. 624 (2013) (discussing Canadian Constitution's framework for governance as well as rights and obligations).

²²¹ Blake, *supra* note 9, at 121-36.

²²² Roark & Fox O'Mahony, *supra* note 46, at 798.

²²³ See generally DANIEL M. HAUSMAN, *THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS I* (1992); John Wolfenden, *Homo Economicus: Fantastic Fact or Factual Fantasy?*, 1 ETHOS J. OF GLOB. ETHICS (1998).

from radical neo-conservatives to radical Marxists.²²⁴ For purposes of this Article, we limit our examination to the neoclassical economics.²²⁵ One of the goals of economics is the efficient allocation of scarce resources for the purposes of increased social welfare.²²⁶ Economics, like all the disciplines, has theories, subject matter, and methods. In the case of economics, its main theories are utility maximization, stable endogenous preferences, infinite commensurability, the individual as the unit of analysis, and markets as the distributive mechanism.²²⁷ Thus, it has a disciplinary bias toward both the individual and market institutions, which are based on the transaction of property rights for profit.²²⁸

The neoclassical model has no concept of a society or group.²²⁹ Rather, it develops its predictions of judgments, human behavior, and prescriptions for law reform using a model in which society is composed of a collection of atomistic individuals—*homo economicus*.²³⁰ The individual is posited as an atomistic, utility-maximizing being, uninfluenced by others and operating with stable preferences. The idea is that all human behavior is directed at maximizing self-interest, which is almost exclusively measured in material terms—thus ignoring community relationships and the ecology.²³¹ Therefore, society is nothing more than a random collection of these individuals who are rational, utility-maximizers pursuing their self-interest by competitively and

²²⁴ See generally NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM I* (2006) (surveying various perspectives).

²²⁵ Although neo-classical economics has several variants, including an important sector of behavioural economics advocates, this article uses the term “Neo-classical economics” to refer to the conventional, neo-classical approach to economics and law and economics. See generally Richard Epstein, *Law and Economics Looking Forward: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167 (1997); Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009). For an example of a Chicagoan approach departing from the conventional view, see Eric Posner, *Milton Friedman Was Wrong*, THE ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/milton-friedman-shareholder-wrong/596545/>.

²²⁶ See generally J. R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939).

²²⁷ Hausman, *supra* note 223; Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 782 (1990).

²²⁸ See generally Paul Davidson, *Achieving a Civilized Society*, 32 CHALLENGE, Sept.-Oct. 1989, at 40.

²²⁹ Reinhard Neck, *Neoclassical Economics: Origins, Evolution, and Critique*, in THE PALGRAVE HANDBOOK OF THE HISTORY OF HUMAN SCIENCES 1-40 (David McCallum ed., 2022).

²³⁰ See generally Dante A. Urbina & Alberto Ruiz-Villaverde, *A Critical Review of Homo Economicus from Five Approaches*, 78 AM. J. ECON. & SOCIO. 63 (2019).

²³¹ Neck, *supra* note 229.

strategically making rational decisions in markets.²³² Conducting this pursuit in unregulated markets is considered the most efficient way to fulfill individual desires and satisfy preferences.²³³

For those thinking about society, this individualist utility maximizing orientation creates an insurmountable obstacle. As Jonathan Leightner explains, when it comes to articulating some vision of society, as advocated by Rawls, neoclassical economics comes to a stop: “it is theoretically impossible to imagine everyone having utility functions in which everyone else’s utility has a weight equal to the chooser’s utility because such utility functions would be infinitely recursive.”²³⁴ Further, given neoclassical economics takes welfare to be no more than “individual preference satisfaction,” it takes no account of public or society-wide well-being or public welfare.²³⁵ In sum, neoclassical theory is ideologically committed to individualism, and as a corollary, places at the top of its value structure that which is used to satisfy individual material wants: private property rights. Further, without a concept of society, there is neither a need to consider others nor balance individual versus group rights.

Analyzing neoclassical economics further, as an implementation of utilitarian ethics,²³⁶ there is no vision of a good society. Nothing intrinsically desirable is “good; and nothing intrinsically undesirable is “bad” or “evil.” Rather, the sole criterion for good or evil is individual utility and the satisfaction of individual preferences.²³⁷

In economics, while the goal is to allocate scarce resources efficiently, attention must be paid to the specific institutions that facilitate this process. The neoclassical economist views markets as the institution of choice, and indeed this belief supports the normative agenda of promoting markets.²³⁸ The market, as the ultimate and best arbiter of individual values and preferences, permits individuals to maximize their own utilities.²³⁹ Building on this, the neoclassical economist relies on price theory to gauge the production quantity

²³² Milan Zafirovski, *Human Rational Behavior and Economic Rationality*, 7 ELECTRONIC J. OF SOCIOLOGY (2003), https://sociology.org/ejs-archives/vol7.2/02_zafirovski.html.

²³³ Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L. J. 1511, 1563-66 (1984) (asserting a critique of the notion of “market”).

²³⁴ Jonathan E. Leightner, *Utility Maximization, Morality, and Religion*, 39 J. ECON. ISSUES 375, 376 (2005).

²³⁵ See generally Daniel M. Hausman & Michael S. McPherson, *Preference Satisfaction and Welfare Economics*, 25 ECON. & PHIL. 1 (2009).

²³⁶ ANTHONY QUINTON, UTILITARIAN ETHICS 1-10 (1973) (suggesting that utilitarian ethics focuses on the betterment of society as a whole).

²³⁷ Leightner, *supra* note 234, at 376.

²³⁸ See generally Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671 (1993).

²³⁹ *Id.*

and perceived value of goods and services.²⁴⁰ In other words, the only value is the monetary value, the price, attached to a particular good or service. Prices are fair and just as they reflect the value of the goods and services to the community.²⁴¹ Items without price such as health and the ecology are not priceless; rather, they are valueless. These views of the individual, of welfare as preference satisfaction, and the role of the market as natural phenomena lie behind the neoclassical economists' antipathy toward government intervention and, more broadly, their opposition to redistributions. As Susan Rose-Ackerman observes, "Free market choice takes precedence over free democratic political choice."²⁴²

B. ECONOMICS FOR DISTRIBUTIVE JUSTICE

There are decades of economics scholarship on distributive justice.²⁴³ Indeed, the Nobel prize winning economist, Professor Joseph Stiglitz, observed:

We are a global community, and like all communities have to follow some rules so that we can live together. These rules must be—and must be seen to be—fair and just, must pay due attention to the poor as well as the powerful, must reflect a basic sense of decency and social justice . . . governing bodies and authorities . . . must ensure that they will heed and respond to the desire and needs of all those affected by policies and decisions made in distant places.²⁴⁴

The foundational approach for economics scholarship on distributive justice is the *Second Theorem of Welfare Economics*,²⁴⁵ which holds that the issues of equity and efficiency are separable.²⁴⁶ This theorem postulates that efficiency must be addressed first, followed by equitable and distributional issues. Essentially, the argument is that private law provides wealth in the first

²⁴⁰ See generally Howard Nicholas, *What is the Problem with Neoclassical Price Theory?*, 3 *WORLD REV. POL. ECON.* 457 (2012).

²⁴¹ *Id.*

²⁴² Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics or Philosophy*, in *LAW AND ECONOMICS* 237 (Nicholas Mercuro ed., 1989) (adding market to the traditional mix to suit the Chicago School's preferences)..

²⁴³ Russell B. Korobkin & Thomas S. Ulen, Response, *Efficiency and Equity: What can be Gained by Combining Coase and Rawls?*, 73 *WASH. L. REV.* 329 (1998); see also Swygert & Yanes, *supra* note 6, at 249-327.

²⁴⁴ Stiglitz, *supra* note 140, at xv.

²⁴⁵ Budit Laekhanukit et al., *Non-redistributive Second Welfare Theorems*, in *INTERNET AND NETWORK ECONOMICS* 227-43 (Paul W. Goldberg ed., 2012).

²⁴⁶ Korobkin & Ulen, *supra* note 243, at 342.

instance and that equity issues can be dealt with secondarily by government through tax-and-transfer and similar policies.²⁴⁷

Although the two—wealth creation and distribution—may well operate separately and be readily recombined through tax-and-transfer and similar policies, in practice, politicians are much less interested in addressing equity concerns and are focused on the sources of campaign funding—business lobbyists.²⁴⁸ The result, evident to even the casual observer, is that while efficiency may be increasing, equity among society’s members is decreasing.²⁴⁹ Noted economist Professor Brad DeLong stated: “We may have solved the problem of production. We certainly have not solved the problem of distribution, or of utilizing our extraordinary, immense wealth to make us happy and good people.”²⁵⁰

The phenomenon is even more pronounced when considered at the global level. Professor Sir Anthony Giddens observed over twenty years ago that although extreme poverty declined by 0.9% worldwide, the super-rich increased their share of the world’s income by 15%.²⁵¹ Even then, economic inequality was haunting the poor, and a lack of basic fairness in our economic system was threatening the sustainability of society as a whole.²⁵²

In the intervening years, the situation has worsened, exacerbated not only by policies but more recently with the onset of the pandemic. Pandemic-related fiscal and monetary policies have disproportionately benefited those who need it the least: the wealthy, the present generation, and those in the developed world.²⁵³

It is not that economists have not or do not continue to wrestle with issues of social welfare and distributive justice—at least to some degree.²⁵⁴ They do espouse, as they work through considerations of Pareto optimal situations which emphasize the optimization of trade-offs and distributions in a

²⁴⁷ *Id.* at 331.

²⁴⁸ See generally LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 1 (2015).

²⁴⁹ Stiglitz, *supra* note 140 (concerning trickle-down economic theory).

²⁵⁰ Annie Lowrey, *The Economist Who Knows the Miracle Is Over: An Era of Remarkable Prosperity Has Ended*, *THE ATLANTIC* (Sept. 3, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/brad-delong-economist-slouching-towards-utopia-book/671337/>.

²⁵¹ Anthony Giddens, Professor, Lecture at the BBC Reith Lectures: Runaway World (May 5, 1999), http://news.bbc.co.uk/hi/english/static/events/reith_99/week1/week1.htm (last visited Feb. 5, 2023).

²⁵² *Id.*

²⁵³ Davide Furceri et al., *How Pandemics Leave the Poor Even Farther Behind*, IMF BLOG (May 11, 2020), <https://www.imf.org/en/Blogs/Articles/2020/05/11/blog051120-how-pandemics-leave-the-poor-even-farther-behind>.

²⁵⁴ S. SUBRAMANIAN, *INEQUALITY AND POVERTY: A SHORT CRITICAL INTRODUCTION* 11-13 (2019).

society,²⁵⁵ utilitarian theories using new insights from behavioral economics. These theories consider both economics and psychology to analyze people's behavior in the real world,²⁵⁶ and the implications of Arrow's Impossibility Theorem with the impossibility of arriving at a social welfare function by aggregating individual preferences and hence, its implications for arriving at societal agreements on distributive justice.²⁵⁷

Further examples include the role of economics in dealing with the difficult issues of allocation in the provision of costly health services. The utility foundation may prioritize people with valuable skills and contribute more to the economy, such as younger people, when deciding who gets access to life-saving medicines and health services. Yet, this solution does not necessarily reflect the values of a society nor the epidemiological advice. There may be non-productive values or other virtues more highly valued by a society than production. Accordingly, an instrumentalist utilitarian analysis favored by economists may well fail the non-utilitarian value structure of a particular society. Economics is best understood as providing instrumental values to support politically determined values—values which may include other, non-productive values.

Economics contributes ideas that have a bearing on the issues, namely, the concept of market failure. This idea acknowledges that markets are imperfect institutions and have limitations. In this instance, economics notes that there are incomplete markets (i.e., insufficient markets for negative externalities in the environment) and incomplete markets that cannot reach or service the needs at the desired price. It fails, however, to offer solutions to these market failures for the most part because they fall outside the scope of disciplinary interest.

To understand the neoclassical economic approach to distributive justice, it is necessary to consider the historical context in which it took hold—an era of rising communism. Its advocates, such as Fredrick Hayek, derided redistributive social programs as “the road to serfdom.”²⁵⁸ In this environment, they argued that the only role of government was supporting the institutions of markets and safeguarding legal protections for private property rights and contracts.²⁵⁹ Without any notion of society, government efforts to engage in redistribution for social welfare purposes were deemed misguided

²⁵⁵ See generally Harold M. Hochman & James D. Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542 (1969).

²⁵⁶ Max Witynski, *Behavioral Economics, Explained*, UCHICAGO NEWS, <https://news.uchicago.edu/explainer/what-is-behavioral-economics> (last visited Dec. 21, 2022); see generally Michael Mandler, *Distributive Justice for Behavioural Welfare Economics*, 130 ECON. J. 1114 (2020).

²⁵⁷ Maskin & Sen, *supra* note 216.

²⁵⁸ See generally F. A. HAYEK, *THE ROAD TO SERFDOM I* (1944).

²⁵⁹ *Id.*

and best understood as impingements on individual liberties bestowed by nature.²⁶⁰

The neoclassical model is not only unconcerned about broader social issues touching upon re-distribution as a matter of distributive justice.²⁶¹ It goes further. Normatively, neoclassical economists argue that re-distributions run contrary to market distributions of rights; they are not only inefficient but also ethically objectionable.²⁶² The view is that people will bargain and pay for the rights they value most and accordingly, the most efficient allocation of rights will occur if people are permitted to transact their particular property rights freely as desired.²⁶³ Any interference in these transactions simply increases transaction costs, reduces the overall quantity of desired transactions, introduces inefficiencies, and so inhibits the ability of parties to maximize their own preferences.²⁶⁴ Accordingly, neoclassical economists oppose interventions, advocate for market solutions, such as expanding markets and private property rights, support exclusively individual choices and therefore, oppose re-distributions.²⁶⁵ This leads to their normative conclusion: interference with market operations for distributive or other purposes is inefficient, morally objectionable, and unethical.²⁶⁶

Problematically, neoclassical economics has no answer to the fact of individuals' limited resources—financial and otherwise. Being able to maximize utility occurs within particularly severe constraints; people operate with limited knowledge, skills, and financial resources to satisfy preferences in markets. As such, by reason of its disciplinary paradigm, neoclassical economics cannot address concerns of distributive justice nationally let alone contribute to global distributive justice.

Thus, distributive justice in neoclassical economics is limited to a very narrow conception of merit in a merit-based distribution.²⁶⁷ What each person has, the neoclassical economist argues, is the result of utility maximization, rational decisions, and informed choices about how most efficiently to satisfy

²⁶⁰ *Id.*

²⁶¹ Stiglitz, *supra* note 140, at 54-58 (discussing privatization by the “market fundamentalists” at the IMF).

²⁶² See G. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 38-42 (1999); see generally Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1996) (discussing various approaches of economics to redistribution).

²⁶³ See Wetlaufer, *supra* note 262.

²⁶⁴ *Id.*

²⁶⁵ See generally John Marangos, *A Political Economy Approach to the Neoclassical Model of Transition*, 61 AM. J. ECON. & SOCIO. 259 (2003).

²⁶⁶ *Id.*

²⁶⁷ See generally Peter J. Boettke et al., *Is the Market Wage the Just Wage? A Reassessment of Factor Pricing and Distributive Justice*, 11 ERASMUS J. FOR PHIL. & ECON. 124, 124-43 (2018).

individual preferences.²⁶⁸ Such being the case, the question is: what ground can there be for any redistribution of property? Equity-based or wider society welfare-based redistribution concerns make a mockery of the ultimate values underpinning neoclassical economics: individuals, rationality, and preference satisfaction—the core of neoclassical economics normative agenda.²⁶⁹

The neoclassical solution of markets has failed a critical test—the value of a democratically governed world. Economist Brad DeLong observed: “The market economy gives me and my preferences 200 times the voice and weight of his. If that isn’t the biggest market failure of all, I don’t know what your definition of market failure could possibly be.”²⁷⁰ Ultimately, the social vision for a just society in the world of neoclassical economics could well be made up of a few wealthy people—such as Jeff Bezos or Elon Musk²⁷¹—and the rest of the population earning a subsistence living, like packing boxes in an Amazon warehouse in the poor suburbs on the outskirts of some rust-belt city. Neoclassical economists are unlikely to ponder much more or propose different policy advice than to ask whether the warehouse worker’s offspring are likely to make better utility-maximizing choices. Presumably, they would argue that the next generation will choose to reject putting food on the table by the daily grind of insecure work at the warehouse and, exercising their individual rights, choose to go to Harvard, Yale, or Oxford, turning their backs on the warehouse. Alternatively, who is to make a judgement as to whether a life of precarious employment in a warehouse is any less satisfying than that of a wealthy CEO? After all, these outcomes are equally the result of individual preferences and decisions in a market. Essentially, neoclassical economics ignores the socio-economic environment—the institutional factors, the politics, and culture among other things that create and deny opportunities—and as a result, deems redistribution as undesirable, unethical, and unwarranted both locally and abroad.

Neoclassical economics as a discipline lacks answers where reality diverges from theory. In fact, as economics Nobel Laureate Ronald Coase put it, the neoclassical economic view is “disdainful of what happens in the real world, [and] it is one to which economists have become accustomed, and they live in their world without discomfort . . . [M]ainstream economics is certainly strong on theory if weak on facts.”²⁷²

²⁶⁸ *Id.*

²⁶⁹ See generally Darley Jose Kjosavik, *Methodological Individualism and Rational Choice in Neoclassical Economics: A Review of Institutional Critique*, 30 F. FOR DEV. STUDS. 205 (2011).

²⁷⁰ Lowrey, *supra* note 250.

²⁷¹ See generally Brian Hayes, *Follow the Money*, 90 AM. SCI. 400 (2002) (reporting that some of market modelling in computational sciences suggests that this is the outcome of unlimited market transactions).

²⁷² Ronald Coase, *The New Institutional Economics*, 88 AM. ECON. REV. 72, 72 (1998).

Given the facts of concern addressed in this article, namely, global health, hunger, and climate change which, contrary to economic theory, are neither unlimited nor wholly commensurable, and economic theory offers little to address these issues. Thus, the issue is that economics is of important but limited use in advancing insight into or providing solutions to equity problems in society. Indeed, neoclassical economics is precluded at a theoretical level from such contributions because of its theoretical and methodological commitments to individualism, markets as level playing fields, value prioritization of efficiency, and the absence of society and related values. In other words, it continues to reflect one's political philosophy, particularly with respect to social welfare as complained about in the colorful language of 1930s: "one's welfare economics will inevitably be different according as one is a liberal or a socialist, a nationalist or an internationalist, a [C]hristian or a pagan."²⁷³

VIII. LAW, LEGAL NORMS, AND GLOBAL DISTRIBUTIVE JUSTICE

Law institutionalizes norms widely accepted as justifications for the social ordering and distributions it underpins. The outcome of these justifications is that non-violent behavior settles disputes about rights, duties, and the distribution of possessions and obligations—that is, institutionally law provides a sufficiently justified distribution to maintain adequate social cohesion for the rest of society's institutions to function.²⁷⁴ While this is less so in the case of international disputes, as a principle it still applies. Further, while again of limited application at the international level, "the literature on social cohesion clearly indicates that problems arise when institutions, particularly public institutions, fail to manage conflicts over recognition [and] legitimacy of claims. . . ."²⁷⁵ Thus, the law must provide at least a marginally adequate level of distributions to allow global society and its institutions, from governance to trade, to sustain itself.

As a society's formalized normative system, the law provides substantive rights and duties. In liberal democracies, it incorporates both liberal and collective political philosophies—it inheres both but prefers neither.²⁷⁶ Rather, the law provides principles and doctrines that support both the

²⁷³ Hicks, *supra* note 226, at 696.

²⁷⁴ See, e.g., Juli Ponce, *Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case*, 36 URB. LAWYER 317 (2004) (discussing the dual perspective of land use law in Spain: protection of property rights, and protection of other rights and values, such as housing rights of the poor).

²⁷⁵ JANE JENSON, *Executive Summary* to MAPPING SOCIAL COHESION: THE STATE OF CANADIAN RESEARCH vi-vii (Canadian Policy Research Networks Inc., 1998), http://www.cccg.umontreal.ca/pdf/cprn/cprn_f03.pdf.

²⁷⁶ See generally Robert P. George, *Individual Rights, Collective Interests, Public Law, and American Politics*, 8 L. & PHIL. 245 (1989).

individual and the collective, creating by default a middle ground, shifting between preferencing individual rights, the rights of the group, or balance between the two.²⁷⁷ By balancing the different interests in a range of different scenarios, law as an institution aims to order society sufficiently to sustain itself. That is, the law is an institution aimed at sustaining the conditions that allow the social collective and the individuals within it to survive.²⁷⁸

A. LAW AS A DISCIPLINE

Law as a discipline investigates the normative system of a society.²⁷⁹ It takes a special interest in the formal institutions of authority—legislature, executive, and judiciary—in terms of their pronouncements, operations and the implementation and reform of those institutions and pronouncements.²⁸⁰ The law's foundational values are: fairness, justice, social order, and the balancing of power both in private relationships and in the political sphere with accountability.²⁸¹ Its phenomena is formal rules in the first instance but extends to institutions of the legal system and beyond into the legal system's interactions and impacts with other institutions and groups.²⁸²

The legal system is, among other things, a distribution system that operates on non-market norms. Human rights, for example, are not for sale. Rather, legal rights and correlative duties are distributed by law using authority rather than wealth. It makes distributions based on group membership (e.g., citizenship, government, age etc.) or some other legally recognized characteristic or norm.

Further, the law has both individual and supra-individual norms—norms that go beyond the individual. The law as an institution places value on individual humans and on groups of humans, whether determined by gender, educational attainment, age, or other characteristic.²⁸³ Additionally, it accepts values beyond utility, efficiency, finance, and property rights—values beyond the reach of markets, on things like the natural and social environments and

²⁷⁷ See, e.g., John D. Blum & Norchaya Talib, *Balancing Individual Rights Versus Collective Good in Public Health Enforcement*, 25 MED. L. 273, 273-81 (2006).

²⁷⁸ *Id.*

²⁷⁹ Sheehy, *supra* note 42.

²⁸⁰ See generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) (discussing separation of powers).

²⁸¹ See, e.g., Frank I. Michelman, *Property, Utility, And Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

²⁸² Sheehy, *supra* note 42.

²⁸³ See generally Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984) (discussing how labor law protects both individual and collective rights in work relations).

affections.²⁸⁴ Accordingly, the law contains both individual and collective norms and institutional norms, such as those foundational norms of the legal system itself, like the rule of law.

B. LAW AND GLOBAL DISTRIBUTIVE JUSTICE

Substantively, these norms are included in the most widely recognized global norm producing institution—the UN. At a foundational level, all states protect human rights at their basis—a position evident from a global commitment to the UDHR. These have been expanded upon and articulated in the United Nations International Covenant on Economic, Social and Cultural Rights (“ICESCR”).²⁸⁵ Without delving into the significant contentious politics around the development and passing of the covenant,²⁸⁶ matters not of concern to this Article, we turn to consider the norms that have been established and accepted.

Of particular interest are Articles 11 and 12. The text of Article 11 (1) reads:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living . . . including adequate food . . . The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.²⁸⁷

The plain language of the provision makes it clear that law provides a global norm for “adequate food.” The meaning of the term adequacy may be debated; however, it certainly is at least the sustenance standard which has been adopted in this Article. The distribution of the right to food is based on legal norms and international rights, not economics. Further, Article 11 (1) creates an obligation on states to cooperate to achieve this outcome. In other words, it is not limited to national boundaries with matters of hunger being irrelevant to other members of the global community of nations. As based on free consent, the idea is that contribution and participation shall not be on the basis of violence or threat of violence. Rather, it shall be according to recognition of the inherent value of human survival and the higher level of participation and cooperation in a rule-based international system.

Article 12, dealing with health reads:

²⁸⁴ *Id.*

²⁸⁵ G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, art. 11, ¶ 2 (Dec. 16, 1966) [hereinafter ICESCR].

²⁸⁶ MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 1 (1995).

²⁸⁷ ICESCR, *supra* note 285.

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: . . .

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.²⁸⁸

This international law global norm acknowledges an inherent right to “the highest attainable standard of . . . health,” regardless of domestic law categories, and it does not allow for national borders.²⁸⁹ Health services ought not be dependent upon nationality, ethnicity, etc. Rather, it is a broad human right in which governments are obliged to invest and recognize. Further, it imposes an obligation to contribute to the prevention of diseases and the creation of services which will assist in situations of sickness.

The legal principles of equity recognized equally at the national and international levels comes to the fore here. As international law instruments, they do not carry authority in the absence of accession by individual countries. The ICESCR has seventy-one parties and 171 signatories.²⁹⁰ This status leaves a small minority of countries not in alignment with its principles. By way of this status, there is widespread distribution of these rights by way of the seventy-one parties’ accession and clear support for distribution of the rights among the vast majority of the rest.

It is evident that the law as a global institution distributes such rights to all humans and creates no distinctions between them, neither by political boundary nor by economic capacity—the latter being a matter of significant controversy. Thus, the law’s normative foundations and explicated principles for global distributive justice emanate from the UN and they do not stop at borders. They are not market-based and are not privately enforced individual rights. Rather, they are global, publicly founded and distributed on the basis of membership in the species—humanity.

²⁸⁸ *Id.* at art. 12.

²⁸⁹ *Id.*

²⁹⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

IX. GLOBAL DRIVERS OF THE GLOBAL DISTRIBUTIVE JUSTICE DEBATE

Everyday human experience is dependent upon the existing distributions. These distributions have enormous, ongoing impacts not only on the individual level, but on national and global levels.²⁹¹

There are currently three areas where distributions have obvious and significant impacts: (1) hunger and the distribution of food; (2) health and the distribution of essential medicines and health services; (3) sustainability and environmental justice. Concerningly, the COVID-19 pandemic has brought all three together,²⁹² with conditions exacerbated by the Russian invasion of Ukraine.²⁹³ Given the immediacy of food and health in human survival, the next section examines the challenges posed to social cohesion by food insecurity, illness,²⁹⁴ sustainability—the current drivers of the distributive justice debate—and we consider the theoretical challenges and obstacles posed by economics and law to redistributions in those contexts.

A. COVID-19 VACCINE INEQUALITY AND THE RIGHT TO HEALTH

The right to health is well-established in international law. The World Health Organization (“WHO”) first established this right in its Constitution in 1946.²⁹⁵ Two years later, the UDHR developed a standard of living for everyone which includes health services as a fundamental human need.²⁹⁶ In the following decades, the ICESCR, along with many other international treaty instruments, protected the right to health of all individuals.²⁹⁷ At the national level, many states provide explicit or implicit constitutional

²⁹¹ See Ezekiel J. Emanuel et al., *Fair Allocation of Scarce Medical Resources in the Time of Covid-19*, 382 N. ENGL. J. MED. 2049-55 (2020) (discussing the importance of fair distribution of medical resources and how it affected human survival).

²⁹² Charles J. Reid, Jr., *Pandemic of Inequality: An Introduction to Inequality of Race, Wealth, and Class, Equality of Opportunity*, 14 U. ST. THOMAS J. L. & PUB. POL’Y 1 (2020) (describing this as a “pandemic of inequality”).

²⁹³ Dea Bankova et al., *The War in Ukraine is Fuelling A Global Food Crisis*, REUTERS (May 30, 2022), <https://graphics.reuters.com/UKRAINE-CRISIS/FOOD/zjvqkgomjvx/>.

²⁹⁴ See generally David Coburn, *Income Inequality, Social Cohesion and the Health Status of Populations: The Role of Neo-Liberalism*, 51 SOC. SCI. & MED. 135 (2000); Ichiro Kawachi & Bruce P. Kennedy, *Socioeconomic Determinants of Health: Health and Social Cohesion: Why Care About Income Inequality?*, 314 BMJ 1037 (1997).

²⁹⁵ Joshua Grissom, *An Analysis of the Temporary and Lasting Effects of the Covid-19 Pandemic on International Human Rights*, 24 GONZ. J. INT’L L. 178, 180 (2021) (citing WHO CONST. pmbl.).

²⁹⁶ UDHR, *supra* note 123, at art. 25.

²⁹⁷ Grissom, *supra* note 295, at 180 (outlining how the ICESCR “established the right to enjoy the highest attainable standard of physical health.”).

protections for health rights.²⁹⁸ Some states and particularly developed countries strive to improve public health systems to ensure accessibility.²⁹⁹

Although the right to health has been widely recognized as a fundamental human right, a large number of people, often those in developing countries, still suffer from poor health services. This problem existed well before the COVID-19 pandemic but was exacerbated by the pandemic.³⁰⁰ The following section uses the global COVID-19 vaccine rollout as an example to demonstrate the importance of global distributive justice in global health governance.³⁰¹

The COVID-19 pandemic presented unprecedented health challenges for the world.³⁰² As of December 2022, it has sickened hundreds of millions and killed over 6.6 million people worldwide.³⁰³ It has been particularly devastating for people in many developing countries as they have limited access to COVID-19 vaccines due to socioeconomic disparities between countries as well as individuals.³⁰⁴ For example, huge disparities in vaccination coverage still existed some two and a half years into the pandemic;³⁰⁵ developed countries had much higher vaccination rates than

²⁹⁸ Jody Heymann et al., *Constitutional Rights to Health, Public Health and Medical Care: The Status of Health Protections in 191 Countries.*, 8 GLOB. PUB. HEALTH 639, 645 (2013).

²⁹⁹ See, e.g., Kay Johnson, et al., *Recommendations to Improve Preconception Health and Health Care — United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 MORBIDITY AND MORTALITY WEEKLY REPORT: RECOMMENDATIONS AND REPORTS 1 (Apr. 21, 2006).

³⁰⁰ Julien Chaisse & Nilanjan Banik, *Global Health Law & Governance Amidst the Pandemic: Evidence, Lessons, and Reforms*, 30 ANNALS HEALTH L. & LIFE SCIS. 207, 208 (2021) (“[T]hey lacked the healthcare infrastructure such as number of hospital beds, doctors and paramedic staffs to react to a health emergency.”); see also Grissom, *supra* note 295, at 181 (“Another prominent health care issue was the lack of adequate hospital and emergency transportation infrastructure in developing countries.”).

³⁰¹ Kristen Underhill & Olatunde C.A. Johnson, *Vaccination Equity by Design*, 131 YALE L.J. F. 53, 61 (2021).

³⁰² Robert H. Jerry, II, *COVID-19: Responsibility and Accountability in a World of Rationing*, 7 J. L. & BIOSCIENCES 1, 1 (2020) (“The COVID-19 pandemic is the first modern public health crisis with the potential to overwhelm the public healthcare system.”).

³⁰³ WHO Coronavirus (COVID-19) Dashboard, WHO, <https://covid19.who.int/> (last visited July 4, 2022) (noting that globally, as of July 4th, 2022, there have been 553,644,980 confirmed cases of COVID-19, including 6,380,929 deaths, reported to the WHO); see also Robyn M. Powell, *Applying the Health Justice Framework to Address Health and Health Care Inequities Experienced by People with Disabilities During and After COVID-19*, 96 WASH. L. REV. 93, 95 (2021).

³⁰⁴ Mohsen Bayati et al., *Inequality in the Distribution of Covid-19 Vaccine: A Systematic Review*, 21 INT’L J. EQUITY HEALTH 122 (2022).

³⁰⁵ *Open Letter to G20 Heads of State and Government - UNHCR, IOM & WHO*, THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Oct. 29, 2022), <https://www.unhcr.org/news/press/2021/10/617bffc64/open-letter-g20-heads-state-government.html>.

developing countries.³⁰⁶ By the end of 2021, rich countries such as Australia and Singapore had double-vaccinated the majority of their populations and were rolling out booster vaccine programs,³⁰⁷ while low income countries, such as most African countries, still struggled to secure adequate vaccines supplies to administer a first dose.³⁰⁸ In the *Open letter to G20 Heads of State and Government* published in October 2021, the UN High Commissioner for Refugees (“UNHCR”) reported: “[f]or every 100 people in high-income countries, 133 doses of COVID-19 vaccine have been administered, while in low-income countries, only 4 doses per 100 people have been administered.”³⁰⁹

The COVID-19 vaccine rollout in poor developing countries was hindered by economic and legal constraints. These countries had limited financial resources to purchase vaccines.³¹⁰ Meanwhile, the developed countries were reluctant to support a patent waiver and give up private property rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) for vaccines.³¹¹ As early as October 2020, India and South Africa had submitted a COVID-19 vaccine patent waiver proposal to the WTO.³¹² Nevertheless, despite the urgency of the situation, its collective nature, and the suffering the pandemic was set to impose globally, many rich developed countries refused to grant a waiver.³¹³ Big pharmaceutical manufacturers, such as Pfizer, also refused to surrender, even temporarily, IP rights on the ground that such a waiver would “harm vaccine supply and invite less safe copycats.”³¹⁴

³⁰⁶ Nicholas Bariyo & Gabriele Steinhauser, *Covid-19 Vaccine Gap Between Rich and Poor Nations Keeps Widening*, WALL ST. J. (Sept. 25, 2021), <https://www.wsj.com/articles/covid-19-vaccine-gap-between-rich-and-poor-nations-keeps-widening-11632578312>.

³⁰⁷ *Coronavirus (COVID-19) Vaccinations*, OUR WORLD IN DATA, <https://ourworldindata.org/covid-vaccinations> (last visited Dec. 5, 2021).

³⁰⁸ Bariyo & Steinhauser, *supra* note 306.

³⁰⁹ The United Nations High Commissioner for Refugees, *supra* note 305.

³¹⁰ Justin Sandefur, *World Bank Grants for Global Vaccination — Why So Slow?*, 594 NATURE 475 (2021), <https://www.nature.com/articles/d41586-021-01678-5>.

³¹¹ Melissa Coade, *Government Told COVID Vaccine Patent Waiver Threatens Global Inoculation*, THE MANDARIN (Sept. 16, 2021), <https://www.themandarin.com.au/168762-government-told-covid-vaccine-patent-waiver-threatens-global-inoculation/>.

³¹² Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, WTO Doc. IP/C/W/669 (Oct. 2, 2020).

³¹³ Sam Meredith, *Rich Countries are Refusing to Waive the Rights on Covid Vaccines as Global Cases Hit Record Levels*, CNBC (Apr. 22, 2021), <https://www.cnbc.com/2021/04/22/covid-rich-countries-are-refusing-to-waive-ip-rights-on-vaccines.html>.

³¹⁴ Paul Karp, *Pfizer Warns Australia a COVID Vaccine Patent Waiver Could Harm Supply and Safety*, THE GUARDIAN (May 13, 2021), <https://www.theguardian.com/australia>

It is worth noting that vulnerable populations in some developed countries also encountered vaccine inequality, particularly at the early stage of the vaccine rollout. In the United States, for example, the rollout among African Americans and Hispanic Americans was far behind that of white Americans.³¹⁵ The United States was criticized for being “inequality-forcing, rather than equity-building.”³¹⁶ Professors Kristen Underhill and Olatunde C.A. Johnson note: “federal agency guidance and states’ own choices have contributed to exacerbating vaccine inequity.”³¹⁷

The lack of distributive consideration in the COVID-19 vaccine rollout poses a serious threat to global health. It leaves, “millions or billions of people vulnerable to the deadly virus.”³¹⁸ It fuels further mutation and spreading of the virus,³¹⁹ increasing the risk of prolonging the pandemic in the developing world as well as the developed.³²⁰ Furthermore, vaccine inequality impedes global business and economic recovery, posing a greater threat to poor and developing countries.³²¹ The UN research indicates: “vaccine inequity will have a lasting impact on socio-economic recovery in low and lower-middle income countries,” and it will “deepen inequality and exaggerate the gap between rich and poor,”³²² and “set back progress on the Sustainable Development Goals (SDGs).”³²³

Lasswell’s framework is informative again. The “who” is limited largely to people living in developing countries and those marginalized groups living in the developed world. The “what” is the vaccine. The “how” is a combination of property law and markets. Taking a different tack, the “who” that would be impacted would be shareholders and executives of pharmaceutical companies—although they could be compensated by government from the public purse (a separate matter of equity).

Both law and economics provide significant obstacles to addressing distributive justice in health services. IP rights have been prioritized over the health of human beings. The large pharmaceutical companies’ profits have been preferred over the quick and equitable distribution of vaccines around

news/2021/may/13/pfizer-warns-australia-a-covid-vaccine-intellectual-property-patent-waiver-could-harm-supply-and-safety.

³¹⁵ Underhill & Johnson, *supra* note 301, at 56, 62; *see also* Jake Horton, *COVID: How Ethnicity and Wealth Affect US Vaccine Rollout*, BBC NEWS (Mar. 18 2021), <https://www.bbc.com/news/world-us-canada-56405199>.

³¹⁶ Underhill & Johnson, *supra* note 301, at 87.

³¹⁷ *Id.*

³¹⁸ United Nations, *COVID Vaccines: Widening Inequality and Millions Vulnerable*, UN NEWS (Sept. 19 2021), <https://news.un.org/en/story/2021/09/1100192>.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

the globe—and with it, virtually ensured that COVID-19 will be part of the viral ecology of the planet for the foreseeable future. Failing to suspend IP rights and prioritizing private profits through vaccine production has allowed the virus to escape control, harming inequitably those least able to afford it, but it preserved the financial power and well-being of these large multinational companies. Again, COVID-19 is increasingly a “pandemic of inequality.”³²⁴

Neither infection nor its absence is a simple matter of choice, just as living in a developed or a developing country is not a choice for the vast majority of the world’s population. Neoclassical economists’ focus on individual choice misses the mark. Prescriptions for wealth maximization and private property do not offer solutions. Redistributions to address health services are anathema in the United States where neoclassical economists have placed private property and individual liberties as the highest ideals.

New Institutional Economics (“NIE”),³²⁵ adopts a broader interdisciplinary approach which aims to “understand the institutions of social, political and commercial life.”³²⁶ Societies rely on a healthy population in the first instance—cohesion and social institutions follow. Modifying health rights by recategorizing them as inalienable rather than property rights would be a strong step in addressing the distributive justice claim. Production and distribution of vaccines, with minimal regard to big pharma’s IP claims, would allow these more fundamental health rights to be addressed. As Roark and Fox O’Mahony note in their pragmatic Resilience Property Theory: “Property theory and property law are embedded in changing national, local, and transnational contexts and in competing individual and institutional demands for resilience. Maintaining equilibrium in a dynamic context, through challenges and crises, requires adaptation, flexibility, innovation, and ‘context-appropriate design.’”³²⁷

B. HUNGER AND THE RIGHT TO FOOD

Food is a fundamental human right.³²⁸ At the international level, the UDHR³²⁹ acknowledges human beings’ fundamental need for food.³³⁰ The

³²⁴ Reid, Jr., *supra* note 292.

³²⁵ PETER G. KLEIN, *New Institutional Economics*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS*, 456-89 (Boudewijn Bouckaert & Gerrit De Geest, eds., 2000).

³²⁶ *Id.* at 456 (combining “economics, law, organization theory, political science, sociology and anthropology” in its approach).

³²⁷ Roark & Fox O’Mahony, *supra* note 46, at 820-821.

³²⁸ Sheehy & Chen, *supra* note 13; Paolo D’Odorico et al., *Food Inequality, Injustice, and Rights*, 69 *BIO SCIENCE* 180, 180-90, (2019).

³²⁹ UDHR, *supra* note 123.

³³⁰ *Id.* at art. 25 (establishing “a standard of living” for all individuals, which includes the fundamental right to food).

ICESCR further elaborates on the right to food and imposes binding obligations on its member states to implement this right.³³¹ Furthermore, the Universal Declaration on the Eradication of Hunger and Malnutrition,³³² the General Comment No. 12,³³³ and many other treaty instruments also explicitly uphold food rights.³³⁴ At the national level, similar to health rights, many states have provided explicit³³⁵ or implicit constitutional protection of this right, while others have integrated the key elements of this right into domestic laws, policies, and programs.³³⁶

Despite these legislative efforts, food insecurity remains a serious problem worldwide;³³⁷ to date, around 735 million people still suffer from high levels of food insecurity.³³⁸ Interestingly, research shows there are still sufficient resources to “feed every person on this planet.”³³⁹ Global food insecurity is not caused by food scarcity³⁴⁰ but results from a mix of social, economic,

³³¹ ICESCR, *supra* note 285, at art. 11, ¶ 2.

³³² G.A. Res. 3348 (XXIX), Universal Declaration on the Eradication of Hunger and Malnutrition, art. 1 (Dec. 17, 1974) (declaring an “inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties”).

³³³ Comm. on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), ¶ 8, U.N. Doc. E/C.12/1999/5 (May 12, 1999), [hereinafter General Comment No. 12] (requiring its member states to guarantee people’s sustainable access to food “in a quantity and quality sufficient”); *see also* Rebecca Lindberg et al., Commentary, *A Rights-based Approach to Food Security in Australia*, 32 HEALTH PROMOTION J. AUSTL. 6, 6-12 (2021).

³³⁴ *See, e.g.*, G.A. Res. 44/25, Convention on the Rights of the Child, arts. 24, 27 (Nov. 20, 1989); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 12 (Sept. 3, 1981); Sheehy & Chen, *supra* note 13.

³³⁵ Sheehy & Chen, *supra* note 13, at 666.

³³⁶ *Id.* at 667.

³³⁷ Even within the rich developed countries, hunger and malnutrition still exist. For example, although the United States, as one of the world’s largest agricultural producers and exporters, is capable of providing sufficient quantities of food to feed its people, hunger and malnutrition remains a major social problem. Inequitable food distributions significantly restrict vulnerable populations’ access to food. *See* Eve E. Garrow & Jack Day, *Strengthening the Human Right to Food*, 7 U.C. IRVINE L. REV. 275, 277 (2017) (noting that food insecurity in the United States is not caused by food shortage).

³³⁸ World Health Organization, *122 Million More People Pushed into Hunger since 2019 Due to Multiple Crises, Reveals UN Report* (Jul. 12, 2023), <https://www.who.int/news/item/12-07-2023-122-million-more-people-pushed-into-hunger-since-2019-due-to-multiple-crises--reveals-un-report>.

³³⁹ Kaitlin Y. Cordes & Anna Bulman, *Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes*, 20 UCLA J. INT’L L. & FOREIGN AFF. 87, 89 (2016).

³⁴⁰ Sheehy & Chen, *supra* note 13, at 641; *see also* Juan Antonio Duro et al., *Global Inequalities in Food Consumption, Cropland Demand and Land-use Efficiency: A Decomposition Analysis*, 64 GLOB. ENV’T CHANGE, (2020).

political, and legal factors.³⁴¹ Particularly inequitable distribution,³⁴² and private property rights prioritized by multinational corporations (“MNCs”)³⁴³ are most relevant to the discussion of global distributive justice.

Juan Antonio Duro and many other scholars observe: “substantial inequalities prevail in the global food system.”³⁴⁴ On the one hand, “overly rich diets represent a serious health issue for many of the world’s most affluent inhabitants and constitute a critical climate-change driver.”³⁴⁵ On the other hand, hunger and malnutrition remain a serious threat to “a considerable fraction of the world population.”³⁴⁶ Exacerbating the situation, COVID-19 and Russia’s invasion of Ukraine have driven additional tens of millions of people into hunger and malnutrition.³⁴⁷ Rising food prices, inflation, and a sharp decrease in disposable incomes have disproportionately affected vulnerable groups, particularly low-income populations.³⁴⁸ As the World Bank reports, individuals and households struggling to secure access to adequate food and nutrition prior to the pandemic are now suffering more.³⁴⁹ The world is facing increasing levels of food insecurity, which is likely to continue into the post pandemic era given that “the pace of economic recovery is massively divergent across countries,”³⁵⁰ and “some economies will take longer to rebound.”³⁵¹

Global agribusiness giants are also blamed for contributing to global food insecurity.³⁵² Although they have played a critical role in advancing

³⁴¹ See generally YING CHEN, TRADE, FOOD SECURITY, AND HUMAN RIGHTS 1 (2014).

³⁴² *Id.* at ix.

³⁴³ Hilal Elver, *The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food*, 20 UCLA J. INT’L L. & FOREIGN AFFS. 1, 30-31, 37 (2016) (noting that these MNCs have the power to determine global agricultural outputs and food distribution).

³⁴⁴ Duro et al., *supra* note 340.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *War in Ukraine Drives Global Food Crisis*, WORLD FOOD PROGRAMME (June 24, 2022), <https://www.wfp.org/publications/war-ukraine-drives-global-food-crisis>.

³⁴⁸ FAO, IFAD, UNICEF, WFP and WHO, *In Brief to The State of Food Security and Nutrition in the World: Urbanization, Agrifood Systems Transformation and Healthy Diets across the Rural–urban Continuum 20 (2023)*, <https://doi.org/10.4060/cc6550en>.

³⁴⁹ *Brief: Food Security and COVID-19*, THE WORLD BANK (July 14, 2021), <https://reliefweb.int/report/world/brief-food-security-and-covid-19>.

³⁵⁰ Gulcin Ozkan, *COVID-19 Recovery: Some Economies Will Take Longer to Rebound – This Is Bad for Everyone*, THE CONVERSATION (June 7, 2021, 5:25 AM), <https://theconversation.com/covid-19-recovery-some-economies-will-take-longer-to-rebound-this-is-bad-for-everyone-162023> (noting that “some economies will take longer to rebound.”); see, e.g., Samer Kharroubi et al., *Food Insecurity Pre- and Post the COVID-19 Pandemic and Economic Crisis in Lebanon: Prevalence and Projections*, 13 NUTRIENTS 2976 (2021).

³⁵¹ Ozkan, *supra* note 350.

³⁵² Elver, *supra* note 343, at 30.

agricultural science and technologies and increasing production,³⁵³ as profit-driven institutions, they prioritize private property rights,³⁵⁴ such as economic profits, and IP rights in agriculture.³⁵⁵ They often pay little attention to collective rights or distributive justice.³⁵⁶ Although about ten MNCs monopolize the global seed and pesticide markets as well as food retailers,³⁵⁷ they are not particularly interested in distributing food supplies to address the needs of vulnerable populations. Private property rights are used to create wealth for the MNCs, concentrating it in their hands, without attention to the distributional results much exaggerated by the pandemic.³⁵⁸ Thus, increasing agricultural production alone will not solve the rising global food insecurity.³⁵⁹

Using Lasswell's framework, it is clear that the "who" is economically determined, namely, the poorer parts of the world generally, and the poor in most countries generally—whether developed or developing. The "what" is sufficient food. The "how" element is determined by law in the first instance and economics. In terms of law, property law distributions permit the accumulation of food in the first instance and the right to alienate those rights by transactions. The "how" is further determined by economics through profit-based markets.

Again, the neoclassical economics, with its focus on individual choice, wealth maximization, and private property, offers limited solutions. People are busy making choices about how to spend their income—whether food or the latest iPhone—and there is no need to redistribute income. Doing so is in violation of the basic ideas of private property and an infringement on individual liberties—those of the wealthy whose property might be at risk of redistribution and those of the poor who have made poor choices.³⁶⁰

³⁵³ Abdul Rehman et al., *Modern Agricultural Technology Adoption its Importance, Role and Usage for the Improvement of Agriculture*, 14 LIFE SCI. J. 70, 71 (2017).

³⁵⁴ It is not uncommon to see collective rights displacing private rights. See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] 1991, art. 58 (establishing that social interests displace private interests and that private property has a social function that implies duties, including an ecological purpose); *France: Equatorial Guinea Vice President's Conviction Upheld*, HUMAN RIGHTS WATCH (July 28, 2021), <https://www.hrw.org/news/2021/07/28/france-equatorial-guinea-vice-presidents-conviction-upheld> (illustrating a case of seizure of private property which was later returned to the benefit of the public).

³⁵⁵ See generally Bongo Adi, *Intellectual Property Rights in Biotechnology and the Fate of Poor Farmers' Agriculture*, 9 J. WORLD INTELL. PROP. 91 (2006).

³⁵⁶ Sheehy & Chen, *supra* note 13.

³⁵⁷ Elver, *supra* note 343, at 30-31.

³⁵⁸ D'Odorico et al., *supra* note 328.

³⁵⁹ Duro et al., *supra* note 340 (noting that producing more food for all remains "a necessary condition" to improve global food security).

³⁶⁰ See generally Gavin Kerr, *Neo-classical Liberalism, 'Market Freedom', and the Right to Private Property*, 26 CRIT. REV. INT'L SOC. & POL. PHIL. 1 (2020).

NIE, however, have some insight to offer. The institutions that sustain the market are those that sustain society at large. These institutions underpin the social cohesion necessary for society to function as a whole. NIE offers the potential to shift rights in food or its production modifying such rights from property rights to inalienable rights. Thus, food at an individual level may be an inalienable right, providing a defence against conversion, trespass, or theft, in a context where a multinational is depriving local producers of the means to feed themselves.³⁶¹

C. SUSTAINABILITY: CLIMATE CHANGE

The UN says access to a healthy environment is a human right as the issue of sustainability has become a dominant issue on the global policy agenda.³⁶² As the UN's Sustainable Development Goals ("SDGs") demonstrate, sustainability stands alongside economics at the center of international attention.³⁶³ Although the term "sustainability" is variously defined,³⁶⁴ it is fundamentally a matter of values. Law professor Benedict Sheehy has argued: "sustainability is a matter of social institutions and value systems over time.... The value question is a political question about what is worth preserving—ranging anywhere from the quality of life for the current generation in a single nation or the global ecology for the indefinite future."³⁶⁵ The term "sustainability" is best limited to ecological matters.³⁶⁶ Among the various ecological issues, climate change is the greatest, and indeed, it is a widely spread and even existential threat to the human species.³⁶⁷

As a justice issue, sustainability is a matter of fairness between the present generation's interests in natural resource use and depletion and the interests of future generations which require conservation.³⁶⁸ It is essentially an equation which Professor Simon Caney explains as follows: "[t]o ask by how

³⁶¹ Sheehy & Chen, *supra* note 13.

³⁶² John Fien & Daniella Tilbury, *The Global Challenge of Sustainability*, in EDUCATION AND SUSTAINABLE DEVELOPMENT: RESPONDING TO THE GLOBAL CHALLENGE 1-13 (Daniella Tilbury et al., eds. 2002)

³⁶³ See *Do You Know All 17 SDGs?*, U.N., <https://sdgs.un.org/goals#goals> (last visited Feb. 5, 2023).

³⁶⁴ Sheehy & Farneti, *supra* note 20.

³⁶⁵ See generally Benedict Sheehy, *Sustainability, Justice and Corporate Law: Redistributing Corporate Rights and Duties to Meet the Challenge of Sustainability*, 23 EUR. BUS. ORG. L. REV. 273 (2022).

³⁶⁶ See generally Julian D. Marshall & Michael W. Toffel, *Framing the Elusive Concept of Sustainability: A Sustainability Hierarchy*, 39 ENV'T. SCI. & TECH. 673 (2005).

³⁶⁷ See generally John Houghton, *Global Warming*, 68 REPS. ON PROGRESS PHYSICS 1343 (2005).

³⁶⁸ See generally EFFICIENCY, SUSTAINABILITY, AND JUSTICE TO FUTURE GENERATIONS 1 (Klaus Mathis ed., 2011).

much current generations should lower emissions requires one to assess their interests with the legitimate interests of future people.”³⁶⁹

As a global justice issue, sustainability becomes more complex. Global distributive justice has a particular pertinence to ecological sustainability in several dimensions: who reaps the benefits and who bears the burden (in addition to the previously mentioned chronological dimension).³⁷⁰

Climate change, as an anthropogenic phenomenon, is largely the result of industrialization.³⁷¹ Returning to Lasswell’s framework, the first facet of distributive consideration is “who,” and we turn to economics for the answer. Industrialization occurred first and remains primarily in the developed countries.³⁷² Populations located in these countries have enjoyed the material benefits of greater health, comfort, and extended lives, increasing over the few hundred years since the industrial revolution. Further, they have obtained a disproportionate share of the wealth associated with such industrialization.³⁷³ By creating the rules and setting the terms of trade, these producing jurisdictions have been successful in securing the lion’s share, as would any party in the position to do so.³⁷⁴

The corollary, the “who” in terms of bearing the costs, is a question answered by pointing to those in the developing, or industrializing world. While these populations too have benefited from industrialization, they have done so later and to a significantly lesser degree than those of populations of industrialized nations. They continue to suffer the effects of the reduced economic resources and lower life expectancies associated with less developed status.³⁷⁵

The “who” element of Lasswell’s framework also has a very significant geographic aspect. These geographical dimensions of sustainability raise distributive justice concerns.³⁷⁶ The parties who have most benefited from the destruction of the natural habit have for the most part lived in the northern

³⁶⁹ Simon Caney, *Climate Change and the Future: Discounting for Time, Wealth, and Risk*, 40 J. SOC. PHIL. 163, 164 (2009).

³⁷⁰ Sheehy, *supra* note 365.

³⁷¹ David Jones et al., *The Great Global Warming Swindle: A Critique*, 20 BULL. AUSTRAL. METEOROLOGICAL & OCEANOGRAPHIC SOC’Y, https://www.researchgate.net/profile/Andrew-Watkins/publication/237288047_The_Great_Global_Warming_Swindle_a_critique/links/56690fa008ae7dc22ad39076/The-Great-Global-Warming-Swindle-a-critique.pdf (last visited: Feb. 5, 2023) (noting that “global warming is largely due to an increase in atmospheric greenhouse gases resulting from increased industrialization during the last 100-150 years.”).

³⁷² See generally Nathan Rosenberg, *How the Developed Countries Became Rich*, 123 HEALTH AND WEALTH 127 (1994).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ Sheehy, *supra* note 365.

hemisphere. The effects of climate change, however, are expected to disproportionately effect nations in the southern hemispheres.³⁷⁷ This distribution of harms and benefits resulting from the accidents of geography is inequitable.

Finally, Lasswell's "who" has a chronological dimension. The past and current generations will have reaped disproportionately more of the benefits while the coming generations will bear disproportionately more of the costs.³⁷⁸ The inequity of this situation calls for us to radically reconsider the way we address the causes and impacts of global warming using the lens of distributive justice.

In terms of addressing injustice stemming from ecological harms, some headway has been made by way of international negotiations and instruments.³⁷⁹ These distributive justice issues with respect to sustainability matters are being addressed through climate change negotiations, which include among other things, technology transfers.³⁸⁰ Such transfers include limits to IP rights associated with lower carbon technologies. Further, compensation funds have been established to compensate people disproportionately bearing the costs of climate change. For example, the Green Climate Fund ("GCF") was established as a financial mechanism within the United Nations Framework Convention on Climate Change ("UNFCCC")³⁸¹ with a goal to reduce "greenhouse gas emissions in developing countries and help adapt vulnerable societies to the already-felt impacts of climate change."³⁸² As part of the GCF programs, the Republic of the Marshall Islands, which is highly vulnerable to rising sea level as a result of climate

³⁷⁷ See generally Christopher Todd Beer, *Climate Justice, the Global South, and Policy Preferences of Kenyan Environmental NGOs*, 8 GLOB. S. 84 (2014).

³⁷⁸ See generally EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS 1 (2006).

³⁷⁹ See *What is the United Nations Framework Convention on Climate Change?*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change> (last visited Feb. 5, 2023) (the United Nations Framework Convention on Climate Change established an international environmental treaty to "prevent dangerous anthropogenic (human induced) interference with the climate system"); *What is the Paris Agreement?*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Feb. 5, 2023) (explaining that the Paris Agreement was also adopted with a goal to limit global warming to well below 2, preferably to 1.5, degrees Celsius, compared to pre-industrial levels).

³⁸⁰ The U.N. Dep't of Econ. & Soc. Affs., *UN-DESA Policy Brief No. 18, Climate Change and Technology Transfer: The Need for a Regional Perspective* (July, 2009), <https://sdgs.un.org/sites/default/files/publications/policybrief18.pdf>.

³⁸¹ *Green Climate Fund (GCF)*, U.N. ENV'T PROGRAMME, <https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/partners/green-climate-fund-gcf> (last visited Feb. 5, 2023).

³⁸² *Id.*

change,³⁸³ has received approximately sixty million dollars in funds to strengthen the resilience of its coastal infrastructure.³⁸⁴ The cost of the relocation of the 75,000 strong population, however, will be in the billions of dollars.³⁸⁵

As a global policy, sustainability has not been limited to ecological matters. The UN's SDGs include economic concerns—as is appropriate where sustainability interacts with the development agenda. In this international policy context, sustainable development has included eradication of extreme poverty as a goal—again a matter of global distributive justice.³⁸⁶ At a basic level, economic inequality results from unequal income labor and unequal accumulation of capital.³⁸⁷ Income inequality is nothing new; however, over the last century it has become increasingly discussed as a justice issue and has been on the rise in many countries around the globe in recent decades.³⁸⁸ In the Western world, economic policy changes in the late 1970's set the foundation for a broader shift to neoliberalism, which reversed a trend toward equality.³⁸⁹ This reversal has been a cause for concern and alarm as it has the potential to undermine the foundations of contemporary society concerning everything from rights to democratic elections and accountability.³⁹⁰ The poor become poorer, while the rich grow their fortunes to record high levels.³⁹¹ As this policy direction enriched the powerful and wealthy, they ensured it was exported around the globe.³⁹²

³⁸³ See generally Sophie Yeo, *Climate Finance: The Money Trail*, 573 NATURE 328 (2019).

³⁸⁴ FP066: *Pacific Resilience Project Phase II for RMI*, GREEN CLIMATE FUND, <https://www.greenclimate.fund/project/fp066#> (last visited July 5, 2022).

³⁸⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-64, COMPACTS OF FREE ASSOCIATION: IMPROVEMENTS NEEDED TO ASSESS AND ADDRESS GROWING MIGRATION (2011).

³⁸⁶ *Sustainable Development Goals-Goal 1: End Poverty in All Its Forms Everywhere*, U.N., <https://www.un.org/sustainabledevelopment/poverty/> (last visited Dec. 21, 2022).

³⁸⁷ THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 304 (Arthur Goldhammer trans., The Belknap Press of Harvard Univ. Press 2017) (2013).

³⁸⁸ See, e.g., Gary Burtless, *Worsening American Income: Inequality: Is World Trade to Blame?*, BROOKINGS (Mar. 1, 1996), <https://www.brookings.edu/articles/worsening-american-income-inequality-is-world-trade-to-blame/> (noting that “[s]ince 1970 American incomes have become strikingly less equal.”).

³⁸⁹ See generally Thomas Volscho, *The Revenge of the Capitalist Class: Crisis, the Legitimacy of Capitalism and the Restoration of Finance from the 1970s to Present*, 43 CRITICAL SOCIO. 249 (2017).

³⁹⁰ See *A Deadly Virus: 5 Shocking Facts about Extreme Global Inequality*, OXFAM INT'L, <https://www.oxfam.org/en/5-shocking-facts-about-extreme-global-inequality-and-how-even-it> (last visited Nov. 9, 2022).

³⁹¹ *Id.*

³⁹² See generally, Branko Milanovic, *Global Income Inequality by the Numbers: in History and Now – An Overview* (World Bank Pol'y Rsch. Grp. Poverty and Ineq. Team, Working Paper No. 6259, 2012) (discussing global income inequality in general).

The UN's World Social Report 2020 provided data indicating that during the period of 1990-2015, the richest one percent of the population significantly increased their share of income, whereas "the poorest 40 per cent earned less than 25 per cent of income" across over ninety countries.³⁹³ Another UN report revealed: "[i]n 2018, the 26 richest people in the world held as much wealth as half of the global population [...], down from 43 people the year before."³⁹⁴ Meanwhile, the pandemic and the COVID-19 recession are pushing an additional 120 million people into extreme poverty.³⁹⁵ The progress toward the UN's SDG in poverty reduction has essentially been halted or even reversed, raising great concerns for distributive justice.

D. SUMMARY

Neoclassical economists do not have a policy solution to inequality or distributive justice in general; frankly, in their economic model, inequality is not a problem.³⁹⁶ Distributions are the result of choices, individual preferences expressed in the institution of neutral markets and accordingly, interfering with them is a transgression of the liberal ethics of individual agency.³⁹⁷ To transfer wealth from people who have made choices which have resulted in an increase in wealth to those who have made other choices is objectionable morally and legally.³⁹⁸ It violates norms of conservative political philosophy and its related absolutist conceptions of property law. Redistributions in this lens are unjustified takings.

New institutional economists, however, see the underlying group interest in social cohesion and the challenge that inequality poses. As a result, they are likely to propose a solution which coordinates the law and the economy to ensure that social cohesion remains. Redistribution becomes a priority and government intervention in markets and reform of property rights is deemed desirable. The lens of this political philosophy sees no conflict with underlying property rights as rights that are not for purposes of profit through trading but for ensuring dignity and flourishing. As noted, NIE scholarship is

³⁹³ World Social Report 2020: Inequality in a Rapidly Changing World, U.N. Dep't of Econ. & Soc. Affs., U.N. Doc. ST/ESA/372, at 3 (2020).

³⁹⁴ U.N., Inequality – Bridging the Divide, <https://www.un.org/en/un75/inequality-bridging-divide> (last visited Nov. 9, 2022).

³⁹⁵ Francisco H. G. Ferreira, *Inequality in the Time of COVID-19*, 58 FIN. AND DEV. 20, 20 (2021).

³⁹⁶ See generally Kerr, *supra* note 360.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

interested in broader social welfare³⁹⁹ and those conditions which may justify regulatory intervention to support social cohesion.⁴⁰⁰ Thus, by placing individual private property rights in second position to broader social well-being through prioritizing equality, the NIE perspective is able to provide insight into a phenomenon which neoclassicals cannot identify and hence cannot contribute to solving. In fact, solutions are available from NIE scholarship. At a global level, social cohesion is required to avoid chaos and the collapse of international norms, evidenced by the Russian invasion of Ukraine. A strong argument that scholars can make to support making vaccines widely available, drawing upon law and political philosophy, is to redistribute the wealth derived from the pandemic by the developed world's MNCs to those countries unable to afford vaccines on their own. Such distributive justice may violate private property norms but answers a much louder and widely shared norm of prioritising human well-being.

This overview of the different schools' responses to the three issues of global health (through the lens of COVID-19 vaccines), food, and sustainability requires analysis of the limitations of theoretical models. The next section provides that analysis.

X. PUBLIC POLICY CHOICES FOR DISTRIBUTIVE JUSTICE

The political philosophy which provides the bedrock of western civilization, currently the dominant form of civilization, is liberalism. Liberalism has brought great improvements to the lives of billions of people over the last century and provides a beacon for billions alive today.⁴⁰¹ Its justification for individual freedoms, for freedom from tyrannical rulers and rules, has transformed profoundly not only individual lives but whole societies.⁴⁰² Like all other ideas and institutions, however, it comes with a cost. These costs are becoming increasingly evident and critical to address—the issues of global health, hunger, and sustainability—and they demand answers which can only be properly founded on ideas of distributive justice.

A fair and equitable distribution of resources is the foundation of distributive justice.⁴⁰³ While fairness is a matter of justification, complete

³⁹⁹ ROBERT COOTER AND THOMAS ULEN, *LAW AND ECONOMICS* 253 (Berkeley Law Books 2d ed. 1996); see also Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L. J. 599, 606 (1989).

⁴⁰⁰ Minda, *supra* note 399, at 606.

⁴⁰¹ See, e.g., Hakan Seckinelgin, *Civil Society as a Metaphor for Western Liberalism*, 16 GLOB. SOC. 357 (2002).

⁴⁰² *Id.*

⁴⁰³ David Elkins, *Responding to Rawls: Toward a Consistent and Supportable Theory of Distributive Justice*, 21 BYU J. PUB. L. 267, 267 (2007) (noting that “[d]istributive justice is concerned with the question of how benefits and burdens, and in particular how economic resources, should be allocated.”).

equality of wealth (however wealth may be defined) is not only impracticable,⁴⁰⁴ but undesirable because every individual values and pursues different combinations of resources to achieve their own different ends. However, it is an uncontroversial position that every individual should have equal access to basic human needs,⁴⁰⁵ as evidenced by the many international instruments cited above and elsewhere.

In terms of economic theories and distributive justice, neoclassical economics' fetishization of individual private interests precludes its contribution to solving the problem. Indeed, to some degree its theories and assumptions lie at the heart of the problem. While NIE focuses on "the problems of the modern welfare, regulatory state,"⁴⁰⁶ and in particular, which conditions justify regulatory intervention,⁴⁰⁷ it has not developed sufficient traction to be a major theoretical framework for policy development. The state is required, from an institutional perspective, to fulfill a critical role in developing legal and policy responses to rebalance private rights and collective rights to mitigate the worst of inequalities, including in particular, times of crisis like the COVID-19 pandemic. This crisis has demonstrated how government can and has addressed distributive justice issues in markedly creative, non-ideologically driven ways, from providing economic support to imposing restraints on private property, such as limiting evictions from accommodation and creating mortgage moratoriums.⁴⁰⁸

Moving beyond the concerns of national governments in the face of a pandemic, the nature of the crises currently faced are such that the domestic focus of traditional distributive justice can no longer be supported. Pandemics, global food supply chains, and ecological sustainability are global issues to such an extent that justice is becoming increasingly a global affair.

There is a strong social and ethical responsibility set out in international law to improve equality in COVID-19 vaccine access⁴⁰⁹ and in health services more widely,⁴¹⁰ This right should not be limited exclusively by the rights of

⁴⁰⁴ Calabresi & Melamed, *supra* note 200, at 1099.

⁴⁰⁵ Amitai Etzioni, *Basic Human Needs, Alienation and Inauthenticity*, 33 AM. SOCIOLOGICAL REV. 870, 871 (1968).

⁴⁰⁶ Rose-Ackerman, *supra* note 242, at 253.

⁴⁰⁷ Minda, *supra* note 399, at 606.

⁴⁰⁸ See detailed discussion in Roark & Fox O'Mahony, *supra* note 46, at 789-855.

⁴⁰⁹ Underhill & Johnson, *supra* note 301, at 87 (arguing that "[i]mproving racial equity in vaccine access is a legal, ethical, and practical obligation, particularly in a crisis.>").

⁴¹⁰ Daniel M. Austin, *Book Review, Syracuse Science and Technology Law Reporter*, 25 SYRACUSE SCI. & TECH. L. REP. 106, 106-108 (2011) (reviewing LOUISE BERNIER, *JUSTICE IN GENETICS: INTELLECTUAL PROPERTY AND HUMAN RIGHTS FROM A COSMOPOLITAN LIBERAL PERSPECTIVE* (2010)) (noting that "[a]ccess to healthcare includes the use of modern medical technologies including the most recent developments in science . . . This bedrock principle is what forms the basis for distributive justice in healthcare distribution").

private property as traded on markets. Access to health services (including life-saving vaccines) needs to be provided at all times.⁴¹¹ Many scholars have called for governments to apply a justice framework to address health inequality. For example, Professors Ruqaiyah Yearby and Seema Mohapatra suggest governments “integrat[e] the health justice framework . . . into . . . governments’ pandemic response.”⁴¹² Professor Robyn M. Powell also argues: the adoption of a health justice framework is vital to address health disparities and achieve “health equity and social justice,”⁴¹³ particularly for people with disabilities.⁴¹⁴

As noted, global food insecurity is the result of unequal access to food resources and an overemphasis on private rights. Legal norms provide strong justification for public intervention in order to redistribute food resources to the needy. Particularly, the right to food, as one of the most fundamental rights necessary for human survival, is indispensable for the exercise of all other rights.⁴¹⁵ All individuals should be granted an equal right to access food and nutrition.⁴¹⁶

Furthermore, ecological sustainability has become a pressing matter of justice between present and future generations.⁴¹⁷ Climate change also disproportionately affects the Global South, raising an additional dimension to distributive justice concerns.⁴¹⁸ There is an urgent need for world leaders to address environmental problems globally.⁴¹⁹

XI. CONCLUSION

Distributive justice is a difficult concept intellectually, politically, and morally. Distributive justice requires us to think of ourselves not only as individuals but also as members of a society. Global distributive justice

⁴¹¹ *Id.* at 114 (noting that “[i]n order for equality to exist, people must have the same right at the same time, or to have the same rights all the time.”).

⁴¹² Ruqaiyah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in Covid-19*, 70 EMORY L. J. 1419, 1425 (2021).

⁴¹³ Powell, *supra* note 303, at 97–98; *see also* Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 277 (2015).

⁴¹⁴ Powell, *supra* note 303, at 97–98.

⁴¹⁵ Sheehy & Chen, *supra* note 13.

⁴¹⁶ Lamont & Favor, *supra* note 108 (noting that “[o]ne of the simplest principles of distributive justice is that of strict, or radical, equality. The principle says that every person should have the same level of material goods (including burdens) and services.”).

⁴¹⁷ Mathis, *supra* note 368.

⁴¹⁸ Beer, *supra* note 377, at 85.

⁴¹⁹ *Climate Change Poses Increasing Risks to Global Stability*, U.N. CLIMATE CHANGE (Feb. 21, 2017), <https://unfccc.int/news/climate-change-poses-increasing-risks-to-global-stability>.

requires us to expand our conception of society to include people beyond the borders of our own nation-state.

Distributive justice draws a response from everyone, whether it is the political conservative's "taking my property is wrong"⁴²⁰ or the radical socialist's "all property is theft."⁴²¹ Since property rights are part of the foundation of distributive justice, addressing them directly and philosophically is important. The hard, positive delineation between individual property rights and wider societal collective interests, while critical to the analysis cannot, particularly in this crisis context, stand as if they are context free. Rather, as Roark and Fox O'Mahony note in their pragmatic Resilience Property Theory:

Property theory and property law are embedded in changing national, local, and transnational contexts and in competing individual and institutional demands for resilience. Maintaining equilibrium in a dynamic context, through challenges and crises, requires adaptation, flexibility, innovation, and "context-appropriate design"—sensitive to the nuances of the property *nomos* in each jurisdiction.⁴²²

This shifts the legal discussion from binary philosophical positions informed by prior political commitments to pragmatic considerations of the development, maintenance, and reform of property rights as they are found particularly in times of crisis and transition.

Taking the analysis further, Roark and Fox O'Mahony's pragmatic approach becomes particularly important. As they note: "The dominance of politically polarized property theories in contemporary property discourse ... tends to privilege a unidirectional account of the nature and effects of state action or restraint on individuals and communities, while obscuring the interactional effects of property problems on individuals and institutions—including the state itself."⁴²³ In other words, ideological political commitments obscure the interaction between states and citizens in responding to the exigencies of life embedded in social, ecological, and economic environments. The consequence, they argue, is that ideologues pursue ideological purity while ignoring and/or opposing the preferred or necessary actions of the state, for both justice purposes as well as basic

⁴²⁰ See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 1(1985) (describing an absolutist property rights position that is an excellent representation of this view).

⁴²¹ See PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY: AN INQUIRY INTO THE RIGHT AND PRINCIPLE OF GOVERNMENT (Benjamin R. Tucker trans., 1970).

⁴²² Roark & Fox O'Mahony, *supra* note 46, at 820.

⁴²³ *Id.* at 798.

survival of the state itself.⁴²⁴ Thus, a clear recognition of the nature of property and the dynamic relationship between private individuals and the state (and beyond)⁴²⁵ is a basic issue in addressing distributive justice at both national and global levels.

A possible solution lies in the idea that people without their basic sustenance needs met have entitlements outside of a market context. The global problems of food insecurity as well as the COVID pandemic illustrate this need and the potential solution.⁴²⁶ An egalitarian approach could have saved millions of lives in underdeveloped countries that lack the means to implement a nationwide vaccine policy. It may well have analogous solutions in terms of food. Such proposals are simultaneously consistent with the conservative and liberal emphasis on the value of the individual.

It has been said that the measure of a society is how it treats its most vulnerable members. Where law is to be something more than the protection of individual private property rights, valuing wealth aggregation above all else, and is understood properly as an institution to address social survival through such things as equity, then distributive justice concerns must have a prominent place on the desks of legislators, judges, and lawyers.⁴²⁷ This vision of law is manifested through a revival and re-allocation of rights—such as the right to food, the right to health, and the right to ecological sustainability—that accord greater value to humanity as individual beings and as a species.

We advanced the argument in favor of global distributive justice based on Lasswell's framework. We have taken a cosmopolitan view as the answer to the first question concerning "who." The recipients ought to be—humanity generally, without divisions based on rank or group membership. For the second issue, the "what" question, we focused on health, food, and a sustainable environment—natural phenomena not limited by political borders. Finally, in analyzing the "how," we focused on the norms of economics and law—particularly property law—to consider the balance between the individual and the group. The issue of re-distributing the planet's resources in the interests of the social well-being of the majority of the planet's population is for everyone, not only economists and law professionals, since improving social well-being is the main project of life together on the planet.

⁴²⁴ *Id.*

⁴²⁵ LORNA FOX O'MAHONY & MARC L. ROARK, SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS 165–68 (2022).

⁴²⁶ Eric A Posner, *The Boundaries of Normative Law and Economics*, 38 YALE J. ON REGUL. 657, 663 (2021).

⁴²⁷ Different scholars, including academics at the University of Chicago Law School, agree with the need for a distributional analysis in considering law and economics. *See id.*; *see generally* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016); Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1649-1701 (2018).