Distributing Justice

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Overview

Ours is an unjust world. It is, however, unjust in at least two ways. First, many people suffer wrongs, both heinous and trivial. They are physically assaulted, discriminated against on account of their race and sex, and so on. One reason we have a legal system is to repair those injustices as best we can; for example, compensation should be paid to those who are assaulted or discriminated against. Second, the natural limits of our society—the intransigence of wrong-doers, the limits of our procedures, the scarcity of resources—are such that not everyone who deserves justice will get it. Some arrangements which determine who gets justice are themselves unjust. When we discuss the civil justice system, at least, the second question is key; yet it is rarely, if ever, isolated with the care it deserves.

Any legal system must have an answer to the question ‘how should legal resources be distributed?’ Few answer in a coherent way. In practice, a market is used to determine most distributions; small exceptions are sometimes made. One principle of distribution, then, is a market. A rival suggestion is that legal resources should be distributed to ensure that just results are maximised. These principles, market and maximisation, both fail to attend to the second question: who should get justice, given that not everyone can? I propose a novel (but familiar) principle to determine the distribution of legal resources: to achieve equal opportunity for justice.

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1 For reasons of space, I will propose principles for the distribution of legal resources in the civil sphere only (the precise scope should get clearer in time).

2 There are other questions. For example, who should suffer injustice, given that some must? This requires us to look beyond the civil justice system. I deal with it in my more complete treatment of these issues, Just Justice (unpublished book ms).
The Problems of Civil Justice

Institutions and Lawyers

Anyone tasked to enumerate the problems of civil justice would be likely to give two particular issues prominence. First would be the access individuals have to legal institutions; second would be the availability of lawyers to help individuals navigate those institutions. These are not, of course, the only problems; but they are extremely important and widely discussed. For a picture of the practical questions motivating this paper, it is worth sketching the issues which arise under these umbrella groups.

The access individuals have to legal institutions depends on a range of factors. Crucially, public courts must determine their conditions of access. This means rules of jurisdiction and standing—and, often, filing fees. These have long proved contentious. King John demanded large sums—‘proffers’—in return for access to his court. Resistance from the King’s tenants-in-chief found voice in Magna Carta’s famous 40th article, which proclaimed that

To no one will we sell ... justice or right.

Court fees are no less contentious today. In England and Wales, recent changes enable the State to charge fees ‘intended to exceed the cost’ of the use of the court. Fees, in other words, which ensure the courts turn a profit. Debates about fees are chiefly debates about who should have access to legal institutions, and under what conditions.

As well as public fora, individuals often have (in theory) access to private fora, such as arbitration. These are increasingly widespread: in the United States, roughly 290 million people have cell phones; 99.9% of subscribers to the major networks have arbitration clauses in their contracts. Access is controlled by each forum’s procedures, though these conditions are, theoretically, subject to public oversight. Some arbitration clauses bar class action law suits. This makes arbitration an unrealistic forum for individuals: as Judge Posner has remarked, ‘only a lunatic or a fanatic sues for $30.’ These individuals are not

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3 I discuss these in my ‘Court Cuts’: Wilmot-Smith, 2015. For a theoretical discussion, see Michelman, 1973; Michelman, 1974.

4 A great number of the problems of so-called ‘boilerplate’ arise here: see generally Radin, 2014.


6 In AT&T Mobility v. Concepcion, 563 U.S. 333 (2011), the Supreme Court accepted this is constitutional.

7 Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).
only unable to bring claims in arbitration, if their arbitration clause is exclusive, they are also thereby barred from public courts.  

The second major issue in civil justice is the availability of lawyers. Lawyers (especially, though not only, good lawyers) are expensive. Provision has long been made to enable the poor to have some access to them. A Scottish provision of 1424 provided that ‘if there be any poor creature for default of cunning or means that cannot or may not follow his cause’ (i.e. argue his own case), free legal advice would be given to him. Seventy years later, Henry VII passed a law instituting what became known as the in forma pauperis procedure. Poor persons could have their filing fees relieved, so they could bring claims free of charge. The Lord Chancellor was authorised to assign ‘lerned Councell and attorneies’ to serve ‘without any rewarde.’ The United Kingdom instituted a comprehensive legal aid scheme in 1949. The United States did not follow suit. The Supreme Court has held that ‘an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.

The Distribution of Legal Resources

What is the right way to think about these topics? We can regard courts, together with the officials that dwell within, and lawyers as legal resources. Access to them can be valuable and they are scarce. It is natural to ask: how should it, the resource, be distributed? The key question to ask about the legal system, it is often assumed, is therefore: how should we distribute legal resources? In this paper, I propose an answer to that question—albeit an incomplete one.

Why incomplete? Legal resources are instrumentally valuable; if we can get the same value without these expensive instruments, so much the better. Let me give two examples. I said that the second issue in civil justice is the availability of lawyers. That was a partisan way of putting the point. There has long been
a desire—long before Dick the Butcher’s drastic and famous suggestion\(^{14}\)—to simplify procedures such that lawyers are unnecessary. Henry II’s courts of General Eyre, during the 12th and 13th century, are a good example. The King sent out itinerant justices to resolve legal disputes that had arisen. There was almost certainly no filing fee, meaning the courts were open to all; more importantly, for now, the bills had no standard form. Individuals could represent themselves. Similar reforms appear periodically, though they have never been entirely successful: in most cases lawyers remain practically necessary (or, at least, valuable).

Consider, further, the speech of Theseus, ruler of Athens, in Euripides’ *Suppliant Women*. He tells the Herald, from Thebes, that

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\text{when the laws are written, both the powerless and the wealthy have equal justice, and the lesser man with justice on his side prevails over the powerful man.}\]

One crucial feature of laws is how accessible their content is.\(^{16}\) Laws are, as Euripides’s Theseus implies, supposed to help bring about justice. Justice is meant to win out over wealth and power and laws are instruments to achieve this. To be able to claim the support of law, you need to know what the law says, when you have been (legally) wronged and how to go about getting redress. This is Theseus’ point. A crucial question for any legal system is, therefore, what access individuals have to knowledge of the law. Yet it is difficult, if not impossible, to ask this question on the legal resources conception. Some legal resources, like lawyers, are instrumentally valuable, to help individuals access legal knowledge; in discussing the distribution of these, we could therefore take knowledge into account indirectly. However, some measures, such as accessible and intelligible laws, are not happily characterised in terms of the distribution of legal resources.

All this shows that a distributive principle for legal resources will be incomplete: we may need to consider other *distribuenda* and, indeed, accounts of justice which are not distributive. That is a question for another paper. I do not, then, suggest that an answer to my chief question—how should legal resources be distributed—would solve all problems of civil justice; it would solve a lot of them, though.

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\(^{14}\) Henry VI, part 2, Act 4, Scene 2, line 73: ‘The first thing we do, let’s kill all the lawyers.’

\(^{15}\) 433–4, 437.

\(^{16}\) Writing alone will not suffice for accessibility: the Emperor Caligula is said to have written laws ‘in a very small character, ... hung ... above high pillars.’ Sir William Blackstone, \(^{17}\) p. 46.
Philosophical Neglect

I have set out some of the practical problems faced by scholars of civil justice. I have also suggested one question we might ask to think about those problems. Good answers to questions like these, questions of justice, can only be built with a firm philosophical foundation. ‘Access to justice’ has been a topic of profound practical import and has generated a voluminous doctrinal literature. Unfortunately, philosophers have tended to ignore the particular question I have posed, and, more generally, the philosophical puzzles in this domain; this, in turn, has hampered the doctrinal discussion.

Here is one example. A very prominent debate in the United States has concerned mandatory arbitration clauses in contracts of adhesion. Reflecting on the Supreme Court’s arbitration jurisprudence, which enforces arbitration clauses and proscriptions on class actions, Maria Glover objects that this permits a private entity, through contractual arbitration provisions, significantly [to] reduce or even remove its substantive legal obligations.

She seems to claim that the procedural changes in respect of arbitration have changed what the substantive law actually is; in her terms, substantive law is ‘eroded.’ How so? Glover claims that, Through the procedural device of private arbitration, private parties have the quasi-lawmaking power to write substantive law largely off the books by precluding or severely impeding the assertion of various civil claims.

Her objections are based on a particular decision of the Supreme Court of the United States, American Express Co. v. Italian Colors Restaurant, which held that provisions in a contract of adhesion waiving class actions was enforceable, even

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17 See, for example, the New York Times pieces by Jessica Silver-Greenberg and Robert Gebeloff, ‘Beware the Fine Print’ Parts One (Oct. 31, 2015) and Two (Nov. 1, 2015).

18 Glover, 2015, p. 3054.

19 This may be a misreading: at other times she appears more circumspect, saying that this jurisprudence allows corporations to ‘use contractual arbitration provisions effectively to erode substantive law from the books,’ (Glover, 2015, p. 3054) that some procedures ‘effectively extinguish[] claims,’ (Glover, 2015, p. 3071) and that ‘corporations now have the power, through contract, effectively to negate substantive law.’ (Glover, 2015, p. 3075). Whether she makes the claim I have attributed to her depends on what force she puts in ‘effectively.’ My reading is the most charitable: if her claim was only that the Supreme Court’s arbitration proceedings had made vindication of a claim more difficult in practice, her paper would have added absolutely nothing to a vast existing literature. In the title of Resnik, 2015, Judith Resnik refers to the ‘erasure’ of rights; there is, however, no reference to this in the text (though she does refer to ‘erasing ... disputes’: Resnik, 2015, p. 2808.)

20 Glover, 2015, p. 3057.
though the provision rendered the claim ‘prohibitively expensive’ to pursue. She goes on:

In *Italian Colors*, the Court placed the power to craft potential plaintiffs’ path to vindication of substantive rights, and by extension, power over the substantive law itself, not in the hands of public lawmaking bodies, but in the hands of private, would-be defendants.

There are two parts to this claim. One part is that the defendant’s power to control procedure implies a substantive lawmaking power; another is that this lawmaking power is illegitimate because it is exercised

almost entirely outside of public view, through commercial (and sometimes confidential) contracts subject to virtually no public scrutiny or regulatory oversight.

Set that second point to the side. Before we can say of a lawmaking power that it is illegitimate, we need to show that it exists.

The difficulty is that Glover gives no argument for the inference from a “power to craft potential plaintiffs’ path to vindication of substantive rights” to a ‘power over the substantive law.’ All she says is that the inference is licensed ‘by extension.’ On one view of the concept of an obligation, this gap can be filled. One view of legal obligation holds that

\[ A \text{ is obligated to } \phi \iff \text{failure to } \phi \text{ will result in } A \text{ being sanctioned.} \]

For example, Bentham writes that

An obligation ... is incumbent on a man ... in so far as, in the event of his failing to conduct himself in that manner, pain, or loss of pleasure, is considered as about to be experienced by him.

This view has august defenders in John Austin and, in a revised version, Hans Kelsen. It is most familiar to obligations lawyers in the form of Holmes’ claim, that ‘[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.’ If this view of obligation is sound, Glover’s claim has some promise. If contracts of adhesion are binding and compulsory arbitration clauses (and exclusion of class actions) are permissible, repeat players (like AT&T or AMEX) can ensure that one-shot consumers are practically incapable of vindicating any claim they might have.

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22 *American Express v Italian Colors* (n 21) at 3074.


24 Bentham, 1859, p. 247. For discussion, see Hart, 1982.


26 Wendell Holmes, Jr, O., 1897, p. 462.
Practical inability, on this view of obligation, would erase the duties. Thus reconstructed, the argument fails simply because it rests on an untenable view of obligation. The objections are well known—it is widely thought that Hart’s analysis in *The Concept of Law* is unanswerable—and I will not add to them. My point here is that the argument depends entirely on a theoretical claim, about the nature of obligations. Once legal obligations are understood, we can see that, whatever the objections to *AT&T* and *Amex* are, they are not that the Supreme Court has delegated lawmaking powers to private parties. Indeed, were sanctions constitutive of obligations, and were Glover correct in her argument, it would rob the theorist of the precise fact which makes the lack of an enforcement mechanism objectionable. The reason why it is objectionable that consumers cannot take *AT&T* or *Amex* to court is surely that their rights will not be vindicated; saying that the inability to vindicate the right means there is no right at all is to deny that there is any problem with consumers being unable to go to court. If there is no right to be violated, what is the objection to the procedural bar?

Perhaps I have spent too long making this point. All I really want to emphasise is, as Sam Scheffler has written, that

> we need to think harder about what [the idea of a fair system of cooperation] includes and what exactly we are demanding when we demand a fair social framework.

It is worth asking *why* we have failed to think enough about this—in particular, why the justice system has been largely ignored by philosophers. There may be any number of explanations; tentatively, I want to suggest what may be the most important. John Rawls, who breathed new life into the study of justice, developed his theory under ‘ideal’ circumstances, a term of art to denote ‘strict compliance’. On his theory

> Everyone is presumed to act justly and to do his part in upholding just institutions.

If everyone acts justly then no rights are violated. Partial compliance, by contrast, concerns ‘the principles that govern how we are to deal with injustice’.

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28 Scheffler, 2015, p. 23.

29 My diagnosis is influenced by John Gardner’s work on justice: see, in particular, Gardner, 2012; Gardner, 2014.


These principles are therefore largely excluded from Rawls’s discussion. He did not ignore questions of civil justice so much as pass them off, relying on a division of labour between scholars of distributive justice and those of corrective and retributive justice. Those, like Rawls, engaged in the study of distributive justice could investigate topics such as the basic structure without any concern for the problems arising when that structure is not respected. Principles of justice to account for correction and punishment are required, no doubt; but they can, Rawls believed, be developed by specialists working in those fields. Without wanting to prejudge the question of whether these topics can be investigated in isolation, they can, at least, be investigated on Rawls’s model; he is quite explicit that they require attention.

However, the approach meant that the very hardest questions raised in civil justice were left without an intellectual home. A central problem in the civil justice sphere, I will claim, is deciding who should get justice (= reparation, compensation, correction for wrongs done to them) when not everyone can. This is not really a problem about correction: it is about how to choose amongst potentially sound corrective claims. Yet it is not easy to see it as a problem of distribution—what are we distributing? Correction, if anything. And is that really a distribuendum?—and impossible to see it at all in the world of strict compliance. This cocktail of both distributive and corrective justice is inevitably sidelined both by Rawls and Rawlsians, who are concerned with place of strict compliance, and by those working in partial compliance, who are chiefly concerned with correction and punishment.

### Two Flawed Principles

#### The Principles

**Market**

The problem of legal resources concerns the distribution of scarce goods; it is, on its face, a question of justice. However, that something is a question of justice does not mean that its object has special status, or that a particular distributive arrangement (or ‘pattern’ of distribution) is required. Fine flutes and vintage

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33 The notable exception is civil disobedience.

34 To choose just two examples in a vast literature, see Hart, 2008; Weinrib, 2012.

35 Compare Scheffler, 2015, p. 16: ‘If anything, it is a society’s legal system as a whole that belongs to the basic structure.’

36 An important exception is Breger, 1982, who attempts to deal with legal aid in a Rawlsian model.
champagne give rise to problems of justice but few think there is a specific pattern which their distribution ought to match. Instead, we use a procedure to distribute them; assuming the procedure is just, the outcome is just (or not unjust). The procedure to distribute most goods in Western democracies is a market. One possible principle to use to distribute legal resources is, therefore, 

*Market*: distribute legal resources according to who is willing and able to pay the most for them.

This is not a reformist proposal: it is the prima facie method of distributing many legal resources. Although it is a regulated market—there are professional qualifications, and so on—lawyers’ services are distributed by means of a market: shorn of complications, the best lawyers go to the highest bidders. Legal aid reforms have created exceptions to this basic position: a conflicting principle of distribution, something like ‘need’, is inserted into the legal system, such that an individual who cannot afford a lawyer but needs one is (in some systems, for some claims) given one (at the expense of the lawyer or the state, depending on the system). These reforms do nothing to undermine the basic position; they are an intervention in the market rather than a challenge to market distributions.

What about courts? They have been used, and are today used in England and Wales, as a means for the sovereign to make profits. Nevertheless, the distribution of access to courts is less obviously led by a market distribution. There are many byzantine rules on standing and jurisdiction and so forth; no one suggests that *Market* is the only principle in play. Even so, in some jurisdictions the use of filing fees to control the court’s docket does mean that those who are able to pay—or for whom the filing fees are a less substantial outlay, relative to their holdings—are the ones who gain access to courts. Other procedural rules suggest tacit support for a market distribution. Increasingly, parties are encouraged, e.g. through the law of costs, to settle their disputes out of court.\[^37\] In England, if you refuse to mediate and your claim is worth less than £250,000, you are in a worse position than if your claim is worth more than that. That is because, in the lexicon of the age, your refusal to mediate is more likely to be ‘disproportionate’.\[^38\] Whether a prospective litigant approached litigation in a ‘proportionate’ way depends on a fraction, with the financial value of the litigant’s case as the numerator and the costs of the legal system as the denominator: the lower the number, the more disproportionate you are. Both numbers are stacked to favour distribution of court time to higher net worth individuals. The more money you have, the more likely it is that your claim will have a

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\[^37\] This phenomenon has generated a vast literature: e.g. Fiss, 1984.

\[^38\] There are very similar problems with the balancing test of *Mathews v. Eldridge* 424 U.S. 319, 335 (1976), applied in *Turner v. Rogers* 131 S. Ct. 2507, 2517–2518 (2011).
high quantum: that is why the numerator is stacked in favour of the rich. The denominator is more complicated: the cost of the legal system is set by various decisions made in its design, and most Western systems are built for (and by) high net worth individuals. The systems are often very good; but they are also, by the same token, very expensive. The result is not only that the poorer you are, the more disproportionate you become; more fundamentally, it indirectly channels court time to those best able to pay for it.

I do not suggest that this is a sensible method of distribution; I will soon argue that it is not. But it has some attraction. Part of the reason is that some legal resources are also people: lawyers and judges (or, rather, their labour). People are not up for distribution—and so are not proper objects of justice. Insofar as their labour is up for distribution, it is sometimes thought that a just distribution can only be achieved through a market, any pattern of distribution requiring too great an interference with individual liberty. These are not trivial concerns and they deserve full answers. I do not want to deny, then, that there are some attractions to Market.

**Maximum Justice**

There are some obvious problems, too. The outcome of an allocative decision is unjust when the wrong kind of facts play a determinative role in the outcome of some procedure. If a politician wins an election because she is able to stuff the ballot box, that is unjust: elections are not supposed to test who is better able to cheat. If an athlete is selected for the Olympic team because they are friends with the coach, that is unjust: sports teams are not supposed to be selected on the basis of friendship networks. Many practical debates concern not this abstract claim but a disagreement over what the right kind of facts are. For example, Bernard Williams claimed that ‘the proper ground of distribution of medical care is ill health.’ Those who disagree with him are unlikely to object to the form of the argument; they claim that Williams is wrong to think that ill health is the only relevant fact when we are distributing medical care.

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39 There is a vast literature on the ‘vanishing civil trial’; it would be useful to know what the median estimated value of claims lodged is now, and how it compares to those in the past. That certain courts are booming—the Rolls Building, London’s commercial court, for example—indicates that only certain kinds of trial have vanished.

40 This statement requires some care. Rawls’s difference principle, for example, allows inequalities that favour those with certain talents; those talents are, for Rawls, ‘arbitrary from a moral point of view.’ The mere interrelation between arbitrary facts and outcomes does not, therefore, necessarily render those outcomes unjust: the outcomes are unjust unless justified in some other way (e.g. by the difference principle).

41 Williams, 1973, p. 240.
Alan Wertheimer asks:

Why should we allow the use of radically unequal legal resources to make the difference between a meager recovery and an adequate award, between liability and a favorable verdict?

This suggests an obvious, and important, problem for Market as a principle to determine the distribution of legal resources. The facts which determine who is supposed to win or lose a legal dispute are not facts about the parties’ antecedent wealth; in most disputes, antecedent wealth is an arbitrary fact. Part of the point of having a justice system is to make right, not might (or wealth), a controlling factor in disputes. Market permits a situation where people pay large sums of money for lawyers to secure their services. If the market for legal services is remotely efficient, it seems that the quality of the lawyer can affect the outcomes of cases; it follows that Market allows antecedent wealth to play an influential role in determining the outcomes of legal disputes. Concerns like these motivate Wertheimer’s remark, and Whitney Seymour’s protest that, if legal assistance is not available to the poor, ‘poverty, and not the judge, may be deciding the case.’

This shows that Market might have a disrupting influence on the outcomes of legal cases. While important, this is comparatively obvious. It is obvious that antecedent wealth should not determine whether someone wins or loses a legal dispute; it is also obvious that Market might lead to this happening. The challenge is—before we even come to consider practicalities—to propose a superior principle of justice. Wertheimer, one of the few to have done so, suggests that we should distribute legal resources so as to ‘maximize the attainment of just results’. There is, he says, a ‘prima facie case’ to move from Market if some alternative ‘would promote a higher probability of just results’. This counsels us to endorse

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42 Wertheimer, 1988, p. 303.
43 Seymour, 1961, p. 7. In Anthony Trollope’s The Last Chronicle of Barset (1867), Mr Crawley refuses to employ a lawyer, objecting:

‘I will have no one there paid by me to obstruct the course of justice or to hoodwink a jury ... [I]f I am dragged before that tribunal, an innocent man, and am falsely declared to be guilty, because I lack money to bribe a lawyer to speak for me, then the laws of this country deserve but little of that reverence which we are accustomed to pay to them.’

44 Wertheimer, 1988, p. 304.
Maximum Justice: distribute legal resources in whatever manner would maximise just results.

The Flaw

Both of these principles are flawed because they give bad answers to the crucial problem a system of civil justice faces. To understand the problem, consider the analogy with healthcare again. An easy problem of healthcare is: between a sick person and a healthy person, who should receive healthcare? The answer is, clearly, the sick person. But this is rarely a problem health systems face; no one sensible thinks that we should waste healthcare on the healthy. The hard question, instead, is: when allocating scarce healthcare between two people who need it, what factors should determine who gets treated? Should the fact that one individual can pay make a difference? What if one person became ill through their own voluntary actions, as where they get cancer from smoking or heart disease from their obesity. These questions are not easy and are at the core of any mature discussion of healthcare reform.

In the legal context, the analogous question arises when a group of individuals have claims of justice, claims which are usually for compensation after a wrong is committed. Everyone in this group, suppose, has a claim of justice, to have their wrong repaired. Absent a drastic change in the background conditions of society, no distribution of legal resources will ensure that all such claims are vindicated: some wrongdoers will be unaware that they have committed wrongs, others will refuse to repair those they have committed; there is not the time nor money to hear all of these claims. It follows that the most important question for any system of civil justice is: which victims of injustice should get reparation?

If some arrangements are unjust, as where only the very rich get justice, this shows (perhaps a little paradoxically) that injustice might be done through justice being done.

To see how this problem lies beneath most major policy debates—and to see why Market and Maximise Justice give flawed responses—consider court fees.

46 I am cheating a little here: this claims is a tautology because the ‘waste’ of healthcare is, necessarily, a waste. There are difficult question of allocation between the healthy and the sick: should we spend more on lung cancer patients or the education of smokers? To make my claims, all I need is the tautology.

47 Not every claim of justice arises out of a wrong, nor is every claim of justice a claim for reparation: the law of unjust enrichment is the most obvious exception to these general rules. This knotty qualification made, I will set it to one side from now.

48 A similar problem is faced in the criminal domain, where the relevant question is: given that some people will be victims of injustices, who should they be?
The introduction of court fees does not, on its face, make court decisions less likely to be justice-tracking: if courts have a relatively fixed capacity to hear cases, we can assume that the introduction of a fee scheme will not affect the rate of injustice done in court. The introduction of fees is, however, an indirect method of controlling access to courts: only those who can afford the fees can get into court. This will prejudice those of lower incomes. One effect of court fees is, therefore, that those with money have a better chance of getting justice than those without. Suppose that court fees were prohibitively high and there were no other ways of forcing wrongdoers to account: this might lead to greater levels of injustice in the first instance (as the unscrupulous know they can act with impunity); it also means that only the rich will get justice.

*Market* will mean that, roughly speaking, when only some victims of injustice can get justice, those able to pay more for it will be more likely to get it. That is the situation mocked in the commonplace complaint that justice is only for the rich. It is clear, then, that—absent market intervention—*Market* will result in injustice. It is harder to know whether *Maximise Justice* will lead to injustice in this distinctive way, injustice through justice being done. That is because the ideal embedded is not easy to parse. How should we go about maximising justice? Justice is a norm, not an object of distribution. For its maximising to be an intelligible goal, we would have to be able to say that one arrangement brings about *more* justice than another. There would have to be some way of individuating claims of justice, or injustices, and making the token instances commensurable. Does a world with one thousand individuals unable to vindicate their rights under their employment contracts, but where one victim of a rape is able to bring a claim, have ‘more justice’ than a world where the thousand are empowered and the one is not? The question may sound offensive—trading injustice off in this manner is highly unattractive. It is more than this, though: it is unclear the question even *makes sense*.

For the purposes of compensation claims, the legal system places a notional price on all injustices. There are set figures for (say) the loss of a thumb or a leg. We might try to build on this idea, to quantify the scale of a particular injustice. But this would have extremely unattractive implications. Suppose that there is a breach of contract case worth $1 million and an employment tribunal dispute worth $5,000. The plaintiff in the first case is a rich investment banker who was denied a bonus; the plaintiff in the second case is an African American secretary dismissed on the grounds of her race. Is the wrong in the first case really *two thousand times* as bad as the wrong in the first case? Can a maximisation principle avoid saying that, in principle, most legal resources should go to the banker, and those like the banker? A maximisation principle risks recreating the flaws of *Market* indirectly: the claims of the rich—who, owning more, are more likely to suffer wrongs which sound in large sums of money—will crowd out
those of the poor. In the United Kingdom, something like this already happens: claims valued at less than £250,000 must justify their decision not to mediate, while those valued at more than that need not. Whatever the precise approach taken, maximising principles will always struggle to account for the fact that it does not only matter how much people have; it also matters who has it.

If I am right, it follows that we need a new principle to determine the just distribution of legal resources. The principle must attend to the central problem in this domain, of how to ensure that there is justice in the distribution of those who get justice. In the next section, I propose and develop one possibility.

Equal Opportunities for Justice

Opportunities

Every individual in society can suffer an injustice at the hands of another individual. Anyone can be run over by a negligent driver, anyone in employment can be wrongfully fired from their job, and so on. Different individuals, as a matter of fact, have different chances of getting justice, should they suffer an injustice. We all have some intuitive familiarity with the idea: popular culture has numerous examples of plucky victims overcoming the odds to secure justice in their case. These works trade on a notion that the opportunity certain individuals have of getting justice can be different from the opportunity others have. Erin Brockovich’s would have been a less compelling story had she been the wealthy partner of a law-firm, rather than a legal secretary: she would not have overcome the odds. We can talk, therefore, of the opportunity individuals have of getting justice.

The concept is rough-and-ready and requires closer analysis if it is to bear the load I claim for it here. We can, though, use pre-theoretical notion to explain a number of objections to the civil justice system—many of which have led to reform—in terms of an inequality in the justice system. One problem with high court fees and expensive lawyers is that justice will not be done in those cases where the victims of injustice are too poor to afford the costs. Another problem is that an exorbitantly priced legal system works only in the interests of the rich: there is an inequality between rich and poor in the opportunities these groups have of getting justice. No increase in the amount of justice done for the rich would erase the blot this inequality does to the legal system. It is not, in other words, merely an objection that not enough justice is being done: the objection is that the distribution of opportunities for justice is unjust.

http://www.cedr.com/solve/courtofappeal/.
Quantum and Comparison

These ideas have only been sketched in a hazy fashion. What more can be said to lend them some precision? Relative to certain criteria, we all have an equal opportunity for justice. A famous quip goes that: 'In England, justice is open to all, like the Ritz hotel.' Any statement of opportunities for justice should avoid formalism about opportunities: we are interested in the chance, in practice, of someone being able to get justice for an injustice done to them.

Some injustices are easier than others to repair. Medical negligence claims are often so factually complicated that victims of these wrongs require much greater resources than victims of intentional torts to vindicate their claims. Sometimes the state of scientific knowledge is such that the ascription of causal responsibility is impossible without further scientific research; this is the case, for example, with mesothelioma. A concern with distribution of opportunities for justice should not compare opportunities in these different fields. Our primary object of concern should be *intra*-injustice comparison, not *inter*-injustice comparison: the thrust of the objection to inequality in the justice system is that two individuals in relevantly similar situations should have the same opportunity for justice, not that two victims of vastly different wrongs should be treated the same. That said, although I will not pursue the idea in depth here, we should be alive to *inter*-injustice comparisons; many people already are in their criticisms of the legal system. Sometimes, certain classes of injustice are particularly hard to vindicate; sometimes these injustices are suffered more by particular classes of individuals. To choose a topical example, rich whites rarely suffer the injustice of being denied a vote through illegal measures to restrict access. If all victims of this injustice are functionally incapable of getting reparation, there is *intra*-injustice equality. Another objection (beyond the basic injustice) to this

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50 More well-known as an ideal is the Supreme Court of the United States’s maxim, ‘Equal Justice under Law.’ I have not discussed this here as I am not sure what it means. For discussion, see Luban, 1988, 252 et seq.

51 The source of this line is disputed. It is customary to attribute it to Mr (or Lord) Justice Matthew, but Lord Birkett said he had heard the same joke attributed to Lord Justice Bowen and Lord Justice Chitty: Jackson, 1961, p. 11. Less well-known is the earlier (very similar) quip of Horne Tooke (Kett, 1814, pp. 71–2). ‘Law,’ he said, ‘ought to be not a luxury for the rich, but a remedy to be easily, cheaply and speedily obtained by the poor.’ Some spoke up. English courts of justice are open to all without distinction, they said. ‘And so,’ Tooke replied, ‘is the London Tavern—to such as can afford to pay for their entertainment.’

52 There is some analogy here with Rawls’s concept of ‘noncomparing groups’: Rawls, 1999, p. 470.
state of affairs is that some people have a better chance of repairing the wrongs they suffer, such as violations of property rights or contract rights; these, not coincidentally, are wrongs the more advantaged are more likely to suffer. This suggests that *inter*-injustice comparison can be valuable.

Although we should be careful to eschew specious precision, these chances of justice are, in principle, capable of quantification. Lawyers often advise clients on their chance of succeeding at trial: when the client has a cast iron case, the chance is never going to be 100% because of litigation risk. It is intelligible to say that some people have a good chance of getting justice and others a much worse chance. I know a number of lawyers, including those who work in aviation law; I therefore have a better shot than most of getting justice for the trivial harms airlines can inflict through delay and so on. I am, for example, usually one of the only ones to claim my meal vouchers when there are long flight delays. All this suggests some intuitive grasp of the idea I have in mind. We can ask, then, for the same wrong, what the chances are of different individuals getting justice. That these matters can sensibly be quantified means ‘the opportunity for justice’ has an advantage over ‘justice’: opportunities are commensurable and, so, capable of intelligible comparison. This overcomes the unintelligibility objection to maximising justice.

**Opportunities and Resources**

Sometimes the amount you get of one good partly determines whether you get another good (or or how much of it you get). When this is the case, the distributive arrangements of each good are *interdependent*. The distribution of legal resources is, on this terminology, interdependent with the distribution of opportunities for justice: as things are, any attempt to adjust the distribution of one will entail or require an adjustment in the other.

The interdependence of distributions is not always a problem. Perhaps one of the goods ought to be distributed so as to ensure (or give us a shot at ensuring) that the other distribution is just. The first distribution thus becomes part of a procedure for reaching (or constituting) a just outcome in the second.\(^{53}\) Suppose that you and I are competing for the final place in the Olympic running team. The good, the spot on the team, is scarce, so the coaches face a problem of justice: to whom should the spot be distributed? Our athletics federation owns our gym (and there are no other gyms in our small country). The athletics federation might distribute the use of gym equipment in a way

\(^{53}\) I here conflate Rawls's distinction between perfect and pure procedural justice (Rawls, 1999, p. 74): in perfect procedural justice, the procedure reaches the just outcome; in pure procedural justice, it constitutes it.
that will lead to the best athlete being picked for the team. The just distribution of gym equipment would, in that way, help ensure the just distribution of places on the Olympic team. When a just distribution of one good helps ensure (or is consistent with) a just distribution of another good, we can say that the distributions interrelate harmoniously.

The distribution of opportunities for justice is determined, as I have said, by the arrangement of legal resources. If we suppose, for now, that these distributions interrelate harmoniously, we might say that justice is achieved in the distribution of opportunities for justice whenever there is a just distribution of legal resources; or we could say the opposite, that the just distribution of legal resources is achieved whenever there is a just distribution of opportunities for justice. In principle, if we were to discover the just distribution in one sphere, we could deduce the just distribution in the other.

Not all distributions interrelate harmoniously. Recall our Olympic competition. Suppose that I bought the running machine. I might rather have it all for myself and not let you use it. There is some justice in that: people should, special circumstances apart, be able to use their own property however they wish. But it will put you at a disadvantage in our competition for the slot on the running team. You might be a better athlete; if you got on the team, you might have a better chance of getting a medal. If so, there is an injustice in me getting the final slot on the team. It seems that the distribution of the running machine will support a just allocation of the final slot in the Olympic team only if my property rights are interfered with. Perhaps the government will pass a law to temporarily expropriate my property rights, forcing me to share the running machine with you. But that would be unjust, too. Sometimes, then, there can be conflicts of justice—justice in one distribution undermines justice in another. The just distribution of legal resources may, in this way, be in tension with the just distribution of opportunities for justice: allowing people to sell their labour in a market upsets a just distribution of opportunities for justice; but, many people think, justice does support the ability of individual to sell their labour in a market. If so, we will not be able to achieve perfect justice.

What should we do, in light of this? If my remarks about these spheres not being in harmony are rejected, there is no problem with starting there: once we discover the just distribution of opportunities for justice, whatever the distribution of legal resources which achieves that is, it will be just. If these spheres are not in harmony, there is some reason to think that opportunities for justice deserve priority in our thought over legal resources. Justice is the basic concern of the legal system; legal resources are instruments to achieve that. If we are to compromise on justice in one sphere, it should be in legal resources.
Principles of Distribution

What’s Wrong with Inequality?

A particular good, Michael Walzer writes, is ‘dominant if the individuals who have it, because they have it, can command a wide range of other goods.’ Opportunities for justice are not dominant in the fullest sense of the word: the mere opportunity does not, eo ipso, give individuals further goods. It is, however, conditionally valuable. This means that inequalities, or gross inequalities, can be unjust for quite familiar reasons. The just distribution of one good might be affected, as I have said, by its effect on the distribution of some other good. Part of the reason why an unequal distribution of political power is unjust is that an inequality in this domain allows some individuals to write laws which benefit them—tax breaks for the rich, religious exemptions for the privileged, and so on. We can tell a similar story about law.

Injustice often disrupts a pattern of entitlements. When you steal from me, your holdings are unjustly increased and mine are unjustly decreased. Part of the point of the justice system is the correction of these wrongs: as Aristotle noticed, there is a particular form of justice, corrective justice, ‘which plays a rectifying part in transactions between man and man.’ This is supposed to restore the parties to equality, usually by means of compensatory damages. James Nickel puts this line of thought nicely when he writes that

compensation protects just distributions ... by undoing, insofar as possible, actions that disturb such distributions ... [J]ustice is a matter of people having those things that they deserve, are entitled to, or otherwise ought to have, and compensation serves justice by preventing and undoing actions that would prevent people from having these things.

The distribution of opportunities for justice can, therefore, affect the amount of holdings individuals have. Those who are able to get justice will be better able to preserve their holdings; those unable to get justice will not. Here the interrelation becomes crucial. Insofar as there is pre-existing injustice in the distribution of holdings—as, uncontroversially, there is in today’s world—inequality

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55 Not always, and not always in the same way. Some injustices simply augment your holdings, as where you make a profit by harmlessly infringing my rights: e.g. Edwards v. Lee’s Administrators, 96 S.W. 3d 1028 (Kentucky C.A., 1936). Others merely diminish mine, as where you negligently injure me and my treatment occasions costs.
57 See Aristotle, 350 BC, 1132a30 on ‘arithmetical’ equality.
58 Nickel, 1976, 2, pp. 381–82.
in the distribution of opportunities for justice will entrench and preserve the pre-existing injustice. This is one reason why inequality in opportunities for justice is unjust. It does not, however, show that equality is a good distribution.

Two Arguments for Equality

In principle, a justice system should repair all wrongs; our question is what to do when we cannot repair them all. I will here propose two possible arguments for an egalitarian distribution of opportunities for justice. Both are partisan, depending upon deeper political principles. The first arises from John Rawls’s first principle of justice, lexically prior (in his theory) to all other considerations, which held that

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

The core of the first argument is: if you have an unequal distribution of opportunities for justice, the first principle of justice is not met. Rawls himself would, it seems, reject the first argument. He distinguished between liberty and the value of liberty to a particular individual. If one is unable ‘to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally’ this affects ‘the worth of liberty, the value to individuals of the rights that the first principle defines.’ Inequality in the value to individuals of their liberties are justified, for Rawls, by the difference principle: individuals would be worse off in absolute terms were it not for these inequalities. The card-carrying Rawlsian might, therefore, say that inequality in opportunities for justice are just insofar as they satisfy this principle.

Perhaps Rawls was too hasty in conflating all background conditions determining the value of liberties. The reparative structure of the justice system is concerned, in a manner other background conditions on the value of liberties

59 Someone might say, in a familiar fashion (Frankfurt, 1988, pp. 134–35), ‘it does not matter that people have an equal opportunity; it matters that they have enough.’ This claim requires fuller consideration; one problem, though, is that in an adversarial system, like in a motor race, enough is an interrelated issue. If you have an IndyCar and I have a Reliant Robin, the lack of equality means I do not have enough for a fair race; if you have Johnny Cochrane and I have a 1L, I do not have enough for a fair fight.

60 Rawls, 1999, p. 220.

61 A similar account could be developed for any other political theory which endorses a similar idea of equal liberty: Kant, 1797, 6:237; Hart, 1955, etc.

62 Some would simply reject Rawls’s scheme (or the first principle): I want to set those arguments to one side; I cannot defend Rawls here.

are not, with upholding the liberties themselves. While I have already stressed the need to distinguish rights from remedies, there is undoubtedly an intimate connection between the right to some thing and the mechanism of protecting or repairing that right. For example, Ernest Weinrib writes that

When the defendant ... breaches a duty correlative to the plaintiff’s right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiff’s right. The defendant’s breach of the duty not to interfere with the embodiment of the plaintiff’s right does not, of course, bring the duty to an end, for if it did, the duty would—absurdly—be discharged by its breach. With the materialization of wrongful injury, the only way the defendant can discharge his or her obligation respecting the plaintiff’s right is to undo the effects of the breach of duty. 64

There are numerous difficulties with the precise account. Yet if something like it is true—and, in one form or another, it is widely endorsed 65—we might carve off some set of background conditions on the value of a liberty—the conditions which aim to protect against infringements of a liberty—and parcel them into Rawls’s first principle. Equal basic liberties are only truly equal if, this account holds, there is some mechanism to protect against, or repair, their violation. If so, equality in the distribution of opportunities for justice means that these equal rights are of equal value to individuals.

The second argument requires a little more by way of introduction. Consider, to start things off, what, precisely, would be wrong with a world without law. Thomas Hobbes famously warned that ‘[t]he life of man’ in a state of nature could be ‘solitary, poore, nasty, brutish, and short.’ 66 We should, he claimed, set up a state to escape that predicament. One particular concern with the state of nature is that might would trump right. Without a legal system, power relations can go entirely unchecked; the powerful are able to do what they want, regardless of the justification of their actions. If someone is wronged by another who has more power, there is nothing the wronged party can do to get justice. At a more abstract level, the problem is this. In a world without law, there is no guarantee that distributions will be made on the basis of norms of justice; it might turn out that there is justice, but it would be a happy accident. People might, instead, trick or steal their way to wealth or exclude others from

64 Weinrib, 2012, p. 135.
65 Nickel, 1976, 2, pp. 381–82; Ripstein, 2009; Gardner, 2011.
66 Hobbes, 1651, p. 193. Although it is customary to say this was Hobbes’ view of what the state of nature would be like, it is ‘a theoretical absolute which may be approached but never reached.’ Malcolm, 2002, p. 452.
resources for no good reason.

The principal obligation of a state has often been thought to be the protection from external threats. Adam Smith, for example, wrote that

The first duty of the sovereign [is of] protecting the society from the violence and invasion of other independent societies.  

He added that

The second duty of the sovereign [is] of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it.  

This gets to our concern. If a state is to escape the problem of a world without law, it must aim to ensure that distributions of goods are responsive to the underlying reasons of justice that hold in one area or another. To do so, Smith reasoned, the state must establish institutions for the ‘exact administration of justice’. The point is: a principal justification of the state is the benefit of living under laws; this benefit is enjoyed by all in the state. This, it will become clear, is my minor premiss. To develop my major premiss, let me change tack. Suppose, Tim Scanlon writes,  

that the members of a group have equal claims to a certain form of benefit, such as the wealth produced by their combined efforts. If a distributive procedure is supposed to be responsive to these claims, then it will be unfair if (absent some special reason) it gives some of these people a higher level of benefit than others. This provides, in schematic form, an argument which leads us to a prima facie case for equality in a certain dimension of benefit.  

This suggests a principle of

Equal Obligation to Benefit: If each member of a group has the same claim that some agent provide it with a certain benefit, and if that agent is obligated to respond to all of these claims, then that agent must, absent special justification, provide each member of the group with the same level of benefit.

These two lines of thought are easily drawn together. One benefit individuals get from living under a justice system is the opportunity of justice if an injustice is committed. The state offers its coercive apparatus to citizens to al-

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68 Smith, 1776, p. 462.
69 Smith, 1776, p. 462.
low them to claim compensation they are owed, protections to which they are entitled, and so on. This benefit is generated—in the form it takes, i.e. through Government institutions—by the entry of all into civil society. It is, in that sense, a benefit all members of society create through their participation in civil society. If the *Equal Obligation to Benefit* principle is sound, we can infer a principle that there should be an equal distribution of opportunities for justice.

**Developing Equal Opportunity**

In his statement of fair equality of opportunity, John Rawls claimed that,

> assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system.\(^7\)

The principle demonstrates that the concept of equal opportunity must be indexed to particular attributes of individuals. Rawls, for example, wants two people to have an equal chance of success only if they have the same talent and tenacity; those with greater ability can justifiably have greater opportunities. It may be that, in a similar spirit, brute inequality of opportunity for justice is only unjust if the inequality arises because of certain facts. We should ask, therefore, which (if any) factors can disrupt individuals’ factual opportunities for justice without undermining the egalitarian spirit of equal opportunity for justice.\(^7\)

For any person, whether they get justice for some individual wrong will depend on a number of factors: their wealth, their time, their tenacity, their luck, and so on. The unequal chance of justice seems unjust when it is explicable solely on the basis of an individual’s class or connections. In a corrupt legal system, the judiciary might select cases to hear based on whether the litigants are their friends or foes, or whether they are upper- or lower-class. Yet we do not have an equal opportunity to get justice when your connections make you better able to get it; intuitively, too, this inequality is unjust. Other inequalities seem quite different. If some people do better in the justice system merely because they are willing to stick to their guns, dedicate the time required to succeed, and so on, that seems less problematic. This suggests that we should aim, as in Rawls’s principle, to equalise the opportunities only of those with ‘the same willingness to pursue it.’\(^7\) If we combine this with the earlier point,

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\(^7\) Rawls, 1999, p. 63; see, further, Rawls, 2001, §13.2.

\(^7\) One could ask, instead, whether all inequalities are unjust; that question is isomorphic with mine here.

\(^7\) Some caution is required in calculating individual tenacity: it is easier for those with wealth
that equality should be relative to the same claim in justice, we can derive the principle of

*Equal Opportunity for Justice*: those who have the same claim in justice, and have the same willingness to pursue it, should have the same prospects of successfully vindicating it.

Beyond the two somewhat esoteric arguments for this principle, outlined above, *Equal Opportunity for Justice* has quite some intuitive support. It can, for example, explain the intuitive opposition many have to *Market*: objections seem to be, as I have said, to the inequality in treatment of individuals that principle permit. *Equal Opportunity for Justice* also provides a good explanation of numerous reforms to the civil justice system. Court fee waivers and legal aid schemes, as well as Citizens’ Advice Bureaux and online information about individual rights, are readily explicable as an attempt to fulfil its promise. Finally, it may also be what many already have in mind when they invoke the ideal of ‘equal justice’ or ‘equal justice under laws.

That said, the principle has radical implications; if too radical, these implications may lead us to reject the principle itself. The difficult question is whether individual wealth should be allowed to upset equality of opportunity; and, if so, when (and by how much). It is hard, as I have explained, to explain antipathy to *Market* and *Maximise Justice* except by pointing to unease with individual wealth disrupting the ideal of *Equal Opportunity for Justice*; this suggests that my proposed principle is an advance on any other principle in play, and that unfettered freedom for money to disrupt equality is not acceptable. There are, however, good reasons to think that the existence of a market in legal services plays a role in increasing efficiency—and perhaps thereby increasing the amount of justice available. We here face a common problem with egalitarian principles, which seem to suppose that it is better for all to have the same amount even if that means there is less for everyone. Further, many people—me included—will find it hard to shake the idea that individuals should be permitted to trade their prospects of justice off against other goods. Suppose that you and I both earn the same amount of money and you choose to spend your money on legal insurance; I prefer to spend it on expensive cars. Is the resultant movement from *Equal Opportunity for Justice* unjust? It does not look like it to me.

and leisure to dedicate their time to legal claims; wealth should not be allowed an indirect influence on opportunity in this way unless we think it should be allowed a direct influence. Further, the concept of ‘tenacity’ will need close attention: in particular, should it index to individual abilities?

74 See above, n 50.
And Now?

*Equal Opportunity for Justice* is, I believe, an advance on other principles in the literature. I have already suggested, though, that it is unlikely to be the last word on civil justice. I look forward to discussing with you both of these claims—and hearing your thoughts on how it might be improved upon.
References


