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Comment on John Oberdiek, "Choice, Value, and the Perfection of Distributive Justice"

Andrew Koppelman*

John Oberdiek offers a qualified rehabilitation of luck egalitarianism, which I'll call value egalitarianism. He claims that "distributive disadvantages that individuals suffer in pursuit of worthwhile activities ought to be remunerated." (2) This principle avoids the intrusive inquiry that, Elizabeth Anderson has shown, is unacceptably demanded by luck egalitarianism. "Under luck egalitarianism, distributive entitlement tracks formal choice, so to determine whether any redress is warranted as a matter of distributive justice, the state is in principle required to determine whether a given person had it in him or her to choose something other than the activity whose risks ripened into distributive disadvantages." (16)

Following Seana Shiffrin, Oberdiek argues that subsidies "may be necessary to retain spheres of activity in which agents can act autonomously and reap the goods associated both with acting freely and with the feeling that one acts freely."[1] If the state regards activities as valuable and encourages people to engage in them, then if it fails to insure those activities against distributive disadvantages that might befall individuals who pursue them, it is engaged in "a kind of distributive entrapment." (6)

Distinguishing valuable from worthless activities, he argues, is not intrusive in the way that luck egalitarianism is. "For the theory does not assess anyone's psychological dispositions or genetic make-up in the service of doing distributive justice, it instead assesses the value of activities. Those values are *external*, in the relevant sense, to the people whose activities are scrutinized, unlike the facts that are relevant to luck egalitarianism, which are (at least in large part) *internal*." (17)

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* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Jon Garthoff for comments.

[1] Seana Valentine Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy and Public Affairs* 29 (2000), p. 236.

Oberdiek succeeds in avoiding the specific difficulty raised by Anderson, but it returns in a different form.

The most obvious problem with his proposal is its potentially destructive consequences. It is not possible, in a market economy, for the state to compensate all misfortune caused by pursuing valuable activities without foregoing the benefits of markets. (Nor is it clear that what happens, when investments go bust, is entrapment in the sense that Oberdiek has in mind. People have discretion about which valuable activities they want to risk their resources pursuing. They can reduce their risks to very small levels if they are willing to accept correspondingly small returns.)

More deeply, even if the state is competent to distinguish valuable from worthless activities, the question of which misfortunes are *caused* by valuable activities is incoherent. All misfortune, indeed every event that occurs in every life, is the consequence of a combination of valuable and worthless activities.

Consider the case of small businesses.[2] According to the U.S. Small Business Administration, more than half of small businesses fail in the first five years.[3] "An estimated 637,100 new employer firms began operations in 2007 and 560,300 firms closed that year."[4] Two-thirds of new employer establishments survive at least two years, 44 percent survive at least four years, and 31 percent survive at least seven years.[5] Starting a small business is a dangerous undertaking. There is a two out of three chance that you will lose your investment, to say nothing of the enormous, fruitless expenditure of time and care. It might be your fault if that happens, but it might not. Businesses fail through some combination of bad judgment and bad luck, in unknowable proportions.

Yet small businesses are crucial to the American economy. "America's small businesses — some 25.8 million strong — are a major sector of the Nation's economy. They

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[2] The U.S. government's definition of small business varies from one industry to another, but the term typically refers to a firm with fewer than 500 employees. For a guide to the government standards, see http://www.sba.gov/contractingopportunities/officials/size/GC-SMALL-BUS-SIZE-STANDARDS.html.

[3] http://usgovinfo.about.com/od/smallbusiness/a/whybusfail.htm

[4] http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24.

[5] "Business Employment Dynamics Data: Survival and Longevity, II," by Amy E. Knaup and Merissa C. Piazza, *Monthly Labor Review*, vol. 30, no. 9 (Sept. 2007), pp. 3-10; "Redefining Business Success: Distinguishing Between Closure and Failure" by Brian Headd, *Small Business Economics*, vol. 21, no. 1 (August 2003), pp. 51-61, cited in id.

account for half of the country's gross domestic product, create 60 to 80 percent of the net new jobs, and produce 13 to 14 times more patents per employee than do large firms."[6] They represent 99.7 percent of all employer firms, employ about half of all private sector employees, pay nearly 45 percent of total U.S. private payroll, and hire 40 percent of high tech workers (such as scientists, engineers, and computer workers).[7]

We want people to gamble in this way. Our prosperity depends on it. Yet integral to the whole undertaking is the fact that the risks involved are not insured, and in fact are uninsurable. Market economies work as well as they do precisely because the costs and benefits of investment are internalized by the investors.

Friedrich Hayek observes that "earnings in a market system, though people tend to regard them as rewards, do not serve such a function."[8] Their function "is rather to indicate to people what they ought to do if the order is to be maintained on which they all rely. The prices that must be paid in a market economy for different kinds of labour and other factors of production if individual efforts are to match, although they will be affected by effort, diligence, skill, need, etc., cannot conform to any one of these magnitudes . . . ."[9] The fact that "remuneration should in part depend on pure accident" is not an eliminable aspect of the market system, but rather is what must be the case "if the market order is to adjust itself promptly to the unavoidable and unforeseen changes in circumstances, and the individual is to be allowed to decide what to do."[10] It is only through "undeserved strokes of misfortune" that people learn "that some activities ought to be reduced" and that "the efforts of all can be continuously adjusted to a greater variety of facts than can be known to any one person or agency."[11] All

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[6] U.S. Small Business Administration, Strategic Plan Fiscal Years 2008-2014, at 4, available at http://www.sba.gov/aboutsba/budgetsplans/index.html.

[7] U.S. Small Business Administration, Frequently Asked Questions, available at http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24.

[8] Friedrich A. Hayek, Law, Legislation, and Liberty, v. 2: The Mirage of Social Justice 80 (1976).

[9] Id.

[10] Id. at 81.

[11] Id. at 94. Hayek argues that it is even necessary that market mechanisms generate inequality of opportunity for children.

> That parents in their choice of a place to live or of their occupation usually consider the effects their decisions will have on the prospects of their children is an important factor in the adaptation of the use of human resources to foreseeable future

this may sound harsh, but there is nothing here that John Rawls could not endorse.

The muting of market signals by insurance against undeserved misfortune, Hayek thought, would require that central direction be substituted.[12] Central direction would be based on far less information than the market makes available. The consequence would be, not only waste, but injustice. The availability of resources to any person, Ronald Dworkin has argued, *should* depend on the value of those resources to others.[13]

Hayek goes too far when he claims that "Justice is not concerned with those unintended consequences of a spontaneous order which have not been deliberately brought about by anybody."[14] The order of society is made, collectively, by human beings, and if we create a structure in which some people are predictably very badly off, we need to justify this. John Rawls is right that the justice of the basic structure is an unavoidable question. But in a functioning market economy, some worthwhile activities must bring about undeserved misfortunes if the system is to respond with sufficient flexibility to unforeseen changes of circumstances.

Oberdiek cashes out his principle with two concrete examples, the police officer and the farmer. (7-9) They have very different implications, however. The salient fact about a police officer (and about some of Oberdiek's other cases, such as firefighters, members of the armed forces, and those who care for children) is that the officer does not get paid anything like the social value of

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> developments. But so long as the individual is free to make such decisions, these considerations will be taken into account only if the risk is borne not only by those who decide but also by their descendants. If they were assured that wherever they moved or whatever occupations they chose, government would have to guarantee that the chances for their children would be the same and that these children would be sure of the same facilities whatever their parents decided, an important factor would be left out of account in those decisions which in the general interest ought to guide them.

Id. at 10.

[12] "Once the rewards the individual can expect are no longer an appropriate indication of how to direct their efforts to where they are most needed, because these rewards correspond not to the value which their services have for their fellows, but to the moral merit or desert the persons are deemed to have earned, they lose the guiding function they have in the market order and would have to be replaced by the commands of the directing authority." Id. at 82.

[13] Ronald Dworkin, *Equality of Resources*, in Sovereign Virtue: The Theory and Practice of Equality 65 (2000).

[14] Hayek at 38.

what he does. There are enormous positive externalities, which is why these activities are not remunerated in the market. Because people who engage in these activities are, in a sense, subsidizing the rest of us, they have an unusually salient claim to compensation if they suffer injury on the job.

Profit-seeking activities are different. The closest Oberdiek comes to addressing them is the case of the farmer. Because farming is valuable, a farmer faced with foreclosure because of international market pressures or crop failure "would be owed a job on the farm under its new owner, or job training in a new line of work, or at least welfare payments." (8) But here Oberdiek lacks the courage of his convictions, or more precisely, his common sense overrides his theory. What he describes is pretty weak compensation. It still leaves the farmer much worse off than he would be if the foreclosure had not happened, and to that extent declines to remunerate distributive disadvantages that the farmer has suffered in pursuit of worthwhile activities. It's not clear how different the farmer's level of compensation is from the social insurance that should be available to someone who loses all his money in a worthless activity such as betting on horses.

It makes more sense just to compensate severe misfortune, without asking whether it was the product of luck. Oberdiek concedes that "the state has *some* duties of distributive justice to those who suffer disadvantage in pursuit of worthless activities or for other reasons," but he thinks that "[t]he duties that the state owes to those who suffer distributive disadvantage as a consequence of pursuing worthwhile activities are more stringent." (7 n.12) Perhaps this is right if we draw a line between undercompensated activities, such as that of the police officers, and those of entrepreneurs. But that's a different line than Oberdiek has in mind. Both police officers and entrepreneurs pursue worthwhile activities.

The real problem with the inquiry proposed by luck egalitarianism, into "whether a given person had it in him or her to choose something other than the activity whose risks ripened into distributive disadvantages," (16) is not so much that the inquiry is intrusive as that it is incoherent. Either the person had free will, or determinism is true. But whichever answer is chosen will be true of all people in all circumstances, and so cannot function as a criterion to distinguish the deserving from the undeserving.

The difficulty is analogous to that of determining the limits of what police can do when interrogating a suspect. The Supreme Court declared in 1966, in the well-known case of *Miranda v. Arizona*, that there must be "appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."[15] My Northwestern Law colleague Ronald Allen has explained why this is an incoherent way of conceptualizing the problem of abusive police behavior.

> The psychology of decisionmaking necessary for its solution to function has to distinguish between "free will" and "compelled" statements. Not only must we have adequate insight into human decisionmaking, but that insight must resolve the free will/determinism debate and provide an algorithm for distinguishing freely willed actions from determined ones, yet it seems inescapable that either free will always exists in the sense that one always has choices one can make, or more likely it never exists because we live in a deterministic world.[16]

The reason it is impossible to determine which confessions are the product of choice is the same reason it is impossible to determine which bad luck is the product of choice. There is no way to draw a line between free will and determinism which would make some but not all choices free.

For a similar reason, it is impossible to determine which bad luck is the product of bad choice. Nobody's perfect. All of us engage in some combination of valuable and worthless activities, and this combination generates whatever misfortunes we suffer. The firefighter injured when a building crumbles is hurt by his valuable activity of being a firefighter, but perhaps he is also hurt by his worthless activity of rushing into the building without noticing how close it is to collapse, which (let us suppose) a closer inspection would have revealed. Or even if he was absolutely flawless in his judgment about whether to enter the building, perhaps he could have had the safe, cushy job of a philosophy professor instead of the dangerous work of a firefighter if he had not wasted so much time playing video games in high school. When we have bad luck, our bad luck is caused by our entire previous biographies, or rather by the entire history of the universe up to the point where the misfortune occurred.

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[15] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[16] Ronald J. Allen, *Miranda's Hollow Core*, 100 Nw. U. L. Rev. 71, 76 (2006).

All misfortune is a product of a combination of good and bad choices. Oberdiek's value egalitarianism thus collapses back into luck egalitarianism.

When deciding how society ought to spread risk through social insurance, it doesn't make sense to focus on either whether the victim of misfortune could have avoided the misfortune or whether his misfortune was the product of valuable choices. Both inquiries are incoherent.

Instead, we should just focus on bad states of affairs in the world, without worrying whether they are the product of good or bad choices. Allen thinks that courts deciding whether to admit statements made during interrogation should focus, not on whether the defendant's will is free, but on "whether police tactics are abusive or likely to make an innocent person give a false confession."[17] Similarly with social insurance, the insurable event should not be a bad choice, but a bad outcome. There should be a social minimum below which nobody is allowed to fall, even if their choices have been bad or reckless. There is room for some measures that try in a very crude way to respond to misfortunes that are especially likely to reflect brute bad luck, such as unemployment in a recession, so it makes sense to supplement social welfare with unemployment insurance. These, however, are measures that only somewhat ameliorate what remains undeserved misfortune.

There is a coherent and attractive, but deeply forlorn, aspiration at the heart of Oberdiek's project. Both luck egalitarianism and Oberdiek's value egalitarianism get their power from our desire to live in a world in which people get what they deserve.

No human power can bring about that world. The idea of desert, George Sher argues, holds that, if we respect people's agency, then we must respect the manifestations of that agency – the goals in which they have invested their efforts. "[O]ne natural reason for saying that free agents ought to enjoy or suffer specific consequences is that those consequences, where predictable, have acquired value from the fact that they are part of what the agent has chosen."[18] We are obligated to respect one another. But the world doesn't respect us. It arbitrarily tricks us and thwarts our projects. We can't count on getting what we deserve. The ones who do are lucky. A market economy is,

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[17] Id. at 84.

[18] George Sher, Desert 40 (1987). This consideration may help to explain why tort law's account of causation focuses, not on whether the defendant caused the plaintiff's harm, but on whether that harm was reasonably foreseeable by the defendant.

in part, a strategy for managing and distributing undeserved misfortune, by transmitting the bad news quickly.

Undeserved misfortune is not just a problem for social justice. It is a problem for theodicy. There are no markets in Heaven.

God, being omniscient, can judge souls on the Day of Judgment. The state isn't God. It can't give us what we deserve, because it can't know us well enough to do that, and we don't want it to try. In order for others to give me precisely what I ought to have, there must be no gap between my true self and what others take me to be. Such transparency is neither realizable nor desirable.[19]

When providing social insurance, the state shouldn't worry about what we deserve. Its primary concern is to see that we get what we need. Whether we deserve it or not.

[19] Amy Gutmann, Liberal Equality 115-16 (1980).