

EQUALITY, PROCEDURAL JUSTICE, AND THE WORLD TRADE ORGANIZATION

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I. Introduction

How can a moral concern for equality be implemented within international institutions? After several years of debate, legal theorists and political philosophers have moved toward the view that equality at least sometimes matters within international politics.¹ Plenty of disagreement remains, but for this article we will take for granted that equality is a political concern within at least some international institutions.² With surprisingly few exceptions, this is

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¹ Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005). This provocative piece sparked academic discussion of global justice. For early and influential criticisms of Nagel, see A.J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFF. 1 (2006); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147 (2006). See also Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 PHIL. & PUB. AFF. 318 (2007); Eric Cavallero, *Coercion, Inequality and the International Property Regime*, 18 J. POL. PHIL. 16 (2010); Andreas Follesdal, *The Distributive Justice of a Global Basic Structure: A Category Mistake?*, 10 PHIL. POL. & ECON. 46 (2011).

² For those who deny that equality ever matters beyond the state, a position we call statism, see DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* (2007); Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3 (2007); Joseph Heath, *Rawls on Global Distributive Justice: A Defense*, in *GLOBAL JUSTICE, GLOBAL INSTITUTIONS* 193 (Daniel Weinstock ed., 2005); Samuel Freeman, *The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice*, 23 SOC. PHIL. & POL'Y 29 (2006); JOHN RAWLS, *THE LAW OF PEOPLES* (1999); Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257 (2002).

where the debate has ended.³ Few scholars have considered how the political concern for equality might differ when applied in international rather than domestic settings, or how different international institutions might require different kinds of egalitarian principles.⁴

The lack of sustained attention is remarkable because the legal and institutional implementation of a moral concern for equality would, itself, involve a morally complicated process. At least two reasons can account for this apparent implementation difficulty. First, equality is a relational rather than a simple moral good.⁵ A moral good is relational if the presence or the absence of the good can only be understood by assessing allocation of some resource among multiple persons. Equality is present when the allocation of a resource across some set of persons provides each with a relevantly similar share. In this way, equality differs from goods that may be understood non-relationally. By hypothesis, whether a person is healthy or sick is (at least in the first instance) a non-relational fact, but whether a person is rich or poor is irreducibly relational. Equality's relational aspect suggests that equality must be understood from the point of view of legal and political institutions, rather than from a first-personal moral point of view.

Second, identifying the equality of persons as morally relevant is important for the design of legal institutions, but also significantly indeterminate.⁶ Not only does it fail to provide any

³ For notable exceptions, see Leif Wenar, *Property Rights and the Resource Curse*, 36 PHIL. & PUB. AFF. 2 (2008); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2008).

⁴ *But see* RICHARD MILLER, *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER* (2010); AARON JAMES, *FAIRNESS IN PRACTICE: A SOCIAL CONTRACT FOR THE GLOBAL ECONOMY* (2012); Pogge, *supra* note 3; Wenar, *supra* note 3.

⁵ The *locus classicus* on this point is THOMAS NAGEL, *MORTAL QUESTIONS* 106-27 (1979). Nagel argues that equality is not involved in raising the absolute level of goods a person enjoys, but in reducing the difference between those who have more and those who have less. *Id.* Raising a person's absolute level may sometimes be a means of promoting equality, but these issues are conceptually distinct. *Id.* See also Derek Parfit, *Equality and Priority*, 10 *RATIO* 202 (1997) (discussing more recent treatment of these issues).

⁶ For a relatively expansive view of the role of global justice, see Pogge,

information about how to achieve the desired egalitarian distribution, but it also fails to reveal what would even count as achieving it. Does equality require equal possession of some resource, or an equal share of some benefit, or an equal status or standing? Alternatively, should egalitarian justice be aimed at securing agents with some type of equal access to power or decision-making ability? In short, even if the hard-won philosophical consensus that equality somehow matters within international institutions is accepted, a range of normative philosophical questions remain before the task of facilitating justice can be handed over entirely to policy practitioners. Although there is a growing literature on global justice,⁷ there may be no single principle of justice that can be applied to every international institution. Instead, there are a variety of localized facts about how particular international legal and political institutions can be structured justly.

In this paper, we will argue that there is no easy way to confidently shift an egalitarian principle from one institutional context to another. This is because there is no uniform basis for the moral significance of equality. On received egalitarian accounts, there is a plurality of considerations that support the moral significance of equality, and these considerations may apply differently in different institutional settings.⁸ Even if some indeterminacy in application is inevitable, it might be hoped that we can say more than just that equality does matter within some international institutions. The purpose of this paper is to seek out some more specific institutional guidance. Doing so requires drawing from literature in economics and political science to understand how inequality is connected to morally undesirable

supra note 3. For a more limited view of the role of global justice, see Mathias Risse, *How Does the Global Order Harm the Poor*, 33 PHIL. & PUB. AFF. 349 (2005). While Pogge believes that very serious reforms would be required to prevent the global economic order from harming the poor, Risse is skeptical that Pogge's counterfactual claims necessary to proving harms can be substantiated. *Id.*

⁷ See *supra* notes 2-4.

⁸ See, e.g., T.M. SCANLON, THE DIFFICULTY OF TOLERANCE 202-18 (2003); CHARLES BEITZ, POLITICAL EQUALITY (1989); Martin O'Neill, *What Should Egalitarians Believe?*, 36 PHIL. & PUB. AFF. 119 (2008).

conditions within international institutions.

Our theoretical thesis is that if an international institution creates a risk of moral wrongdoing, such as coercion or deception, then procedures ought to be implemented to protect agents from these wrongs. Egalitarian procedures can help offer such protection. Because this proposal treats equality as a valuable means to preventing wrong actions, we will describe it as an *instrumentalist egalitarian* account. This account can help illuminate how international institutions, like the World Trade Organization (WTO) can be reformed to promote the type of equality required by justice. To illustrate this, we propose a series of informal proceduralist reforms for the WTO, which we believe would capture the normative benefits described in our theory. By so doing, we illustrate how a localized theory of global justice might be developed and applied in a particular international legal context.

We will proceed in the following way. First, in Part II we describe equality as a norm of distributive justice within domestic political contexts. We consider and reject the possibility of exporting domestic egalitarian principles to international legal institutions. Second, in Part III we assemble materials for a theory of international egalitarian justice. We hold that the variety of international contexts favors a procedural rather than substantive approach. Third, in Part IV we develop a set of procedural egalitarian norms for satisfying justice within the WTO. Finally, in Part V we consider three policy level reforms that would help to secure the procedural protections required by justice. Taken together, we hope that this argument contributes to the theorization of global justice and helps to demonstrate the possibility of building a bridge from egalitarian principles to concrete reforms in international institutions.

II. Domestic Egalitarianism

In this part we will first provide an overview of recent developments with the literature on egalitarian justice at the level of domestic political societies. Recent debate has centrally involved

two kinds of equality-advancing proposals, one stemming from *luck egalitarianism*, and the other from what might be termed the *democratic equality thesis*. We describe how these proposals provide different grounds for including equality among the requirements of domestic justice. Second, we describe a simple strategy for deriving an egalitarian principle of justice for international institutions. That is, a strategy according to which the same principle or principles of egalitarian justice that are supported by one's preferred theory of domestic justice are also supposed to be part of justice within some international domain or set of multinational institutions. Because this strategy redeploys the same principles of justice from the domestic to the international setting, we call it the *exporting strategy*. Finally, we suggest reasons for skepticism about the exporting strategy's prospects for successfully developing a theory of international justice. We conclude this section by delineating between procedural and substantive egalitarian theories.

A. *Egalitarianism in Domestic Political Institutions*

Many philosophers and legal scholars accept some form of egalitarianism as part of a domestic theory of justice.⁹ By including it among the prescriptions of a "domestic theory of justice," we mean to suggest that the securing of equality among citizens is an appropriate use for the coercive political force of the state.¹⁰ In

⁹ See *infra* text accompanying notes 12-17. For recent examples from legal scholarship, see William S. Koski & Rob Reich, *When Adequate Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006); Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017 (2006); Greg M. Nielsen, *For and Against John Rawls: Reflections on South-North Citizenship*, 17 FLA. J. INT'L L. 479 (2005).

¹⁰ JOHN RAWLS, A THEORY OF JUSTICE 8-9 (1971). Rawls famously supposed justice to the "first virtue" of social institutions, he wrote:

A conception of justice, then, is to be regarded as providing in the first instance of a standard whereby the distributive aspects of the basic structure of society are to be assessed A complete conception defining principles for all the virtues of the

general, justice is characterized by a set of political rights distinguishable from other moral claims by the fact that their coercive enforcement is either morally required, or at least morally permissible.¹¹ A domestic theory of justice is egalitarian if it involves a specific, politically enforceable concern for securing equality of some good among citizens. Philosophers have proposed a variety of possible goods whose equal distribution might be a source of moral concern. These include, for example, equality in resources,¹² equality in capabilities,¹³ equality in opportunity,¹⁴ equality in welfare or well-being,¹⁵ equality in freedom,¹⁶ or equality in access to political power.¹⁷ We will not concern ourselves here with addressing the correct currency of egalitarianism—that is, the answer to the question, “Equality of what?”¹⁸ Nor will we address first-order moral theories that attribute a kind of equality to persons—for example, equal moral status or significance—but do not involve specifically egalitarian commitments within the theory of political justice. Our purpose in this section is instead to describe two types of grounds for a norm of equality within the theory of

basic structure, together with their respective weights when they conflict, is more than a conception of justice; it is a social ideal. The principles of justice are but a part, although perhaps the most important part, of such a conception.

Id.

¹¹ See Jeremy Waldron, *The Primacy of Justice*, 9 LEGAL THEORY 269 (2003).

¹² See, e.g., Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981).

¹³ See, e.g., AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

¹⁴ See, e.g., RAWLS, *supra* note 10; Richard Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL. STUD. 77 (1999).

¹⁵ See, e.g., ROBERT GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (1995); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

¹⁶ See, e.g., Hillel Steiner, *The Natural Right to Equal Freedom*, 83 MIND 194 (1974).

¹⁷ See, e.g., David Estlund, *Political Quality*, 17 SOC. PHIL. & POL'Y 127 (2000); Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999).

¹⁸ Amartya Sen, *Equality of What?*, in *THE TANNER LECTURE ON HUMAN VALUES* 198 (Sterling McMurrin ed., 1980).

justice. Clarifying the potential bases for egalitarian theories will be important to investigating how egalitarian theories might be subsequently applied to international legal institutions, including the WTO.

Beginning with Rawls's acclaimed *A Theory of Justice*, egalitarian-minded political philosophers have located the basis for equality primarily through one of two basic strategies, which we will identify as *luck-egalitarian* and *democratic equality*.¹⁹ Interpreters in both traditions have traced both strategies to Rawls's book, although such findings have been controversial.²⁰ We will describe them in turn.

Luck egalitarians distinguish between two kinds of fortune: option luck and brute luck.²¹ Option luck involves outcomes that result from deliberate, voluntary choices in which the results of the choices are known to be partly determined by chance.²² When someone gambles on a game of dice, their losing may be bad luck, but it is bad luck of their own making. Brute luck involves outcomes that are in no respect the result of deliberate choices.²³ If someone contracts a rare disease, they suffer from bad brute luck, even though they took no action to occasion incurring the risk of this outcome. The luck egalitarian view holds that inequalities that result from bad brute luck are unfair.²⁴ If one citizen of a political community has much less than another, but to no fault of her own, this seems

¹⁹ See RAWLS, *supra* note 10. The term "luck egalitarian" was coined by Anderson, *supra* note 17, whose contrasting view presents an early version of the democratic equality thesis.

²⁰ See Norman Daniels, *Democratic Equality: Rawls's Complex Egalitarianism*, in THE CAMBRIDGE COMPANION TO RAWLS 241 (Samuel Freeman ed., 2003); S. L. HURLEY, JUSTICE, LUCK AND KNOWLEDGE (2003).

²¹ This distinction was originally formulated by Ronald Dworkin. For discussion, see RONALD DWORKIN, SOVEREIGN VIRTUE 73-77 (2000).

²² *Id.* at 73.

²³ *Id.*

²⁴ Discussions of luck egalitarianism include Richard Arneson, *Luck Egalitarianism: An Interpretation and Defense*, 32 PHIL. TOPICS 1 (2006); G.A. Cohen, *Luck and Equality: A Reply to Hurley*, 72 PHIL. & PHENOMENOLOGICAL RES. 439 (2006); ANDREW MASON, LEVELING THE PLAYING FIELD: THE IDEA OF EQUAL OPPORTUNITY AND ITS PLACE IN EGALITARIAN THOUGHT (2006).

intuitively unacceptable. Luck egalitarians rely on intuitions that recoil against disparities in health care, education or other goods when these disparities result from seemingly morally arbitrary facts: where a person was born, their race or gender, or the wealth of their family. It is wrong, according to luck egalitarianism, for some people to have more while others have less, but not for any reason connected to their own effort or desert. Such arbitrary inequalities constitute the essence of unfairness.²⁵ The luck egalitarian prescription, in turn, is to neutralize the effects of brute luck, while allowing the effects of option luck. Because the consequences of bad brute luck can be difficult for single individuals to correct (think of the effects of an unforeseeable natural disaster), only the political state is equipped to address the disparities of bad luck in a justice-satisfying way.

Although luck egalitarianism is still defended by some,²⁶ it is perhaps no longer the dominant expression of distributive justice within the philosophical literature. Luck egalitarianism seemed to some at once too concerned with the source of inequality, and insufficiently attentive to inequality's morally objectionable consequences. Even when inequalities result from option luck (that is, the voluntary choices of persons), they still might have consequences that were appropriate for public concern.²⁷ In addition, the conception of fairness crucial to the success of the luck egalitarian proposal seems open to objection. Luck egalitarianism supposes that any arbitrary (because unchosen) difference is objectionable on fairness grounds, but this use seems to demand more than can be given by a plausible theory of fairness.²⁸ It is not unfair for an athlete to win a race, even if she has unusual physical gifts which she did not deserve or choose.²⁹ Moreover, standards of fairness seem localized to particular domains and institutional

²⁵ For a sustained development of this view, see G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008).

²⁶ See *id.*

²⁷ See Anderson, *supra* note 17.

²⁸ This argument is developed by Susan Hurley. See HURLEY, *supra* note 20.

²⁹ See Samuel Scheffler, *What is Egalitarianism?*, 31 *PHIL. & PUB. AFF.* 5 (2003).

settings, and so it may be difficult to locate a fundamental norm of fairness as broadly applicable as that conception presupposed by luck egalitarian views.

Skepticisms of this sort have pressed distributive liberals into pursuing a conception of egalitarianism without so much normative machinery. What has emerged is the democratic equality thesis, which holds that liberal democracies should include provisions for social equality as a means to securing a kind of equality of citizenship.³⁰ Differences in access to wealth, education, or positions of prestige or political power might undermine the ability of some to participate as equals in a liberal democracy. However, liberal philosophy has long supposed that a democratic right to participate would be compromised if participation could not be carried out in an atmosphere of equality for all citizens.³¹ In other words, if some have superior rights to others in their control of state power, then the rights of those with less control would be violated by that very difference. Thus, equality (understood in terms of the allocation of political power) supplies a kind of precondition for democratic rights. In addition, democratic theorists have supposed that there are morally relevant goods associated with sustaining relationships of equality with other citizens.³² Relationships in which other citizens are respected as co-authors of the law can only be sustained in the presence of certain basic types of equality (the details of which have been tabled for present purposes).³³ The basic point is that the democratic equality thesis recommends modes of equality that will protect rights associated with democratic participation, or else sustain morally valuable political relationships within the democratic political community.

³⁰ See Samuel Scheffler, *Choice, Circumstance, and the Value of Equality*, 4 POL. PHIL. & ECON. 1 (2005). See also Anderson, *supra* note 17.

³¹ See generally RAWLS, *supra* note 10. See also Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989).

³² See, e.g., Scheffler, *supra* note 30. See also Scanlon, *supra* note 8; O'Neill, *supra* note 8.

³³ This idea of citizenships as legal "co-authorship" is from RAWLS, *The Idea of Public Reason Revisited*, in THE LAW OF PEOPLES 131, 152-56 (1999). See also John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

B. Exporting Domestic Theories to International Institutions

Luck egalitarianism and democratic equality are both theories that provide support for why equality should be included within a theory of justice. They leave open the question of exactly how an egalitarian principle ought to be formulated. Since the considerations that they identify as morally important differ, it would be natural to suppose that the specific egalitarian principles they would support would also differ in content and extension. In general, democratic equality might target a narrower range of inequalities which implicate political activity. Luck egalitarians might be more interested in a broad array of inequalities and focus instead on identifying facts about their causal history.³⁴ Nevertheless, luck egalitarians and democratic equality theorists may converge in their first-order political prescriptions. For example, Rawls's difference principle, according to which any departure from equality in primary goods should be to the advantage of the least well off, has been supported by both luck egalitarians and defenders of democratic equality.³⁵

Although the differing conceptions of egalitarian justice at the domestic level may thus recommend convergent political programs, there is a real question about how equality-based considerations can be transferred from the domestic to the international level. Because the grounds of equality are much better developed domestically than internationally, it would be helpful in the development of an international distributive theory if resources from domestic distributive justice could be fruitfully borrowed and reused. However, the forgoing discussion of luck egalitarianism and democratic equality has revealed that there are multiple, divergent

³⁴ Kok-Chor Tan, *The Boundary of Justice and the Justice of Boundaries: Defending Global Egalitarianism*, 19 CAN. J. L. & JURIS. 319 (2006). Extending the luck egalitarian intuition to the global setting, Tan writes, "[s]o if distributive justice is motivated by the need to mitigate the effects of contingencies that are 'arbitrary from a moral point of view' on people's life chances, this presents a consideration also for global distributive equality." *Id.* at 319.

³⁵ For a description of the continuing appeal of Rawls's theory of justice as fairness, see Paula Casal, *Is Sufficiency Enough?*, 117 ETHICS 296 (2007).

bases on which an egalitarian theory may be developed. It is, of course, far from obvious that any given explanation of the moral significance of equality will apply in any international context in the same way that it applies in a domestic context. How, for example, could one distinguish option luck from brute luck in institutions regulating international trade? Alternatively, what kind of relationships might count as morally valuable within international organizations in a way analogous to those of “citizen co-legislators” in a single political system?

Perhaps the simplest way of utilizing resources from domestic political theory to construct an international theory of justice would be to borrow them directly. Here is one strategy you might use to decide on a determinate egalitarian principle to apply to the international institution: determine what egalitarian principle or principles apply within the state, and then adopt those same principles for the international institution. We call this the *exporting strategy*. The exporting strategy recommends that if you believe equality matters within the WTO, and you believe that equality of opportunity should be promoted within the United States, then you should also favor adopting equality of opportunity as an egalitarian principle for the WTO. Whatever egalitarian principles our preferred domestic theory of justice recommends should simply be exported to all international environments in which equality is a political concern.

The exporting strategy has a simple appeal.³⁶ It reduces the question of what international egalitarian principles should be adopted to the question of what egalitarian principles should be adopted within the state. This is helpful because it allows us to answer an unfamiliar problem with the same solution already in hand from a more familiar problem. For the exporting strategy, there are two important questions: “When is equality a political concern?” and “What is the true egalitarian principle?” Once the master egalitarian principle is uncovered, all that is left to do is apply it to all institutions in which equality matters.

It should not be surprising, then, that much recent

³⁶ See generally DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* (2002).

argumentation about international egalitarianism has proceeded as if the exporting hypothesis is true.³⁷ For example, Thomas Nagel's near-canonical paper frames the issue as one of whether equality should matter internationally, as if the primary question for theories of global justice was to settle whether there was an analogy between the political state and the international political environment.³⁸ Nagel wonders, "[W]hat is the characteristic in virtue of which [institutions besides the state] create obligations of justice and presumptions in favor of equal consideration for all those individuals?"³⁹ The question of whether egalitarian norms apply outside the state presupposes we have a set of distributive principles already in hand, and that we must determine the range of their application.⁴⁰ But that is only true if the exporting strategy is correct—that is, if the same norms that apply in domestic law can be redeployed with minimal revision to domains governed by international legal bodies.

³⁷ See Pietro Maffettone, *The WTO and the Limits of Distributive Justice*, 35 PHIL. & SOC. CRITICISM 243 (2009); Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Competition*, 36 METAPHILOSOPHY 93 (2005); Darrel Moellendorf, *The World Trade Organization and Egalitarian Justice*, 36 METAPHILOSOPHY 145 (2005).

³⁸ Nagel, *supra* note 1.

³⁹ *Id.* at 142.

⁴⁰ In a passage that has provoked much subsequent literature, Nagel writes, "A sovereign state is not just a cooperative enterprise for mutual advantage. The societal rules determining its basic structure are coercively imposed: it is not a voluntary association. I submit that it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences—that creates the special presumption against arbitrary inequalities in our treatment by the system. *Id.* at 128-29."

Responses to Nagel include Julius, *supra* note 1; Cohen & Sabel, *supra* note 1; Abizadeh, *supra* note 1; Aaron James, *Distributive Justice Without Sovereign Rule: The Case of Trade*, 31 SOC. THEORY & PRAC. 533 (2005).

C. Why Exporting is Not Promising

Despite its intuitive appeal, the exporting strategy's elegance is too good to be true. Just because equality is a political concern within two different institutions, it does not follow that it will be a concern in the same way, or to the same extent. For example, it might be unfair for parents not to provide their children with equal opportunity, but it might not be unfair (or at least, less unfair) for different families to focus to varying degrees on using resources to enhance the opportunities their children enjoy. There may be some views, such as certain luck egalitarian views, that deny this.⁴¹ For example, if you believe that all humans are owed equality of opportunity with any other human, then the equality of opportunity principle will be exportable. But in this case, exporting is of no significance, since the principle applies globally in the first instance anyway.⁴²

Once the grounds (or considerations that favor adopting) of a given egalitarian principle are understood, then the exporting strategy begins to look less plausible. Suppose democratic equality theorists are right to say that cooperative relationships provide a basis for egalitarian obligations. If this is true, suppose that whenever cooperative relationships are present, equality is a concern among parties to the relationship. If A and B share a cooperative relation from which A benefits much more than B, assuming equal contributions, this inequality is morally concerning.⁴³ There is moral reason to avoid it. But to what degree should equality between A and B be promoted? The answer likely depends on the depth and importance of their cooperative relationship. If A and B share a limited business relationship or are members of the same club or political advocacy group, securing the conditions of their equality may not be very important at all.⁴⁴ If A and B share a marriage, their

⁴¹ See, e.g., Harry Brighouse & Adam Swift, *Equality, Priority, and Positional Goods*, 116 *ETHICS* 471 (2006).

⁴² This paragraph is informed by Scheffler, *supra* note 29.

⁴³ See Garrett Cullity, *Moral Free Riding*, 24 *PHIL. & PUB. AFF.* 3, 4 (1995).

⁴⁴ Charles Beitz considers a related example. See CHARLES BEITZ, *POLITICAL*

equality might be extremely important from a moral point of view. It would be very surprising indeed to find that these diverse relationships triggered a concern for equality in the same way, or to the same degree. The same is true for egalitarian theories that rest on the importance of coercion.⁴⁵ Many institutions may be coercive, but to widely varying degrees.⁴⁶ It would be surprising if a slight coercive force in a contained aspect of one's life warranted the same egalitarian principles as being subject to strongly coercive institutions with pervasive effects.⁴⁷

The implication of this complexity is that we cannot simply redeploy our preferred domestic principles of equality to international institutions. Instead, we must investigate first what reasons make a given egalitarian principle suitable for a political society. Then we can inquire whether these reasons apply to an international context—for example, an international institution like the WTO.⁴⁸ It is possible that the relevant international principles will be very different from their domestic analogs, but we might hypothesize that it would be helpful to begin with well-known principles. Domestic egalitarian principles may provide a good starting point because theories of justice for states have been much more thoroughly developed.

Here, we are concerned with two broad classes of egalitarian principles: substantive and procedural.⁴⁹ Roughly, procedural principles hold that some distributive outcome is justified if it is the

THEORY AND INTERNATIONAL RELATIONS 165 (1979).

⁴⁵ For examples of this, see Nagel, *supra* note 1; Freeman, *supra* note 2, and Blake, *supra* note 2.

⁴⁶ For discussion, see Matthias Risse, *What to Say About the State*, 32 SOC. THEORY & PRAC. 671 (2006). Although a variety of institutions may be coercive (i.e. physical force or violence or credible conditional threats of force or violence), the extent of their coerciveness may vary considerably. *Id.*

⁴⁷ For a longer discussion of this point, see Ryan W. Davis, *Is an International Egalitarianism Empirically Defensible?* (Working Paper Presented at Dartmouth University 2011).

⁴⁸ See *infra* Part III.

⁴⁹ For a recent statement of the distinction, see Teun J. Dekker, *Choices, Consequences, and Dessert*, 52 INQUIRY 109, 119-20 (2009).

outcome of a justified procedure.⁵⁰ Substantive theories reverse the order of explanation, recommending a certain distributive outcome and holding that procedures are justified insofar as they achieve it.⁵¹ This distinction might be understood in terms of direction of fit. Substantive theories place priority on outcomes or results, and understand a good procedure as one that tracks these outcomes. Procedural theories prioritize procedures, and understand good outcomes as those that result from a justified procedure.⁵²

If equality matters in some international institutions, the question left to consider is *how* it matters. Equality might matter in a broadly procedural way, or in a broadly substantive way (although we should expect there will also be candidate principles that will resist easy classification).⁵³ These alternatives correspond to two types of approaches to reforming international institutions. One alternative focuses on the fact that wealthy states gain most of the benefits of international cooperation facilitated by bodies like the WTO.⁵⁴ The associated proposal for reform requires that the

⁵⁰ See Dekker, *supra* note 49, at 119. “Purely procedurally justified theories of consequences determine the consequences of choices by applying some procedure that is independently justified; as long as the consequences were set in the proper fashion, they are just.” *Id.*

⁵¹ See *id.* “[S]ubstantively justified theories of consequences select consequences by invoking some feature of choices in question. They associate this feature with particular consequences that are deemed appropriate.” *Id.*

⁵² For a discussion of the distinction between practice rules and rules of thumb, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). See also Tamar Schapiro, *Three Conceptions of Action in Moral Theory*, 35 NOÛS 93 (2001). Rawls calls “pure procedural justice” the case in which there is “no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.” RAWLS, *supra* note 10, at 86.

⁵³ Cf. AMERICO BEVIGLIA ZAMPETTI, FAIRNESS IN THE WORLD ECONOMY: US PERSPECTIVES ON INTERNATIONAL TRADE RELATIONS (2006). Zampetti makes the related distinction between a fairness of benefit in a scheme of social cooperation, and a fairness of a level playing field. *Id.*

⁵⁴ See Joanne Gowa & Soo Yeon Kim, *An Exclusive Country Club: The Effects of the GATT on Trade, 1950-1994*, 57 WORLD POL. 453 (2005); Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT’L L. 165 (2007); Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 J. INT’L ECON. L. 617 (2009).

economic benefits, resources, or opportunities be distributed among cooperating states in some more equal way. Approaches of this type display concern for *substantive equality*. They seek outcomes in which cooperating parties are more equal in their share of some good (resources, primary goods, cooperative benefits, etc.). The second alternative focuses on the fact that wealthy states enjoy a set of institutional advantages conferred by the formal or informal procedures of the international institution.⁵⁵ These advantages in turn allow them to do relatively better, or secure a larger share of the collective benefits of cooperation. This second approach proposes to reform the institutions in a way that prevents differences in wealth or power from deciding outcomes. It reflects a concern with *procedural equality*.

It seems plausible to expect that the substantive and procedural concerns for equality will be related. If more equal procedures were adopted, we would expect greater substantive equality in the distribution of goods. And if we began with a concern for substantive equality, procedurally equal institutions might be an efficient means of securing it. Nevertheless, there could also be differences in what reforms these approaches would recommend. We will consider the reasons for taking a substantive or procedural approach in the next section. For now, the point we have tried to establish is that regardless of the form of an egalitarian principle, we should not complacently assume that principle can be exported from a domestic to an international context.

III. Distributive Justice and International Institutions

This section begins the task of assembling materials to construct a theory for applying the norm of equality to international institutions.⁵⁶ We proceed by first sketching how a substantive

⁵⁵ For a discussion of examples of reforming the WTO in a way that is consistent with the demands of procedural justice, *see infra* Part IV.

⁵⁶ We intend for this to be a theory that is generally applicable to international institutions. We will, however, later turn to specifically discussing the WTO in order to provide a specific illustration of our theory.

principle of distributive justice might be implemented internationally. To clarify, we use Rawls's difference principle as an example, modifying this substantive distributive rule for application to the WTO. However, we then observe that this principle—or any other substantive egalitarian principle—confronts a series of difficulties. These include a lack of popular support, a lack of institutional structure necessary for implementation, and most seriously, a paucity of moral facts for underwriting any such principle as a constituent of justice among political societies. Finally, we motivate the search for an acceptable procedural alternative to any substantive egalitarian principle.

A. Substantive Principles of Distributive Justice

Philosophical defenders of “global justice” most often employ what we are calling the substantive approach to treating equality as a political concern. The project of achieving a more just world is taken to be the project of securing a more equal distribution of resources. Some cosmopolitans propose applying the difference principle internationally.⁵⁷ Others propose equality of opportunity, or a “needs-based minimum floor.”⁵⁸ These proposals share the idea that securing global justice would involve promoting the substantive equality of the world's less well-off. What we owe the global poor is a greater or more equal share of resources. The content of these principles does not apply, in the first instance, to the procedures that help determine what the varying shares of resources or opportunities will be. Rather, the principles apply directly to the outcomes that would count as “more equal.” Just institutions would be those that help bring about the substantively just distribution.

⁵⁷ See, e.g., MOELLENDORF, *supra* note 36. For other examples of substantive principles being proposed, see Wenar, *supra* note 3; Pogge, *supra* note 3. For a discussion of applying the difference principle to international institutions including the WTO, see Frank J. Garcia, *Global Justice and the Brettonwoods Institutions*, 10 J. INT'L ECON. L. 461 (2007).

⁵⁸ SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* (2005); Gillian Brock, *The Difference Principle, Equality of Opportunity, and Cosmopolitan Justice*, 2 J. MORAL PHIL. 333 (2005).

In considering international organizations like the WTO, which egalitarian principle or principles are suitable candidates? To make the issue more concrete, we will focus on one especially famous principle of substantive equality—Rawls’s difference principle.⁵⁹ Although we are not committed to the difference principle (or something in its family of principles) being true, its broad familiarity makes it a convenient starting place. Several proposals, beginning with Beitz’s seminal *Political Theory and International Relations*, have considered a global difference principle analogous to Rawls’s principle of distribution for a closed society.⁶⁰ Decades after it was introduced into the idiom of political philosophy, the difference principle remains a resilient contender for a plausible distributive principle of fairness. Although the reasons why cannot be recounted here, we believe that central to the difference principle’s appeal is its requirement that the basic structure be justified to each member of a society. When inequality benefits the least advantaged person, it can be justified to that person (otherwise the least advantaged person would be even worse off). And if the least advantaged cannot complain, no one can, so the system is fair.⁶¹ As Rawls understood it, “the difference principle is essentially a principle of reciprocity.”⁶²

Consider again relationships like those shared by members of the WTO. If the difference principle is an appropriate principle of distributive justice within a state like the United States, is it also appropriate among members of the WTO? Although the WTO does have norm-generative features and is therefore appropriately subject to some egalitarian norms, the shared membership in the WTO imposes significantly less serious risks than shared membership in a state. True, the WTO burdens its members with the possibility of manipulation and whatever attendant losses might follow, but it lacks the coercive power of a state.⁶³ Further, the domain over which the

⁵⁹ RAWLS, *supra* note 10, at 76.

⁶⁰ BEITZ, *supra* note 44, at 125-77. *See also* MOELLENDORF, *supra* note 36.

⁶¹ *See* Jonathan Quong, *Contractualism, Reciprocity, and Egalitarian Justice*, 6 POL., PHIL., & ECON. 175 (2007) (simplifying it to the point of being false, but capturing the basic idea).

⁶² JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 64 (2001).

⁶³ *See* Richard Steinberg, *In the Shadow of Law or Power? Consensus Based*

WTO could interfere is comparatively constrained because it exclusively pertains to a set of issues relevant to international trade practices. Given these limitations, it would be odd to find that the same distributive principle required to provide justification to all citizens was also required to provide justification to individuals sharing much weaker institutional ties. The difference principle is ordinarily concerned with the distribution of all social primary goods, including income and wealth, powers and prerogatives of offices and positions of responsibility, and the social bases of self-respect.⁶⁴ For Rawls, these categories will encompass all social and economic advantages a person could have.⁶⁵ In other words, the reach of the difference principle is pervasive, which makes sense given that its intended object of regulation—a basic structure—is concomitantly pervasive. Like death and taxes, the basic structure's influence can be counted upon. A basic structure has a “profound and pervasive influence on the persons who live under its institutions”—an influence that begins at the start of a person's life and persists throughout it.⁶⁶

The difference principle assumes a baseline of complete equality in all social and economic advantages, and sanctions any inequalities as just from that point.⁶⁷ That this assumption seems right is a contingent matter. Intuitively, the magnitude of the impacts involved justifies the baseline of equality. A few cases help to bring out this intuition.

First, we consider a case we will call *New World*. Imagine a

Bargaining and Outcomes in the GATT/WTO, 56 INT'L ORG. 339 (2002).

⁶⁴ For a discussion, see Philippe van Parijs, *Difference Principles*, in THE CAMBRIDGE COMPANION TO RAWLS 200 (Samuel Freeman ed., 2003).

⁶⁵ RAWLS, *supra* note 62, at 55.

⁶⁶ *Id.*

⁶⁷ See Quong, *supra* note 61; Todd B. Adams, *Rawls' Theory of Justice and International Environmental Law: A Philosophical Perspective*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1 (2007); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391 (2006); Kevin Kordana & David Tabachnick, *Rawls & Contract Law* (The John M. Olin Program in Law and Economics Working Paper, Paper 15 2005). On the application of the Rawlsian approach to global justice, see also Anupan Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005).

group of explorers from several different states who embark on a voyage to the new world. Upon arriving, they draw up a constitution establishing their own sovereign state, independent of any others from which they came. Happily, each of their respective political societies of origin was governed according to all of the tenets of justice as fairness, including the difference principle. At the time they entered their ship, each explorer had a fair share of social and economic advantages.

What egalitarian principle or principles should the explorers adopt when they establish their own constitution? One possible answer is to say that since they currently have a fair share of primary goods, no distributive principle is needed, provided that they also establish a fair system of exchange. Despite its libertarian ring, some forms of egalitarianism might respond in this way as well.⁶⁸ Rawlsians, however, may protest that such a system would fail to justify the new state's coercion to its least advantaged member. Given the responsibility of citizens for the state's coercion and the expected impacts of that coercion, the explorers should set up a system that includes the difference principle.

Next, consider a modified case, which we will call *Voyage*. A group of explorers sets out from their respective Realistic Rawlsian Utopias for a long journey. They do not establish their own society, but they do hope to cooperate to acquire resources and wealth along the way. Their economic interaction is limited to this voyage alone, but over the course of their trip, they acquire various assets through trade and discovery.

What egalitarian principle, if any, should the explorers in *Voyage* adopt? Here, it seems inappropriate to apply the difference principle just as it was applied in *New World* because the interaction between the explorers in *Voyage* is more limited in its effects on their life chances. If the voyagers did not cooperate at all, fairness would not—*ex hypothesi*—require any particular distribution of goods among them (since they are all from different societies with, let us suppose, no interaction). As it is, their cooperation is limited in

⁶⁸ Cf. Matthew Seligman, *Luck, Leverage, and Equality: A Bargaining Problem for Luck Egalitarians*, 35 PHIL. & PUB. AFF. 266 (2007).

multiple ways: the duration of their cooperative project, the aspect of their lives in which they are engaging in cooperation, and the impact of their cooperative project. It would therefore seem odd if such limited cooperation triggered exactly the same distributive demands among them as the cooperation of members of the same political community.⁶⁹

However, the explorers might still adopt some weaker principle of fairness. They might, for example, adopt a related egalitarian principle limited to the goods produced by their cooperative venture. Such a principle might assume that each member of the voyage should have an equal share of the benefits their voyage brought about. The thought behind this revision is to limit the distributendum of an egalitarian principle to those goods naturally implicated by the type of relationship the principle regulates. Call this *domain restricted egalitarianism*.⁷⁰ We will stipulate that according to domain restricted egalitarianism, the domain of goods an egalitarian

⁶⁹ Beitz suggests a threshold above which the difference principle would apply as a way of solving the problem of variable levels of cooperation. BEITZ, *supra* note 44, at 165-66. On his view, the contemporary world economy is more like the case of a domestic basic structure in that both are importantly nonvoluntary. *Id.* This point is extended to the WTO by both Cohen & Sabel and Maffettone, suggesting that membership is importantly nonvoluntary. *See* Cohen & Sabel, *supra* note 1; Maffettone, *supra* note 36. Although we do not investigate this particular claim much here, we are not persuaded. It is true that actors did not consent to the particular schedule of institutional options that they enjoy, but neither do trading parties to any voluntary transaction get to choose what their options will be. One might think that membership is nonvoluntary in that non-membership is an unacceptable alternative. But this seems like a confusion about voluntariness. If someone has only one job offer, turning it down may be an unacceptable alternative. But certainly my choice to take the job is still voluntary. And besides, it would be very surprising to learn that membership in the WTO were somehow so vital that a state would be in an unacceptably bad state by turning it down. Far from being vital, there is still reasonable disagreement on the empirical question about whether such institutions make any causal difference at all. The claim that membership in the WTO is nonvoluntary may thus potentially be overwrought.

⁷⁰ Although “domain restricted egalitarianism” is our own term, this speculation about how intermediate egalitarian principles might be found finds a forerunner in A.J. Julius’s sliding maximum scale. *See* Julius, *supra* note 1, at 191 n.14.

principle regulates should be informed by the types of goods whose distribution would not exist without the regulated norm-generative relationship.

As suggested in Part II-C, there is a problem with the exporting strategy of lifting the distributive principle and applying it to an international environment. The problem is that the reasons in virtue of which equality is a political concern may be different, and this difference creates a layer of complexity that likely renders the exporting strategy inappropriate. Domain restricted egalitarianism offers one path for managing the resultant complexity. It holds that there should be some connection between the resources or goods whose distribution an institution affects, and the particular subset of goods that the egalitarian principle should manage.⁷¹ To make this a little clearer, suppose again that one's preferred egalitarian principle is the difference principle, and the question is how the difference principle might be lifted from the ordinary national context and applied to the WTO. This might recommend a domain restricted difference principle, which might say something like: any inequality in the distribution of economic resources created by shared membership in the WTO, and in the positions of power within the WTO, should be arranged to benefit the least well-off person in a WTO member state.

This principle is motivated by a revision in the exporting strategy considered at the beginning of this section.⁷² It exports the difference principle from its original application to domestic political society, but also modifies it in a way that makes it more compatible with reasons supporting equality as a political concern within the WTO. Because its demands are not out of touch with the level of cooperation within the WTO, it is more plausible than exporting the difference principle in an unrevised form.

⁷¹ In this way domain restricted egalitarianism is comparable to Wenar, *supra* note 3.

⁷² Applying an egalitarian principle of justice to the WTO is supported by interpretations of WTO law as based in "justice as equality." See Chios Charmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 527 (2008).

B. The Shortcomings of Substantive Principles

Nevertheless, we believe that a revised distributive principle of this form still faces several troubling objections. We will mention three. First and most obviously, we might anticipate that such a principle would confront a number of hurdles to implementation. Many policy elites—not to mention public opinion more generally—are swayed by the view that organizations like the WTO are to promote trade, rather than to assist in the development of other countries. Given this aim, they will argue that the United States should try to extract as large a share of the goods of trade as it can, and that implementing an egalitarian distributive principle would undermine the reasons for American involvement in the WTO in the first place. Of course, public opposition to a distributive principle does not imply that it is not morally required, and so this challenge alone might not be worth considering seriously. A more difficult implementation problem is that there is no institutional structure in organizations like the WTO to manage such redistribution. Redistributing the goods of trade presupposes that there is some way of identifying what those goods are. This is a nontrivial task. Though social scientists largely agree that the WTO has produced benefits, and that these benefits are skewed in favor of its richest and most powerful members,⁷³ it is not clear exactly what the value of the benefits is. This is a problem not only for implementation, but for the principle itself, which assumes that some set of resources are brought into existence by the shared membership in the institution. And further, identifying the extent to which these benefits are distributed inequitably will likely be fraught with controversy.

The political philosopher is free to dismiss these concerns as someone else's problem—as issues to be resolved by social scientists or institutional designers. It is true that the impracticability of a theory of justice does not independently weigh against its acceptance.⁷⁴ Still, these difficulties for substantive egalitarian

⁷³ See *infra* text accompanying notes 83-86.

⁷⁴ See DAVID ESTLUND, *DEMOCRACY'S AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 258-75 (2007).

reform may belie deeper problems for this approach. It may not sound troubling—at least to philosophers—to learn that there is serious dissent from their proposed moral reform. But what would be troubling is if the dissent indicated or provided evidence against the general moral importance of the values motivating reform. How could this happen? Very generally, it could happen if the actual importance of the values was connected to persons' attitudes toward the values, such that dissenting attitudes would tend to undermine the values' importance. Consider the value of equality. The value of equality follows from the bad, or the disvalue, of inequality.⁷⁵ Inequality is bad because it results in social harms like domination, servility, and stigmatization. According to Martin O'Neill, these harms are connected to inequality by a “deep social fact.”⁷⁶ In other words, where inequality is present, we should expect to find that people experience feelings of being dominated by those with more, a loss of self-respect that attends servility, and to notice that persons feel stigmatized or stifled by their relative differences.

Notice that each of these bads associated with inequality depends on the attitudes of those in the society where inequality is present. If inequality really is connected to these bads by a deep social fact, we should expect inequality to be robustly associated with these negative attitudes. Notice also that this is an empirical claim to be resolved by social science rather than philosophical speculation.⁷⁷ And it seems that there is considerable doubt about whether the claim is true. For example, economists have found that there are considerable differences in how Americans and Europeans respond to inequality. While Americans oppose inequality in some forms, they are less aware of inequality at the top of the income distribution, and less concerned about reducing inequality at the bottom of the income distribution.⁷⁸ Americans also differ from some Western Europeans in their beliefs about the relationship

⁷⁵ See Scanlon, *supra* note 8. See also O'Neill, *supra* note 8.

⁷⁶ See O'Neill, *supra* note 8, at 131.

⁷⁷ See *infra* Part IV.D.

⁷⁸ Lars Osberg & Timothy Smeeding, “Fair” Inequality? Attitudes Toward Pay Differentials: The United States in Comparative Perspective, 71 AM. SOC. REV. 450 (2006).

between fairness and wealth. Those living in social democracies like Sweden are less likely to regard individuals as responsible for the causes of wealth. Instead, they are more likely to attribute wealth to personal connections, as opposed to skill or intelligence.⁷⁹ The stability of these attitudes is not surprising. In countries with institutions that favor limited redistribution and low taxation, individual effort will have greater importance relative to luck in determining wealth.⁸⁰ Beliefs about the relationship between effort and success will tend to become self-fulfilling. Likewise, countries that believe luck, birth, and connections are responsible for wealth will implement higher taxes and redistribution, and these beliefs will tend to become self-fulfilling as well.⁸¹

C. Motivating the Procedural Alternative

Results such as these may raise skepticism about just how “deep” the social fact connecting inequality with negative attitudes really is. While there is a social fact connecting inequality to a range of negative attitudes, this fact seems to depend on economic institutions that reinforce the attitudes in question. It is, in this sense, shallower than egalitarians like O’Neill might have hoped. Interestingly, the deep social fact seems to connect fairness and responsibility. Americans and Europeans share the basic idea that there is a relationship between what people are responsible for and what is fair. They just disagree about the responsibility facts, and by extension about the fairness of inequality in wealth or resources. Of course, there is a further question about whether these judgments are reasonable. Ought we take them seriously from a moral point of view? The egalitarian might want to resist granting importance to the judgments of actual persons. But this is just another way of

⁷⁹ Ann-Sofie Isaksson & Annika Lindskog, *Preferences for Redistribution—A Cross Country Study in Fairness* (Göteborg U. Sch. of Bus. Econ. & L., Working Paper No. 258, 2007).

⁸⁰ Albereto Alesina & George-Marios Angeletos, *Fairness and Redistribution*, 95 AM. ECON. REV. 960 (2005).

⁸¹ *Id.* at 960.

raising the question about what *really* makes inequality bad. If the badness of inequality is in some social fact, there must presumably be some way of empirically identifying that social fact. If empirical judgments about equality are not an acceptable measure, then we are owed some explanation of what is.

These differences create a challenge for the substantive egalitarian approach. To see why, consider another version of the voyage case, which we will call *Voyage 2*. A group of explorers set out together to cooperate and gain wealth. Their cooperation is limited to the voyage. The explorers come from different political societies. Each political society is free of the bads of inequality. However, they achieve this in different ways. Some of the voyagers come from societies in which income inequality is perceived as connected to features of life for which individuals are not responsible. In these societies, inequality is judged to be unfair, and inequality in fact does cause feelings of servility, domination, stigmatization, and so on. These societies have adopted strong egalitarian principles of redistribution. Other voyagers come from societies in which inequality is not associated with unfairness, and is not a sufficient cause of feelings of servility, domination, or stigmatization. These societies are therefore free of the bads of inequality, though they may not be free of inequality.

This is a complicated case, but it may well reflect a serious moral complexity confronted by international institutions like the WTO. Suppose the voyagers want to adopt a domain-restricted egalitarian principle. How should they go about it? Voyagers from societies in which inequality causes servility and domination will prefer a strongly egalitarian substantive principle. Voyagers from societies that regard differences in wealth as resulting from effort will prefer to give each explorer greater latitude in retaining the goods that she personally discovers. Accordingly, they will prefer a more limited substantive principle of equality, if any at all.

The problem is not just that the explorers *disagree* about the evaluative significance of equality. Rather, the problem is that the evaluative facts are different for different explorers. Relative to the explorers from egalitarian-minded societies, inequality is very bad, and so equality is correspondingly valuable. But relative to the

explorers from less egalitarian societies, inequality is not as bad. In other words, because the importance of equality depends on non-robust social facts, the value of equality will be agent relative. And because the explorers come from societies in which the social facts differ, the agent relative value of equality will be different for different individual voyagers.⁸² This disagreement makes choosing a substantive egalitarian principle very difficult. It is not just that we do not know how to choose, because the fact about which principle is just is epistemically unavailable. The challenge is that there may not be any such fact at all, because there may not be a single coherent set of values to underwrite any such principle. In the next section, we will argue that the procedural approach to equality does a better job responding to the considerations that made equality a political concern in the first place.

IV. The World Trade Organization and Institutional Equality

We have thus far tried to construct an argument that procedural approaches to justice should provide an effective means of implementing a moral concern for equality. We believe that this theory can help illuminate how equality can best be promoted within international institutions like the WTO. Established in 1995 as a replacement to the General Agreement on Tariffs and Trade (GATT), the WTO is an organization that has sought to promote economic exchange by breaking down barriers to trade.⁸³ Today, the WTO has over 150 members and has achieved major successes in opening markets and promoting liberalization. There has been growing concern, however, that the benefits that the WTO has generated have

⁸² For a general defense of agent relative values, see Michael Smith, *Neutral and Relative Value after Moore*, 113 ETHICS 576 (2003).

⁸³ See generally Christina Davis, *Who Adjudicates? Enforcing Trade Rules in the WTO* 6-8 (May 11, 2011)(unpublished manuscript)(on file with author). See also CHAD P. BOWN, *SELF-ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT* 45-62 (2009) (providing a history of dispute settlement under the GATT and WTO).

not been distributed equally.⁸⁴ Instead, developing countries have had difficulties using the dispute settlement process to assert their formal rights and ensuring that they are treated fairly within the WTO.⁸⁵ As a result, we believe that the WTO presents an excellent example of an international institution that could be reformed to improve distributive justice.⁸⁶ In this section we will first explain why the procedural approach to equality is better suited to locating an egalitarian principle to govern international institutions like the WTO. We will then discuss how attempts at promoting formal procedural equality alone will do little to ensure that developing countries are able to promote their interests. Finally, we will outline how attempts at advancing informal procedural justice through helping developing countries improve their capacity to defend their rights is the optimal way to ensure distributive justice within the WTO.

A. Procedural Justice and the WTO

The shortcomings of substantive principles of distributive justice are easily seen in the context of the WTO. Consider, in a very general way, how the substantive and procedural approaches might

⁸⁴ See, e.g., Chad P. Bown & Rachel McCulloch, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law*, 19 J. INT'L TRADE & ECON. DEV. 33, 34 (2010). "Yet many observers, and especially those representing the interests of poor countries, judge that participation in the Uruguay Round and in the WTO have so far yielded few benefits for [developing and least developed] countries." *Id.* But see BOWN, *supra* note 83, at 22-44 (arguing that WTO has had mixed results for developing countries); Arvind Subramanian & Shang-Jin Wei, *The WTO Promotes Trade, Strongly but Unevenly*, 72 J. INT'L ECON. 151, 153-54 (2007) (arguing that part of the reason developing countries have gained less from the WTO is that they have taken fewer steps to liberalize).

⁸⁵ See, e.g., Bown & McCulloch, *supra* note 84.

⁸⁶ For the view that finding ways to promote the importance of developing countries within the WTO is important, see J.H. Jackson, *Perceptions About the WTO Trade Institutions*, 1 WORLD TRADE REV. 101, 111 (2002). "This participation of the developing countries in this system is, in the opinion of many, absolutely vital to the long-term durability and effectiveness of the WTO dispute settlement system, and, therefore, probably of the WTO itself." *Id.*

be specifically presented as a solution to the prospect of being harmed; for example, through the manipulation or coercion of more powerful agents. The substantive approach guarantees members an equitable share—at least roughly.⁸⁷ This helps solve the problem, since we have been assuming that developing states in the WTO are sometimes manipulated into taking inequitably small shares of the goods of trade.⁸⁸ If they were guaranteed an equal share, then the *harms* associated with manipulation would be mitigated, or even eliminated. Does it follow that the moral problem of manipulation would be solved? It does not. The reason is that *wronging* does not reduce to *harming*. To see why, notice that one person can wrong another without causing any harm. For example, it is wrong to touch another person in a way they do not consent to, even if the person is unconscious, not harmed in any way, and never learns of the incident.⁸⁹ People have moral rights to more than freedom from harm.

So even if the substantive strategy removed the harms of manipulation, it does not follow that it would render manipulation morally innocuous. Members of the institution might plausibly care about more than just getting a fair share of the goods provided by the institution. They might also care about being treated as equal members of the institution, or being recognized as contributing or cooperating parties. Even if equality in resources was secured, it would not be attended by this recognition if manipulation remained. Manipulating a person is one way of disrespecting him or her, which involves a failure to recognize that person's moral authority. For example, if someone wrongs you by punching you in the face, what he or she did is still wrong, even if they compensate you with money. This remains true even if you judge the compensation to exceed the harm of the punch, such that you judge yourself to be, on balance, benefited by the exchange. It was still disrespectful to punch you,

⁸⁷ See *supra* Part III (discussing equitable share). We are leaving open what counts as equal and what the share should be of, but these issues were confronted in the previous section. How they are settled will not matter for the current issue.

⁸⁸ Cf. Gowa & Kim, *supra* note 54.

⁸⁹ This example is from Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 216 (2006).

and this is still wrong.

Does the procedural approach face a symmetrical problem? If it works, the procedural approach guarantees (let us suppose) that members are protected from manipulation. It does not follow that they will thereby secure a substantively equal share of the resources produced by membership in the institution. Poorer members might still lose out for other reasons. Perhaps this is still concerning, but it is not necessarily morally concerning. Suppose someone goes into a fair bargaining game and happens to lose out for reasons that he or she is responsible for (say, he or she did not exercise their capacity to compete in the game effectively, despite having the capacity). Here it seems that the loss is bad for him or her, and so perhaps harmful. It does not follow that he or she has been wronged, and indeed, there need not be anything morally concerning about his or her loss at all. For example, if your neighbor cuts down a tree in her yard, thus exposing your house to the afternoon sun, you are made worse off, but not in a way that gives you grounds for moral complaint. There is no entitlement that others avoid changing the circumstances of our actions in ways that are adverse to us.⁹⁰

On balance, the procedural approach is starting to look like a better alternative to the substantive approach. This finding echoes a result about domestic political equality among citizens. In *Political Equality*, Charles Beitz argues that a theory of political equality faces the task of “identifying the features that institutions for political participation should possess if they can truly be said to treat citizens as equals.”⁹¹ Beitz identifies three such features: recognition, equitable treatment, and deliberative responsibility.⁹² Recognition

⁹⁰ At least, this is not sufficient for someone to have an entitlement. This point and the example preceding it are similar to a point of Ripstein’s. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009).

⁹¹ BEITZ, *supra* note 8, at 98. Beitz’s own claim is finely grained in ways to which our broad distinction is insensitive. For example, Beitz allows that a theory of political equality should not ignore results-oriented considerations altogether. *Id.* Rather, theories that treat procedural fairness as depending on results bring in results “in the wrong way.” *Id.* at 46.

⁹² *Id.* at 100.

refers to the public status of roles occupied by citizens.⁹³ If some citizens are officially accorded a lower or inferior status, they are not then being recognized as equal. Equitable treatment requires that citizens' interests not be unfairly jeopardized by the political process.⁹⁴ Deliberative responsibility ensures that political decisions are sensitive to informed, diverse public discussion or consideration.⁹⁵

In the remainder of this section, we propose to follow an analogous strategy for international institutions, focusing on the WTO. What procedures would protect members of the WTO against wrongful manipulation? As in the domestic case, it will help to identify desiderata for a set of procedures. We have suggested that it will not suffice to locate these desiderata in the substantive ends that the procedures aim at or seek to produce. Instead, they will be desiderata of the procedures themselves, rather than the results of the procedures. The analogy with the domestic political case may also extend beyond the search for procedural values. The values themselves may also be similar.⁹⁶ Consider the feature of procedures that Beitz labels "recognition."⁹⁷ A problem with manipulation in the WTO is that it seems to deny the good of recognition, because it relegates those subject to manipulation, or the risk of manipulation,

⁹³ BEITZ, *supra* note 8, at 100

⁹⁴ *Id.*

⁹⁵ *Id.*, at 110-14.

⁹⁶ See James Thuo Gathii, *International Justice and the Trading Regime*, 19 EMORY INT'L L. REV. 1407 (2005). Gathii explains that fairness has been an important aim of the WTO from its inception:

Since the establishment of the WTO in 1995, the objective of ensuring a fairer, more open, and transparent international trading framework has been expressly recognized in the founding texts of the WTO. In fact, several WTO agreements also expressly mention fairness as a criterion for the application of WTO rules by national authorities and adjudicatory bodies. For example, the Agreement on Agriculture has as an objective a 'fair and market oriented agricultural trading system.' Article 2.4 of the Agreement on Implementation of Article VI of GATT provides that 'a fair comparison shall be made between the export price and normal value.' *Id.* at 1423.

⁹⁷ BEITZ, *supra* note 8, at 110.

to a lower status. This worry squares with a central concern about the WTO in the empirical literature: the inability of developing countries to effectively use the WTO's Dispute Settlement Procedures.⁹⁸ Poor countries participate much less frequently in making claims against other members of the WTO. Rich states, led by the United States and the European Union, have initiated a sizeable majority of complaints.⁹⁹ Further, these differences appear to be distributionally significant. Once a country has won a case through the WTO's Dispute Settlement Procedures, other trade partners become more cautious toward that country.¹⁰⁰ So there are additional positive returns to being an active complainant.¹⁰¹ This helps make sense of why most of the goods of trade liberalization through the WTO have been accumulated by the rich.

B. The Failure of Formal Proceduralism

There are two types of procedural strategies for responding to this problem. One approach is to reform the formal Dispute Settlement Process (DSP) in ways that would recognize the public status of each member as equal. A second approach would be to leave the formal procedures in place, but look for ways barriers to access for poor countries might be removed. In this way, the goods of recognition could be provided without legal change. Call this the difference between formal and informal proceduralist approaches.¹⁰²

⁹⁸ See, e.g., James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 *REV. INT'L POL. ECON.* 542 (2004); Marc Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 *J. WORLD TRADE* 719 (2003).

⁹⁹ See Christina Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 *J. POL.* 1033 (2009). Davis and Bermeo report that rich states have filed 239 of 376 complaints. *Id.* at 1033.

¹⁰⁰ *Id.* at 1034.

¹⁰¹ *Cf. id.*

¹⁰² This is similar to a distinction offered in Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 *J. INT'L ECON. L.* 861, 864 (2005).

The formal approach has considerable appeal. Public recognition of one's standing or status is sometimes associated with official or legal recognition. And one might further suppose that securing equal formal recognition would be instrumentally valuable to preventing manipulative wrongdoing. This thought is natural in the setting of domestic justice, where equality before the law is important to being fairly treated within the legal system. But supposing that formal status is what matters assumes that the important aspect of the WTO's Dispute Settlement Understanding is its legal force, and this assumption may be false.¹⁰³ The WTO renders legally binding decisions, but these decisions also create reputational concerns. Either mechanism could be important in affecting how countries trade. As an empirical matter, there is evidence that the reputation effect is more important than legal status.¹⁰⁴ Dispute settlement mechanisms that involve only review by third parties, but lack binding legal decisions or standing tribunals, do just as well at promoting trade.¹⁰⁵ In this way, the domestic analogy connecting legal status with recognition breaks down. Decisions under the WTO's Dispute Settlement Understanding do not impinge on member states in the way that the decisions of a domestic court constrain citizens.¹⁰⁶ Rather, they create reputational costs for noncompliance.¹⁰⁷ This underscores an insight of statisticians like Nagel: there is something distinctly different about the international context.¹⁰⁸ Decisions made within it are made

¹⁰³ See, e.g., Chad P. Bown, *Participation in WTO Dispute Settlement: Complaints, Interest Parties, and Free Riders*, 19 *WORLD BANK ECON. REV.* 287, 288 (2005). "[A]lthough all WTO members have equal access to the system in principle, use of the dispute settlement provisions may reflect an institutional bias—that is, that the poor or powerless members do not participate because of the incentives generated by WTO rules and procedures." *Id.*

¹⁰⁴ See Daniel Y. Kono, *Making Anarchy Work: International Legal Institutions and Trade Cooperation*, 69 *J. POL.* 746 (2007).

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 757.

¹⁰⁷ For a more detailed discussion on the reputational impacts of noncompliance in international institutions, see Rachel Brewster, *Unpacking the State's Reputation*, 50 *HARV. INT'L L.J.* 231 (2009).

¹⁰⁸ See Nagel, *supra* note 1.

under conditions of anarchy rather than hierarchy, so legal status does not carry the same normative force. How this translates into a normative account of recognition is a further issue, but there is some reason for skepticism that legal status will have the same recognitional import in the WTO that it has domestically.

In fact, there may be an even stronger case against the formal route. An early hope for the WTO had been that formal legal procedures would “put an end to the law of the jungle, where might is right.”¹⁰⁹ On this view, the predicted beneficiaries of legalization are developing countries. With greater legal protections, weak states would have the means to prevent themselves from being manipulated by stronger states.¹¹⁰ However, legalization has had both benefits and costs, and these have not followed expectations. Legalization decreases uncertainty and increases the ability of different countries to coordinate their expectations about outcomes, yielding benefits in trade. These benefits are produced through specifying the substantive rules of trade with procedural rules.¹¹¹ For example, a substantive rule might forbid a certain action (e.g., the prohibition against the use of quotas), and a procedural rule might guide how to follow the substantive rule (e.g., filing legal complaints when warranted by violations of the substantive rule).¹¹² On the other hand, legalization yields increasingly complex procedural rules, which are costly for states to follow.¹¹³ In consequence, only states

¹⁰⁹ Don Moon, *Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data*, 32 *INT’L INTERACTIONS* 201, 202 (2006) (quoting Peter Sutherland, former GATT Director General).

¹¹⁰ The WTO’s first Director General, Renato Ruggiero has argued that “by reducing the scope for unilateral actions, [the WTO] is an important guarantee of fair trade for less powerful countries.” Henrick Horn et al., *Is the Use of the WTO Dispute Settlement System Biased?*, in *THE WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT* 454 (Petros C. Mavroidis & Alan O. Sykes eds., 2005).

¹¹¹ This explanation is taken from Moonhawk Kim, *Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures*, 52 *INT’L STUD. Q.* 657 (2008).

¹¹² *Id.* at 661.

¹¹³ See Timothy Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and its Impact on Developing Countries*, 39 *CORNELL INT’L L.J.* 811, 814 (2006) (arguing that the WTO has become less accessible to

with high capacity can use complicated legal-procedural rules for their interests.

At worst, the resulting system could have the opposite of its intended effect. Rather than giving the weak a tool against the rich, legalization might just put another arrow into the quiver of already powerful states. Poor countries often lack the technical legal expertise and financial resources to work within the WTO's legal system, and they may also fear reprisal by the powerful states against which they would file claims.¹¹⁴ Developing countries are actually less likely to file complaints under the WTO than they were under the GATT, but the percentage of cases targeting developing countries has risen significantly.¹¹⁵ Moreover, "the most pointed criticisms of the new WTO system have come from its presumed beneficiaries."¹¹⁶

The developing world's weaknesses betray the difficulty of achieving equality through further legalization. Asymmetries in ability to make use of the formal rules has led legal scholars to conclude that the key to reform is not changing the legal system, but equipping developing countries to operate within it.¹¹⁷ This recommends the informal proceduralist approach. Before detailing potential solutions, it will be helpful to clarify the extent of the problem. Developing countries face multiple layers of obstacles to effective participation within the WTO.¹¹⁸ First, exporting industries within developing countries often have difficulty organizing to

poor members because of "the vastly increased complexity of the substantive law, coupled with the more formal, quasi-judicial litigation process, has imposed enormous costs on would-be users of the system, both in the pre-litigation stage (when a country first identifies the existence of a disputable trade measure) and during the litigation itself (when substantial legal expertise is needed to 'try' a case)".

¹¹⁴ Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System?* 11 (ECIPE Working Paper No. 01, 2007).

¹¹⁵ Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, 14 (ICTSD Resource Paper No. 5, 2003).

¹¹⁶ Smith, *supra* note 98, at 543.

¹¹⁷ Cf. Schaffer, *supra* note 115, at 26.

¹¹⁸ These reasons are provided in Bown & Hoekman, *supra* note 102, at 870-72.

pressure their governments to take a case to the WTO.¹¹⁹ Second, even if they do succeed at organizing, their countries often lack public sectors that facilitate government responsiveness.¹²⁰ Third, developing countries lack the necessary private sector competence—for example, private law firms to pursue cases. Combined with expenses of up to \$1 million for bringing a case to the WTO, it is easy to see why developing countries are largely blocked from participation.¹²¹

C. The Potential of Informal Proceduralism

Can an informal proceduralist approach remove these obstacles?¹²² In other words, it is worth considering whether there are reforms that could be taken to help developing countries gain the capacity to participate fully within the WTO. Encouragingly, some developing countries participate much more effectively within the WTO than others. Even though Botswana exports a higher percentage of its GDP than Costa Rica, the latter has become a fairly active participant while the former has never filed a case.¹²³ Costa Rica's path to participation is informative. Costa Rica filed against the United States regarding US restrictions on trade in the clothing industry.¹²⁴ With an excellent team of US-trained lawyers, the Costa Rican government overcame considerable opposition from both the United States and elements in its own government concerned about damaging relations with America.¹²⁵ Annabel Gonzales, a member

¹¹⁹ Cf. Megumi Naoi, *Shopping for Protection: The Politics of Choosing Trade Instruments in a Partially Legalized World*, 53 INT'L STUD. Q. 421 (2009).

¹²⁰ See Davis & Bermeo, *supra* note 99, at 1039.

¹²¹ *Id.*

¹²² As a reminder, we have defined informal proceduralist approaches as those that leave formal procedures in place, but attempt to remove barriers to access for poor countries. See *supra* text accompanying note 102.

¹²³ Davis & Bermeo, *supra* note 99, at 1038.

¹²⁴ See Request for Consultation by Costa Rica, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/1 (Jan. 15, 1996).

¹²⁵ For a detailed case study, see John Breckenridge, *Costa Rica's Challenge*

of the Costa Rican team, noted that the government decided to proceed after determining that the case was straight forward and clearly a winner for Costa Rica.¹²⁶ Rather than damaging its relationship, Costa Rica also enjoyed an increase in respect for its status with the United States and other WTO members.¹²⁷ The case also prepared Costa Rica for future participation. Gonzales subsequently reported, “Once we had learned to use the system we felt we might as well go ahead and use it.”¹²⁸

Through participating, Costa Rica gained something like recognition within the WTO. The Costa Rican case is illustrative of how participation can be efficacious in facilitating future participation, and this can help reduce the vulnerability to manipulation.¹²⁹ Costa Rica’s Washington embassy opposed pursuing the case, dismissing Costa Rica’s own lawyers as driven by a naively “romantic” and “theoretical” vision.¹³⁰ The case’s success showed that Costa Rica did not have to adopt a position of servility or second class status, but instead could assert its equal standing. Davis and Bermeo find that Costa Rica’s experience is representative of the benefits of experience.¹³¹ Participating in a dispute provides a “pathway to experience” and future participation as a claimant.¹³² Such experience may be gained either as a claimant, as in the Costa Rican case, or as a defendant. Noticing this, Davis and Bermeo point out that one way to advance the participatory ability of poor countries would be to file more claims against them!¹³³ They hasten

to US Restrictions on the Import of Underwear, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 178 (Peter Gallagher et al. eds., 2005).

¹²⁶ Breckenridge, *supra* note 125, at 187.

¹²⁷ *Id.* at 186.

¹²⁸ Davis & Bermeo, *supra* note 99, at 1037.

¹²⁹ Cf. Kyle Bagwell et al., *Auctioning Countermeasures in the WTO*, 73 J. INT’L ECON. 309, 310 (2007). “One prominent problem is the practical difficulty faced by small and developing countries in finding the capacity to retaliate effectively against trading partners that are in violation of their WTO commitments.” *Id.*

¹³⁰ Breckenridge, *supra* note 125, at 184.

¹³¹ Davis & Bermeo, *supra* note 99, at 1038.

¹³² *Id.*

¹³³ *Id.* at 1048.

to add that they do not advocate achieving equality *that way*, but the possibility recalls an important point. In the dramatic conclusion of *The Problem of Global Justice*, Nagel expressed concern that the only way toward justice might be through injustice.¹³⁴ Without taking active steps to assist developing countries in overcoming entry barriers to participation, Nagel's pessimistic prophecy might well be made true. The question, then, is whether there are informal procedural reforms that could help overcome these barriers without a detour through injustice.

V. Egalitarian Proposals to Reform the WTO

The WTO is an institution that has had considerable success in reducing trade barriers, and by doing so, it has increased the economic opportunities of people around the globe. As we have argued, however, the benefits from the liberalization that the WTO has produced have not been equally distributed.¹³⁵ Instead, developing states have had difficulty ensuring that their rights to access foreign markets are fully respected. As we have argued, the just way to rebalance this inequality is for the WTO to undertake procedural reforms that help developing states to protect their interests. Fortunately, lawyers and social scientists have already begun to explore avenues that might arrive at justice without detours through injustice in exactly this way. In this part we will outline several proposals that have been put forward that fit this description. We recognize, of course, that there are limits to the political viability of these proposals.¹³⁶ Our objective is not to outline the most feasible way to reform the WTO, but instead to argue for proposals

¹³⁴ Nagel, *supra* note 1, at 145-47.

¹³⁵ See BOWN, *supra* note 83, at 238. "The consensus among many analysts of and participants in the current international trading system appears to be that there are two distinct World Trade Organizations—one for rich economies and one for poor economies." *Id.* See also Horn et al., *supra* note 110, at 454 (noting that there has been a "debate about whether the DS system is biased against smaller and poorer countries").

¹³⁶ For an expression of similar concerns, see Steinberg, *supra* note 63. See also Shaffer, *supra* note 115, at 41.

that would promote institutional equality within the WTO in a way that is consistent with the distributive theory of justice that we have advanced.

In this part we will specifically discuss three proposals to reform the WTO that satisfy our egalitarian proposal's demands. First, we will discuss the value of Advisory Centers that help developing states to increase their capacity and enforce their legal rights. We argue that although the existing Advisory Centre on WTO Law does important work to help developing states, efforts should be taken to expand its capacity as well as establish additional centers to provide legal advice to help poor states defend their rights. Second, we consider the benefits of expanding the remedies available through the WTO dispute-resolution system to include payment of damages. We believe that this proposal would improve the bargaining position and resources of developing states within the WTO. Finally, we explain the virtue of proposals that would allow states whose rights have been violated to auction their right to take countermeasures. This reform would both create a financial gain for developing countries and increase the incentive for developed states to not violate their WTO obligations. These three proposals share in common the aim of enabling poor countries to use the legal system provided by the WTO more effectively, and thus instantiate one way an instrumentalist egalitarianism could be developed that is consistent with the demands of justice.

A. Improving and Expanding Advisory Centers

One step that has been taken to assist poor countries in asserting their rights in the WTO is the creation of the Advisory Centre on WTO Law (ACWL).¹³⁷ Given the high costs and expertise required to utilize the WTO dispute resolution settlement system, there was

¹³⁷ See Kenneth Ruwan Schunken, *The Advisory Centre on WTO Law: A Success Story, But for Whom?*, 7 L. & PRAC. INT'L COURTS & TRIBUNALS 59, 63 (2008) (stating that "[t]he Advisory Center on WTO Law . . . was founded in order to contribute to the greater participation of developing and least developed countries and to enhance the credibility of the WTO dispute settlement system").

concern that developing countries would not be able to enforce their rights to access the markets of more powerful states.¹³⁸ In an effort to address these concerns, an agreement to establish the ACWL as a separate entity from the WTO was signed on December 1, 1999 by twenty-nine countries, and went into effect on July 15, 2001.¹³⁹ The ACWL is primarily funded by “High-Income” members of the WTO, and provides general legal advice and support to complainants, respondents, and third parties in WTO disputes.¹⁴⁰ These services are available to two groups of countries.¹⁴¹ The first group of countries is members of the Centre. Any developing country that joins the WTO is entitled to become a member of the ACWL, but to do so must make a contribution to the Centre’s endowment. There are currently thirty countries that are members of the Centre.¹⁴² The second group of countries that are able to use the services of the ACWL is Least Developed Countries (LDCs) that are members of the WTO. These countries are automatically entitled to access the services of the ACWL without formally becoming a member. Currently, there are forty-three LDCs that are members of the WTO

¹³⁸ See Bown & McCulloch, *supra* note 84, at 35 (noting that “several [developing countries] have proposed that the WTO should bear all costs associated with the efforts of developing countries to enforce their market access rights”). See also Kim Van der Borgh, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 2 J. INT’L ECON. LAW 723, 723 (1999) (arguing for the need to support developing states to litigate in the WTO because “[t]hey often do not possess the specialist legal expertise and/or experience in international trade law needed to assess whether their legitimate rights are being infringed, thus forgoing any chance of enforcement of these rights”).

¹³⁹ Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177, 187 (2006). See also Schunken, *supra* note 137, at 64 (arguing that “[t]he establishment of the [ACWL] was one of the few successes accomplished during the WTO Ministerial Meeting in Seattle in 1999”).

¹⁴⁰ See Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L ECON. L. 861, 874 (2005). See also ACWL Mission, available at http://www.acwl.ch/e/about/about_us.html (last accessed March 3, 2011).

¹⁴¹ See The Advisory Centre on WTO Law Quick Guide, available at <http://www.acwl.ch/e/documents/Quick%20guide%202011%20for%20website.pdf> (last accessed March 3, 2011).

¹⁴² *Id.*

and fall into this category.¹⁴³ Taken together, roughly half of the WTO's 153 members are entitled to access the services of the ACWL.¹⁴⁴

Since its founding in 2001, the ACWL has assisted its members and LDCs to participate in a range of litigation activities within the WTO Dispute Settlement Understanding (DSU).¹⁴⁵ Between 2001 and 2008, the ACWL helped countries participate in twenty-three of the 144 disputes initiated.¹⁴⁶ Of these twenty-three cases, in nineteen the Centre assisted its clients to bring a dispute as a claimant.¹⁴⁷ These suits included cases against the United States and European Community, as well as suits by one developing state against another.¹⁴⁸ Furthermore, there is evidence to suggest that the establishment of the ACWL helped to increase the participation of developing states in the dispute-settlement process.¹⁴⁹ Since the establishment of the Centre, a larger share of WTO disputes have been initiated by developing countries.¹⁵⁰ It is worth noting, however, that all but one of the ACWL's clients previously had experience with the DSU.¹⁵¹ That said, although the ACWL may have had limited success helping new states start to participate in the dispute-settlement process, the Centre has helped its clients initiate

¹⁴³ See The Advisory Centre on WTO Law Quick Guide, *supra* note 142.

¹⁴⁴ *Id.*

¹⁴⁵ See Bernard M. Hoekman & Petros C. Mavroidis, *The WTO Dispute Settlement, Transparency, and Surveillance*, 23 *WORLD ECON.* 527, 535 (2000) (comparing the ACWL to a public defender in domestic settings that helps ensure that all citizens can have legal assistance).

¹⁴⁶ Bown & McCulloch, *supra* note 84, at 48.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 50 (noting that between 2001 and 2008 the ACWL help clients file complaints against the United States three times, the European Community six times, and against developing countries nine times).

¹⁴⁹ See BOWN, *supra* note 83, at 160-61. "Although [this study] found almost no evidence that the ACWL is introducing completely new countries without prior DSU experience to WTO self-enforcement, the evidence does suggest that the ACWL is empowering many developing countries without prior, albeit sometimes minimal, DSU experience to do more." *Id.*

¹⁵⁰ Bown & McCulloch, *supra* note 84, at 50.

¹⁵¹ *Id.* at 51.

solo-complaints when they had only previously served as third parties, and also helped its clients take litigation further in the dispute process than those states had previously gone.¹⁵²

Despite the resources that the ACWL provides, there are still a number of significant limitations on the Centre's ability to help developing countries enforce their rights to access the markets of powerful members of the WTO.¹⁵³ First, there are valid concerns that the funding structure of the ACWL creates conflicts of interest.¹⁵⁴ The Center is dependent on rich states for contributions, and these states have incentives to not provide all the resources necessary for developing states to litigate all of their valid claims aggressively. Even if rich countries provide funding, it makes support dependent on the will of the powerful, and so undermines the equal standing of developing member states.¹⁵⁵ As a result of these concerns, there have been suggestions for either seeking funding from private organizations,¹⁵⁶ or extending an annual membership fee,¹⁵⁷ to help ensure the Centre is on stable financial footing. Second, not all states that could stand to benefit from the resources of the ACWL can access them.¹⁵⁸ Currently the ACWL is based in Geneva, and although the Centre does try to perform outreach, many states simply do not have representatives near the ACWL. To remedy these problems, there have been proposals to create additional legal service offices in Washington and Brussels, where

¹⁵² Bown & McCulloch, *supra* note 84, at 53.

¹⁵³ It is worth noting that the current ACWL also has very limited resources. For example, there are less than ten lawyers that work at the center. *See* BOWN, *supra* note 83, at 138.

¹⁵⁴ *See* Bown & Hoekman, *supra* note 140, at 875. "For political reasons, a rich country government may be hesitant to sufficiently fund a legal services centre that ultimately provides litigation assistance directly challenging its own actions." *Id.*

¹⁵⁵ It could be argued that this arrangement raises worries of domination. *See, e.g.,* PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

¹⁵⁶ *Id.*

¹⁵⁷ *See* Schunken, *supra* note 137, at 73-74.

¹⁵⁸ *See* Bown & Hoekman, *supra* note 140, at 875. "[T]he ACWL can advise clients in need of assistance only once they arrive and request it." *Id.*

firms with technical expertise could offer pro bono services to developing world clients,¹⁵⁹ and to put more resources toward developing a field training program to help officials in developing countries to gain the skills necessary to bring their own cases effectively.¹⁶⁰ Finally, currently the ACWL only advises governments, which are often unaware of the claims that they could potentially litigate in the WTO.¹⁶¹ Efforts could thus be taken to extend the ACWL mandate to provide legal advice so that exporters in developing countries or NGOs could access the Centre's resources and expertise to identify possible cases that domestic governments could take to the WTO.¹⁶²

B. Providing Financial Remedies

Another area where the WTO could be reformed to help protect the rights of developing states would be to alter the remedies that are available after a successful claim is brought through the dispute-settlement process.¹⁶³ In the current system, there are three basic remedies available in the WTO.¹⁶⁴ The primary remedy if a state is found to be in violation of its WTO obligations is that the breaching

¹⁵⁹ See Bown & Hoekman, *supra* note 140, at 876-79. See also Shaffer, *supra* note 139, at 33 (arguing that by “harnessing domestic political pressure and legal expertise within the United States and Europe, developing countries can curtail, at least somewhat, great power coercion”).

¹⁶⁰ See Schunken, *supra* note 137, at 74-75.

¹⁶¹ *Id.* at 75-76.

¹⁶² *Id.*

¹⁶³ See generally Robert Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS* 345 (Friedl Weiss ed., 2000).

¹⁶⁴ See Joel P. Trachtman, *The WTO Cathedral*, 43 *STAN. J. INT'L L.* 127, 131 (2007). “The basic remedies in WTO law are, in order, cessation, consensual compensation, and non-consensual suspension of concessions or other obligations.” *Id.* See also Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, art. 3(7) [hereinafter DSU].

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state is ordered to cease the non-conforming practice.¹⁶⁵ If the offending state is unwilling to bring its practices into compliance with WTO policies, the second remedy available is that the claimant state and breaching state may agree upon “mutually acceptable compensation.”¹⁶⁶ It is important to note, however, that the payment of compensation is not mandatory.¹⁶⁷ If compensation is given at all,¹⁶⁸ it is a result of negotiations between the states.¹⁶⁹ Finally, if the offending state is unwilling to comply with the WTO ruling, and the two states cannot agree on compensation, then the final remedy available is that the claimant state may suspend a trade concession against the breaching state “equivalent to the level of the nullification or impairment.”¹⁷⁰

Although these remedies are available equally to all members of the WTO, there is good reason to believe that they disadvantage small states.¹⁷¹ For starters, the relatively small market share of developing states means that developed states face only the prospect

¹⁶⁵ See Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY INT’L L. REV. 151, 167 (2011). “If a panel or Appellate Body report finds a measure to be inconsistent with WTO rules, the offending member must ‘bring the measure into conformity’ with its WTO obligations.” *Id.* See also DSU, *supra* note 164, at art. 19(1).

¹⁶⁶ DSU, *supra* note 164, at art. 22(2).

¹⁶⁷ See Shaffer, *supra* note 115, at 37.

¹⁶⁸ See William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 122 (2009) (noting that compensation has only been used once since the creation of the WTO).

¹⁶⁹ For a discussion of the difficulties in agreeing on compensation, see Cai, *supra* note 165, at 172.

¹⁷⁰ DSU, *supra* note 165, at art. 22(4).

¹⁷¹ See, e.g., Bryan Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding*, 8 WORLD TRADE REV. 315, 318 (2009). “The problem of increased tariff levels as retaliation is particularly troublesome for smaller developing country Members, who more often than not depend upon one (larger developed) country for a large percentage of their total trade and rely upon imports for both consumer goods and necessary imports.” *Id.* For a discussion of the development of the DSU and how it relates to developing countries, see Amin Alavi, *African Countries and the WTO’s Dispute Settlement Mechanism*, 25 DEV. POL’Y REV. 25, 26-30 (2007).

of weak retaliation.¹⁷² The result is that even if a powerful state receives an adverse ruling in the WTO, it knows that if it does not come into compliance or offer compensation, it will not face many consequences.¹⁷³ When the weaker state does impose retaliatory tariffs against a developed country, it often stands to suffer more than the country that was found to be in breach.¹⁷⁴ This is because if the developing country relies on imports from the developed state, it simply is forcing its citizens to pay a higher price for goods without imposing a meaningful cost on the violating state. Finally, developing states run the risk that even if they are able to force a more powerful state to comply with its WTO obligations in an individual case, they still face the risk of retribution in some other form.¹⁷⁵ This could include the reduction of economic aid or the withdrawal of another preferential agreement.¹⁷⁶ Given these concerns, developing countries are often discouraged from bringing enforcement actions, and when they do elect to pursue a complaint, they face considerable obstacles to gaining effective relief.¹⁷⁷

Given the disadvantages the current system poses to developing states, there are a number of reforms that could be made to the

¹⁷² See Shaffer, *supra* note 115, at 38. See also Chad P. Bown, *Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes*, 27 *WORLD ECON.* 59 (2004).

¹⁷³ See generally Bown, *supra* note 103.

¹⁷⁴ See Mercurio, *supra* note 171, at 318 (noting that “both trading partners understand that retaliation will likely harm the smaller partner more than it harms the larger partner”).

¹⁷⁵ See Bown & Hoekman, *supra* note 140, at 866.

¹⁷⁶ Joseph Francois et al., *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System*, 730 (Stockholm Research Institute of Industrial Economics, Working Paper 2007) (finding that countries that are dependent on bilateral aid from another country are less likely to be engaged in trade disputes). See also Horn et al., *supra* note 110, at 454. “[S]mall developing countries may exercise self-constraint in picking their fights in order not to jeopardize privileges they depend on, for example, development aid and unilateral trade preferences.” *Id.*

¹⁷⁷ See Horn et al., *supra* note 110, at 454. “[S]mall countries may be discouraged from bringing complaints if their prospects of enforcing rulings in their favor are bleak because of limited retaliatory power.” *Id.* See also Busch & Reinhardt, *supra* note 98, at 720.

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remedies available in the WTO to increase fairness.¹⁷⁸ First, the WTO could use payment of fines as a prospective remedy.¹⁷⁹ Under this proposal, if the DSU process resulted in a ruling that a state was not meeting its obligations and the state subsequently failed to bring its policies into compliance, it could be forced to pay the complainant state in exchange for its continued violation.¹⁸⁰ A number of governments have also expressed their support for awarding this form of financial compensation for violations of WTO rules.¹⁸¹ A second modification that has been proposed is the payment of retrospective damages.¹⁸² This modification would not only give developing states a greater incentive to enforce their rights through the dispute settlement process, but it could also increase their capacity to do so because the possibility of retrospective damages could lead to experienced law firms agreeing to take on the cases of developing countries on a contingency basis.¹⁸³ Finally, a third way to reform the WTO remedy structure to increase the rights of developing states would be to make the payment of attorney's fees included as part of the decision when a complaint is successful.¹⁸⁴ This proposal would further reduce the incentive for rich countries to

¹⁷⁸ For an extensive list of articles discussing reform proposals to reform the remedies system of the WTO, see Trachtman, *supra* note 164, at 127 n.3.

¹⁷⁹ See Shaffer, *supra* note 115, at 41-43.

¹⁸⁰ On our earlier distinction, this remedies proposal might seem to be a change in the formal rights of member states, rather than an informal change in means available to navigate the system. Although this is correct, we do not see a reason to fear that this type of change would incur the costs associated with formal changes, such as burdensome increases in the complexity or difficulty of bringing cases within the WTO.

¹⁸¹ See Trachtman, *supra* note 164, at 162 n.167 (citing Communication from Pakistan to the General Council, *Preparations for the 1999 Ministerial Conference-The Dispute Settlement Understanding (DSU)*, WT/GC/W/162 (Apr. 1, 1999)). See also Shaffer, *supra* note 115, 41-42.

¹⁸² See Shaffer, *supra* note 115, at 43-44.

¹⁸³ See *id.* at 43. It is worth noting that the reason that this benefit does not necessarily occur with prospective damages is because if a complaint is successful, the respondent state could simply decide to alter their policies instead of paying damages for future behavior.

¹⁸⁴ See *id.* at 43-48 (offering a range of justifications for this policy due to its potential to help developing states protect their rights).

drag out cases to exploit their advantage in resources. Although there are concerns that may militate against any of these proposals,¹⁸⁵ they deserve strong consideration as ways to help improve the distributive justice of the WTO.

C. Making Countermeasures Tradable

In addition to expanding the set of permissible remedies to include mandatory financial compensation, there is reform that has been proposed in recognition of the fact that, because of disparities in market size, it does not make sense for a country with a small market to even request to impose countermeasures against a violator.¹⁸⁶ One idea originally proposed by Mexico is to allow members who won claims the ability to trade the right to impose countermeasures.¹⁸⁷ The rationale is that a state that brought a successful complaint in the WTO might not be able to successfully use the right to enforce countermeasures,¹⁸⁸ and thus cannot successfully gain any compensation for having their exports blocked from foreign markets. There may be, however, other states that would be better situated to take advantage of the right to retaliate, and thus a market could be created for that right to ensure that the violator could not act with

¹⁸⁵ For arguments against reforming the remedies available in the WTO, see Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319 (2008). See also Mercurio, *supra* note 171.

¹⁸⁶ See Kyle Bagwell et al., *The Case for Tradable Remedies in WTO Dispute Settlement*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 395 (Evenett & Hoekman eds., 2006).

¹⁸⁷ See Proposal by Mexico, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, TN/DS/W/23 (Nov. 4, 2002).

The suspension of concessions phase poses a practical problem for the Member seeking to apply such suspension. That Member may not be able to find a trade sector or agreement in respect of which the suspension of concessions would bring about compliance without affecting its own interests There may be other Members, however, with the capacity to effectively suspend concessions to the infringing Member. *Id.* at 5.

¹⁸⁸ See *supra* text accompanying notes 171-77.

impunity.¹⁸⁹

There have been at least four benefits identified with creating a system that allows states who have won favorable judgments in the DSU process to auction the right to retaliate.¹⁹⁰ First, it would improve the bargaining power of weaker states during all stages of WTO litigation because of the increased costs that could be associated with adverse judgments.¹⁹¹ Second, since developing states that have had their rights violated are often unable to retaliate themselves, it would more fairly compensate them by providing a financial gain.¹⁹² Third, the incentive for developed states to comply with WTO policies would be increased because those states would face the threat of more effective retaliation.¹⁹³ Fourth, there would be increased efficiency in the system because the right to retaliate would be moved to the state that valued it the most.¹⁹⁴

D. Summary

These are mere sketches of proposals for promoting procedural equality. They share in common the aim of enabling poor countries to use the legal system provided by the WTO more effectively. Hopefully, they would enable non-participating poor countries to acquire the capacity (and recognize the viability of exercising the capacity) to make claims against richer, more powerful states. Moreover, there is strong social scientific evidence that suggests capacity is more important than power in deciding whether to file.¹⁹⁵ Given the distributional significance of the WTO

¹⁸⁹ For a discussion of the various ways this proposal could be implemented, and the tradeoffs associated with it, *see* Bagwell et al., *supra* note 129. For a discussion of the potential limits associated with creating these auctions, *see* Trachtman, *supra* note 164, at 155-56.

¹⁹⁰ *See generally* Bagwell et al., *supra* note 129, at 310.

¹⁹¹ *See id.*

¹⁹² *See* Proposal by Mexico, *supra* note 187, at 6.

¹⁹³ *Id.*

¹⁹⁴ Bagwell et al., *supra* note 129, at 310.

¹⁹⁵ *See* Davis & Bermeo, *supra* note 99. *See also* Andrew Guzman & Beth Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and*

procedures, we might expect that these reforms would also increase the substantive equality in how the benefits of trade liberalization are distributed. But as argued in Part II, the moral value of substantive equality is, in this context, uncertain. More pressing is the obligation to protect weaker parties from wrongful treatment by others. The social scientific evidence suggests that proposals like the ones we have discussed will help to provide equal access to the WTO's procedures. In this way, the proposals could help to deny powerful states the ability to coerce, deceive or manipulate weaker actors into doing the bidding of the rich. If this hypothesis is right, equality is morally important as a means of preventing morally wrong actions. Equality also protects the weak from the risk of future wrongdoing, which would otherwise be present in the legal system. This account is egalitarian because it treats equality as a political concern. We morally ought to bring about procedures that recognize the equal status of members. However, it does not locate the moral importance of this value in equality's intrinsic features. Rather, the account offered here is a species of a non-intrinsic egalitarian view, according to which equality is valuable for the sake of something else.¹⁹⁶ In this case, equality is instrumentally valuable in securing a more just order within the WTO.

We should also emphasize that the institutional criticisms and recommendations offered here are provisional. Questions of institutional reform are freighted with empirical controversy. Whether any given reform ought to be adopted requires an all things considered judgment informed by the social sciences. Our hope throughout has been to point out a few normative considerations that bear on the question, and then conjecture about what reforms these considerations would weigh in favor of, provided a few empirical assumptions are true. So, the point we mean to underscore is that the conclusions offered here should be read as defeasible in light of opposing social scientific evidence.

Settlement at the World Trade Organization, 31 J. LEGAL STUD. 205 (2002).

¹⁹⁶ On non-intrinsic egalitarianism, see O'Neill, *supra* note 8.

VI. Conclusion

The purpose of this paper has been to move from an abstract conclusion about the political importance of equality to a more determinate conclusion about how the value of equality should guide international institutions like the WTO. The abstract conclusion was that equality ought to be a political concern in some international institutions, like the WTO, in roughly the same way that it is a political concern in domestic political states. As such, it counts as a form of *cosmopolitanism*. We have argued that the cosmopolitan imperative is best understood as procedural rather than substantive, and that those procedural reforms will be best that prevent future wrongdoing by agents with the institutions. So equality is valuable in a procedural and instrumental way. We have further suggested that informal changes enabling poor countries to use the system better are likely preferable to altering the WTO's legal system, itself. Our use of the WTO has been primarily illustrative, and we have not meant to suggest that we can apply these lessons to other institutions without a detailed investigation of the empirical facts about those specific institutions.

In one sense, these results are not surprising. The moral cosmopolitan's pressure for institutional reform echoes calls for reform already on the table from social scientists, international lawyers, and trade ministries from the developing world. The practical advantage of these proposals is that it is clear how they would be implemented: they require only modifying presently existing institutions, and sometimes not even that. Merely securing greater equality in access to presently existing institutions could be enough to satisfy the demands of justice. An important consequence is that justice is an idea that is attainable in the actual world. And we do not even need a detour through injustice to get there.¹⁹⁷

It is in this sense the institutional prescriptions offered here are actually quite startling. They contrast sharply with extant cosmopolitan proposals forwarded by philosophers. Many

¹⁹⁷ Cf. Nagel, *supra* note 1, at 145-47.

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cosmopolitan philosophers of global justice see the current global order as either in need of drastic overhaul, or else hopelessly unjust. Philosophy points a way toward a better, if distant world. On the view developed here, philosophy does not so much cast a light toward a distant ideal of justice as much as follow along with the practical proposals made by others. In fact, some of the reforms suggested here are not even opposed by powerful states in the developed world.¹⁹⁸ This is not to deny the existence of dire humanitarian problems in other corners of the world, nor to doubt the need to call attention to such problems. But it does strike one note of optimism. The concern for justice is not a concern had only among philosophers, but it is a concern motivating policy practitioners as well. The course of international institutions, like the WTO, seems to be sensitive to the requirements of justice. There is reason to hope that the moral arc of these institutions is, at the least, toward progress.¹⁹⁹

¹⁹⁸ For example, Shaffer has noted that in some cases the United States has supported the use of remedies that he favors. *See* Shaffer, *supra* note 115, at 42.

¹⁹⁹ *Cf.* Joshua Cohen, *The Arc of the Moral Universe*, 26 PHIL. & PUB. AFF. 91 (1997); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986).