WELFARE-BASED EX POST EGALITARIANISM

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In response to Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279 (2007).

In a thoroughly argued article, Adler and Sanchirico defend the view that egalitarianism is concerned not merely with the equalization of expected well-being (the ex ante approach) but also with the expected equalization of actual well-being (the ex post approach).[1] The ex post approach that they defend dictates that when the policymaker faces uncertainty, she ought to care not merely about the equality of the prospects of well-being or maximization of the prospects of overall well-being, but also about the prospects of equality ex post. Under ex post egalitarianism, policies with uncertain outcomes ought to be judged (also) on the basis of the expected ex post equality that they generate; the more egalitarian the expected outcomes, the better the policy.

Furthermore, the ex post egalitarianism favored by Adler and Sanchirico conflicts with established traditional views advocating that no decision be made that is ex ante Pareto inferior.[2] Adler and Sanchirico believe that sometimes society ought to make choices that are detrimental to everybody's expected well-being for the sake of promoting ex post egalitarianism.

Adler and Sanchirico's defense of ex post egalitarianism is grounded in a much broader philosophical framework—the welfarist framework. As Adler and Sanchirico explain, "'[w]elfarism' is the principle that social policy should be based solely on individual well-

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    [1] Matthew D. Adler and Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 U. PA. L. REV. 279 (2006).
    [2] For a discussion of the conflict between ex ante Pareto superiority and ex post egalitarianism, see *id.* at 331-34.

being, with no reference to 'fairness' or 'rights.'"[3] To be integrated
into the welfarist framework, equality ex post must be understood as a
component of welfare that causes society to incorporate a disp11fer-
ence for ex post inequality. In contrast to the belief that equality is
grounded in fairness or rights, Adler and Sanchirico insist that ex post
egalitarian sentiments should be grounded in welfarism—that is, in ex
post concern for the welfare of the members of the society.[4]

As a responder to this article, I have the misfortune of being in
agreement with much of Adler and Sanchirico's analysis.[5] I believe
that a preference for ex post equality underlies some of our common-
sense intuitions. In fact, I believe that some rules that are used to
support deontological intuitions can be defended within an egalitar-
ian framework.[6]

Fortunately, however, I also have serious disagreements with Adler
and Sanchirico and, in particular, with their fundamentalist welfarism.
I believe that the egalitarian intuitions shared by Adler and Sanchirico
and myself cannot be fully explained in terms of the welfarist frame-
work. Further, I believe that intuitions of nonwelfarist fairness-based
egalitarianism are necessary to provide an adequate account of egali-
tarianism.

In this Response, I wish to explore two issues. First, I wish to es-
tablish that the paradigmatic cases used by Adler and Sanchirico to
substantiate their claims are too simplistic—they do not capture the
complexity of our intuitions concerning equality. More specifically,
Adler and Sanchirico use two-stage scenarios involving decisions made
ex ante that affect equality ex post, yet our shared egalitarian intui-
tions also surface in three-stage scenarios that cannot easily be ac-
commodated within Adler and Sanchirico's welfarist framework. Sec-
ond, I wish to examine whether and to what extent autonomy and
consent can be reconciled with Adler and Sanchirico's framework.

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[3] *Id.* at 279.

[4] They also try to rebut Diamond's arguments favoring fairness-based egalitarian-
ism. *See id.* at 339-42.

[5] For a defense of ex post egalitarianism, see Alon Harel et al., *Ex Post Egalitarian-
ism and Legal Justice*, 21 J.L. ECON. & ORG. 57 (2005).

[6] *Id.* at 63-69.

I. IN DEFENSE OF NONWELFARIST EGALITARIANISM

Welfarism is characterized by Adler and Sanchirico as a position that

> holds that social choices should be evaluated solely according to how they affect the well-being of society's members. Importantly, the approach is broad enough to allow concern for inequality of well-being across individuals. But it does not admit criteria like 'fairness,' 'rights,' or 'justice'—at least not as foundational criteria for choice.[7]

What characterizes welfarism is the conviction that social policy is a function of nothing other than the level of people's well-being. Welfarism, however, presupposes a method of aggregating individuals' well-being.[8] The method of aggregation could be sensitive to egalitarian concerns such that in assessing overall social welfare, the well-being of the worse-off individual ex post may be given additional weight. The amount of additional weight is a determination ultimately grounded in welfarist considerations; it is based on a normative judgment concerning the differential weight to be given to increases in welfare in accordance with their distributional effects.

What makes this position plausible is the normative judgment that equality ex post is indeed an attractive state of affairs that should count in favor of a particular policy. The fact that policy *A* leads to outcomes that are more egalitarian than policy *B* counts in favor of policy *A* because the egalitarian *outcomes* are judged to be welfare enhancing. It seems, therefore, that welfarism can accommodate egalitarian intuitions because the improvement in the well-being of the less well off under the more egalitarian policy counts more than the deterioration in the well-being of the better off. Notions of fairness and rights are unnecessary to justify the concern for ex post equality.

Welfare-based egalitarianism is indeed convincing unless, of course, one designs a scenario in which egalitarian rules/policies are normatively superior but the egalitarian states of affairs that they generate are not welfare enhancing.[9] If such a scenario is possible, it fol-

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[7] Adler & Sanchirico, *supra* note 1, at 282.

[8] *See, e.g.*, Louis Kaplow & Steven Shavell, *Principles of Fairness Versus Human Welfare: On the Evaluation of Legal Policy* 22-23 (John M. Olin Ctr. for Law, Econ., & Bus., Harvard Law Sch., Discussion Paper No. 277, 2000), *available at* http://papers.ssrn.com/paper.taf?abstract_id=224946 (arguing that a "method of aggregation is of necessity an element of welfare economics").

[9] Adler and Sanchirico describe and criticize Diamond's attempt to develop a similar argument supporting fairness-based egalitarianism. *See* Adler & Sanchirico, *su-*

lows that the normative appeal of some egalitarian policies cannot be attributed to welfarist considerations and must therefore be explained in nonwelfarist terms.

To develop such an argument, I shall distinguish between two paradigms: the first is the two-stage paradigm used by Adler and Sanchirico; the second is a three-stage paradigm, which I will explore for the sake of demonstrating that some of the egalitarian intuitions are ultimately fairness based (rather than welfare based).

The paradigm governing the Adler and Sanchirico analysis is a simple two-stage paradigm. At the first stage, individuals face a choice between an "uncertain" policy that ex ante promotes the *expected* well-being of both individuals but ex post benefits only one of them at the expense of the other, and a "certain" policy that ex ante promotes the expected well-being of both individuals to a lesser degree but ex post benefits both equally. What characterizes the uncertain policy is that at the initial stage, it is attractive both for distributive justice reasons (given that both individuals are equal in terms of their expected well-being) and for efficiency reasons (given that the sum of the welfare of all individuals following the uncertain policy is higher than the sum of the welfare of all individuals following the certain policy). Yet, this seemingly attractive policy leads ex post to an unequal society in which one person is worse off than he would have been under an alternative (certain) policy.

Yet some of the most interesting scenarios are three-stage scenarios in which the decisions made at the initial stage do not increase or decrease inequality ex post, but generate *expected* inequality at an intermediate stage. At the initial stage, individuals face a choice between *A* and *B*. *A* is Pareto superior ex ante, but produces expected inequality at an intermediate stage. *B*, on the other hand, is Pareto inferior ex ante, but is congenial to equality at the intermediate stage.

Let me provide two examples. In the Second World War, American pilots participating in military operations had to risk their lives. Pilots were faced with the choice between two ways of distributing the risks. Assume that there are 100 pilots and that every mission requires the participation of 25 pilots. Under one possible selection process *B*, every pilot flies once in every four missions. Yet, experts calculated that one can reduce the number of deaths by designing an alternative selection process. Under the alternative selection process *A*, 25 pilots

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pra note 1, at 339-42. As I shall argue later, I think that the examples used in this paper are immune to some of the objections raised by Adler and Sanchirico.

would be chosen at random and those 25 pilots would participate in all missions. The more frequent the participation is in the missions, the more trained the pilots become and, consequently, the lower the probability is of being killed. Hence, by choosing *A*, all 100 pilots increase their expected well-being.

The allocation of limited mining-safety resources presents a similar, frequently cited dilemma.[10] Assume that the government decides to invest $1 million to save lives of miners trapped in mines. Under *A*, it invests $1 million in designing precautions that save 1,000 miners a year. Under this policy, once a mine has collapsed the government makes no further investment in saving the trapped miners. Alternatively, the government can invest $1 million in saving miners who have been trapped in the mines and thereby save 900 miners. *A* increases the expected inequality at the intermediate stage between the well-being of miners who have been trapped in the mines and those who have not.

Both scenarios can be described in terms of a three-stage paradigm. At the initial stage, society is faced with two alternative policies: *A* (selecting 25 pilots, investing in mining precautions) and *B* (every pilot flies once in every four missions, investing in saving trapped miners). *A* leads at the intermediate stage to inequality in the expected well-being. Thus, for instance, under *A*, 25 pilots face a greater threat than they would face under *B*, and the trapped miners are more likely to lose their lives than under *B*. The expected well-being under *A* is higher than under *B*, yet unlike the cases falling under the two-stage paradigm, there is no more inequality at the third ex post stage under *A* than under *B*.

The egalitarian sentiments that lead Adler and Sanchirico to endorse ex post equality and give it priority over ex ante equality in the two-stage cases are present also in the three-stage cases. It is unfair to release 75 pilots from military activities at the expense of 25 pilots. Admittedly, fairness considerations may be overridden if the gains are sufficiently high. But it is difficult to deny that a policy selecting 25 pilots is indeed unfair.

Welfarism can easily explain the two-stage cases because inequality ex post reduces societal well-being, as it is indeed an undesirable state of affairs for the person whose well-being ex post is low. Intermediate stages of inequality (inequality in the expected well-being ex post) of

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[10] *See, e.g.*, Charles Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1416 (1969).

the type characterizing the three-stage scenarios do not directly affect individuals' welfare.[11] Thus, there is no *welfarist* reason to protect equality at the intermediate stages.

Furthermore, even if one can defend the view that the disparity in risks at the intermediate stage reduces one's well-being, such a reduction is outweighed by the increases in well-being at the initial stage. If indeed the greater risk following policy A reduces the losers' intermediate well-being, the lower ex ante risk under A ought to improve their well-being. Such improvement outweighs the reduction in the well-being at the intermediate stage. The well-being at the intermediate stage is outweighed because what people really care about is the expected well-being ex post. Any intermediate stage is important only to the extent that it bears on the outcome ex post. There is therefore a reason to care more about the expected well being at the initial stage—the stage in which the choice determining individuals' fate ex post is being made—than at the intermediate stage.

The three-stage paradigm differs from Diamond's defense of fairness-based egalitarianism.[12] Diamond describes a case in which society has to choose between two policies. Under one policy, person A gets a good; under the second, there is a lottery under which either person A or person B gets a good. Diamond argues that the latter policy is superior on fairness-based grounds.

There are, however, several differences between Diamond's case and mine. First, unlike the case provided by Diamond, the three-stage cases illustrate that ex ante fairness considerations may override ex ante Paretian considerations. Second, and more importantly, these cases overcome the objection that fairness considerations seem to require reiterating the procedure indefinitely to equalize expected utilities.[13] This is so because in the three-stage cases described above, there is a salient procedure dictated by the circumstances. For instance, in the miners' example, the forces of nature generate expected inequality that can then be alleviated by investing resources in saving the trapped miners.

To sum up, the three-stage scenarios establish the existence of circumstances under which egalitarian sentiments cannot comfortably be grounded in welfarist explanations. The welfarist justification for ex

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[11] This is true unless, of course, individuals suffer mental anxiety. For the sake of this analysis, one can ignore the mental anxiety caused at the intermediate stage.

[12] *See* Adler & Sanchirico, *supra* note 1, at 339-42 (discussing Diamond's example and its fairness implications).

[13] *Id.* at 341.

post egalitarianism fails to justify the intuition that expected inequality in the prospects for welfare is wrong and ought to be alleviated. The only way to salvage the egalitarian intuitions in the three-stage scenarios is on the basis of nonwelfarist concepts such as fairness or rights.

The existence of fairness-based egalitarian intuitions raises the question of whether egalitarian sentiments are supported by welfarist and nonwelfarist considerations combined or whether the best way of justifying these sentiments is in terms of fairness considerations alone. Whatever the answer is to this question, it seems evident that welfarism cannot address some of our egalitarian practices. Adler and Sanchirico could maintain their purely welfarist position and reject the view that inequality in the intermediate stage is normatively relevant. Such a view, however, maintains the purity of welfarism at the expense of deeply seated intuitions.

II. AUTONOMY

Most philosophically oriented readers of Adler and Sanchirico's article would notice the article's marginal treatment of autonomy. Adler and Sanchirico believe that "[o]ne might argue against using the ex post approach . . . because it violates principles of autonomy and majoritarianism. But these values per se have no place in welfarism. A welfarist may argue on the basis of these values only to the extent that they produce increases in individual well-being . . . ."[11]

This short treatment of autonomy would probably offend philosophers. Most contemporary philosophers, including fervent advocates of egalitarianism, concede that the willful taking of risks typically can justify inegalitarian outcomes. The famous Dworkinian distinction between "option luck" and "brute luck" is meant to differentiate between cases in which the inegalitarian outcomes are the byproduct of a willful taking of risks and cases in which the inegalitarian outcomes cannot be attributed to a voluntary decision on the part of the agent. Option luck is "a matter of how deliberate and calculated gambles turn out—whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined."[15] Brute luck, in contrast, is "a matter of how risks fall out that are not in

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[14] *Id.* at 18.
[15] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 73 (2000).

that sense deliberate gambles."[16] Dworkin believes that inequality that
is the by-product of brute luck should be remedied by society, while
inequality that is the by-product of option luck should not. To illus-
trate that consent-based inequality is less offensive, consider the fol-
lowing example:

> [L]et us suppose that equally wealthy and capable individuals are pre-
> sented with an equal opportunity to gamble in a casino. Suppose further
> that nobody is a compulsive gambler and that everyone could live a life
> comfortably free of risk in the absence of gambles. Egalitarian justice
> would not be violated in these circumstances when some grow richer
> than others because they have made high-stakes gambles at roulette that
> others could have made but chose not to. Nor would it be violated when
> two people make equally risky high-stakes gambles at roulette, and one
> wins and the other loses.[17]

There are three ways of explaining why ex post inequality result-
ing from the willful taking of risks is just. The explanation most con-
genial to welfarism is to regard consent in itself as welfare enhancing.
This position, despite its appeal to the welfarist, is difficult to main-
tain. A person who consents to a gamble may and should be warned
that gambling reduces her well being even when she consents to it.
This reduction in well-being provides a person with a reason not to
gamble. It seems, therefore, that the differential treatment of willful
and unwillful taking of risks is not grounded in welfarism.

Under a second view, consent is a nonwelfarist consideration that
has an independent normative force and that, under certain circum-
stances, overrides welfarist considerations. This explanation deviates
from the welfarist picture provided by Adler and Sanchirico since it
presupposes the existence of a nonwelfarist component—consent. At
the same time, ex post inequality understood in welfarist terms still
operates as a normative consideration. So, while this explanation is
not purely welfarist, it does leave room for some welfarist considera-
tions. Unfortunately, however, this explanation fails to account for
the fact that inequality resulting from the willful taking of risks is con-
sidered to be just not as a result of delicate balancing between welfa-
rist considerations and nonwelfarist considerations (consent). In
other words, most egalitarians regard consent not merely as an inde-
pendent consideration that may override considerations of equality,
but rather as a consideration that annuls the weight of considerations
of ex post equality. Consent-based inequality functions as an "exclu-

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[16] *Id.*

[17] Michael Otsuka, *Luck, Insurance, and Equality*, 113 ETHICS 40, 41 (2002).

sionary reason;" it operates to exclude the force of welfarist considerations.

The third and most plausible explanation for the relevance of consent perceives consent as a nonwelfarist exclusionary reason. This explanation is, at the same time, the most antagonistic to the welfarist paradigm provided by Adler and Sanchirico. Under this view, consent is not merely a nonwelfarist consideration that competes with welfarist considerations, but rather a nonwelfarist consideration that excludes them or lessens their weight.

Adler and Sanchirico make an important contribution by drawing attention to the fact that equality sometimes could be understood to be a welfarist consideration. They also provide powerful reasons for favoring ex post equality. This Response shows, however, that the welfarist understanding of equality is limited. Some forms of equality are better understood as grounded in nonwelfarist considerations and, furthermore, welfarist considerations supporting equality sometimes may be excluded by nonwelfarist considerations.