Moral Uncertainty and Redistribution through Private Law

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Abstract

One of the central arguments against redistribution through private law is its inefficiency due to the double-distortion phenomenon that accompanies it. I argue that in a subset of cases—in which there is uncertainty regarding the fairness principle that should be accepted in the realm of private law—it may be required to take into account redistributive considerations even if one generally accepts the double-distortion argument. I assert that while side-constraints may apply to direct redistribution, they do not apply to the role of redistributive considerations in determining which of the fairness principles should be accepted in the realm of private law. As a consequence, some distributive patterns could be achieved only by taking into account redistributive considerations in the realm of private law. I argue that redistributive considerations may tilt the scales toward accepting the fairness principle with the lower credence of being true.

Introduction

In the legal scholarship there is an ongoing debate about whether redistribution should be achieved also through private law or whether it should be restricted to the realm of conventional transfer payment and spending programs such as social security. Some scholars object to redistribution through private law due to its violation of corrective justice. Admitting redistributive considerations violates the correlativity requirement of corrective justice. A remedy directed to rectify only one side’s situation compared to the situation before the transaction or incidence in question is deemed unfair and unjustified.1 Libertarian scholars raise a categorical objection to redistribution in general on the grounds

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1 See Ernest Weinreb, Corrective Justice (Oxford: Oxford University Press: 2012): pp. 15-21. There are a few versions for corrective justice besides Weinreb’s version, one of the most prominent is Jules Coleman’s “mixed conception of corrective justice”. In contrast to Weinreb’s conception, Coleman’s “mixed conception” does not require a causal link between the victim’s loss and the wrongness of the injurer’s actions if order for corrective justice measures to apply. See: Jules Coleman, Risks and Wrongs (New-York: Cambridge University Press, 1992): p. 340.
of its violation of property rights. The most pervasive objection to redistribution through private that this article will focus on is on grounds of its inefficiency due to the double-distortion phenomena; that it is possible to reach the same distributive pattern with lower costs when achieved through the tax and transfer system.

In this article I would like to provide a justification for the role given to redistributive considerations in a subset of cases in private law, circumventing the latter double-distortion critique. I argue that redistributive considerations may be relevant for determining the principle that should be accepted on grounds of fairness, desert, or any other backward-looking deontic consideration. In cases in which there is uncertainty regarding the correct deontic principle, redistributive considerations should be taken into account in determining which principle should be accepted or adopted. This role of the redistributive consideration is not necessarily as a tie-breaker that applies only when there is a tie in the plausibility of two possible deontic principles. It may be relevant even when one principle is more plausible than the other—taking into account the redistributive considerations may tilt the scale of which principle should be accepted on the grounds of fairness or desert. The redistributive effects may amplify the weight of the less plausible principle, thus tilting the scale for its acceptance. Under such a framework the double-distortion critique does not arise: in such cases the redistributive considerations are not taken into account for the sole purpose of promoting redistribution but as part of the process of determining the appropriate fairness, desert or other deontic principle that should be accepted.

The argument in this paper is based on the fundamental distinction between the moral theory one believes and the moral theory one accepts—namely, the possibility that, although one attributes greater credence to a certain theory being true, there may be other reasons that may cause one to accept an alternative theory to which one attributes less credence of being true. The distributive considerations may amplify the weight of the moral theory that the agent attributes less credence of being true and justify its acceptance.

The argument is based on a few metaethical assumptions that although plausible and supported by quite a few philosophers they could also be contested. In this article I will not delve into to debate between the rival theories regarding each assumption, but only point to the metaethical branch on which the argument is located. The argument is based on a cognitivist approach to morality—that moral judgments are based on beliefs. Some philosophers hold that normative judgments are not based on beliefs, but on other mental

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states such as desires. If belief is irrelevant to morality problems regarding the degree of belief in moral theories do not arise. The most prominent non-cognitivist approach towards morality is the expressivist approach that views moral sentences as expressing attitudes toward their content. Yet even without delving into the arguments for each one of approaches it is evident that the cognitivist approach is well grounded, as the many philosophers that support it indicate. Even if one is a cognitivist, he may yet object to the framework of the argument in this paper—that there may be various degrees of beliefs—claiming that in the moral sphere there are only three possible modes: belief, disbelief and suspension of judgment. A condition for having a reason for a certain moral judgment is that one believes the moral judgment which the reason has supported. This view seems to go against common sense in which people view it possible to have different degrees of beliefs in a moral theory, but as I noted above, I will not go into the debate whether it is possible to have different degrees of beliefs regarding moral theories. I only locate the metaethical branch on which the argument is located—that in the moral sphere beliefs may be gradable.

The last objection to the metaethical framework on which the argument is based is an objection to the possibility of attributing a certain degree of credence for a normative theory being true. Even if one accepts the possibility that normative beliefs may be gradable, he may object to the possibility of attributing an exact degree of credence and limit gradability to imprecise or “mushy” degrees, such as “X is more likely than Y” or “its more likely that X than not X”. First, a belief may not be occurrent—it may be dispositional and playing behind-the-scenes in our theoretical and practical reasoning. Even if we do not consciously think in terms of the precise credence but only in terms of imprecise credence, it is possible to derive the precise credence working in the background. Second, imprecise credence does not pose a theoretical problem for the argument in this article. While it is true that reasoning with imprecise credence raises technical problems, yet the techniques offered to deal with imprecise credence in general, can be similarly employed to imprecise credence in the realm of normative uncertainty.

To avoid these technical difficulties, the examples in this article are based on precise

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5 *Id.*, supra. n. 3


8 *Id.* at 9.

9 *Id.* at 205-206

credence, but the gist of the argument could similarly apply to imprecise credence. While the use of a precise credence to model normative uncertainty can be contested based on the objections mentioned above, it is the framework utilized by a few prominent works of scholarship in the field.11

This paper will proceed in the following manner: section I will present the debate regarding redistribution through private law. Section II will provide background for the possibility of separating the moral theory one believes from the moral theory one accepts. Section III will lay out how redistributive considerations can play out within the framework of separating the theory or principle one believes from the theory or principle one accepts. In section IV a few possible objections to the central argument of this paper will be considered. I will conclude the article in section V.

I. Redistribution through private law

There has been much ongoing debate in the legal scholarship regarding redistribution through private law. The main critique of redistribution through private law has been presented by Louis Kaplow and Steven Shavell. Kaplow and Shavell claim that redistributing through private law is inefficient due to the double distortion it generates.12 In addition to the distortion that any redistributive scheme causes, such as distorting individuals’ decisions on whether they should work, redistribution through private law creates an additional distortion of the legal rule in the field in which redistribution is implemented. Adding redistributive criteria in forming the legal rule may generate an additional distortion: rejecting the optimal legal rule and accepting a suboptimal legal rule on the grounds that it generates a better distributive pattern. Kaplow and Shavell argue that it will always be more efficient to achieve the desired distributive pattern by confining the distributive concerns to the tax and transfer system, thus insulating the private law realm from such considerations. Such a separation would enable the acceptance of the optimal legal rule in the realm of private law, and achieve the desired distributive pattern in a more efficient way with lower costs.

There have been many replies to Kaplow and Shavell’s critique of redistribution through private law. Some of the critiques are internal critiques of Kaplow and Shavell’s efficiency analysis, questioning the existence of the double-distortion phenomenon. Zachary Liscow has argued that, in instances in which the initial allocation of the legal

rights are determined, taking into account distributive considerations has no distortionary effect and is more efficient than redistribution through the tax system.\textsuperscript{13} Christine Jolls has argued that, from a behavioral-economic perspective, redistribution through private law could be less distortionary than redistribution through the tax system—people tend to underestimate the redistributive impact of private law norms and thus it may be less distortive.\textsuperscript{14}

Other internal critiques of Kaplow and Shavell’s economic analysis have acknowledged the existence of the double distortion but have claimed that there may be other economic factors that may offset the costs of the double distortion. David Gamage has pointed out the exposure of the income tax system to gaming and manipulations and asserts that a combination of different policy tools may be more efficient than relying on one mechanism (i.e. taxation).\textsuperscript{15} Tsilly Dagan argues that globalization has intensified the potential for manipulations of the redistribution through the tax system which redistribution through private law could overcome.\textsuperscript{16} Avraham, Fortus and Logue point to the prohibitive administration costs of the tax system in order to question whether the tax system redistributes more efficiently than private law mechanisms, even given the double distortion of redistribution through private law.\textsuperscript{17}

Besides the internal critique of Kaplow and Shavell’s position, some scholars have provided an external critique of their analysis, questioning the assumptions underlying their economic analysis. Lewinsohn-Zamir argues that an objective welfare theory may justify on welfarist grounds transferring certain in-kind goods specifically through the private law realm.\textsuperscript{18} Howard Chang claims that redistributive considerations could still have a tie-breaking role within the realm of private law in cases in which no legal rule Pareto dominates the other, a possibility the Kaplow and Shavell do not acknowledge.\textsuperscript{19}

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\textsuperscript{13} Zachary Liscow, “Reducing Inequality on the Cheap: When Legal Design Should Incorporate Equity as Well as Efficiency”, \textit{Yale Law Review} 123(7) (2014): pp. 2478-2511. This is in contrast to redistributive considerations in the contexts such as damages—that relative income affects the damages awarded. In this context, Liscow admits that the double distortion persists. \textit{See id.} at 2483.


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Sanchirico argues that if one attributes even minimal weight to equity in one’s distributive function, achieving the desired redistributive pattern efficiently will require utilizing the private law system to some extent. This is due to the heterogeneity among individuals in their interaction with the private law system.20

In this paper I offer a different justification for taking into account redistributive considerations in the realm of private law that could also be classified as an external critique of Kaplow and Shavell’s argument. It is assumed by Kaplow and Shavell that redistributive considerations are pure consequential reasons, even if one accepts the possibility of other forms of reasons.21 As such, the context of the redistributive consideration makes no difference, i.e. it does not matter whether they are taken into account in determining the proper legal norm that should be adopted or whether they are taken into account in the context of determining the proper tax and direct transfer scheme that should be adopted. Thus, the only relevant factor for determining the context in which they should be implemented is the efficacy of achieving the desired redistributive consequences. If it is more effective to implement the redistributive consideration in one context—that of the tax and transfer system—there could be no other reason to implement the redistributive consideration in an additional context—that of private law.

I would like to argue that the redistributive considerations are not necessarily self-standing consequential reasons. They may also be significant factors within the deontological framework determining which fairness principle should be accepted, especially in cases in which there is some uncertainty regarding the proper principle that should be accepted. The redistributive consideration may affect the weight of the deontological reasons. They may tilt the scale from one deontological principle the agent attributes higher credence of being true, to the other which the agent attributes less credence of being true. Redistributive considerations may also have a role in determining the baseline for redistribution. Section III of this paper will elaborate the difference between

20 Chris Sanchirico, “Taxes v. Legal Rules as Instruments for Equity: A More Equitable View”, Journal of Legal Studies 29(2) (2000): pp. 797-820. Equitable distribution may be based on an individual’s ability to pay, which is not necessarily reflected by their income. There is no reason to believe that the tax system is categorically more efficient in rating signals of ability to pay relatively to private law redistributive mechanisms. See id., at 802-03.

21 Although Kaplow and Shavell, in a consequent study, reject outright the possibility of any other forms of reasons that might be relevant to legal policy besides welfarist-consequentialist reasons, their double distortion argument is independent of their argument against fairness considerations and applies even to views that accept other forms of deontological reasons such as fairness. See KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, supra n.12. The argument above exposes how there may be an interconnection between these two arguments to a certain extent. For scholars that reject Kaplow and Shavell’s argument regarding the irrelevance of any non-welfarist consideration to legal policy, see: Jeremy Wadron, “Locating Distribution”, Journal of Legal Studies 32(1) (2003): pp. 277-302. Lewis Kornhauser, “Preferences, Well-being and Morality in Social Decision”, Journal of Legal Studies 32(1)(2003): pp. 303-330; See also Jules Coleman, “The Grounds of Welfare”, Yale Law Journal 112(6) (2003): pp. 1511-1544.
the role of distributive considerations in defining the baseline for redistribution and conventional distributive considerations. Before that I present in the next section the separation between the theory one accepts and the theory one believes in cases of moral uncertainty.

II. Separation between the theory one believes and the theory one accepts under uncertainty

Recent scholarship has dealt with the question of making decisions under uncertainty regarding moral facts. While there has been extensive scholarship on making decisions under epistemological uncertainty regarding non-moral facts, only recently has scholarship emerged regarding uncertainty that stems from moral facts, i.e. uncertainty regarding the moral theories that should guide our actions. Andrew Sepielli has framed this question as “what to do when you do not know what to do”.22

Jacob Ross notes two important observations regarding decisions under moral uncertainty. The first is the analytic distinction between the moral theory one believes in and the moral theory one ought to accept.23 The moral theory one believes in is the moral theory to which one ascribes the highest credence of it being true. In addition, it may also require surpassing an objective credence level threshold.24 The moral theory that one accepts refers to a disposition toward a theory over the course of a practical reasoning process that endows it a primary role in guiding one’s actions—namely, deciding to perform the action that the moral theory regards as the best.25 According to Ross’s analytic distinction between believing and accepting a moral theory it is not necessarily true that the theory which an agent believes or ascribes the greatest credence of being true is the theory the agent ought to accept and permit to guide his actions. It is possible that the agent would accept a moral theory that he or she ascribes a low credence and reject the moral theory to which he or she ascribes the highest credence of being true. Ross has provided one second-order reason why there should be such a separation between the moral theory

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24 In order to demonstrate the distinction between the theory one attributes the highest credence to and the theory one believes, consider the following example: an individual is facing 12 possible moral theories. To two of them he attributes each a 5% chance of being true; to five of them he each attributes a 7% chance of being true, to an additional seven he attributes an 8% chance of being true and to one he attributes a 9% chance of being true. In such a case one does not necessarily believe that the moral theory he attributes the highest credence to—i.e. the one he attributes 9%—is the true moral theory. For an example of a distinction between highest credence and belief, see Gilbert Harman, Change in View: Principles of Reasoning (Cambridge, Massachusetts: MIT Press, 1986), pp. 21-22 (supporting the view that a belief is an “all or nothing” matter).
one believes and the moral theory one accepts, and I will soon elaborate on this. In section IV I will provide an additional second-order reason for such separation.

Ross’ second observation that follows from the first is that one does not have to be consistent regarding the moral theory one accepts. The second-order reasons may lead the agent to accept one theory under certain conditions and a rival theory under a different set of conditions.26

These two observations may seem implausible: why would one not be obligated to accept the moral theory that one ascribes the greatest credence of being true? Why would one not be obligated to be consistent in the moral theory one accepts? The second-order reasons Ross provides for distinguishing between the theory one believes and the theory one accepts is that one should bend toward accepting non-deflationary theories over deflationary theories. Deflationary theories are theories in which the gap between the moral value the theory ascribes to each potential course of action is minimal. Because under deflationary theories there is not a significant difference between the moral value of the various possible courses of actions, it may be preferable for one to guide one’s actions according to a rival theory under which the difference between the different courses of actions is significant, even if one ascribes less credence for to the latter theory being true. In other words, the overall expected moral value may actually be higher by accepting the moral theory one ascribes less credence of being true.

The following example demonstrates this point. An agent is in a situation in which he has to decide between performing two actions: action 1 and action 2. There are two relevant moral theories for determining which action the agent should perform: moral theory X and moral theory Y. The agent ascribes moral theory X a 0.6 probability of being true and moral theory Y a 0.4 probability of being true. Moral theory X ascribes two units of moral value to the performance of action 1 and three units of moral value to the performance of action 2. Moral theory Y ascribes 10 units of moral value to action 1 and four units of moral value to action 2. See Table 1 below.

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26Ross, supra n. 23. at 744-7.
Table 1

<table>
<thead>
<tr>
<th>Moral theory</th>
<th>X</th>
<th>Y</th>
</tr>
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<tbody>
<tr>
<td>Credence</td>
<td>0.6</td>
<td>0.4</td>
</tr>
<tr>
<td>Moral Value of Action 1</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Moral Value of Action 2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

Although the agent perceives there to be greater credence of theory X being true, according to Ross in such a case a rational agent would choose to accept theory Y, and thus perform action 1, the action the theory ascribes the highest moral value to. Performing action 2, prescribed by theory X, would generate an expected moral value of 3 (0.6*3 + 0.6*2), whereas the expected moral value of action 1 that theory Y would generate is 5.6 (0.4*10 + 0.4*4). The higher expected moral value generated by adopting theory Y justifies its acceptance, although the agent attributes higher credence to the rival theory X being true.27

III. Distributional considerations as tilting the scales away from the theory one believes in

The framework underlying the argument of this paper accepts the existence of side-constraints on redistribution. While it rejects or not necessarily accepts the Nozickean framework—according to which any redistributive goals is illegitimate—it accepts the existence of limited side-constraints on achieving society’s optimal redistributive pattern.28 In other words, according to such a framework property rights are not entirely post-
institutional; there may be pre-institutional claims for property rights based on claims such as desert and fairness that have to be factored into the final distributional pattern.29

I will illustrate the framework by using the following example. Assume that society’s social welfare function is a strict egalitarian function. Assume that the following constraint applies to redistribution: it is possible to redistribute only the average between the baseline of the fair allocation of resources, which in this case is the resources that the two individuals are initially endowed with, and the amount of resources that the strict egalitarian function prescribes to redistribute. Society is comprised of two individuals: David and John. Under the initial baseline of the fair allocation of resources, David has 10 resource units and John has 20 resource units. The strict egalitarian function would prescribe redistributing the resources so that each individual would have 15 resource units. The implementation of the side constraint would enable the redistribution of only 2.5 resource units from John to David. The distributive outcome under the redistributive side constraint would be that David will possess 12.5 resources units and John would possess 17.5 resource units.30

Up to this point the story is very simple. But what happens when there is uncertainty regarding the principle that defines the baseline for the fair allocation of resources? Let us assume that there are two rival principles for determining what the fair market allocation is. One principle, which we will label the Pufendorfian Principle, is that first occupancy is a reason for deserving to own the resource. The Second Principle, which we will label the Lockean Principle, is that only first occupancy in which the agent mixes his labor with the resource is a reason for deserving to own the resource. Let us revise our story accordingly. David is an indigenous Maori hunter roaming his land. He acts as an owner of his land, driving out intruders, but has not executed any productive development of his land. The value of the land is five resource units. Under the Pufendorfian Principle David deserves to own the land, and thus it should be included in the baseline for the fair allocation of resources that he should be endowed with. Under the Lockean Principle, however, John, who was the first to develop the land by plowing it, deserves to own the land, and it should be added to his baseline of fairly allocated resources.

At this stage, the story is not so complicated: one has to decide whether one thinks that the Pufendorfian Principle or the Lockean Principle is the true principle for determining the fair allocation of resources. If one accepts the Pufendorfian Principle one would maintain the baseline above, under which the baseline of the fair allocation of

30 This is the average between the optimal redistributive pattern—15 units to both David and John—and the fairly allocated resources, that in this example is assumed to be equal to the initial allocation of resources, i.e. 10 units to David and 10 to John.
resources is 10 units for David and 20 for John. The final distribution under the redistributive constraint mentioned above would be 12.5 units for David and 17.5 units for John. If one accepts the Lockean Principle, the baseline for the fair allocation of resources would be five units for David and 25 for John. Accordingly, the final distributive outcome under the redistributive constraint would be 10 units for David and 20 units for John. Thus, one has just to make a decision regarding the principle one thinks is the true principle for determining the baseline allocation and the consequences will simply follow.

What complicates the situation is if there is uncertainty regarding which of the two is the true principle for determining the fair allocation of resources. I think that this may be the case in a large set of real world cases. Even when we ascribe one principle greater credence of being true, even if by a significant margin, in most cases we do not necessarily hold that the alternative principle is totally implausible. It may have some plausibility. The question that arises is whether the fact that the agent has some degree of uncertainty should effect the decision making process in such a case. If the agent is not absolutely sure regarding which of the principles is true, but ascribes higher credence to one principle being true than the alternative principle, should such a case be treated any differently than the case in which the agent is certain that one of the principles is the true principle? My argument in this paper is that it should be treated differently. Even if the principle from which David benefits is ascribed lower credence of being true, David is endowed with the certain expectancy that he deserves the benefit. Endowing John completely with the benefit requires the taking from David of the expectancy that he deserves the benefit. An action of taking might have special requirements in order to be fair. These requirements may depend on the situation of the agent from which something is taken. The impact of the taking on the specific individual may be an important factor in determining whether the taking is permissible. The context of the taking shapes and defines the action of the taking. If the resource is the poor man’s ewe lamb, the taking action might have to pass a higher bar than the taking from a well-off individual. The taking in such a context is a different action than the taking in the context of an individual with many assets. As a consequence, there should be different restrictions on the takings in these two distinctive actions.

It is important to note that factoring in the conditions of the agent in a taking action is fundamentally different than taking into account redistributive considerations. The condition of the agent from whom something is taken is considered in order to determine whether the taking is fair. Conventional redistributive considerations do not pertain to fairness, but are the second level on top of the fair allocation of resources. Assuming a fair allocation of resources, how should the resources be reallocated in order to achieve an optimal redistributive pattern? The difference between the two is not only structural—in what phase of the decision making process the socio-economic conditions are taken into

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31 The average of the optimal redistributive pattern—15 units to David and John—and the initial allocation, which is presumed to be fair—five units to David and 25 to John.
account—but also in substance: there is greater sensitivity to the socio-economic conditions of an agent that something is taken from him than the sensitivity to the socio-economic conditions in determining the resources he should receive. The two considerations are not symmetric: the consideration of the wrongness in *taking* from someone without many resources is fundamentally different to the consideration of the goodness of *giving* to that same person.

Because of the greater sensitivity to taking from the poorly-endowed, it is possible to accept the principle that benefits the poorly-endowed individual, although the decision-maker ascribes it less credence being true. Although the credence attributed to the principle being true is lower, the wrongness of taking from the poorly-endowed individual the expectancy that he deserves the resource is greater. The enhanced wrongness of the taking in his case amplifies the moral weight of the fairness principle that endows him with the resources. As a consequence, the amplification of the moral weight of his fairness claim to the resource justifies accepting the principle, although it is has a lesser chance of being the true principle. This is the additional justification for separating the moral theory one believes in from the moral theory one accepts that I have been referring to since the beginning of the paper. In the case of poorly-endowed individuals we might accept the fairness principle we do not necessarily believe, i.e. that we do not necessarily attribute the highest credence of being true.

I will demonstrate this approach by altering the example above. Assume that the decision-maker assigns a probability of 0.4 that the Pufendorfian Principle is true and a 0.6 probability that the Lockean Principle is true. There are not many resources that David actually deserves, thus taking from him the 40% expectancy that he deserves the field requires a much higher bar than the bar needed to take from John the 60% expectancy that he deserves the field. Thus, although one attributes the Pufendorfian Principle less credence of being true, one may still be obliged to accept it.

**IV. Possible objections**

1. *The assumption that the individual is “endowed” with the expected benefit in cases of moral uncertainty*

Treating the agent as being “endowed” with the expectancy that the principle from which he benefits is true is not trivial. One may claim that the following proposition A, on which the argument is based, is not necessarily the correct way to describe the situation:

**Proposition A**: David is endowed with a “40% probability that the principle from which David benefits is true.”
The situation above could be described also by the following proposition A’:

**Proposition A’**: There is a 40% chance that “the principle from which David benefits is true.”

Under proposition A’, David is not necessarily endowed with anything, and thus accepting the principle that is more plausible does not necessarily require any ‘taking’ from David. According to such an understanding of the situation, the argument laid out above is irrelevant.

I am willing to bite the bullet and admit that it is possible to describe the situation above using proposition A’. I am also willing to bite the bullet and admit that if proposition A’ is the proper description of the case above, the argument above cannot work. Yet I think that, even so, the bottom line of this paper—the possible separation between the fairness principle one believes in and the fairness principle one accepts—should not be affected. It only moves the argument I am making one level up: from a second-order reason that applies to the first-order reason we should accept to a third-order reason that applies to the second-order reason we should accept. In choosing between two second-order principles or moral accounts—propositions A and A’—that determine which of the first-order principles will be accepted, the same moral reasoning may apply as the moral reasoning regarding the decision between the two first-order principles. It might be justified to accept the second-order principle or moral account that benefits the poorly endowed, by enabling the acceptance of the first-order principle that benefits them. It is legitimate even if the deciding agent does not believe that the second-order principle accepted is the true principle. Just as the taking from the poorly endowed agent intensifies the moral weight of the first-order principle to an extent that it overcomes the moral weight of a rival principle with a higher credence of being true, it can intensify the moral weight of the second-order principle from which it benefits.

The intensification of the moral weight on the second-order level may have an even greater impact: in the case above, I do not see any reason for necessarily accepting proposition A’ and rejecting proposition A. There are good reasons to believe that the two symmetric propositions are plausible to the exact same extent. In such a case, the most minimal intensification of the moral weight of A due to the benefit it confers on the poorly endowed should tilt the scales toward the acceptance of A and the rejection of A’. This cannot be said regarding its effect on first-order reasons. There is not a good reason to think that two first-order principles, such as the Pufendorfian and Lockean principles, are plausible to the exact same extent. They are not two symmetric propositions—each has a distinctive ground for justification. It may be that the two are exactly equal, but there are no good reasons to believe so, as there is in the case of the two second-order propositions. In order to be effective and tilt the scales when they are not equal, the intensification of the
weight of the less likely principle obviously has to be more significant. Otherwise it could be disregarded.

It should be noted that the general argument applies all the way up: similarly to the modus it applies to third-order reasons, in determining which of the second order it should accept, it could apply to fourth-order reasons, if there would have been on a rival third-order reason and so on and so forth. As long as the reason in whatever upper-level benefits the poorly endowed, its moral weight should be intensified. The intensification could enable it to overcome a rival reason on the same level, even if there is a greater possibility that the rival reason is true.

2. *The distinction between taking redistributive considerations into account in the deontological phase and the redistributive phase*

Is there really a difference between taking into account the socio-economic status of an individual in the process of determining the appropriate fairness principle that should be accepted and taking it into account in the conventional redistributive phase? Is this not merely a matter of semantics?

In order to claim that taking into account socio-economic status in determining the fair baseline is fundamentally different from conventional redistribution, one has to show how it would lead to distinctive distributional outcomes. I will do this by throwing in an additional individual into our story – Tom. Tom possesses 30 units of resources, five of which are in the form of land he has acquired by Pufendorfian First Occupancy. John has also been the one to develop this tract of land, and thus from a Lockean perspective he is the one entitled to be initially endowed with the land.

Table 2 sums up the two possible initial baseline distributions.

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<thead>
<tr>
<th></th>
<th>Pufendorfian Principle</th>
<th>Lockean Principle</th>
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<tbody>
<tr>
<td>David</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>John</td>
<td>20</td>
<td>30</td>
</tr>
<tr>
<td>Tom</td>
<td>35</td>
<td>30</td>
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In the case in which we add in Tom, it is not clear that accepting the Pufendorfian Principle promotes achieving the desired social welfare function. While David receives more resources and is closer to the optimal distributive pattern, Tom also receives more resources, which pushes him away from the optimal distributive pattern. Although accepting the Pufendorfian Principle does not promote achieving a more desirable distributive pattern, one may still be obliged to accept it although it is attributed lower credence of being true. David’s fairness-based claim for the resource might still be amplified due to his socio-economic condition, requiring the acceptance of the Pufendorfian Principle.

3. The distinction between fairness and redistribution

The third possible objection to the argument in this paper, regarding the premise of the argument, is that there is an analytical separation between an initial baseline of fair endowment that could be separated from distributional considerations. Liam Murphy and Thomas Nagel have argued against such separation, claiming that property is post-institutional, and thus no one has a claim to a pre-institutional level of resources. The only kind of fairness consideration is distributional fairness. In the example above, no individual has a claim for neither the Pufendorfian Principle nor the Lockean Principle. The state determines the distribution of resources and there are no side-constraints on achieving what the state views as a fair distribution of resources.

While in this paper I do not aim to discredit the view represented by Murphy and Nagel, I do aim to substantiate the existence of a legitimate alternative view on which the argument of this paper is based. One of the central arguments made by Murphy and Nagel is that the market baseline is incoherent, and thus should not have any moral weigh in determining the final allocation of resources. As Kevin Kordana and David Tabachnik argue, the fact that market allocation is not decisive in determining the allocation of resources does not mean it does not have any weight. The pre-institutional market allocation may generate a prima facie moral right. Even if it is not necessarily decisive, pre-institutional claims for resources do have moral weight.

V. Conclusion

In this paper I have argued that redistribution through private law could be justified by using the separation between the principle or moral theory that one accepts and the principle or moral theory that one believes is true. Even though the agent attributes greater credence to an alternative principle being true, the redistributive effects of the principle

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33 Kordana & Tabachnik, *supra* n. 29. For more general views that argue for adopting non-absolutist side-constraints, see Vallentyne and Scanlon, *supra* note 28.
with the lower credence may yet serve as a reason for accepting the principle. As I have demonstrated in the paper, this function of redistributive consideration within the fairness realm is fundamentally different from the role of such considerations in direct redistribution. As I have demonstrated above, the two functions may lead to distinctive distributive outcomes.

As noted at the beginning of the paper, the argument applies only to a subset of cases of redistribution through private law, i.e. only to cases in which there is uncertainty to some extent regarding the principle that prescribes what fairness would require in the specific field. In other words, that there are at least two principles for determining fairness that the agent attributes each of them some credence of being true. Although it applies only to a subset of cases, this subset of cases is fairly wide. In many of the cases in which redistribution through private law is considered, there is more than one plausible principle for determining what fairness requires. Cases in which the decision-maker is absolutely certain regarding the proper principle that should be applied, and does not have more than one minimally plausible principle, are very rare. For example, in the question of whether to permit self-help eviction in real-estate law, besides the redistributive consideration to side with the tenants that are mostly on the weaker side in comparison to their landlord, there are other reasons to disallow self-help eviction. One of these is that eviction is a form of violence and, similar to any other forms of violence, the individual is entitled to be protected from the violent actions of any other individual in society. Such violent enforcement should be executed only by state organs that should have a monopoly over the exertion of violent actions. The same applies to many other cases of redistribution through private law wherein the redistributive consideration is not the only reason for accepting a legal rule, and it accompanies an additional reason explaining why accepting the legal rule is fair in some sense. In such cases, the redistributive consideration is not self-standing. It amplifies the weight of the other consideration that may have been rejected due to it having a lower credence of being true without the redistributive amplification.