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Proportionality, winner take all, and distributive justice

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abstract

When faced with multiple claims to a particular good, what does distributive justice require? To answer this question, we need a substantive moral theory that will enable us assign relative moral weights to the parties' claims. But this is not all we need. Once we have assessed the moral weight of each party's claim, we still need to decide what method of distribution to employ, for there are two methods open to us. We could take the winner-take-all approach, and award the good to the party with the strongest claim. On the other hand, we could divide the good proportionally, according to the relative strength of each party's claim. Because the choice between these two methods of distribution can have a dramatic impact on the resulting pattern of distribution, the choice presents a question of justice. But this is a question of justice that is often overlooked. As a result, we currently employ the principle of proportionality far less often than justice actually requires. If we focus on the question of distributive method, however, we are not only better able to understand how certain reasons enter into our all-things-considered moral judgments, we are also able to explain some perplexing, but common aspects of our moral beliefs: how rights can be said to have preemptory force, yet still be balanced against other important interests; how justice can sometimes require compromise, yet sometimes require victory; and how a moral theory can avoid being too demanding while still being demanding enough.

keywords autonomy, equality, indivisibility, inviolability, weighted lotteries, rights

1. Two methods of distribution

Suppose we are asked to divide a good between two claimants. The good could be some natural or artificial resource, the product of individual labor or social

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cooperation, something distributed by one of the basic institutions of society, any other benefit, or even the avoidance of some burden. Property, money, medical resources, human organs, jobs, educational opportunities, public services and the obligation to pay for them, political power, custody of children, and basic rights and liberties are all 'goods' in the sense that I am using the term. For now, however, it is better if we do not have a specific good in mind, for we want to remain unbiased by intuitions about how the good should be divided, intuitions that specification of the good would inevitably trigger.

Regardless of the nature of the good involved, there is a certain decision procedure to be followed in determining how the good should be distributed. First, we need to identify what reasons there might be for distributing the good to one claimant rather than the other. In most cases, these reasons will be designed to support claims of need, desert, entitlement, or furtherance of the common good, but in some cases these reasons may simply constitute expressions of bare desire. In any event, once these reasons have been identified, our next step is to evaluate their moral weight. We need a substantive moral theory to do this – a theory that tells us what reasons count as reasons to give the good to one claimant or the other and how much they count. There are many moral theories on offer, of course, and since different weights may be assigned to different reasons under the available theories, which theory we choose has a great deal of impact on the outcome of the dispute. For the purposes of the argument I intend to make in this article, however, it does not matter which theory we choose, or how this theory would apply to the particular facts and circumstances presented. All that matters is that our theory gives us a way of evaluating the moral weight of the reasons that are claimed to support each party's claim.

Once we have evaluated the overall moral weight of each party's claim, we may find that only one party's claim has any weight at all. In this case, justice demands that the good be distributed to that party. I will have nothing more to say about such cases. But many cases, perhaps even most, will not fall into this category. In many cases, *each* party's claim will be entitled to *some* moral weight. Indeed, in some cases, each party's claim will be entitled to *equal* moral weight, although in most cases one party's claim will be weightier.

In these cases (cases in which each party's claim is entitled to at least some moral weight), there is a second step in the process of deciding how the good should be divided, for there are two courses of action open to us. We could distribute the entire good to the party with the weightier claim. I will call this the 'winner-take-all approach'. If we adopt this approach, the party with the weightier claim gets the entire good, and the other party gets nothing. This is the approach we typically adopt when the parties are making legal as well as moral claims to the good. In a contest between a true owner and a good-faith purchaser for value, for example, each party's claim may have some moral weight, but whichever party is deemed to have the stronger legal claim will receive the entire good while the other party will receive nothing.

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Instead of distributing the entire good to the party with the weightier claim, however, we could take a different approach. We could distribute a share of the good to each party in proportion to the relative strength of their respective claims. I will call this the ‘strength-of-the-arguments approach’. If we adopt this approach, each party gets a share of the good – an equal share if their claims happen to have equal moral weight under the applicable substantive moral theory or an unequal share if their claims happen to have unequal moral weight, but a *proportional* share in either case. We sometimes use this method when the parties are pressing legal as well as moral claims to the good. For example, we typically reduce, but do not eliminate the damages recoverable from a negligent wrongdoer when the injured party is also partially at fault. In most cases in which legal claims are involved, however, we use winner take all. We generally use proportional division only to resolve strictly moral disputes, such as when we allocate scarce public resources over a variety of worthwhile, but not equally important government projects. Even when a dispute is strictly moral, however, we seem to use proportional division less often than we might expect. In most cases, we use it only when the moral weight of each party’s claim is equal, such as when we are allocating basic rights and liberties. When the moral weight of each party’s claim is not equal, we typically apply winner take all.

Note that in many cases, the determination of which method of distribution to employ will have a dramatic impact on the resulting pattern of distribution. No matter what the good, one party gets everything if we employ winner take all and the other gets nothing, even though the losing party’s claim may be only slightly weaker than the prevailing party’s. If we employ proportional division, in contrast, each party gets a share of the good (assuming the good can be meaningfully divided) and perhaps almost the same share if the moral weight of each party’s claim is roughly equivalent, even though one party’s claim may be somewhat weightier. Only in the special case in which the claim of one party is entitled to no moral weight at all does the determination of which method of distribution to employ have no impact on how the good is ultimately distributed.

What this means is that determining which method of distribution to employ presents a question of justice. In order to resolve any dispute over how to distribute a particular good justly, we need *two* theories: an underlying substantive moral theory that enables us to assign moral weights to the parties’ competing claims and a separate, meta-distributive moral theory that tells us which method of distribution is more just in the particular circumstances presented. The first theory is by itself insufficient to tell us what we should do, for regardless of whether one party’s claim has greater moral weight than another’s, as long as the claims of each party have *some* moral weight either of our two methods of distribution could be employed. Only after our second, meta-distributive moral theory is applied can we determine what course of action distributive justice requires.

Unfortunately, this second, meta-distributive question of justice is rarely given the attention it deserves. It is often simply ignored and winner take all applied,

either because winner take all appears to be the only method of distribution available or because we simply assume that this is the method of distribution that justice requires. As a result, we currently employ proportional division far less often than we might if we actually considered more deeply the question of which method of distribution to apply. Indeed, even when we do employ proportional division, we often do so reflexively, without consciously considering why this method of distribution might be required by justice under the circumstances presented. So even in these cases (assuming we have got it right), we are unlikely to be able to explain why proportional division is the more appropriate choice.

The purpose of this article is to rectify this situation. After briefly addressing the question of the assessment of moral weight, I consider the question of which method of distribution is more just. I argue that proportional division, not winner take all, is the method of distribution that justice *prima facie* requires, although the ultimate determination of which method of distribution justice requires can only be made on a case-by-case basis. Next, I consider various arguments that might be offered in favor of using winner take all rather than proportional division in a particular case or class of cases, and especially arguments based on the supposed indivisibility of many goods and arguments based on the goal of promoting personal autonomy. The remaining three sections of the article go beyond the simple question of why we might use one method of distribution rather than the other in a particular case to show how recognition of the question of distributive method can help us explain some critical aspects of our moral reasoning that many people currently find rather perplexing. One is how we can claim that rights have preemptory force, yet still be willing to balance the interests that these rights protect against other important interests with which they may conflict. Another is why we sometimes feel that compromise is the most just way to resolve a particular dispute, yet sometimes feel that justice requires outright victory for one party or the other. A third is how we can assign greater weight to our own interests in our moral deliberations, yet still feel that morality requires us sometimes to act in the interests of others. The first two of these issues illustrate the effect of concerns for autonomy on the decision of which method of distribution justice requires us to employ; the third illustrates the effect of concerns for indivisibility. But more importantly, what an examination of these issues shows is that the question of distributive method does not only arise in traditional distributive disputes, but is an important part of resolving a variety of other fundamental moral problems as well.¹

2. Some preliminary matters: reasons and the assessment of moral weight

Throughout this article, I refer to ‘claims’, ‘arguments’, and ‘reasons’. While different meanings could be assigned to these terms, I will take claims to be based on arguments and arguments to be composed of reasons, so for my purposes the

notion of a reason is fundamental. A reason can be a mere explanation for something, but I will be using the term exclusively in its normative sense. When I speak of a reason, I mean a consideration that counts in favor of or against a certain action, intention, attitude, or belief.² A reason has moral weight if it is among the factors the applicable moral theory says are permissible to consider in determining what we should do, intend, feel, or believe about something, and the amount of weight it has depends on how important a consideration it seems to be. Because reasons can have moral weight, arguments and claims can too.

While I will spend most of this article focusing on the question of distributive method, this does not mean that I take the assessment of moral weight to be unproblematic. On the contrary, determining whether a reason or a set of reasons should be assigned moral weight and if so, how much, can be difficult and controversial. Despite these difficulties, however, the use of the weighing metaphor is a persistent and widespread feature of our moral discourse, and this could not be the case if the metaphor did not capture something important about how we think about reasons and the role they play in the process of determining what morality requires us to do. We can all make assessments of moral weight intuitively, and while it may not be entirely clear how we do this, there is already a wealth of material devoted to the exploration of this issue, so I will not devote any time to it here. The question of distributive method, in contrast, has been largely ignored.³

Before we move on to the question of distributive method, however, there are two points I want to stress. One is that reasons do not have moral weight merely because each is relevant to a particular distributive calculation under *competing* moral theories. For example, the Rawlsian difference principle and the Nozickean historical entitlement theory offer competing ways of determining whether social and economic inequalities are unjust. Under the difference principle, what matters is whether the inequality makes the least advantaged members of society worse off.⁴ Under the historical entitlement theory, what matters is how the inequality came about.⁵ But this does not mean that if an inequality is justified under one theory, but not under the other, there are reasons with moral weight both for and against redressing the inequality. To assign both sets of reasons moral weight merely because each is relevant to the moral assessment of inequality under *competing* moral theories would simply be to make a pragmatic, but unprincipled moral compromise, to adopt what Ronald Dworkin calls a 'checkerboard solution' to this particular moral problem, not to settle on and apply a single, coherent moral theory and use *this* to determine what moral weight should be assigned to the reasons for and against interfering with a particular pattern of distribution.⁶ One simply has to decide whether one accepts the difference principle, the historical entitlement theory, or one of the many other theories on offer before one is in a position to determine what considerations count for and against addressing an inequality and whether there are considerations with weight on both sides of the equation.

The second point I want to stress is that competing claims to a particular good are not each entitled to moral weight merely because the underlying facts are disputed. Only good-faith factual disputes that cannot be resolved through reasonable investigation can produce competing claims that each have moral weight. If I contend you borrowed money from me, but you contend the money was a gift, for example, our claims do not each have moral weight merely because it is difficult to tell which of us is lying. Fraudulent claims are entitled to no weight at all under any plausible moral theory. If one of us is not asserting his position in good faith, then those responsible for resolving our dispute must simply do the best they can to determine what the true facts are and then accept either your claim or mine. On the other hand, if there was some ambiguity in the circumstances out of which this transfer of funds occurred for which neither of us was responsible, and as a result of this you could have reasonably believed that the money was a gift while I could have reasonably believed you understood it was a loan, then there is reason to assign each of our claims moral weight. But this is not because the question of our relative good faith cannot be resolved; it is because that question has been resolved in a way that reveals our respective expectations to have both been reasonable, and the moral principle we want to apply to determine whether the money should be repaid is that the reasonable expectations of the parties should be protected.

3. Which method of distribution does justice *prima facie* require?

Now that we have a better idea of what it means for a reason to have moral weight, we can begin exploring what morality requires us to do when we find that there are such reasons on both sides of a distributive equation. To begin my analysis of this question, I am going to make two assumptions, both of which should be uncontroversial, but I am going to defend them nevertheless. The first is that whenever the competing claims to a particular good have equal moral weight, the good ought to be divided equally, unless we have good all-things-considered reasons for doing otherwise. The effect of this assumption is to establish that equal division is the default position, meaning that departures from this have to be justified. I do not deny that such departures may often *be* justified. Indeed, a great deal of political philosophy is about why and in what circumstances such departures *are* justified. For the moment, however, I am not making any claim about *when* such departures are justified, I am merely pointing out that the widely accepted starting point for such discussions is that unless it is shown otherwise, competing claims are assumed to have equal moral weight, and therefore equal division is *prima facie* just. If we want to divide a good in some other manner, we have to justify this.

The second assumption I am going to derive from the first. While the first assumption generates the principle of equality, the second generates what I will

call the 'principle of proportionality'. The first principle says that when two competing claims to a good have equal moral weight, the good should be divided equally, unless we have good all-things-considered reasons to believe it would be more just to divide the good in some other fashion. Now if this principle is true, then it must also be true that when two competing claims have *unequal* moral weight, we should divide the good so that the parties each receive a share of the good that is proportionate to the relative strength of their competing claims, unless we have good all-things-considered reasons to believe it would be more just to divide the good in some other fashion. Indeed, the principle of equality is just a special case of the principle of proportionality, for it applies when the moral weights of the competing claims are equally balanced, while the principle of proportionality applies in all cases. Proportionality, not merely equality, is the default position, and proportional division, not merely equal division, is *prima facie* just.⁷ Again, I am not suggesting that some other form of division cannot be justified. I am merely saying that the starting point for any discussion of the appropriate method for accomplishing distributive justice in a particular case is that the good should be divided proportionally, and that if we want to divide the good in some other fashion, we have to justify this.⁸

Some people, however, deny that we can derive the principle of proportionality from the principle of equality. They say that even if the principle of equality is the default position and departures from this have to be justified, this tells us nothing about which method of distribution should apply when we know that the relevant claims are not evenly balanced. It is true, of course, that applying winner take all in these cases is not ruled out by the principle of equality – the fact that the relevant claims are not evenly balanced gives us reason to depart from that principle. But applying the principle of proportionality in such cases is clearly more in keeping with the spirit of the principle of equality. When we divide a good equally, either because we believe the claims involved are evenly balanced or because we have no reason to believe otherwise, shares match either the actual or the assumed weight of claims. But when we apply winner take all, this is not the case. If we start from the position that shares should match claims when their weight is evenly balanced, it is hard to see why we should not start from the same point in other cases. While there may be reason to depart from the principle of proportionality in some of these cases, and perhaps even in many, accepting the principle of equality *does* give us reason to accept the principle of proportionality as the *default* position, and reason to reject assigning this role to winner take all.

But perhaps these objectors have a more radical argument in mind. Perhaps they deny that one can get the principle of proportionality from the principle of equality because they deny that even equality is a default position. Under this version of the argument, winner take all is the default position, and we simply have reason to depart from this when we know nothing about the relative moral weight of the claims involved or when we know that these claims are evenly

balanced, for in these cases there is no winner. But it is hard to see why we would apply the principle of equality in such cases rather than simply flip a coin or use some other randomized method to determine a winner and then employ winner take all. In one case, claimants get equal shares; in the other, they get equal chances at receiving the entire good. Why should the former approach be privileged over the latter? Indeed, the 'equal chances' approach ultimately produces a winner-take-all result, which, after all, is our preferred method of distribution under this view. Absent some convincing reason for nevertheless favoring equal shares over equal chances whenever we could employ either method of distribution, the fact that we do prefer equal shares means we do view the principle of equality as a default position.

Even if there were some reason to prefer equal shares to equal chances in these circumstances, however, this would still not suggest that the true default position is winner take all. To view winner take all as the default position, we would have to view equal division as a second-best solution to be employed only when the first-best solution of winner take all was not available. But this is not how people typically think about equality. For most people, equality is one of the fundamental principles upon which political morality is based. Relegating the principle of equality to the status of second-best solution and elevating winner take all to the level of first principle would be a radical step indeed. Unless those who want to assign the role of default position to winner take all are willing to embrace this view, and my sense is they are not, they cannot deny that the principle of equality *is* typically viewed as a default position, and this means they cannot deny that our acceptance of the principle of equality supports assigning the role of default position to the principle of proportionality too.

There is also an independent, deontological argument to be made in favor of assigning the default position to proportional division rather than winner take all. By giving the claimant with the weightier claim a larger share of the good, we acknowledge that his claim is stronger. But by giving the other claimant a share of the good as well, we acknowledge that his claim has moral weight too. With proportional division, each party is treated with equal concern and respect. If the moral weight of their respective claims is not equal, the *good* will not be divided equally, but the *parties* will be treated equally, for each of their claims will be satisfied according to their respective moral weight. Proportional division accordingly instantiates the deontological claim that all persons are entitled to be treated with equal concern and respect in a way that winner take all does not.

This seems to be the argument for proportional division advanced by John Broome. Broome claims that proportional division is a requirement of fairness, which he distinguishes from justice, but what he appears to mean by fairness is that all persons should be treated with equal concern and respect. Broome says:

What, then, does fairness require? It requires, I suggest, that *claims should be satisfied in proportion to their strength*. I do not mean 'proportion' to be taken too literally. But I do mean that equal claims require equal satisfaction, that stronger claims require more

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satisfaction than weaker ones, and also – most importantly, that weaker claims require some satisfaction. Weaker claims must not simply be overridden by stronger ones.⁹

Broome acknowledges, as I do, that this reason for employing proportional division can sometimes be overcome by other reasons, and that winner take all rather than proportional division may accordingly be what justice sometimes or even often requires on an all-things-considered basis. Broome does not say much about what these other reasons might be, or when they might be sufficient to justify employing winner take all, but it is nevertheless clear that for Broome, as for me, proportional division is a default position, to be employed unless there are good and sufficient reasons for doing something else.

There is an important difference, however, between my theory and Broome's. For Broome, not all reasons for distributing a good to one party or another that have moral weight constitute 'claims', which he defines as duties owed to a person that do not arise out of side constraints, the label that some theorists use to describe rights. Broome does not commit himself to a particular view as to what these non-side-constraint duties might be, for he sees this as controversial, but he does mention what he considers to be some uncontroversial cases. He notes that people in future generations cannot assert claims, because duties cannot be owed to persons who do not yet exist, even though there may be reason to take their interests into account, and that someone would not ordinarily be said to have a claim against a good merely because they might benefit from receiving it, even though this might be a reason to give it to that person. When Broome speaks of the proportional satisfaction of claims, he is accordingly speaking about a subset of distributive dilemmas – those in which the reasons to distribute the good one way or the other do not arise out of side constraints, but do arise out of duties owed to a person.¹⁰

No such limitations are included in my theory. When I speak of claims, I am referring to any reason with moral weight. Under some moral theories, it may be the case that no opposing reasons have weight in the face of the assertion of a side constraint, and that there are accordingly no reasons with weight that are not also claims as Broome defines them, in which case our respective approaches to applying the principle of proportionality lead to exactly the same thing. But when a reason has weight under a particular moral theory, I do not see why it should make a difference whether that theory also provides that this reason should be characterized as a duty owed to a person, but not a side constraint. Reasons, not duties or side constraints, are fundamental, for whenever there are reasons with weight on both sides of the equation under a particular moral theory, we must consider which method of distribution justice requires us to employ. When we consider this question, in turn, we may decide that justice requires that we depart from the default position of proportional division and apply winner take all, and this may be in whole or in part because of the nature of the underlying reasons that favor giving the good to one party rather than the other, but this is a question

we need to explore, and if we are to be able to do so, we cannot limit the application of the principle of proportionality at the outset to cases that involve the assertion of certain kinds of reasons, but not others. If we take the subject matter of the principle of proportionality to be claims as Broome has defined them, we may accordingly be imposing limitations on the principle that we do not necessarily want to embrace.

My theory also differs from Broome's in one other respect. Broome says that claims should be satisfied in proportion to their strength, while I say that goods should be distributed in proportion to the relative weight of the claims made against them. Some people find this slight difference in phrasing significant, and argue that claims, not goods, are the proper subject of the principle of proportionality. But I believe that focusing our attention in the first instance on the good to be divided rather than on the weight of the claims presented better captures the order in which we should analyze these questions. Indeed, for the concept of relative moral weight to be meaningful, it seems to require that we first have the same good or portion thereof in mind.¹¹ The bottom line, however, is that we must ultimately consider *both* the nature of the good to be divided *and* the nature of the claims (broadly defined) made against it in order to apply the principle of proportionality no matter how it is phrased. We cannot understand what claims are being made unless we understand what they are being made against and we cannot understand what good is at issue unless we understand what claims are being made against it. Which phrase we use to describe what we are doing when we are applying the principle of proportionality is accordingly more a matter of style than of substance.

But I will not press this point further here. I am merely attempting to establish that employing *some* conception of proportionality is what justice prima facie requires; I am not attempting to establish *which* conception of proportionality this should be. Those who find Broome's way of describing what the principle or proportionality requires more appealing can feel free to substitute it for mine throughout the remainder of this article without fear of undermining my overall argument, at least as long as the term 'claims' is understood to be broadly rather than narrowly defined. The important point is that despite our use of slightly different terminology, both Broome and I agree that there is a positive argument for assigning the default position to the principle of proportionality that arises out of the deontological view that all persons should be treated with equal concern and respect.¹²

There is also a positive argument for assigning the default position to the principle of proportionality that relies on consequentialist rather than deontological moral reasoning, an argument that Broome ignores. With winner take all, disappointed claimants receive no tangible proof that their claims were taken seriously, much less that they were treated with the requisite degree of concern and respect. With proportional division, in contrast, disappointed claimants do receive tangible proof of exactly how seriously their claims were taken, at least

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as long as they have some general knowledge about the nature of the claims against which they were competing. Furthermore, even a claimant who knows nothing about these other claims can still tell *something* about how seriously his claim was taken simply by comparing what he asked for to what he received. A disappointed claimant may disagree with the value assigned to his claim, but even if he does, he is far more likely to accept the resulting pattern of distribution if his claim is partially satisfied than if winner take all were applied and he received nothing at all.

Of course, disappointed claimants in winner-take-all contests could be given tangible proof that their claim was taken seriously in the form of a statement of reasons setting forth the moral theory used to evaluate their claim and explaining how the theory was applied in their particular case. But in many cases, the issuance of such a statement would not be practicable, and even when it is, this is likely to be much less satisfying. After all, talk is cheap – it is easy to feign concern and respect when it costs nothing to do so. An overly solicitous explanation can also be counterproductive – a disappointed claimant who learns that his claim was only slightly weaker than the prevailing claim is likely to be even more frustrated with a winner-take-all result than if he had received no explanation of the decision at all. A disappointed claimant who receives an actual share of the good rather than a mere explanation, on the other hand, can be confident that this accurately reflects the reaction to his claim, and as long as this reaction is reasonable, the claimant is more likely to accept the resulting pattern of distribution and move on.

This is because reasonable people recognize what John Rawls calls ‘the burdens of judgment’.¹³ The burdens of judgment are the reasons why reasonable people can sometimes reasonably disagree. Evidence, for example, is often complex, conflicting, and hard to assess, as is the weight to be assigned to relevant considerations, while normative concepts are often vague and open to different interpretations. Our judgments on these matters are influenced by our personal experiences and our personal experiences are diverse, leading us reasonably to assign different priorities to competing considerations. Given the burdens of judgment, there is a limit to what we can reasonably expect in the behavior and judgments of others. Recognition of these burdens means that we can accept a range of resolutions to distributive questions, regardless of how we would resolve these questions ourselves, and such acceptance is essential if we are to be able to contain social conflict and restore pre-conflict levels of social cooperation when such conflicts arise. A society which embraces proportional division as its method of distribution rather than winner take all is accordingly more likely to be a stable, well-ordered society, ruled by principles of justice that everyone accepts and generally respects.¹⁴

For those who still doubt that proportional division should be treated as the default position, a word on how this might change what I have to say in the remainder of this article. In what follows, I argue that both methods of distribu-

tion are available in every kind of distributive dispute, no matter what good is at issue. Even if proportional division were not the default position, we would accordingly have to consider which method of distribution was more just in each individual case. Only the direction of the argument would change. Instead of looking for reason to apply winner take all, we would be looking for reason to apply proportional division. But if we truly give the question of distributive method the attention it deserves instead of simply assuming that one or the other method should apply, this might make less of a difference than first appears. The result would change only in the case of a tie, or where we do not know enough about the relevant circumstances to make an informed judgment. Regardless of which method of distribution is treated as the default position, the same arguments would have to be considered. I accordingly invite those who remain skeptical about which method of distribution should be treated as the default position to proceed with this in mind.

4. Arguments in favor of winner take all

Having established why I think proportional division should be treated as the default position, I will now consider whether there are reasons that might justify applying winner take all in some number of cases, and if there are, in what number of cases these reasons apply. There are three possible answers to this question: winner take all is *always* more just or winner take all is *never* more just or winner take all is *sometimes* more just. In what follows, I claim that both categorical options must be rejected. It is impossible to determine a priori which method of distribution is more just, for this determination depends on the facts and circumstances of each particular case.

But this claim has to be defended. To defend it, I am going to address each of the arguments that might be used to justify the selection of winner take all over proportional division in some category of cases. But remember, the purpose of this discussion is not to prove that winner take all is *never* more just, only that it is not *necessarily* or *always* more just, and that the question of distributive method must therefore be considered in every case. Once I have established this, I will then consider whether recognition of this often overlooked question offers us any insights into our moral practice or otherwise helps us to arrive at a more just resolution of particular distributive problems.

Indivisibility

One obvious argument for employing the winner-take-all rather than strength-of-the-arguments approach in a particular case is that the good in question is indivisible. If a good were indivisible, it would have to go to either one claimant or the other – the option of employing proportional division as a method of distribution would never arise. It seems indisputable that in many important cases the good involved *is* indivisible. But I am going to argue that appearances here are

deceiving – indivisibility is neither as common nor as problematic as it might seem. It is true that many goods cannot be *physically* divided without dramatically reducing their total value, but even goods that are indivisible in this sense are almost always divisible in some other meaningful sense. Indeed, I am going to argue that for purposes of deciding which method of distribution to employ, nothing is indivisible.

For one thing, even a good that is physically indivisible may often be divided by value. In other words, instead of dividing the good physically, we accomplish proportionate division by converting the good into another, divisible good (such as money) and then dividing that. This, for example, is how we might divide a piece of real property or an ongoing business or a work of art.¹⁵ This method requires that the value of whatever is physically indivisible be commensurable with the value of some other, divisible commodity, and many people deny that this is true for all carriers of value. But no one denies that this is true for some carriers of value. So this method is available in at least some cases, and it may be available in all cases if those who argue against incommensurability are correct.

Even if a good is not divisible by value, either because it is incommensurable with money or because we are unwilling to convert it into money for reasons of public policy or private preference, it may be divisible by time. For example, we would not attempt to convert a child into a divisible good of equal value, but we can and often do divide the time each parent spends with a child. Indeed, joint custody arrangements are often presumed to be in the best interests of the child – departures from this are only permitted if the party seeking sole custody establishes that this is justified by the particular facts and circumstances of the case. Suppose, alternatively, we had a good that was commensurable with money, but to which we each attached a substantial degree of subjective value – perhaps a sailboat or a summer cottage. In this case, we might prefer to share the good over time rather than have it sold and the proceeds divided between us.

Of course, it might be impractical to divide a good by time in some cases, so this method of distribution is not always available, but in these cases there is yet another technique we could employ – we could simply expand the number of goods to be divided. To do this, we add something else (a sum of money, for example) into the pot, and instead of the parties having to compete for a single, indivisible good, there are now *two* goods to be divided. This, for example, is effectively what we do when we award the good to one party, but nevertheless require him to compensate the other, not for the full value of the good, but in an amount equivalent to the relative strength of the other party's claim. While incommensurability concerns may also arise here, they are less likely to be a problem than if we were trying to divide the good by value. To divide a good by value, the good has to be commensurable with the same specified carrier of value for *each* party. If we divide the good by expanding the number of goods to be divided, in contrast, we have to satisfy the incommensurability concerns of only one party. The party for whom the value of the good is incommensurable receives

it, while the party for whom the value of the good is commensurable receives something else in an amount equivalent to the proportional value of his claim. All that is required for this method of distribution to be available is that the party who ultimately receives the good has sufficient resources to compensate the other for the proportional value of the other's claim.

Finally, even if none of these methods of division are available, there is one other method we might still employ. We can also proportionally divide a good by using a lottery, weighted to reflect the relative strength of each party's claim. In this case, one party ultimately receives the entire good, but the chances of the good being awarded to one party or the other would be proportionally divided. The party with the strongest claim would have the greatest chance of receiving the good, but the other party would have some chance too.

If we employ a weighted lottery, of course, shares will ultimately not match claims, but conducting such a lottery is nevertheless a meaningful way of implementing the principle of proportionality. Use and enjoyment of the good will not be proportionally divided, but the *opportunity* for such use and enjoyment will be, and while that opportunity may be a derivative good, people often consider such opportunities very important carriers of value in their own right. Indeed, a great many claims are aimed directly at such opportunities, rather than at the goods from which they derive. I recognize that by treating what is to be distributed as the opportunity for use and enjoyment of the good rather than the good itself, we have in some sense redefined the good at issue. But we also do this when we add another good into the mix and then require one party to compensate the other for the proportionate value of his claim or when we divide the good by value or even time, and since no one seems to find such redefinition objectionable when we use one of these methods of distribution, I see no reason why it should be objectionable when we use a weighted lottery. Moreover, dividing a good by weighted lottery has one great advantage over these other methods of distribution – while these other methods may not always be available, conducting a weighted lottery is always an option.

Take, for example, the distribution of kidneys and other human organs for transplant. Suppose that under the moral theory we have selected to determine who gets an available kidney age is an important consideration. If I am 65 and the other potential recipient is 45, I might agree that the number of years of life the transplant would provide should be a factor in the decision, and that the younger person's claim to the kidney should accordingly be attributed more weight than mine, all other relevant criteria being equal. But I might also feel that it is unfair to make age a decisive factor, which is what we do if we give years of life to be added by the transplant a great deal of weight at the evaluative stage and then apply winner take all. In this case, even though my claim to the kidney has *some* moral weight, it might as well have no weight at all, for my claim will be outweighed and I may very well die before another kidney becomes available. On the other hand, if we use a weighted lottery to distribute the kidney, I am treated

differently than someone whose claim has no moral weight at all. In this case, I get a chance at life, and I no longer feel that my life is being treated with neither concern nor respect, even if the kidney is ultimately distributed to the younger claimant. If the kidney is distributed to me, on the other hand, the younger claimant has no cause to complain, since his claim was given exactly the amount of weight it deserved in the course of arriving at the distributive decision. While I am not claiming that using a weighted lottery to distribute kidneys and other body parts is *necessarily* the most just method of distribution (this depends on how one cashes out the idea of equal concern and respect and how important one decides that concern to be), it is the method of distribution that many theorists who have focused on such questions actually advocate. Broome, for example, argues for the use of a weighted lottery in these and similar cases,¹⁶ and many medical ethicists think that using a weighted lottery in these circumstances is precisely what justice requires.¹⁷ Some even propose using this method to allocate places in medical school and at university in general.¹⁸

Of course, there is no denying that the use of weighted lotteries in these and similar cases has aroused some vociferous objections. Most of these objections have been discussed and disposed of by Jon Elster,¹⁹ and so need no further discussion here. But there is one objection even Elster finds troubling that I do want to address. This is the view that once we have decided which party's claim to a good is stronger, it is simply perverse to assign that good to the party with the (perhaps substantially) weaker claim, and this is always a possibility when a lottery is used no matter how much it is weighted in favor of the party with the stronger claim.²⁰ Exactly what Elster means by 'perverse' is unclear, but many people have a similarly negative reaction, and while none of them are any better at articulating what lies behind this intuition, the fact that it is widely shared suggests it should be taken seriously.

I think the most likely source of this intuition is a sense that once we have decided one party's claim to a good is stronger, giving it to some other party seems to represent an abdication of reason. But as Elster himself notes, reason does have a role to play here, only at an earlier point in the process, when the chances of receiving the good were proportionally distributed. While it may be difficult to keep the *ex ante* perspective in mind once the weighted lottery has been run, why should the *ex post* perspective be the one to enjoy the more privileged position? Indeed, we often adopt an *ex ante* perspective when it comes to distributing burdens rather than benefits. For example, we do not have much sympathy for people who are caught speeding when they complain that others have got away with driving just as fast or even faster. As long as everyone had a proportional chance of being caught, people who *are* caught are not being treated unjustly merely because some more frequent or egregious violators have been luckier. Luck is often a factor in how we distribute moral praise and blame, and if we do not see this as a sufficient reason to abandon our current practice of distributing these goods, I see no reason why the fact that luck plays a role in a

weighted lottery should disqualify it as a method for instantiating distributive justice.

Another possible source of this intuition is a suspicion that the use of a weighted lottery represents a form of double counting. If we have already taken relevant, but outweighed reasons into account in the balancing process, it seems improper to take them into account *again* by conducting a weighted lottery. This, for example, seems to be what Scanlon has in mind when he argues against the use of weighted lotteries.²¹ But this argument proves too much. It would apply not only to attempts to employ a weighted lottery when dealing with a physically indivisible good, but also to attempts to instantiate any form of proportional division, even when the good involved is physically divisible or divisible by time, by value, or by adding another good into the mix, and no one rejects proportional division in all cases. Indeed, even if we took winner take all to be the default position, as long as we believed that proportional division could sometimes be morally required, then determining the appropriate method of distribution would present a separate and independent moral question, and taking account of the relative weights of the reasons on both sides of the distributive equation in the course of addressing that question would not represent a form of double counting.

The final possible explanation for why certain people have such a negative reaction to the use of weighted lotteries is simply that some people are such committed consequentialists that they are offended by any possibility that the party with the strongest claim might end up losing. Indeed, this seems to be what is driving Brad Hooker when he argues against weighted lotteries by using examples in which the one party's claim is many times stronger than the other's. In one example, one party's claim is a thousand times stronger; in another, it is four times stronger. Hooker does not explain why he thinks that employing a weighted lottery would be unfair in either example, but simply appeals to our moral intuitions, which he thinks establish that use of a weighted lottery in both cases is manifestly unfair.²²

We may indeed have that intuition in the first case. But I do not think this has the significance that Hooker thinks it does. First, no plausible moral theory would give such a *de minimis* claim any weight at all in deciding what we should do. Winner take all is therefore more appealing in this situation, not because we think lotteries are necessarily unfair, or because we are all committed consequentialists even though some of us may be unwilling to admit it, but because using winner take all in this situation is a way of correcting for what we intuitively recognize is an erroneous assignment of moral weight to the other party's claim, an error that has been effectively established by stipulation. Second, even if it were plausible to give such a *de minimis* claim moral weight, in this case, the consequences of employing a weighted lottery would be extremely bad if the weaker claimant won, and even a deontological moral principle allows its usual recommendations to be overridden when the consequences of not doing so are bad enough. Indeed, no deontological principle worthy of our consideration disregards consequences

entirely – deontological principles simply take other factors into account as well, making consequences alone not necessarily determinative.²³ So this example does not establish that weighted lotteries are always or necessarily unfair, merely that the use of such a lottery would be unfair under most plausible moral theories given the extreme facts and circumstances of this case.

Hooker's second example is much less extreme, and whatever intuitive force it has it derives from being set up by the more extreme example. Were it to be set forth on its own, I suspect that many people's intuitions would be much more equivocal. How we feel about this case also depends to a large extent on what good is at issue, something that Hooker leaves unspecified. If what is at issue is a 'critical good', as in the kidney example, my own intuition is that there is nothing unfair about using a weighted lottery when the weaker claim is this substantial, even though the competing claim is several times stronger. Only a strict consequentialist who takes a very narrow view of what consequences matter would conclude that such a substantial claim should be simply ignored. If, on the other hand, we applied either a deontological moral theory that requires equal concern and respect or a broader consequentialist theory that recognized there was significant societal disvalue in not offering weaker claimants at least chance of obtaining certain critical goods, then the fact that employing winner take all *in this particular case* might have somewhat better expected consequences than employing a weighted lottery is not grounds for objecting to instantiating proportional division by using such a lottery. At least at some point, the relative weights of the competing claims are sufficiently close that the risk of the weaker party prevailing is not reason enough to depart from the default position of proportional division and apply winner take all. So Hooker's second example does not prove that a weighted lottery is unfair whenever a good is otherwise indivisible; it merely proves that in deciding this question, it matters what kind of moral theory we apply and how we apply that moral theory to the facts.

But the point of this exercise is not to determine whether using a weighted lottery to divide a physically indivisible good is *ever* objectionable. There may indeed be cases in which the use of a weighted lottery would be unjust. The point is to determine whether a weighted lottery is *always* objectionable, and I think that even the most vociferous opponents of weighted lotteries would have to concede that there are a variety of reasonable moral theories under which the answer to this question is clearly no. Indeed, even if weighted lotteries were *always* unjust, there would still be many cases in which the good involved was at least divisible by value, by time, or with the payment of compensation. I do not see any reason why these less controversial techniques for dealing with physical indivisibility would also always be unacceptable. On the contrary, the number of cases in which none of these techniques would be acceptable is actually likely to be relatively small.

What this means is that when it comes to addressing questions of distributive justice, indivisibility is a *political* not a *metaphysical* conception, for even a

physically indivisible good can always be meaningfully divided. Of course, the fact that it is always *possible* to divide a good proportionally does not mean that it is always *just* to do so. As we have already seen, there may be reasons for rejecting one and perhaps all of these methods of distribution in a particular case. But the availability of these methods means that we cannot simply assume that winner take all should apply whenever we find that a good is physically indivisible – we need to articulate reasons for *treating* the good as indivisible and awarding it exclusively to the party with the stronger claim. No doubt the determination that a good should be treated as indivisible will be uncontroversial in some cases, and perhaps even in many, but this does not make the determination any less political. Even in these cases, our decision to apply winner take all rests on evaluative judgments about what justice requires in light of the nature of the good being divided, the nature of the claims being made against it, the circumstances under which the distribution is to take place, and the nature and consequences of the methods of distribution available. If we fail to consider these facts and circumstances, or are unable to explain why they provide reasons to apply winner take all under whatever moral theory we use to evaluate them, we have not given the question of distributive method the attention it deserves and we cannot be sure that employing winner take all will not violate the demands of distributive justice.

Autonomy

Another possible reason for employing winner take all rather than proportional division as our method of distribution is that winner take all tends to promote autonomy, while proportional division tends to undermine it. By ‘autonomy’ I mean the ability to reflect on and choose freely ends for oneself from among a wide range of options and meaningfully to pursue these ends free from interference by other human agents. The greater one’s autonomy, the larger the sphere within which one can freely choose, develop, and pursue one’s own private projects and plan of life. I recognize that this definition of autonomy is rather broad, and there may be notions of freedom or liberty, both negative and positive, as well as privacy built into it. In other contexts, it might be helpful to break these notions out and develop a pure conception of autonomy, but it is unnecessary to do so here.²⁴ What we are interested in is identifying the moral force of this objection to proportional division. If a somewhat overly inclusive notion of autonomy does not justify reliance on winner take all in a discreet category of cases, then a more refined notion will not do so either.

How might the selection of one method of distribution or the other have an impact on autonomy? When we employ winner take all, the party with the strongest claim enjoys the exclusive right to control the use and disposition of that good. He can use it or (if it is consumable) consume it himself, or at least deprive others of the ability to use or consume it. He can share it (if it is divisible) and decide who will participate in the good’s use and enjoyment or he can transfer it (if it is alienable) on whatever terms he alone deems agreeable. For

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goods that have one or more of these features, winner take all accordingly increases the sphere within which the party with the strongest claim can exercise his discretion free from interference by other human agents. The larger this sphere of discretion, in turn, the greater that party's ability freely to choose, develop, and pursue his projects and plan of life.

In contrast, when we employ proportional division, neither party enjoys exclusive control over the use and disposition of the good. Instead, each party enjoys exclusive control (if he enjoys exclusive control at all) over only a portion of the good or its value or, if the good is divided by time, the parties must share control according to the relative strength of their respective claims. For goods that could otherwise be distributed by winner take all, employing proportional division as our method of distribution accordingly decreases the sphere within which the party with the strongest claim can exercise his discretion free from interference by other human agents. The smaller this sphere of discretion, in turn, the more limited that party's ability freely to choose, develop, and pursue his own projects and plan of life.

The degree to which this reduction in a party's sphere of discretion undermines his autonomy will vary, however, depending on the nature of the good at issue. Usually, goods that make a significant contribution to personal autonomy are protected by what we call rights and liberties. My ability to think and speak freely, to prevent others from interfering with my body, to sell my labor only on terms to which I am willing to agree, to own property and to use, consume, or otherwise to dispose of such property as I see fit, to enter into contracts with others only when I feel it is in my interests to do so and to choose whether to release or enforce the contractual obligations owed to me, and various other similar goods all contribute to my autonomy precisely because (and perhaps only to the extent that) my discretion to exploit these goods is not subject to interference by others, even though they may have claims on these goods that have some moral weight. Distributing these goods by winner take all accordingly promotes my autonomy, for it increases the sphere of discretion these goods confer, while distributing these goods proportionally undermines it, for it limits the extent to which I may exploit these goods as I see fit.

This does not mean that all interference with such goods must be absolutely prohibited. As we shall see later when we examine the nature of rights in some detail, sometimes the claims of others will have sufficient moral weight to override my claims to these goods. I cannot falsely shout fire in a theatre and cause a panic, for example, or build a factory on land I own in a residential neighborhood, or refuse to accept people of color as guests in my hotel, even though my autonomy would be greater if I could do these things. In some cases, in turn, my claims to these goods and the claims of others may be merely equivalent, which is why basic rights and liberties are typically distributed equally. But when my claim does outweigh the claims of others with regard to these goods, promoting autonomy provides a powerful reason to apply winner take all.

Or does it? When we distribute these goods proportionally we decrease the autonomy of the party with the strongest claim, but does this necessarily mean we have decreased autonomy overall? If we employ proportional division, neither party enjoys exclusive control of the entire good, but each party enjoys partial control, or perhaps even exclusive control over a portion of the good. The sphere of discretion of the party with the strongest claim has been reduced, but the sphere of discretion of the party with the weaker claim has been increased. In this case, have we not simply redistributed some autonomy from one individual to another? If this is true, then the net effect of employing one method of distribution rather than the other is actually autonomy neutral.

But this is not how autonomy works. In deciding what personal projects I will pursue and in devising my own plan of life, I take stock of the goods I currently enjoy, the goods to which I believe I am entitled, and the goods that I believe I will otherwise be able to obtain. My sense of personal autonomy is accordingly primarily experienced in a forward-looking way. If I know in advance that winner take all is to apply to any disputes that arise with regard to these important autonomy-conferring goods, I know I will retain full control of these goods except on those few occasions when the reasons that exist for assigning these goods to me in the first instance are overwhelmed by even more important reasons for reassigning them to someone else. I can therefore be relatively confident of the goods at my disposal, and can plan my private projects with these goods in mind. In contrast, if I know that these goods will be proportionally divided, I know that I will lose full control in a wide variety of circumstances, even when the reasons for assigning these goods to me are greater than the reasons for assigning them to someone else. While I will gain some control of goods for which my weaker claims would have otherwise been outweighed, I am likely to be far less certain about the total extent of the goods under my command, for now I must estimate exactly how much my claims and the claims of others weigh, and not merely whether my claims are likely to be found weightier than my competitors'. This more precise calculation is far more difficult to make, and a great deal of uncertainty will inevitably surround it. Given that most people are averse to such uncertainty,²⁵ I am likely to view my options as exponentially rather than proportionally more limited, and be far more circumspect with regard to the private projects I am willing and able to pursue comfortably. Rather than simply transferring some autonomy from one individual to another by employing proportional division, the net effect of using this method of distribution is actually to reduce it.

What we have to decide, then, is whether the exponential reduction in autonomy entailed by the proportional division of certain goods is reason enough to reject this method of distribution and employ winner take all whenever disputes over these goods arise. The answer to this question, of course, depends on what moral theory we use to resolve it, but it seems clear that under most moral theories, the fact that one method of distribution will promote autonomy while

another will undermine it is an important consideration. This consideration has to be balanced against the loss in distributive justice that departing from the default position of proportional division entails, but it is plausible that promoting autonomy is important enough to warrant such a departure in some number of cases in which these kinds of goods are concerned.

But I do not see how this could be a decisive reason in every case. Under many moral theories, there might be a class-wide presumption in favor of winner take all for goods that contribute significantly to personal autonomy (goods such as rights and liberties), but not an irrebuttable one. There is no reason to believe that under the right circumstances, the contribution an individual good makes to personal autonomy would not be overcome or undermined by various factors. For example, as I shall argue at length later, when there is significant uncertainty surrounding the precise scope of the good to which a right or liberty applies, neither party could have a legitimate expectation of being entitled to enjoy it, and therefore its contribution to either party's autonomy is likely to be minimal, at best. In these cases and in various others I will describe during my upcoming discussion of the justice of compromise, the value of a more just proportional division may exceed the disvalue occasioned by any corresponding reduction in autonomy. Before we decide which method of distribution to use in a particular case, we will have to balance carefully the value of greater personal autonomy against the value of greater distributive justice in order to decide which, in our considered judgment, is more important given the particular facts and circumstances the case presents.

Other arguments for winner take all

There are a variety of other arguments that could be made in favor of winner take all, but I will only be able to mention them briefly here. In some cases, using winner take all might be more efficient, for it relieves the decision-maker of the burden of having to assess the precise cardinal strengths of each party's claim. Greater precision typically requires the acquisition of more information, and the acquisition and processing of additional information usually entails greater administrative time, effort, and expense. But in close cases, it is winner take all, not proportional division, which would require greater decision-making time and precision, for rougher calculations have much less effect on the outcome when dividing a good proportionally. The cost of using winner take all in time, effort, and expense will therefore sometimes be higher. Furthermore, even when winner take all would be more efficient, there is no reason to believe that the value of the efficiency to be gained will necessarily exceed the value of the distributive justice to be lost. So while administrative cost is obviously a factor to consider in determining which method of distribution is more just in a particular case, efficiency concerns will not always favor using winner take all.

Using winner take all also encourages decision-makers to create ordinal rankings in close cases, where ordinal rankings are important, while using pro-

portional division might encourage them to abdicate their decision-making responsibility in such cases and simply ‘split the baby’, for slight differences in cardinal rankings will produce different ordinal rankings, but will not have much effect on the actual distributive results. If we adopt a method of distribution that discourages the production of principled ordinal rankings in close cases, this important public good may not be produced, or it may be produced in smaller amounts than would be ideal.²⁶ But not all cases are close cases, and in any event, universal reliance on winner take all would discourage decision-makers from distinguishing between close cases and those in which the weight of one party’s claim is dramatically greater. This would be an abdication of responsibility too, and so once again, whatever force this argument has it does not support universal reliance on winner take all.

Using one method of distribution rather than the other might also have different incentive effects, and these may properly be considered when determining which method of distribution justice requires. By increasing the stakes of a distributive dispute, winner take all provides greater incentives for competing claimants to settle, and so we might be more likely to achieve proportional division in any particular case if we threatened to use winner take all. But if we threatened to use winner take all, we would sometimes actually have to do so for the threat to remain credible, and deliberately using an unjust method of distribution in some cases in order to produce a more just resolution in others would be morally objectionable under any deontological theory of justice. In addition, even if using proportional division as our ‘official’ method of distribution were self-defeating in some number of cases, this would not be true in all cases, and so it is impossible to say that threatening to use winner take all would have better consequences across the board.

Finally, in cases with three or more claimants, implementing proportional division is potentially more problematic. While I do not have time to address specifically the various complications that multiple claims create, there is no reason to believe that we cannot construct a more nuanced conception of proportionality to deal with such cases, and in any event, many cases are or can be reduced to disputes between two sets of claimants.²⁷ So once again, this argument for winner take all cannot provide a basis for departing from proportional division across the board. Because none of the available arguments support reliance on winner take all in even a subcategory of cases, we must accordingly conclude that there are indeed two questions of justice presented by every distributive dilemma (one of moral weight and one of distributive method) and that we can determine which method of distribution is more just only after considering the facts and circumstances of each individual case.

Having shown that the question of distributive method is present in almost every distributive situation, I will now move on to explore some of the insights that recognition of this question provides. To do this, I shall leave the typical set of applied distributive problems behind – questions such as how to distribute

particular kinds of property, human organs, places at university, and various other tangible burdens and benefits. Instead, I shall focus on three seemingly non-distributive, but nevertheless equally important and vexing moral problems: the nature of rights, the relative justice of compromise and victory, and the demands and limits of common-sense morality. The reason for this shift in focus is that my purpose in this article is not to argue for a specific solution to any particular distributive problem – that would require settling on a particular moral theory to apply to the relevant facts, and both the selection of this theory and its application are bound to be highly controversial. My purpose is to show how the question of distributive method plays an unnoticed, but critical role in many important aspects of our moral reasoning, even in resolving problems not commonly thought to have a distributive component. Indeed, it is essential that these broader applications of the question of distributive method be explored if its power and importance are to be made clear.²⁸

5. The question of distributive method and the nature of rights

The first broader application that I want to explore arises in the context of a long-running dispute regarding the nature of rights. The specific issue at the heart of this dispute is whether rights are inviolable or merely particularly important interests that must be balanced against conflicting interests (regardless of whether these interests are also protected by rights) before we can decide what morality requires us to do. The dispute arises between those who hold what I will call the ‘traditionalist view’ of the nature of rights and those who hold what I will call the ‘modernist view’. Neither side actually uses these labels themselves, but because both traditionalists and modernists come from a variety of schools of philosophical thought, there is no better way to refer to their respective positions.²⁹ To understand how recognition of the question of distributive method allows us to resolve this dispute, however, I will have to describe its background in some detail.

The primary tenet of the traditionalist view is that rights are inviolable. By ‘inviolable’, the traditionalist means that rights describe an impenetrable sphere of personal autonomy within which the right-holder is free to make choices without interference from other human agents even when this impedes public goals or the private projects of other persons. This view could be a deontological view with Kantian roots. In other words, the traditionalist could view rights as infeasible side constraints that cannot be overcome by weighing other considerations against them.³⁰ Both Broome and Hooker, for example, seem to embrace this view, for they believe that weighing is ruled out by the very concept of a side constraint.³¹ But it could also be a higher-order consequentialist view. In other words, it could be the case that the traditionalist views rights as inviolable because he thinks that that such a view has the best overall consequences – a rule-utilitarian view.³²

In either case, in light of its commitment to inviolability, there can be no true rights conflicts under the traditionalist view. Inviolable spheres of personal autonomy cannot overlap. What appear to be rights conflicts are in fact only pseudo-conflicts because they disappear once the rights at issue have been more closely examined and the exact scope of each right more precisely defined. To implement the traditionalist view, you must accordingly have criteria for resolving definitional disputes. Indeed, under the traditionalist view, defining the precise scope of each right is essential. For example, you cannot say that you have a right not to be killed, for this is too broad. You might say that you have a right not be *wrongfully* killed, but the precise scope of this is also uncertain, so until it has been given further content you have still not described an inviolable sphere of personal autonomy. At best, you have described a sphere with potentially permeable edges and various highways and byways running through it for which we have no detailed map.³³

Of course, once you know the exact facts and circumstances of a particular case, you can determine whether a rights violation has occurred. But it is simply impossible to think of all the facts and circumstances that could be relevant to this determination in advance. The traditionalist view is therefore fundamentally a backward-looking view – any attempt at a general description of an inviolable sphere of personal autonomy is bound to be incomplete. So if you accept the traditionalist view, it really only makes sense to say ‘I *had* a right to *x*’, for you can never be sure the statement ‘I *have* a right to *x*’ is true. Under the traditionalist view, as in the popular song, ‘You don’t know what you’ve got ’til it’s gone.’

Under the modernist view, in contrast, rights do not represent inviolable spheres of personal autonomy, but simply mark important interests.³⁴ Because it is not committed to the idea of inviolability, there can be real rights conflicts under the modernist view. It is also possible to say ‘I have a right to *x*’ under the modernist view, since this statement is making a less ambitious claim than under the traditionalist view. The modernist is not claiming that the interest a right protects will necessarily prevail over every potentially competing interest. The modernist is merely making a claim about the degree of weight to be assigned to that interest. The modernist view is accordingly more forward looking than the traditionalist view, for under the modernist view rights can exist even before their content and scope are fully defined. But the modernist view also requires further criteria to make it operational. While the traditionalist view requires criteria for resolving definitional disputes, the modernist view requires criteria for balancing interests.

Now that we have an outline of these two views, we can give shape to the debate that arises between them. If rights are simply important interests to be balanced against other interests with which they happen to conflict, what is the point of calling something a right, the traditionalist asks? Why not just call it an important interest, for under the modernist view there is no practical difference between how we treat rights and how we treat other important interests. If we

accept the modernist view, the traditionalist claims, then anointing something a right is meaningless, for the word 'right' is doing no work within the conceptual structure of our moral reasoning. If the concept of a right is to have any content, rights must have peremptory force. They must be absolute and inviolable, which means that the interests they protect must prevail over competing interests no matter how important these competing interests prove to be.³⁵

According to the modernist, however, even the traditionalist is committed to balancing the interests that rights protect against competing interests, regardless of whether these are also protected by rights or are instead categorized as 'mere' interests. The traditionalist simply does this in the context of defining the scope of the right involved. Indeed, if traditionalists are not deciding these definitional disputes by balancing interests against one another, the modernist asks, how are such disputes to be decided? Even the most ardent traditionalist concedes that in extreme cases such balancing must occur,³⁶ and it is hard to see how there could be any principled basis for treating non-extreme cases differently. If competing interests must be balanced against each other under either view, the modernist claims, why not be up front about this? To the modernist, acceptance of the traditionalist view does not lead to different substantive results, but merely obfuscates what is really going on.

How should we choose sides in this debate? It seems that we are faced with two equally unpalatable positions. Either we admit that rights do not have peremptory force and that calling something a right is mere hypocritical hyperbole, for rights are not treated any differently than other important interests, or we claim that rights do have peremptory force despite the fact that this does not fit how rights enter into our moral reasoning in actual practice.

Some modernists have attempted to solve this dilemma by adopting what might be called a 'hybrid' view.³⁷ Under this view, calling something a right does not merely mark it as an important interest, it also excludes balancing certain kinds of interests against it, no matter how weighty those interests turn out to be. For example, interests that are protected by rights may get balanced together, but no balancing occurs between a right and a mere interest, such as considerations of need, desert, or the common good. Under this view, the word 'right' does seem to have some real work to do – excluding some, but not all countervailing reasons for action from the balancing process, thereby giving rights at least some peremptory force.

But there are a number of problems with the hybrid view. First, there is the question of whether a right can be said to possess peremptory force in degrees. Does it really make sense to call a right 'partially' inviolable? Traditionalists, at least, are likely to find the concept of partial inviolability incoherent, for a right that is subject to balancing in some cases can hardly be considered absolute, even if there are also some cases where balancing does not occur. The hybrid view accordingly does not really capture what traditionalists claim is a right's essential characteristic. Second, distinguishing between *kind* and *weight* with regard to

a countervailing reason is not as easy as the hybrid view seems to suppose, even if we merely have to distinguish between interests that are protected by rights and interests that are not. We still have definitional problems, for we must still decide whether the relevant interests are ones that a right protects, and it seems that to resolve this issue, we will need to weigh the reasons for including this interest within the protection of the right against those for excluding it. If this is so, then the hybrid view does not really differ from the modernist view at all, for it does not deny that rights are always subject to being balanced against competing interests, it merely contends that the interests protected by rights are important enough to prevail over most other interests in the balancing process. Third, even if we can distinguish between kind and weight when it comes to countervailing reasons, it is not clear that this distinction can actually do the necessary work. It merely reflects the fact that under whatever substantive moral theory we use to evaluate the relative weight of the parties' competing claims, some reasons will have weight and some will not. We are still left with the problem of what to do when there are reasons with weight on *both* sides of the equation, and this is what the dispute between the modernists and the traditionalists is all about. So it seems like the hybrid view does not really offer us a way out of the dilemma that choosing between the modernist and the traditionalist view seems to create.³⁸

What I would like to suggest is that there is a way out – an option that is brought to light once we recognize that there are two questions of justice presented by every distributive dispute. Rights may indeed get balanced against other competing interests when it comes to deciding how a particular good should be divided, regardless of whether these competing interests are themselves protected by rights. But this does not render our conception of a right merely formal and empty. Although balancing occurs, it occurs in the process of deciding the relative weight to assign to each party's claim under our underlying substantive moral theory. At this level, the interests that rights protect are handled no differently than any other interest. If the interest is deemed important enough to be called a right, it will be assigned a great deal of weight in the balancing process, but balancing still occurs, and in particular cases interests protected by rights can be outweighed, even by interests that are not.³⁹ But once we have resolved the question of relative weighting and come to the question of distributive method, rights *are* treated differently than other important interests. As the traditionalist contends, rights are not just important interests, they are important precisely because of the contribution they make to personal autonomy. By anointing a particularly important interest a right, we are accordingly committing ourselves not only to the view that this interest is important, but also to the view that the autonomy of the right-holder is sufficiently important that we have reason to depart from the default position of proportional division and apply winner take all in any conflict in which, on balance, the right prevails.⁴⁰

This way of explaining the nature of rights captures what is appealing about both the traditionalist and the modernist view. It fits how rights are treated in

actual practice, as modernists insist it should, for it accepts that rights do get balanced against competing interests of all types as part of the moral reasoning process. It gives the word ‘right’ real work to do, as traditionalists insist it should, for once the requisite balancing of interests is complete, it tells us that if the right prevails, we have reason to depart from proportional division and apply winner take all. In addition, it gives autonomy a prominent role to play at both stages of the process, as all rights theorists insist it should, for promoting autonomy is not only a reason for designating a particular interest as especially important and marking it as a right in the first place, it is also a reason for departing from the principle of proportionality and applying winner take all.

Indeed, once we have separated the question of moral weight from the question of distributive method, we can see how it is possible to pursue the promotion of autonomy without making a corresponding commitment to inviolability. Although *inviolability* cannot coherently exist in degrees, *autonomy* can easily do so, and if promoting autonomy does not depend on establishing inviolability, but can also be instantiated through employing the winner-take-all method of distribution, then a right need not preclude all forms of interference nor be immune to further definitional disputes in order to confer a sphere of autonomy on the right-holder. I may not know all the circumstances in which I have a right not to be killed, for example, but I know a great many of them, and this is sufficient to create the requisite sphere of autonomy within which I may confidently pursue my own projects with minimal risk of interference even though the conflicting interests of others could outweigh mine in unusual circumstances and my right could be defeated. By accurately locating the point at which concerns for autonomy enter into our moral reasoning process, we can better understand how these concerns figure in our conception of the nature of rights, and how autonomy relates to the question of distributive justice.

6. The question of distributive method and the relative justice of compromise and victory

The preceding section established that in a conflict in which a claim is important enough to be characterized as a right, and this claim prevails, promoting autonomy provides a powerful reason for departing from proportional division and applying winner take all. This helps explain why winner take all is the most common method of distribution where legal rights are concerned. There are exceptions to this, of course – comparative negligence would be one obvious example; the contemporary preference for shared-parenting arrangements in child-custody disputes would be another. But it remains fair to say that in most cases, saying that someone has a legal right to something generally means that winner take all will apply.

While winner take all is the method of distribution that is officially employed in most disputes involving legal rights, it is not the method of distribution that is

most commonly used in practice. The overwhelming majority of disputes involving legal rights are resolved by settlement rather than by judgment. Settlement, in turn, implies compromise, and compromise usually involves some sort of proportional division of whatever good is in dispute rather than outright victory for one party or the other. If we were committed to the view that winner take all is always more just when legal rights are at issue, then we would have to conclude that our legal system is overwhelmingly unjust, since most legal disputes do not end with winner-take-all results. But most theorists who have considered the matter do not believe that this high number of settlements makes our legal system overwhelmingly unjust. On the contrary, most have argued that we should have more settlement, not less of it, while only a few have argued against this, and various measures designed to facilitate the settlement of legal disputes are now firmly entrenched.⁴¹ But how can this be true? How can the settlement of so many legal disputes *not* be unjust if it entails employing some form of proportional division when justice requires that we employ winner take all? How do we explain why the powerful reason for departing from proportional division that promoting autonomy provides in rights disputes does not always apply?

The answer is that while promoting autonomy provides a powerful reason for applying winner take all when one party's claim takes the form of a claim of right, it does not provide a conclusive reason. Promoting autonomy merely shifts the default position from proportional division to winner take all, making the former rather than the latter *prima facie* just. But in some cases, the moral force of promoting autonomy may be undermined or overwhelmed by other concerns. When this occurs, we may feel that a dispute is more justly resolved by settlement than by judgment, for settlement provides at least the opportunity for proportional division, while judgment typically involves the application of winner take all.

For example, in some cases the reason to apply winner take all that promoting autonomy provides may be weakened by factual uncertainty as to whose autonomy we ought to promote. Let us take an example that I have adapted from one suggested by John Coons in a remarkable article that for some reason has never received the attention it deserves.⁴² Imagine two farmers with adjacent farms. Suppose that one day a tornado sets down and destroys the fence that separates their farms. The animals on each farm are scattered as a result of the storm, and many are found wandering on the neighboring farm. Suppose that each farmer owned a prize dairy cow. These cows were twins, and neither was branded, so there is no way of telling them apart. After the storm, one of these cows has disappeared, but the other is found wandering on Farmer A's farm. Farmer A claims that this cow is his cow; Farmer B claims that it is his. How are we to resolve this dispute?

Under the substantive moral theory that the law currently uses to evaluate each farmer's claim, what matters is ownership. The remaining cow should be returned to its true owner. The fact that the cow is now on what would have been

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Farmer A's side of the fence makes it more likely that the cow belongs to Farmer A than to Farmer B, but this is by no means certain. After all, one cow has disappeared entirely, and it is possible that the remaining cow wandered over to the neighboring farm after the fence was destroyed by the storm. Since the true owner has a right to the cow, we would ordinarily apply winner take all, but if we do apply winner take all, the result seems unjust. Although Farmer A is the most likely owner, Farmer B's claim is asserted in good faith and therefore has moral weight too, and it seems wrong to disregard this moral weight by awarding the cow exclusively to Farmer A. Our uncertainty as to the identity of the true owner weakens the reason for employing winner take all that promoting autonomy usually provides, so there would no longer be sufficient reason for departing for proportional division. Either we should divide the cow by value, or by time, or award the cow to one farmer but have him compensate the other for the proportional value of his claim, or divide the cow by employing a weighted lottery. Moreover, since the only way we could realize some form of proportional division in this case, given the current state of the law, would be through settlement rather than judgment, settlement would be more just.

Similar arguments could be made in cases of legal uncertainty. When both parties claim a legal right to a good, but the applicable law is uncertain, each party's claim must be assigned at least some moral weight. After the precise scope of the rights involved has been clarified, we might be happy to apply winner take all to any similar disputes that arise in the future, for this would reward the right-holder's legitimate expectations and promote his autonomy. But we may be reluctant to apply winner take all to the case that produced this clarification. Such a clarification is a public good, but it is a public good to which each party contributed to creating. If neither party could have reasonably predicted the outcome of their dispute in advance, proportional division, not winner take all would seem to protect their legitimate expectations better. Furthermore, since neither party could have reasonably expected to be free from interference under such conditions of uncertainty, employing proportional division would entail no sacrifice of autonomy. In such circumstances, it would be unjust to use winner take all.

Finally, it may also be more just to use proportional division as our method of distribution in cases in which the applicable legal rule is clear, but the moral weight of the underlying arguments is nevertheless more equally balanced. The conflict between a good-faith purchaser for value and a true owner is one obvious example. In these cases, both parties may be faultless, and the real wrongdoer (the thief who has stolen the good from one party and fraudulently sold it to another) is typically nowhere to be found. While there may be all-things-considered reasons that slightly support awarding the good to one side or the other in such cases, the autonomy of both parties seems equally worthy of protection and respect. It accordingly seems unjust to depart from proportional division. Because winner take all remains the official method of distribution in these cases, however, the only way to accomplish proportional division is

through settlement. As a result, when conflicts like this do arise, we may feel that settlement is more just than a winner-take-all judgment because the usual reasons for favoring winner take all when a dispute involves a claim of right do not apply.

Indeed, in a few selected areas, the law already departs from its general preference for winner take all and adopts proportional division in its place. Under the rule of general average in admiralty law, for example, losses for cargo jettisoned at sea are shared by all owners of cargo on that particular vessel, and not just by the owner of the particular cargo that was lost. Under the rule of comparative negligence in tort law, a party is no longer barred from recovering any damages if its own negligence contributed to its injury, but can recover that portion of its loss caused by the negligence of others. A good-faith improver of real property is entitled to compensation under real property law, but not ownership, a remedy that could be seen as a kind of proportional division. Market share liability for injuries caused by dangerous drugs supplied by a manufacturer who cannot be individually identified is a form of proportional division, although in most cases causation issues are still decided by winner take all. In addition, insolvency law has long provided for the pro rata satisfaction of creditors' claims, rather than requiring some creditors to forfeit their entire claim while others have their claims satisfied in full.

But there are many other cases in which the law does not provide for proportional division even though the moral weight of each party's claim is roughly equivalent. The terms of our contract may be uncertain or it may be uncertain whether the relevant facts establish breach or even what the relevant facts are, but winner take all will still apply. Winner take all applies in nuisance cases and in most other areas of real property law, in cases that turn on the issue of informed consent, cases subject to the 'but for' causation test, cases alleging violations of environmental, occupational health and safety, or labor laws, and so on. Yet in many of these cases, as in the case of a true owner versus good-faith purchaser for value, there may be claims with moral weight on both sides, and the circumstances may be such that the promotion of autonomy no longer provides a sufficient reason to depart from proportional division and apply winner take all. In such cases, settlement will be more just than outright victory by either party through judgment, for only through settlement can each party hope to receive a share of the good that is even roughly equivalent to the moral weight of his claim.

7. The question of distributive method and the demands of morality

The final application of the question of distributive method that I want to discuss relates to the long-running problem of explaining how a moral theory can avoid being too demanding without failing to be demanding enough. It might seem odd to think of this problem as presenting a question of distributive justice, but this is precisely why I have chosen to discuss it. As I shall explain in a moment, recog-

nizing the question of distributive method allows us to transform what seems to be a purely non-distributive moral problem into a distributive one, and this transformation can be a powerful tool for explaining certain aspects of our moral practice. What I have to say, however, is meant to be suggestive, not comprehensive. My intent is to illuminate a path one might follow if one were inclined to develop a defense of a certain type of moral theory, but I shall not travel very far down that path myself. The main purpose of this section is simply to demonstrate that recognizing the question of distributive method has important applications beyond the resolution of traditional distributive disputes.

The debate between those who worry that morality is too demanding and those who worry that it is not demanding enough arises as follows. Many moral theories require that we give equal weight to everyone's interests in our moral reasoning rather than special priority to our own. Utilitarianism, for example, is often accused of being such a theory,⁴³ and while a few utilitarians deny this (they argue that the best way to maximize overall utility is to look after your own interests and let others look after their own), most admit that strict impartiality is indeed what utilitarian moral reasoning requires.⁴⁴ But strict impartiality is very demanding. There is at least reason to be concerned that even people who are inclined to treat the interests of others with some concern and respect cannot reasonably be expected to be strictly impartial when their interests and the interests of others seriously conflict. If moral theory is to play a significant role in our practical reasoning, those who advance such concerns argue, it is going to have to be based on a more realistic assessment of human nature, of what people of good will can reasonably be expected to be motivated to do. This does not mean, of course, that moral theory must abandon any attempt to appeal to the better angels of our nature – the fact that many people have trouble thinking about anybody but themselves is not a reason to refrain from encouraging them to do so. But there is a difference between encouraging us all to do what at least some of us are capable of doing and setting a standard that even the most reasonable among us are unlikely to be able to maintain. Any theory that demanding is simply too utopian, and theories that are too utopian are unlikely to have much use as guides for human conduct, no matter how attractive their ideals.⁴⁵

There are various ways, of course, in which a moral theory might avoid the charge of being too demanding while still attempting to prod us toward the ideal, but the one that I will focus on here is the approach taken by those advocating what is often called 'common-sense' morality. Under that theory, we must take account of and give some weight to the interests of others in our moral reasoning, but we need not give those interests equal weight to our own. Not only is this theory less demanding than its more utopian competitors, it is also the theory, its proponents argue, to which most of us privately adhere, no matter what theory we publicly embrace. But the proponents of common-sense morality run into problems too. One is that if we reject the view that everyone's interests count equally, we need a principled basis for deciding how much more our own interests

count, and a principle that would explain how much more weight we may legitimately assign to our own interests is difficult to identify and defend. Without such a principle, we are left to assign varying weights to our interests and the interests of others by intuition, and any moral theory that relies on intuition to assign differing weights to competing interests is open to some well-known attacks. I shall not say anything more about this particular problem, except to note that it has not stopped many people from embracing forms of moral reasoning that allow them to favor their own interests to a significant extent.

But there is another problem I do want to discuss. Whatever its basis or source, suppose we do have a moral theory that allows us to assign greater weight to pursuing our own interests than to advancing the interests of others. We might be *permitted* to act in the interests of others under such a theory, but it is hard to see how we could ever be *required* to do so, for will not the interests of others *always* be outweighed? If this is the case, then common-sense morality is not much of a moral theory at all, for it in fact never makes *any* demands on us, even though it recognizes that the claims of others do have some moral weight. While more utopian moral theories may be open to the charge that they are too demanding, common-sense morality is open to the charge that it is not demanding enough.

For those seeking to defend common-sense morality, one possible response is to claim that even though the interests of others are entitled to less moral weight than our own interests under such a theory, it is not true that our interests will always come out on top in the balancing process. Even though our interests may be always assigned greater weight than the similar interests of others, our interests may be outweighed when the interests of others are not similar, or when the impact on the parties' respective interests differs substantially. If I pass by a drowning child, for example, surely common-sense morality requires that I throw her the life preserver sitting nearby even if by doing so I would get my shoes wet. But it is impossible to generalize from such examples, for there is no consistency here in our moral practice. There are a great many trivial pleasures we pursue and trivial burdens we avoid every day in lieu of dramatically improving the lives of others. Instead of buying fresh flowers for my home every week, I could instead give the money to the homeless person I pass on the street on the way to the florist, but it does not seem that common-sense morality requires me to do so. If we are going to defend common-sense morality from the charge that it is not demanding enough, we cannot simply assert that in the right circumstances our own interests will be conveniently outweighed, for there is too much evidence that this will not usually be the case.

If we recognize that the question of distributive method has application even here, however, we can develop a much stronger defense of common-sense morality, and show how it can be demanding without demanding too much. When confronted with a decision that has a potential impact not only on our interests, but also on the interests of others, we can view the moral dilemma presented as a *distributive* problem similar to that we face when having to divide an indivisible

good. We can act either in our own interests or in the interests of others, but when these interests conflict, it seems that we cannot do both. As long as the problem of practical reasoning confronting us seems indivisible, all we can do is apply winner take all. If we apply winner take all, we would always act in our interests, and never in the interests of others, for even though most people would assign *some* weight to furthering the interests of others, they would still assign *more* weight to furthering their own, and any reasons for acting in the interests of others would ultimately be outweighed.

But it is obvious that people *do* sometimes act in the interests of others, and that they do so out of a sense of moral obligation, even though they view their own interests as having greater moral weight. The only way to reconcile these two phenomena is to treat the daily moral questions that confront us not as individual indivisible events, but as part of ongoing stream-of-life decisions that make up the divisible question of how one is to lead a moral life. In other words, we deal with the problem of indivisibility by adding further decisions into the mix. While each individual decision may be indivisible, they are not indivisible as a set. Determining how to lead a moral life accordingly presents a distributive problem as well as a problem of assigning moral weight. While common-sense morality may resolve the question of weighting in favor of giving special priority to our own interests, there is no reason to depart from the default position of proportional division when it comes to the question of distributive method. If we do apply the principle of proportionality to resolve this question, we can see how common-sense morality can steer a course between the Scylla of being too demanding and the Charybdis of not being demanding enough. Even if we always give greater weight to our own interests in any individual decision situation, as long as we give *some* moral weight to the interests of others, we are *required* by the principle of proportionality to act in the interests of others in a portion of these decision situations, even at some and occasionally at substantial cost to ourselves.

I recognize, of course, that there are numerous questions that could be raised about what it would mean to use the principle of proportionality to lead a moral life. For example, would I be leading a moral life if I always acted in my own interests in the first half of my life, but in the second half always acted in the interests of others or does proportionality require that I distribute my altruistic behavior more evenly throughout my life? Am I really leading a moral life if I refuse to save one person from serious injury to avoid some trivial burden, but then save another at substantial cost to myself? How does this differ from saying that rightful and wrongful acts somehow cancel each other out? While I will not be able to address any of these interesting questions here, none are material to the point I am making. I am not claiming that there is necessarily one right answer to the question of how the principle of proportionality should be applied. I am merely illustrating that the principle of proportionality can explain how people could assign greater weight to their own interests, yet on some number of occasions still be morally required to act in the interests of others.

Of course, there are other ways to explain how we could assign special priority to our own interests, yet still sometimes act in the interests of others even at some cost to ourselves. We could simply be inconsistent, sometimes complying with the demands of morality and sometimes not, or we could be adopting the interests of others as our own on some number of occasions, in which case we would always be furthering our own higher-order interests even though on a superficial level it appeared that we were behaving altruistically. But neither of these explanations works as a defense of common-sense morality, for neither explains how we could assign greater weight to our own interests, yet sometimes still be required to act in the interests of someone else. Once we recognize that common-sense moral reasoning involves not only an assessment of moral weight, but also an assessment of distributive method, however, we can explain this, for now we can rely on the principle of proportionality to do the requisite work.

There is precedent for this approach to moral reasoning in the allocative decisions of nation-states. How can a government justify spending some of its limited resources on the arts, or on national parks, or on foreign aid when there are people within its own borders in need of food, shelter, and the basic necessities of life? Clearly, the claims of these people have greater moral weight than the claims of those who would benefit from a subsidized national theatre, or government-maintained parks, or any of the other innumerable, but less pressing projects that seek a share of the limited resources in society's coffers. But even though these claims are weaker, they nevertheless have some moral weight. To explain why we divide our resources among these various projects rather than apply all our resources to our most pressing needs, we simply have to focus on the question of distributive method. Indeed, if we characterize what we are doing as satisfying the requirements of the principle of proportionality when we use public money to fund less pressing claims, we can avoid the twin charges of elitism and paternalism that often attend attempts to defend such a use of public funds.⁴⁶ Because we are not favoring the interests of the minority over the interests of the majority or giving the majority what we think they would want if they only knew better, but rather recognizing the actual percentage of support for these projects within the relevant population, funding these projects in proportionate amounts is neither elitist nor paternalistic. It is simply a reflection of the fact that it is proportional division, not winner take all, which enjoys the privileged position in our moral thinking about distributive justice.

notes

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1. Note that throughout this article, I am treating the all-things-considered judgment of how a good should be divided as a question of justice. One could argue that our all-things-considered judgments about how a good should be divided are not judgments about justice, but judgments that balance the concerns of justice against a plurality of other moral concerns, such as efficiency, autonomy, and liberty. I talk about these other concerns as if they were aspects of justice, but it makes no difference to my ultimate conclusion if these are considered separate carriers of value in their own right to be balanced against justice. In this case, only the terminology would change. The ultimate question (that is, which method of distribution must we employ if we are to satisfy the demands of morality in a particular case) would remain the same.
2. For a similar approach, see T.M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), especially pp. 3, 17, and Joseph Raz, *Practical Reason and Norms*, 2nd edn. (Princeton, NJ: Princeton University Press, 1990), especially pp. 186–7. While I take the concept of having a reason to be basic and not in need of some deeper philosophical explanation, those who feel it needs to be further developed can see John Broome, ‘Reasons’, in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, edited by R. Jay Wallace et al. (Oxford: Oxford University Press, 2004), pp. 28–55.
3. In commenting on this article, several people have queried how I would categorize theories that assign certain reasons lexical priority, and suggested that such theories do address the question of distributive method. But I do not think this is correct. Lexical rules are not, in my view, rules regarding distribution, but rather rules regarding the assignment of moral weight. Under these rules, as long as a certain kind of reason is present, no other kind of reason has weight. If such reasons are present on only one side of the equation, the question of distributive method does not arise. If such reasons are present on both sides of the equation, however, the question of distributive method is left unaddressed, for there is nothing in such theories to tell us how to resolve cases that involve conflicting reasons of unequal weight within the same class of priority.
4. See John Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Harvard University Press, 1999), Section 13, pp. 65–73.
5. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 169–231.
6. See Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 178–86, 217–18.
7. Note that by ‘prima facie’, I mean ‘should be accepted as correct until proven otherwise’. When I mean ‘having weight, but capable of being overridden’, a meaning that is also sometimes associated with the term ‘prima facie’, I shall use the term ‘pro tanto’. Thus, if a reason for distributing a good one way or another has moral weight, it is a *pro tanto* rather than a prima facie reason, for it is an actual

reason that is subject to being overridden by weightier concerns rather than a reason that appears to have weight, but on closer inspection, turns out to have no weight at all. My claim that proportional division is the default position, in contrast, means that it represents our prima facie conclusion as to which method of distribution distributive justice requires. It is prima facie in the sense that it is made before all the evidence is in. Once all the evidence is in, our prima facie conclusion may be confirmed, in which case it becomes our final conclusion, or it may be proved wrong, in which case it has no weight at all and is simply replaced by our better informed all-things-considered judgment.

8. This view arguably goes all the way back to Aristotle. See Aristotle, *Nicomachean Ethics*, 1131a30–1131b24.
9. John Broome, 'Fairness', *Proceedings of the Aristotelian Society* 91 (1990–91): 95. See also John Broome, *Weighing Goods* (Oxford: Blackwell, 1991), pp. 195–6.
10. See Broome, 'Fairness', pp. 90–93. See also Brad Hooker, 'Fairness', *Ethical Theory and Moral Practice* 8 (2005): 329–52. Like Broome, Hooker would exclude side constraints from the reach of the principle of proportionality, although he would do so for slightly different reasons. But unlike Broome, Hooker would also exclude indivisible goods when the relevant claims have unequal moral weight, whereas Broome would use a weighted lottery to implement the principle of proportionality in such cases. Compare Broome, 'Fairness' with Hooker, 'Fairness'.
11. To see this, suppose that one person claims an entire piece of property worth, say, US\$100,000, while another claims a 20 percent interest in that property. Even if we assume that the moral weight of each party's claim is equal, we cannot begin to decide how the property should be divided until we decide what 'good' is actually in dispute. If we take the relevant good to be the entire piece of property and abate the parties' claims proportionally, one party receives US\$83,333 ($100/120 \times \text{US\$}100,000$) and the other US\$16,667 ($20/120 \times \text{US\$}100,000$). On the other hand, if we apply what H. Peyton Young calls the 'contested garment rule' (see H. Peyton Young, *Equity in Theory and Practice* (Princeton, NJ: Princeton University Press, 1994), p. 67), we would treat the relevant good as a 20 percent interest in the property, for ownership of this is all that is being contested. Under the contested garment rule, the uncontested 80 percent of the property would accordingly go to the first claimant outright and the remaining 20 percent would be proportionally divided, producing shares of US\$90,000 ($\text{US\$}80,000 + 50 \text{ percent of } \text{US\$}20,000$) and US\$10,000 ($50 \text{ percent of } \text{US\$}20,000$) rather than US\$83,333 and US\$16,667.
12. Various other theorists also view the principle of proportionality as being based on considerations of equal concern and respect. See, for example, Nicholas Rescher, *Fairness: Theory and Practice of Distributive Justice* (New Brunswick, NJ: Transaction Publishers, 2002), pp. 13–15 and James Griffin, *Well-Being* (Oxford: Oxford University Press, 1986), pp. 207–10.
13. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 54ff.
14. For more on the role of acceptance in restoring pre-conflict levels of social cooperation, see Mark R. Reiff, *Punishment, Compensation, and Law: A Theory of Enforceability* (Cambridge: Cambridge University Press, 2005).
15. For a more unusual example of this method of distribution, see *Popov v. Hayashi* [2002] WL 31833731 (December 18, 2002), in which the California Superior Court

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- ordered the record-setting 73rd homerun ball hit by Barry Bonds at the end of the 2001 season sold at auction and the proceeds divided between two claimants: Popov, who (almost) caught it, and Hayashi, who picked it up after it had been jostled out of Popov's glove by a crowd of onlookers.
16. See Broome, 'Fairness', pp. 97–100.
 17. See Jon Elster, *Local Justice* (New York: Russell Sage, 1992), pp. 110–12.
 18. See, for example, William K.B. Hofstee, 'The Case for Compromise in Educational Selection and Grading', in *On Educational Testing*, edited by S.B. Anderson and J.S. Helmick (San Francisco, CA: Jossey-Bass, 1983), pp. 111–17; *Columbia Law Review*, 'Scarce Medical Resources', *Columbia Law Review* 69 (1969): 665.
 19. See Jon Elster, *Solomonic Judgements* (Cambridge: Cambridge University Press, 1989), pp. 116–22.
 20. See *ibid.*, pp. 114–15.
 21. See Scanlon, *What We Owe to Each Other*, pp. 233–4.
 22. See Hooker, 'Fairness', pp. 348–50.
 23. See Rawls, *A Theory of Justice*, p. 30.
 24. For a discussion of the interrelationship of these various notions, see Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1982), Ch. 1.
 25. See, for example, Daniel Kahneman and Amos Tversky, 'Choices, Values, and Frames', *American Psychologist* 39 (1984): 341–50; Daniel Ellsberg, 'Risk, Ambiguity, and the Savage Axioms', *Quarterly Journal of Economics* 75 (1961): 643–69.
 26. For further discussion of this problem, see Jules Coleman and Charles Silver, 'Justice in Settlements', *Social Policy and Philosophy* 4 (1986): 114–19.
 27. For a discussion of these problems and some possible solutions, see Steven J. Brams and Alan D. Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (Cambridge: Cambridge University Press, 1996).
 28. Unfortunately, there are some interesting aspects of the question of distributive method that I will not have time to explore. For example, to what extent does our choice regarding which moral theory we will use to evaluate moral weight limit or even determine which moral theory we can use to determine distributive method, and vice versa? Could we use a deontological moral theory at one level, but a consequentialist one at the other? Could we use different consequentialist theories at each level?
 29. While many traditionalists are will theorists and many modernists are interest theorists, this is not necessarily so, and in any event, the 'will' and 'interest' theorist labels come with a great deal of baggage that is not relevant to the issues I want to discuss and is therefore best avoided. For a helpfully brief description of some of this baggage, see William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004), pp. 119–32.
 30. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28–35.
 31. See Broome, 'Fairness', p. 96; Broome, *Weighing Goods*, pp. 1–21; Hooker, 'Fairness', p. 340.
 32. See, for example, Philip Pettit, 'The Consequentialist Can Recognise Rights', *Philosophical Quarterly* 38 (1988): 42–55; R.B. Brandt, 'Utilitarianism and the Rules of War', *Philosophy and Public Affairs* 1 (1972): 145–65.

33. For further discussion of the need to impose boundary conditions on the traditionalist conception of rights, see N.E. Simmonds, 'Rights at the Cutting Edge', in *A Debate over Rights*, edited by Matthew Kramer, N.E. Simmonds and Hillel Steiner (Oxford: Oxford University Press, 1998), pp. 114–232.
34. See, for example, Jules L. Coleman and Jody Krauss, 'Rethinking the Theory of Legal Rights', *Yale Law Journal* 95 (1986): 1335–71.
35. See, for example, Thomas Nagel, 'War and Massacre', *Philosophy and Public Affairs* 1 (1972): 123–44.
36. See, for example, Nozick, *Anarchy, State, and Utopia*, p. 29: 'The question of whether these side-constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.'
37. See, for example, Raz, *Practical Reason and Norms*.
38. For a discussion of additional problems with the hybrid view, see N.E. Simmonds, *Central Issues in Jurisprudence*, 2nd edn. (London: Sweet and Maxwell, 2002), pp. 259–63, 291–304.
39. In other words, marking something a right does not mean it has lexical priority over all competing interests; it simply means that we consider the interests a right protects important. In some cases, however, these interests might still not be important enough to outweigh considerations of the common good, for example, or considerations of individual need or desert.
40. I therefore disagree with both Broome and Hooker that side constraints are not subject to the principle of proportionality. They are subject to the principle, only in most cases the fact that the winning claim is based on a side constraint is sufficient warrant to depart from the default position and apply winner take all.
41. For a discussion of the ever-increasing pressure for more and more settlement, see Carrie Menkel-Meadow, 'Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)', *Georgetown Law Journal* 83 (1995): 2663–96; Marc Galanter and Mia Cahil, "'Most Cases Settle": Judicial Promotion and Regulation of Settlements', *Stanford Law Review* 46 (1994): 1339–91; David Luban, 'Settlements and the Erosion of the Public Realm', *Georgetown University Law Journal* 83 (1995): 2619–62; Coleman and Silver, 'Justice in Settlements'; Owen Fiss, 'Against Settlement', *Yale Law Journal* 93 (1984): 1073–90.
42. See John E. Coons, 'Approaches to Court Imposed Compromise – The Uses of Doubt and Reason', *Northwestern University Law Review* 58 (1964): 750–94. For one of the few serious attempts to critique the positions taken by Coons and to develop the themes he presents, see Joseph Jaconelli, 'Solomonic Justice and the Common Law', *Oxford Journal of Legal Studies* 12 (1992): 480–506.
43. See, for example, Samuel Scheffler, *Human Morality* (Oxford: Oxford University Press, 1992).
44. See, for example, Shelly Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1989).
45. See Thomas Nagel, 'The Problem of Utopianism', in *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 21.
46. See, for example, Ronald Dworkin, 'Can a Liberal Support Art?' in *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp. 221–33.