

# THE OBJECTIVITY OF WELL-BEING AND THE OBJECTIVES OF PROPERTY LAW

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*Assuming that the enhancement of people's well-being is a worthy goal for the state to pursue, the question of what well-being consists of arises. This fundamental question has been debated extensively by philosophers, but it is mostly ignored in the legal literature, mainly due to the dominance of the economic-analysis-of-law movement in legal scholarship. The shortcoming of the efficiency analysis is that it primarily focuses on satisfaction of preferences, while disregarding other possible criteria of welfare. Thus, if the preferences considered are people's actual, subjective ones, then whenever a person's desires are based on misinformation, prejudice, or lack of self-esteem, the fulfillment of these preferences might result in a reduction—rather than advancement—of that person's welfare.*

*This Article argues in favor of an objective approach to welfare. According to an objective approach, certain things, such as knowledge of ourselves and the world around us, accomplishment of worthwhile goals, and attainment of deep and meaningful relationships, are intrinsically valuable, notwithstanding one's preferences. The Article shows that an objective theory need not be rigid or elitist, and can be sufficiently flexible to respect people's autonomy and allow many paths to achieving a good life. It further demonstrates that the obvious attractions of preference theories—their antipaternalistic flavor and practical simplicity—are misleading. In fact, objectivity cannot be avoided even in seemingly subjective theories of well-being. The Article explains the importance and normative implications of an objective theory of well-being for legal theory and develops an objective approach to property law. Objective standards justify certain requirements of property law, in terms of both quantity and quality. These requirements are manifest in existing legal rules, such as property exemptions in bankruptcy, the numerus clausus principle, and restrictions on owners' power to control property after death.*

## INTRODUCTION

Herman Melville's memorable novella, *Bartleby*,<sup>1</sup> tells the story of a most unusual person. *Bartleby* is set in a Wall Street law office in the 1850s and is narrated by a lawyer whose increased business has required the hiring of an additional scrivener (copyist). In the age preceding photocopying machines and computers, copies of legal doc-

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<sup>1</sup> Herman Melville, *Bartleby, in Billy Budd and Other Tales* 107 (Signet Classics 1998) (1853).

uments were handwritten and proofread for accuracy with the aid of scribes. Bartleby, the newly hired worker, appears to be diligent.<sup>2</sup>

Very quickly, however, he starts refusing to perform any of his assigned tasks, with the exception of the act of copying itself. To his astonished employer he repeatedly offers only one response: "I would prefer not to."<sup>3</sup> No matter how pressed he is to give some reasonable or even *any* explanation for his behavior, Bartleby unyieldingly persists with the mantra, "I would prefer not to."<sup>4</sup> Events deteriorate rapidly, and one day Bartleby announces to the bewildered lawyer that he will cease to copy, and that he prefers not to work at all. He stands motionless and silent in the office all day long.<sup>5</sup> The lawyer's attempts to fire Bartleby and make him leave the office fail miserably in the face of Bartleby's calm reply that he "would prefer not to."<sup>6</sup> This failure results in the *lawyer* moving his office to another location, leaving Bartleby behind in the empty rooms. The new tenant eventually summons the police who arrest Bartleby for vagrancy.<sup>7</sup> In prison, Bartleby "prefers" to refuse food and eventually dies of starvation.<sup>8</sup>

The story of Bartleby, although touching, is also comical. This is so, despite his tragic demise, because Bartleby himself hardly seems human. One cannot identify with, or feel pity for, a person whose only reason for wanting something is his preference for it. Real people desire various things *because they are valuable*, and they believe them to be valuable for *certain reasons*. These objective or external reasons, and not the act of desiring itself, confer value on our choices and actions.<sup>9</sup> Thus, Bartleby's stubborn persistence is unintelligible to us. Refusing to back his preferences with adequate reasons, Bartleby is more a caricature than a martyr. His plight leaves us bemused, not heartbroken.<sup>10</sup>

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<sup>2</sup> See *id.* at 113-14.

<sup>3</sup> *Id.* at 115.

<sup>4</sup> *Id.* at 116, 119-21, 125-26.

<sup>5</sup> *Id.* at 127-28.

<sup>6</sup> *Id.* at 128-29, 131-32.

<sup>7</sup> *Id.* at 135-39.

<sup>8</sup> *Id.* at 140-42.

<sup>9</sup> See *infra* notes 69-76 and accompanying text.

<sup>10</sup> Law and literature scholars heroically attempt to give Bartleby's bizarre behavior deep ideological meaning. Robin West, for example, emphasizes the employment-relationship context of the story, and views Bartleby's resistance as a victim's response to the exploitative and spirit-murdering task of being a scrivener in a law office. Robin West, *Caring for Justice* 223-24, 227-32, 240 (1997). In a similar vein, Brook Thomas regards the story as a critique of *laissez-faire* ideology in employer-employee contractual relationships. Bartleby, accordingly, is representative of the class of oppressed workers. Brook Thomas, *Cross-Examination of Law and Literature: Cooper, Hawthorne, Stowe and Melville* 165-67, 177, 179-80 (1987). To my mind, these interpretations are not wholly convincing in light

On a more general level, Melville's novella demonstrates the inadequacy of equating a person's well-being with the fulfillment of his or her preferences. Most people will agree that enhancement of well-being is important, and that it is a worthwhile goal for the state to pursue.<sup>11</sup> However, what well-being is, and which criterion of well-being the state should adopt, are complex and controversial issues. These issues are extensively debated by philosophers,<sup>12</sup> but are mostly ignored in the legal literature. This phenomenon is mainly due to the dominance of the economic-analysis-of-law movement in legal scholarship. Efficiency analysis has focused primarily on a certain, rather narrow, criterion of well-being—preference satisfaction—and has advocated its maximization.<sup>13</sup> At the same time, it largely has disregarded other options, especially objective criteria of well-being.<sup>14</sup> Thus, people's well-being is determined by the extent to which their preferences are fulfilled. Consequently, the legal debate on issues of welfare is centered on the conflict between the goal of "welfare" (maximizing the size of the pie), defined in preference-satisfaction terms, and the goal of "fairness" (the distribution of the pie's slices among individuals). Although there is much controversy on what the adequate tradeoff between welfare and fairness is and, in particular, on whether legal rules should attempt to redistribute wealth,<sup>15</sup> it is

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of Melville's comical portrayal of *Bartleby* as an unattractive, incomprehensible, and hardly human figure.

<sup>11</sup> I do not claim that advancement of overall well-being in society should be the state's only goal. Issues of equality, for instance, are of prime importance too. See Shelly Kagan, *Normative Ethics* 48-49 (1998) (discussing conflict between welfare maximization and equality considerations); Amartya K. Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 *J. Phil.* 169, 186, 194-95 (1985) (noting importance of other goals besides well-being). In addition, I do not address the question of whether in promoting overall welfare, governments should aim at maximizing the *total* well-being in society, or the *average* level of well-being. On the distinction between the two conceptions of maximization, see Kagan, *supra*, at 43-47 (describing advantages and disadvantages of each criterion). For the purposes of this Article, suffice it to say that enhancing citizens' well-being is justifiably a major governmental concern.

<sup>12</sup> See *infra* Parts I.A, I.B, II.A, and II.C.

<sup>13</sup> Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility and the Pareto Principle*, 110 *Yale L.J.* 173, 175 (2000); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 *U. Chi. L. Rev.* 1197, 1197 (1997); Scott Shapiro & Edward F. McClellan, *Law-and-Economics from a Philosophical Perspective*, in 2 *The New Palgrave Dictionary of Economics and the Law* 460, 461 (Peter Newman ed., 1998).

<sup>14</sup> See *infra* notes 83-89 and accompanying text.

<sup>15</sup> Central discussions of these issues include, for example, Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff* ch. 4 (1975) (examining government compromises between economic efficiency and equality, such as progressive income taxes, aid to low-income groups, and employment opportunity programs); A. Mitchell Polinsky, *An Introduction to Law and Economics* 124-27 (2d ed. 1989) (concluding that legal rules should be based primarily on efficiency considerations as legal system cannot redistribute income as

almost universally uncontested that “welfare” is synonymous with “preference satisfaction.”<sup>16</sup>

This state of affairs is quite surprising in light of the grave deficiencies of a preference criterion of welfare and the impressive advantages of rival criteria. Thus, for example, fulfillment of a person’s subjective, *actual* preferences might result in a reduction—rather than an advancement—of that person’s well-being.<sup>17</sup> This may be so if a person’s desires are based on misinformation, prejudice, or lack of self-respect and self-esteem. Suggested remedies, such as switching to an ideal preferences criterion of well-being, or disregarding (“laundering”) objectionable preferences, are but partial, unsatisfactory solutions.<sup>18</sup>

In contrast, a more objective theory of well-being that also judges people’s welfare by external standards, may be more suitable for measuring well-being and for welfare maximization in general. According to an objective approach, certain things—such as knowledge of our-

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systematically and precisely as tax system); Christine Jolls, Behavioral Economics Analysis of Redistributive Legal Rules, 51 Vand. L. Rev. 1653 (1998) (advancing view that redistributive, as opposed to efficient, legal rules may distort work incentives less than redistributive taxes); Louis Kaplow & Steven Shavell, Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income, 23(2) J. Legal Stud. 667 (supp. vol. 1994) (arguing that redistribution is accomplished more efficiently through income tax system than through use of legal rules); Duncan Kennedy, Law-and-Economics from the Perspective of Critical Legal Studies, in 2 The New Palgrave Dictionary of Economics and the Law, supra note 13, at 469-72; Chris William Sanchirico, Taxes Versus Legal Rules as Instruments for Equality: A More Equitable View, 29 J. Legal Stud. 797 (2000) (claiming that legal rules should deviate from efficiency in order to redistribute in favor of less well-off persons); Steven Shavell, A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?, 71 Am. Econ. Rev. 414 (1981) (arguing that, even with imperfect redistribution through taxation, legal rules should be chosen only on basis of efficiency).

<sup>16</sup> There are some exceptions that have emerged only recently. See Matthew D. Adler & Eric A. Posner, Rethinking Cost-Benefit Analysis, 109 Yale L.J. 165, 197-204 (1999) (discussing various theories of well-being); Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961, 980 n.35, 1353-54 (2001) (criticizing objective conception of welfare); Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. Rev. 106, 128-33 (2002) (differentiating between concepts of efficiency and welfare); Eyal Zamir, The Efficiency of Paternalism, 84 Va. L. Rev. 229, 234-35 (1998) (describing different criteria of well-being). I have noted various criteria of well-being in Daphna Lewinsohn-Zamir, Consumer Preferences, Citizen Preferences, and the Provision of Public Goods, 108 Yale L.J. 377, 381 n.9 (1998). None of these sources, however, thoroughly discuss rival criteria of welfare. Adler & Posner, supra, and Kaplow & Shavell, supra, quickly dismiss competing theories of well-being, without acknowledging their strengths, in comparison with preference theories. Sunstein correctly states that welfare “can be specified in many different ways,” Sunstein, supra, at 129, but does not elaborate on this claim. Zamir mentions different accounts of well-being, but focuses on variants of preference theories. Zamir, supra, at 240-54.

<sup>17</sup> See infra notes 36-39 and accompanying text.

<sup>18</sup> See infra notes 47-67 and accompanying text.

selves and the world around us, accomplishment of worthwhile goals, and attainment of deep and meaningful relationships—are intrinsically valuable, and having them makes for a better life.<sup>19</sup> Their value does not depend entirely on whether they are, in fact, desired by those whose welfare is being evaluated.

Thus, even laying aside fairness considerations, and focusing on the goal of maximizing overall well-being, preference satisfaction is not, and should not be, the only game in town. We should enrich our discussion and improve our policy recommendations through careful evaluation of additional theories of well-being. As a result of such consideration, we may conclude with confidence that certain legal rules, considered “efficient” (by the preference-satisfaction criterion), do not advance people’s well-being; while other rules, deemed “inefficient” by economic analysis, are actually well-being-enhancing and thus justifiable from an objective perspective.

By taking the notion of preference satisfaction to the extreme, Melville’s novella clearly illustrates two of the theory’s major shortcomings: first, the necessity of grounding preferences in adequate reasons (preferences alone do not suffice); second, the relation between fulfillment of desires and enhancement of welfare. Bartleby has certainly satisfied his preferences, but this can hardly be viewed as a success story since its outcome is death—the quintessence of a reduction in a person’s well-being. Bartleby probably would have fared better if his desires were not fulfilled. Both flaws of preference theories thus support the articulation of an alternative theory of well-being, based on the *objective value* of certain good things.

The first goal of this Article is to argue in favor of an objective theory of well-being, which claims that any adequate criterion of welfare must consist of strong objective components. Nonetheless, an objective theory need not be rigid or elitist. It may be sufficiently broad and flexible as to respect people’s autonomy and allow many paths to achieving a good life. Furthermore, the Article argues that the obvious attractions of preference theories—their antipaternalism and practical simplicity—are misleading. In truth, any plausible preference theory involves a great deal of objectivity and intervention in people’s desires. Moreover, it is not easier, and often is more difficult, to implement a preference criterion than an objective criterion. Consequently, objectivity cannot be avoided even in seemingly subjective theories of well-being, although proponents of the latter certainly attempt to obscure and downplay this fact.

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<sup>19</sup> See *infra* notes 158-81 and accompanying text.

The second goal of this Article is to explain the importance and normative implications of an objective theory of well-being for legal theory. By generally justifying the use of objective criteria in evaluating and advancing people's welfare, the argument is relevant and applicable to any field of law. The Article shall demonstrate this great potential by developing an objective approach to property law.<sup>20</sup>

The Article shows that private property and objectively defined well-being are intimately connected and that the former is essential to the achievement of the latter. Furthermore, objective standards justify certain requirements of property law, in terms of both *quantity* and *quality*. The most important, distinctive feature of "well-being-enhancing property" is the *quality* requirement,<sup>21</sup> which is comprised of two types of constraints: *identity* and *content*. The first pertains to the *identity* of the property items that are most conducive to well-being. From an objective-welfare perspective, not all objects of property are equally important; some are more essential than others. Thus, in certain circumstances, property law should prohibit the taking, or even the voluntary relinquishment, of particular kinds of property. The second quality requirement concerns the *content* of specific property items. A given property right must have certain characteristics, or "core" elements, in order to advance welfare. Property rights lacking these features resemble an empty shell, and cannot improve well-being (entirely, or only to a far lesser extent). Therefore, property law is justified in preventing the creation of coreless property rights.

This Article's claims are both normative and descriptive. It posits that the "double objectivity" requirement of *identity* and *content* is manifest in existing rules of property law and illustrates this in various applications: property exempted in bankruptcy; the *numerus clausus* principle; the implied warranty of habitability and implied covenant to deliver actual possession in landlord and tenant law; and restrictions on owners' power to control property after death. Furthermore, as the discussion of these applications shows, rules that seem problematic from an efficiency, distributive, or personhood theory's point of view can be justified more easily from an objective-welfare perspective. Thus, the objective theory of well-being may provide a more persuasive explanation for many current rules than do rival theories, as well as a sound basis for evaluating existing doctrines.

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<sup>20</sup> See *infra* notes 419-28 and accompanying text for suggestions of objective approaches to other areas of law.

<sup>21</sup> See *infra* notes 226-30 and accompanying text.

Part I opens with a critical discussion of subjective theories of well-being. In particular, Part I.B focuses on the deficiencies of preference theories, and Part I.C explains and criticizes the prevalence of preference theories in legal literature. Part I.D then claims that objectivity cannot be avoided and demonstrates how most theories of well-being are, in fact, objective to some extent. Part II analyzes the objective theory of well-being, its advantages, and its appropriate scope. Following a general outline of this theory in Part II.A, Part II.B explores the relationships between an objective theory of well-being and considerations of fairness. Part II.C then explains why an objective theory does not entail excessive curtailment of people's autonomy and freedom. The objective approach to property law is developed in Part III. Parts III.A and III.B present the basic thesis, explaining the importance of private property to the promotion of objectively defined well-being, with the consequent quality requirements of *identity* and *content*. Part III.C discusses important differences between an objective theory of welfare and the personhood theory of property, advocated by Margaret Radin. Part III.D then demonstrates how an objective theory of well-being provides convincing justifications for various doctrines of property law, as well as sound yardsticks for critical evaluation thereof—justifications and yardsticks superior to those provided by other theories.

## I

### SUBJECTIVE THEORIES OF WELL-BEING

Theories of well-being are commonly divided into three types or categories: mental state theories, desire or preference theories, and “objective list” or objective theories.<sup>22</sup> The discussion opens with mental state theories, but will focus on the more influential preference theories and their shortcomings. This Part next explores the inherent objectivity of preference theories.

#### *A. From Mental State Theories to Preference Theories of Well-Being*

Mental state (MS) theories assert that well-being is wholly determined by individuals' experiences, consciousness, or feelings.<sup>23</sup> A famous example is Jeremy Bentham's utilitarian conception of well-

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<sup>22</sup> Derek Parfit, *Reasons and Persons* 493 (1984); Shelly Kagan, *The Limits of Well-Being*, 9 *Soc. Phil. & Pol'y* 169, 169-70 (1992); Thomas M. Scanlon, *Value, Desire, and Quality of Life*, in *The Quality of Life* 185, 186-87 (Martha C. Nussbaum & Amartya Sen eds., 1993).

<sup>23</sup> For this reason, these theories are also referred to as “experiential theories.” See generally Thomas M. Scanlon, *What We Owe to Each Other* 112-13 (1998).

fare, which equates well-being with happiness, defined as the presence of pleasure and absence of pain.<sup>24</sup> Bentham recognized the positive value of a single experience—pleasure—and claimed that well-being should be calculated by subtracting the total quantity of pain from the total quantity of pleasure. The greater the surplus of pleasure over pain, the better life is.<sup>25</sup>

MS theories, however, also come in more sophisticated versions. First, one may differentiate between various kinds of pleasures. John Stuart Mill, for example, rejected the view that all pleasures are equally valuable—distinguishing between “higher” pleasures such as the spiritual pleasures of understanding and accomplishment and “lower” ones such as physical or bodily pleasures—and argued that the quality of pleasures, and not only their quantity, matters.<sup>26</sup> A given quantity of higher pleasures will enhance a person’s well-being to a much greater extent than a similar quantity of lower pleasures.<sup>27</sup> Second, an MS theory may reject the claim that pleasure and pain are the only experiences that determine well-being, and argue that additional experiences, besides pleasures, are valuable and contribute to a person’s well-being.<sup>28</sup> According to this view, well-being consists of having several different, favorable mental states.<sup>29</sup>

All MS theories, however, face a crucial problem, demonstrated by the following example: Imagine a person who is leading a happy and contented life, believing herself to be loved and respected by family, friends, and colleagues. In reality, however, her beliefs are false, a mere illusion. Unbeknownst to her, she is in fact hated,

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<sup>24</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *The Collected Works of Jeremy Bentham* 11-12 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

<sup>25</sup> *Id.* Kagan refers to this version of mental state (MS) theory as “quantitative hedonism.” See Kagan, *supra* note 11, at 31-32.

<sup>26</sup> John Stuart Mill, *Utilitarianism*, in *On Liberty and Other Essays* 136, 137-43 (John Gray ed., Oxford World’s Classics 1998) (1860).

<sup>27</sup> *Id.* Mill supports his theory of qualitative hedonism with a comparison between the low pleasures of a contented pig—wallowing in the mud—and the high pleasures of a scholarly life, such as the life of Socrates. *Id.* at 140. For a discussion of Mill’s MS theory, see generally L.W. Sumner, *Welfare, Happiness, and Ethics* 110 (1996); David O. Brink, *Mill’s Deliberative Utilitarianism*, 21 *Phil. & Pub. Aff.* 67 (1992).

<sup>28</sup> James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* 8 (1986); Kagan, *supra* note 11, at 34; Kagan, *supra* note 22, at 169-70; Sen, *supra* note 11, at 188-89. Griffin gives a persuasive example that supports the rejection of the narrow pleasure account: At the end of his life, Sigmund Freud was ill and suffered great pain. Nevertheless, he refused to take strong pain relievers, preferring the ability to think in torment rather than the inability to think clearly. Griffin, *supra*, at 8. Although we tend to agree with Freud that his chosen MS is the more valuable state, it is doubtful that it is the more “pleasurable” one. *Id.*

<sup>29</sup> Elizabeth Anderson, *Value in Ethics and Economics* 125 (1993); Griffin, *supra* note 28, at 8-9; Henry Sidgwick, *The Methods of Ethics* 128-29 (7th ed. 1981).

despised, and deceived by all. Would we describe this person as leading as good a life as possible, since her mental state is extremely pleasurable, to the same extent that it would have been were she not mistaken? Evidently, the deceived person's life is not going as well as that of the same person whose optimistic beliefs are all true.<sup>30</sup> Well-being is determined not only by what we feel, but also by what we are and what we do in reality.

A more extreme illustration of this point is Robert Nozick's famous "experience machine," which is capable of stimulating people's brains to provide any desired experience. A person plugging into the machine will feel and think that all his wishes are coming true: He is writing a great novel, making a new friend. Our easy rejection of the experience machine's allure demonstrates that there is more to well-being than how our lives feel from the inside.<sup>31</sup> The deluded person does not have, in fact, what he desires, and this reality diminishes his well-being.<sup>32</sup>

The main problem with MS theories is the possible lack of contact with reality. A more plausible theory might define well-being as the actual satisfaction of desires or preferences in the real world. Thus, the deficiency of MS theories may lead us to preference theories of well-being.<sup>33</sup>

### B. Preference Theories of Well-Being

A desire or preference theory holds that a person's well-being is determined by the extent to which her preferences are fulfilled.<sup>34</sup>

In its most simple form, preference theory asserts that an individual's well-being is advanced by satisfying her *actual* preferences, regardless of content. "Satisfaction" of preferences is tantamount to the occurrence of the individual's desired state of affairs.<sup>35</sup> The

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<sup>30</sup> See Kagan, *supra* note 11, at 34-36 (discussing "deceived individual" case); Scanlon, *supra* note 23, at 112 (same); Richard Kraut, Two Conceptions of Happiness, 88 *Phil. Rev.* 167, 177-78 (1979) (same).

<sup>31</sup> Robert Nozick, *Anarchy, State and Utopia* 42-45 (1974).

<sup>32</sup> Kagan, *supra* note 11, at 35-36; Sumner, *supra* note 27, at 96-98; Kraut, *supra* note 30, at 178-79.

<sup>33</sup> David O. Brink, *Moral Realism and the Foundations of Ethics* 224 (1989); Griffin, *supra* note 28, at 9-10; Kagan, *supra* note 11, at 36; Thomas M. Scanlon, *The Status of Well-Being*, in 19 *Tanner Lectures on Human Values* 93, 100 (1998); Kagan, *supra* note 22, at 171.

<sup>34</sup> Griffin, *supra* note 28, at 10; Kagan, *supra* note 11, at 36; Scanlon, *supra* note 22, at 186; Sumner, *supra* note 27, at 113.

<sup>35</sup> Richard B. Brandt, *A Theory of the Good and the Right* 146-47 (1979); Kagan, *supra* note 11, at 37; Scanlon, *supra* note 22, at 186.

advantage of simplicity,<sup>36</sup> however, is lost by the overwhelming problems of such an unrestricted conception of the good. A major objection to the actual preference (AP) theory is that people may often desire what is bad for them.

This discussion assumes that it is possible to say that the satisfaction of certain preferences is not good for a person, in the sense that it does not advance her welfare. To take an extreme example, it seems unlikely that the fulfillment of a person's desire to commit suicide furthers her well-being.<sup>37</sup> Objective judgments regarding the connection between preference satisfaction and welfare promotion are possible even in less extreme cases: Fulfillment of desires based, for example, on misinformation, mistakes, prejudice, whims, or lack of self-respect and self-esteem, might leave people no better-off and frequently worse-off, and so reduce their welfare.<sup>38</sup> This unhappy result is also due to the inherent unavoidable gap between *ex ante* expectations and *ex post* experiences: Our desires are always directed toward some future state of affairs. We may wish our preferences to be fulfilled because we anticipate that their fulfillment will improve our lives, but

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<sup>36</sup> For a critical discussion of this advantage and other reasons for the popularity of actual preferences in economic analysis, see *infra* notes 90-101 and accompanying text and Part I.D.

<sup>37</sup> I believe that this is true even in cases of painful terminal illness. Although suicide may be justified or rational in such cases, it cannot increase a person's *well-being*. The category of preferences that does not promote a person's welfare may include not only those harmful to oneself alone, but, arguably, also those that benefit others at one's own expense. It does not necessarily follow, however, that we should treat both types of well-being-reducing preferences equally. Although advancing well-being is an important social goal, it is certainly not the only goal. Therefore, we may decide to disregard or even thwart the former type of preferences because self-harm does not advance any worthwhile end, so there is no reason to depart from the goal of welfare promotion. At the same time, we may praise and encourage the latter type because self-harm is outweighed by the ensuing good to others. To my mind, there is nobility in sacrificing one's own welfare to help others. Viewing this sacrifice as promotion of self-interest, that is, advancement of one's own well-being, belittles this gift by giving it an egoistic tint. For the purposes of this Article it is unnecessary to decide whether the satisfaction of altruistic preferences should be seen as reducing an altruist's well-being or, rather, as advancing self-interest or "taste" for fairness. The former view is advocated in Brandt, *supra* note 35, at 127; Sumner, *supra* note 27, at 134; Nussbaum, *supra* note 13, at 1211-13; Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *Phil. & Pub. Aff.* 317, 326-29 (1977); Sen, *supra* note 11, at 206-07. Supporters of the latter view include Kaplow & Shavell, *supra* note 16, at 975, 982-83, 1350-55, 1363.

<sup>38</sup> Anderson, *supra* note 29, at 130; Brandt, *supra* note 35, at 147; John Broome, *Ethics Out of Economics* 4 (1999); James Griffin, *Against the Taste Model*, in *Interpersonal Comparisons of Well-Being* 45, 48 (Jon Elster & John E. Roemer eds., 1991); Griffin, *supra* note 28, at 10; Daniel M. Hausman & Michael S. McPherson, *Economic Analysis and Moral Philosophy* 73 (1996); Kagan, *supra* note 11, at 38; Peter Railton, *Moral Realism*, 95 *Phil. Rev.* 163, 173 (1986).

these expectations may be disappointed when we actually experience the satisfaction of our desires.<sup>39</sup>

Another deficiency of the AP theory is that actual preferences are too wide in scope and thus satisfaction of some preferences may in no way affect people's lives. Such are, for example, preferences about the prosperity of a stranger whom one will never meet again,<sup>40</sup> the number of atoms in the universe,<sup>41</sup> or the color of Frank Sinatra's eyes.<sup>42</sup> The mere fact that reality is, was, or will be in accordance with my desires does not improve my life. This problem can be mitigated by restricting preferences to those concerning a person's own life and success.<sup>43</sup>

The philosophical literature has identified and discussed additional problems of an unrestricted AP theory of well-being. One such problem concerns the possible changes in the content of preferences over time. Which of the conflicting preferences should we strive to satisfy?<sup>44</sup> Yet another difficulty is posed by trivial or extremely expensive preferences. Should all preferences be afforded equal weight and importance, or should we grant priority to the most urgent preferences?<sup>45</sup>

The value of individual autonomy does not resolve these problems with the AP theory. This would confuse two distinct questions: "Is AP a plausible criterion of individuals' well-being?" and, "In what circumstances should the state interfere with people's mistaken AP regarding their well-being?" The discussion below is confined to the first question.<sup>46</sup> Because fulfillment of AP might not

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<sup>39</sup> Sumner, *supra* note 27, at 129-30.

<sup>40</sup> Parfit, *supra* note 22, at 494.

<sup>41</sup> Kagan, *supra* note 11, at 37.

<sup>42</sup> Scanlon, *supra* note 22, at 186; see also Brandt, *supra* note 35, at 147 (further illustrating preferences that do not affect person's life); Scanlon, *supra* note 23, at 113-14 (same); Sumner, *supra* note 27, at 125 (same).

<sup>43</sup> See Griffin, *supra* note 28, at 21-22 ("The notion we are after is not the notion of value in general, but the narrower notion of a life's being valuable solely to the person who lives it."); Parfit, *supra* note 22, at 494 (contrasting unrestricted desire fulfillment theory with success theory). The restriction of actual preference theory (AP) to preferences concerning a person's own life and its success introduces an objective element into the seemingly subjective preference theory of well-being. See *infra* Part I.D.

<sup>44</sup> Brandt, *supra* note 35, at 249-51; Parfit, *supra* note 22, ch. 8.

<sup>45</sup> See Thomas M. Scanlon, *Preference and Urgency*, 72 *J. Phil.* 655, 659-66, 668 (1975) (discussing questions of whether and which preferences have priority over others). For the purposes of this Article, the most important deficiency of AP is that people may be mistaken about their own interests and desire things that will not promote their welfare.

<sup>46</sup> For discussion of the second question, see *infra* Part II.C. As will be shown, considerations of autonomy and liberty may sometimes support noninterference with people's preferences, even if they are mistaken or reduce their well-being.

advance the preference holders' welfare, it is not a satisfactory criterion of well-being.

Philosophers have long acknowledged the inadequacy of an AP theory of well-being. Indeed, the deficiency of AP is deemed so obvious that it is summarily rejected, and discussions center on more sophisticated versions of preference theories.<sup>47</sup>

The most promising solution to the problem of mistaken *actual* preferences seems to be the theory of *ideal* preferences (IP) (also called "informed desire," "hypothetical preferences," "true preferences," or "rational preferences").<sup>48</sup> An IP theory does not focus on a person's actual preferences, but rather on those she *would have had* if she were thoroughly, clearly, and calmly deliberating all possible alternatives and their consequences with full, relevant information and no reasoning errors.<sup>49</sup> IP theories may differ greatly in the content of their ideal conditions. Some theories require high emotional and intellectual capabilities, as well as appropriate understanding of the true nature of the objects of desire, while others suffice with relatively undemanding requirements of rationality, such as no factual or logical errors and consistency in reasoning.<sup>50</sup> Throughout this Section, I assume a "moderate" version of an IP theory, which is neither extremely demanding nor very relaxed.

IP will succeed in correcting certain mistaken preferences—in particular, errors of fact and logic—and is therefore a more plausible theory of well-being than AP. Yet, if we wish to remain within the confines of a *preference* theory of welfare—aimed at identifying the hypothetical desires of *real* human beings—it is doubtful whether IP

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<sup>47</sup> John Broome bluntly states that "the preference-satisfaction theory is obviously false, and no one really believes it." Broome, *supra* note 38, at 4. Similarly, Griffin writes that "[t]he objection to the actual-desire account is overwhelming." Griffin, *supra* note 28, at 10. It is therefore quite surprising that economic analysis of law has largely adopted the AP theory, a theory disregarded and disfavored by philosophers. For discussion of the use of preference theories in law and economics, see *infra* Parts I.C and I.D.

<sup>48</sup> See, e.g., Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *Phil. Stud.* 77, 82 (1989) (stating that ideal preferences are most plausible criterion for measuring person's welfare); Allan Gibbard, *Interpersonal Comparisons: Preference, Good, and the Intrinsic Reward of Life*, in *Foundations of Social Choice Theory* 165, 172 (Jon Elster & Aanund Hylland eds., 1986) (same).

<sup>49</sup> Anderson, *supra* note 29, at 129; Broome, *supra* note 38, at 4-5; Griffin, *supra* note 28, at 11-13; Kagan, *supra* note 11, at 38; Sidgwick, *supra* note 29, at 110-12; Arneson, *supra* note 48, at 83; John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *Utilitarianism and Beyond* 39, 55-56 (Amartya Sen & Bernard Williams eds., 1982); Zamir, *supra* note 16, at 235.

<sup>50</sup> For discussion of the differences between ideal preference (IP) theories and their important implications for a theory of well-being, see *infra* Part I.D.

can remedy improper appreciation of the object of desire, malicious and racist preferences, or lack of self-respect and self-esteem.<sup>51</sup>

Preferences that do not promote individuals' well-being may persist even in the face of full information. Imagine an intelligent and creative person who prefers a life of idleness to a life of learning or accomplishment. She may acknowledge that learning and accomplishment are valuable, and that her time could be spent more usefully or enjoyably, yet persevere in her lack of activity. Would we consider this person as leading her best possible life, or would we view her choice of not exercising her capabilities and potential as a shame, a waste?<sup>52</sup> Arguably, the problem with this person's preferences does not stem from lack of information, inconsistency, or logical errors, but from the failure to properly appreciate the value of different activities.

Amartya Sen illuminates the case of the poor, the starved, or the oppressed, whose deprivations may be so great that they "have learned to keep their desires in line with their respective predicaments."<sup>53</sup> Even with adequate information and time for reflection, their own desires might remain very modest.<sup>54</sup> Similarly, Anderson doubts that IP can solve the problem of impoverished desires and failure to care for oneself due to lack of self-respect and self-esteem or adaptation to oppressive circumstances: "One cannot simply add self-valuation to the conditions of rational desire."<sup>55</sup>

IP may also fail to deal satisfactorily with the case of objectionable preferences. Take, for instance, a dedicated member of the Ku Klux Klan, who devotes much time and energy to the persecution and intimidation of people of color. It is doubtful whether clear and calm deliberation of relevant information will alter his firmly held beliefs.<sup>56</sup>

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<sup>51</sup> See *infra* notes 111-16 and accompanying text.

<sup>52</sup> Griffin discusses a more extreme example: a person whose aim in life is to count blades of grass on various lawns, although he knows that this activity is unimportant and boring. See Griffin, *supra* note 38, at 49-50. The "blades of grass" example was first introduced by John Rawls. John Rawls, *A Theory of Justice* 379-80 (rev. ed. 1999). Derek Parfit uses it as an illustration of the difficulties of preference theories of well-being. Parfit, *supra* note 22, at 499-500. In a similar fashion, David Brink discusses the case of an individual who achieves her primary goal in life—having the smallest handwriting—by neglecting her other social and intellectual capacities. Brink, *supra* note 33, at 227.

<sup>53</sup> Sen, *supra* note 11, at 191. Sen discusses a similar example in Amartya K. Sen, *On Ethics and Economics* 45-46 (1987).

<sup>54</sup> Sen, *supra* note 11, at 191.

<sup>55</sup> Anderson, *supra* note 29, at 131. Likewise, Hausman and McPherson note that "women who have been systematically oppressed may not have strong preferences for individual liberties, the same wages that men earn, or even for protection from domestic violence. But liberties, high wages and protection from domestic violence may make them better off than giving them what they prefer." Hausman & McPherson, *supra* note 38, at 79.

<sup>56</sup> Brink, *supra* note 33, at 229-30.

Yet, most people will not view successful satisfaction of these hate preferences as advancing even *his own* welfare. It is arguable that our KKK member would live a better life were he not consumed by hatred and anger, but rather believed in equality of all and the possibility of friendship between different groups. His failure is not one of rationality, but of developing appropriate relationships with others.<sup>57</sup> As these examples demonstrate, IP cannot remedy important deficiencies of AP.<sup>58</sup>

Another partial solution to the problem of objectionable preferences advanced in the literature is the “laundering” of antisocial preferences. Some writers suggest that certain objectionable preferences, such as those based on cruelty, racism, and prejudice, should be disregarded in social policy.<sup>59</sup> These writers claim that “no amount of goodwill to individual X can impose the moral obligation on me to help him in hurting a third person, individual Y, out of sheer sadism, ill will, or malice,”<sup>60</sup> and that “only a preference that is consistent with the principle of universal beneficence can give rise to a moral claim that obliges others to satisfy it.”<sup>61</sup> Others argue against consideration of a much wider category of preferences—all “external” preferences.

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<sup>57</sup> See *id.* at 227-28 (explaining why successful Nazi is not leading good life); Parfit, *supra* note 22, at 500 (discussing person whose informed preference is to cause as much pain as possible to others and concluding that such preferences do not advance well-being). But see Kaplow & Shavell, *supra* note 16, at 1339-43 (assuming that malevolent preferences, such as bigoted and sadistic ones, can be informed and rational).

<sup>58</sup> Another reason for the inadequacy of IP is connected with the prospectivity of desires. See *supra* note 39 and accompanying text. There is an unavoidable gap between our *ex ante* expectations regarding future states of affairs which *form* our desires, and our *ex post* experience from the fulfillment of our desires. Even if we arrive at our preferences after knowledgeable and careful deliberation of all possible alternatives and their consequences, we may still be disappointed when we actually experience the satisfaction of our preferences in the future. Therefore, satisfaction of preferences cannot guarantee that our lives will indeed go well. Sumner argues that IP cannot solve this inherent problem of preference-satisfaction theories: If we stipulate that a preference cannot be deemed “ideal” or “informed,” and cannot be viewed as improving a person’s welfare, if its satisfaction leaves her disappointed, then we have in fact adopted a mental state theory of well-being, because the subjective feelings of satisfaction—and not the actual realization of preferences—are what is decisive for her welfare. Sumner, *supra* note 27, at 131-32, 136. Sumner concludes that “when a desire is satisfied it is a logically open question whether the welfare of its holder has thereby been enhanced.” *Id.* at 132. It should be noted that Sumner advocates and develops a sophisticated hedonistic approach to well-being—“authentic happiness”—that equates welfare with the happiness of an informed and autonomous subject. *Id.* ch. 6. Although I share Sumner’s criticism of preference-satisfaction theories, I shall argue for a more objective account of well-being.

<sup>59</sup> See Harsanyi, *supra* note 49, at 56; see also Chang, *supra* note 13, at 190-91 (describing Harsanyi’s arguments).

<sup>60</sup> Harsanyi, *supra* note 49, at 56.

<sup>61</sup> Chang, *supra* note 13, at 191; see also Robert E. Goodin, *Laundering Preferences*, in *Foundations of Social Choice Theory*, *supra* note 48, at 81-96 (discussing various justifications for laundering of preferences).

This suggestion is based on a distinction between personal preferences concerning a person's own life and enjoyment of goods and external preferences involving the assignment of goods and opportunities to others. Proponents of this approach claim that only personal preferences should be taken into consideration by policymakers.<sup>62</sup>

The category of external preferences is obviously wide enough to include malevolent preferences. However, it is so wide as to embrace not only objectionable preferences, but altruistic and other-regarding preferences as well. Dworkin, for example, claims that considering altruistic external preferences will result in "double counting" and will thus infringe upon the norm that people should be treated equally.<sup>63</sup> To my mind, this argument is unpersuasive. It seems both impossible and undesirable to separate between self-regarding and other-regarding preferences.<sup>64</sup> Therefore, we should not adopt the easy solution of automatically barring all external preferences from the social calculus. Rather, we should employ the harder method of analyzing the *reasons* behind the many kinds of external preferences, and thus attempt to differentiate between legitimate and illegitimate external preferences, such as the malicious or the racist.<sup>65</sup>

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<sup>62</sup> See Ronald M. Dworkin, *DeFunis v. Sweatt*, in *Equality and Preferential Treatment* 63, 77-81 (Marshall Cohen et al. eds., 1977). Central discussions of the distinction between personal and external preferences and its policy implications include: Brian Barry, *Political Argument* 62-66, 71-72 (1965); Kurt Baier, *Welfare and Preference*, in *Rational Man and Irrational Society? An Introduction and Sourcebook* 284, 289-91 (Brian Barry & Russell Hardin eds., 1982); Brian Barry, *Lady Chatterley's Lover and Doctor Fischer's Bomb Party: Liberalism, Pareto Optimality, and the Problem of Objectionable Preferences*, in *Foundations of Social Choice Theory*, supra note 48, at 35-36, 41; Timothy J. Brennan, *A Methodological Assessment of Multiple Utility Frameworks*, 5 *Econ. & Phil.* 189, 196, 202, 204 (1989); Chang, supra note 13, at 183-88; Howard Margolis, *A New Model of Rational Choice*, 91 *Ethics* 265, 277-78 (1981).

<sup>63</sup> Dworkin, supra note 62, at 78. This is because some people will benefit not only from the weight accorded to their own preferences but also from the weight accorded to others' altruistic preferences concerning their well-being. Individuals holding opposing personal preferences may be unable or unwilling to develop countering external preferences to offset this influence. *Id.* at 78-79, 81. The exclusion of other-regarding preferences is criticized in Griffin, supra note 28, at 24-26; H.L.A. Hart, *Between Utility and Rights*, 79 *Colum. L. Rev.* 828, 842 (1979); Kaplow & Shavell, supra note 16, at 1343-50; Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 *Pol. Stud.* 123, 131-32 (1978).

<sup>64</sup> As Griffin explains:

Each of us wants certain pure states of himself (e.g. to be free from pain); but we also want our lives to have some point, and this desired state can be hard to separate from states of others. . . . A father's happiness can be at stake in his child's happiness—two persons' welfare riding on one person's fate. Allowing that is no violation of everybody's counting for one; it merely allows the father, like everyone else, also to count for one.

Griffin, supra note 28, at 24.

<sup>65</sup> See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 97-98 (1994).

The “laundering” technique, which attempts to filter out such objectionable preferences, operates quite differently from an IP theory of well-being: It does not purport that antisocial preferences would not exist in certain “ideal” conditions. Contrarily, it acknowledges the existence of rational and informed objectionable preferences, but advocates their exclusion from the social calculus. Yet, notwithstanding this difference, the laundering process shares in IP’s failure to render “preference satisfaction” an adequate criterion of well-being. This is so because the laundered preferences concern a person’s actual desires for the good or bad of *others*. The laundering technique does not address the main problem of AP as a measure of a person’s well-being: the phenomenon of desiring what is bad for *one-self*,<sup>66</sup> or the absence of certain preferences that would advance an individual’s *own* welfare.<sup>67</sup>

Moreover, all versions of preference theories share an additional basic difficulty. *Any* preference theory holds that a person’s well-being is determined and advanced to the extent her preferences—be they actual, ideal, or otherwise restricted—are satisfied. This equation of the good with the satisfaction of our wishes implies that the act of desiring confers value on the object of desire. That is, things are valuable because they are desired, and therefore, by fulfilling people’s desires, we improve their lives.<sup>68</sup>

This is false. It seems that the very opposite is true: Value precedes desire. We judge something to be valuable for certain reasons, and consequently adopt it as an object of our desire. A thing is desired *because* it is *valuable*, and not vice versa.<sup>69</sup> Furthermore, mere preference is almost never a reason for choice or action, so it can hardly be the decisive factor that contributes to people’s well-being.<sup>70</sup> Mere preference may only be enough for action in relatively trivial

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<sup>66</sup> Arguably, a person’s objectionable preferences, such as racist preferences regarding others, can be said to be “bad” for that person’s (the racist’s) welfare as well. See *supra* notes 56-57 and accompanying text. Nevertheless, it is still true that the laundering technique does not attempt to address a person’s mistaken preferences concerning what is predominantly her own well-being.

<sup>67</sup> See *supra* notes 51-55 and accompanying text.

<sup>68</sup> Brandt, *supra* note 35, at 127; Griffin, *supra* note 38, at 45; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 15 (1990) (“Utilitarianism of the preference-satisfaction variety says that something is made valuable by the fact that lots of people desire it.”); Scanlon, *supra* note 22, at 191; Scanlon, *supra* note 23, at 113.

<sup>69</sup> Brink, *supra* note 33, at 225-26; Griffin, *supra* note 28, at 26-27. Although Griffin rejects the claim that things are valuable because they are desired, he eventually adopts the view that there is no order of priority between value and desire. Griffin, *supra* note 38, at 45, 50; Griffin, *supra* note 28, at 28-30.

<sup>70</sup> See Joseph Raz, *The Morality of Freedom* 140-44 (1986) (discussing reason-dependent character of desires); Scanlon, *supra* note 23, at 42-49, 98, 114 (same).

cases, such as the choice between apples and pears,<sup>71</sup> or between flavors of ice cream.<sup>72</sup> One person concludes that teaching is a worthwhile goal, and so desires to become a teacher; another thinks that climbing Mount Everest is a challenging accomplishment, and so decides to pursue it; yet another believes that a vacation in Bora Bora will be relaxing and enjoyable and so forms a preference for it. Most preferences require value-laden explanations to be intelligible and forceful. Naked preference, such as Bartleby's, is not enough.

If, indeed, preferences are not the basis of value, what is their role in the theory of a good life? It seems that desires may serve an evidentiary role, as a possible indication of value.<sup>73</sup> Preferences represent beliefs about what is good and suggest, *prima facie*, that the objects of preferences may indeed be welfare-promoting. However, this evidence can sometimes be refuted.<sup>74</sup>

These arguments apply not only to the theory of actual preferences, but also to the more plausible theory of ideal preferences: Even if we define IP as preferences backed by adequate reasons, these reasons are not provided by the fact of desire, but by the considerations that give rise to it.<sup>75</sup> Shelly Kagan clearly articulates: "It is not that the various goods that we would want were we ideally informed are valuable because we would desire them; rather, we would want these goods because we would be able to *see* that they are indeed valuable, *independently* of our wanting them."<sup>76</sup>

If preferences are mainly evidence of value and not value-giving, and if the value of things is based on external reasons and is largely independent of their being the object of desire, why bother with a preference criterion of welfare at all?<sup>77</sup> Why attempt to form, articu-

<sup>71</sup> Griffin, *supra* note 38, at 59.

<sup>72</sup> David Sobel, *On the Subjectivity of Welfare*, 107 *Ethics* 501, 503 (1997). Even in these cases, it may be claimed that subsequent pleasure—rather than the desire itself—is, in fact, the basis of value. See Brink, *supra* note 33, at 226; Scanlon, *supra* note 22, at 191-92.

<sup>73</sup> See Sen, *supra* note 11, at 189-90, 196; Sen, *supra* note 53, at 46-47, 60.

<sup>74</sup> See Kymlicka, *supra* note 68, at 14-15 (citing example that one's welfare would not be promoted by satisfaction of preference for pizza if pizza turned out to be rancid or poisoned); Joseph Raz, *Facing Up: A Reply*, 62 *S. Cal. L. Rev.* 1153, 1213-14 (1989) (arguing that desires can be premised on false assumptions, and that there is, normally, no reason to respect such desires); Zamir, *supra* note 16, at 238 (noting that common experience and scientific studies show that people may be mistaken as to what course of action will maximize their well-being).

<sup>75</sup> See Scanlon, *supra* note 22, at 191-92; Scanlon, *supra* note 23, at 98, 115.

<sup>76</sup> Kagan, *supra* note 11, at 39.

<sup>77</sup> See Griffin, *supra* note 28, at 17; Kagan, *supra* note 11, at 39; Scanlon, *supra* note 22, at 192. In the final analysis, Griffin prefers a restricted and refined theory of IP to an objective theory of well-being. See Griffin, *supra* note 28, at 20, 72. For discussion of Griffin's view, see *infra* notes 117-19 and accompanying text.

late, and fine-tune the most plausible IP theory of well-being when the *properties* and *features* of the desired things—and not their being preferred—are really what is decisive in evaluating welfare? This conclusion is strengthened by the fact that even the best possible IP theory falls short of solving the problems of AP.<sup>78</sup> Since preferences do not play a major role in explaining the source of value, and their satisfaction does not necessarily make people better-off, we should consider instead adopting a theory of *valuable goods*.

An objective theory of well-being does just that. It holds that certain things are good for people, and that having them promotes their welfare. These things have intrinsic value, independent of individuals' preferences, tastes, or mental states. By the same token, some things are bad for people. These things have a detrimental effect on individuals' well-being, even if those individuals do not realize it.<sup>79</sup> The list of objective goods commonly includes such values as autonomy, knowledge, realization of one's potential, and attachments of friendship and love.<sup>80</sup> Thus, an objective theory judges people's well-being by an external standard: the extent to which they attain the goods worth having in their lives (and avoid the intrinsically bad things).

Parts II and III of the Article explore the objective theory of well-being in more detail and develop an objective approach to property law. Before turning to this discussion, however, I would like to address two more questions pertaining to subjective theories of well-being: First, what are the reasons for the prevalent resort to preference theories in the legal literature?<sup>81</sup> Second, can a theory of well-being avoid any objective feature without losing its plausibility?<sup>82</sup>

### C. *Economic Analysis of Law's Criterion of Well-Being*

Among the possible candidate criteria for measuring well-being—mental state theories, preference theories, and objective theories—economic analyses have embraced preference theories.<sup>83</sup> In this

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<sup>78</sup> See *supra* notes 50-58 and accompanying text.

<sup>79</sup> See Kagan, *supra* note 11, at 39; Parfit, *supra* note 22, at 499.

<sup>80</sup> See Kagan, *supra* note 11, at 39; Parfit, *supra* note 22, at 499.

<sup>81</sup> See *infra* Part I.C.

<sup>82</sup> See *infra* Part I.D.

<sup>83</sup> See Broome, *supra* note 38, at 4 (arguing that preference-satisfaction theory "is implicit in much of welfare economics"); Gibbard, *supra* note 48, at 167 (noting that welfare economists have "replaced pleasure with preference-satisfaction as the standard of intrinsic value in utilitarian theory"); Kagan, *supra* note 11, at 307 ("Preference theories of well-being are largely taken for granted in contemporary economic theory, especially welfare economics."); G. Peter Penz, *Consumer Sovereignty and Human Interests* 10 (1986) (stating that goal of welfare economics is maximization of consumption in accordance with

respect, economic analysis of law is no exception.<sup>84</sup> Most writers in the law-and-economics movement ignore rival theories of well-being. Moreover, they do not distinguish between the different variants of preference theories, most importantly failing to distinguish between actual preference and ideal preference theories of well-being. Usually, it is at least implicitly assumed that efficiency, or welfare maximization, involves the value-free process of satisfying people's actual preferences, regardless of content.<sup>85</sup> The relatively few scholars aware of competing criteria quickly dismiss objective theories of well-being, without acknowledging their strengths that desire theories lack.<sup>86</sup> Furthermore, even these writers presume that, in most cases, there will be little or no discrepancy between the consequences of using

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preferences); Sumner, *supra* note 27, at 115 (stating that welfare economics redefines utility or welfare in terms of preference).

<sup>84</sup> See Nussbaum, *supra* note 13, at 1197 (asserting that economic analysis of law is based, among other things, on idea that "utility is best analyzed in terms of the satisfaction of preferences"); see also Chang, *supra* note 13, at 175 (same).

<sup>85</sup> See Anderson, *supra* note 29, at 129 ("Welfare economics identifies rational preferences with actual preferences."); Griffin, *supra* note 28, at 10 ("The simplest form of desire account says that utility is the fulfillment of *actual* desires. It is an influential account. Economists have been drawn to it . . ."); Adler & Posner, *supra* note 16, at 191, 199 (stating that standard economic theory determines person's well-being by extent to which she satisfies her unrestricted preferences). How are people's actual preferences defined? One approach, favored by economists, equates preferences with people's market choices ("revealed preferences"). Accordingly, individuals' preferences are revealed through their willingness to pay for certain things. See Sumner, *supra* note 27, at 114-18; Sen, *supra* note 37, at 323-24; Sen, *supra* note 11, at 187. Another view regards preferences as external to the act of choice and highlights the differences between the two concepts. See Hausman & McPherson, *supra* note 38, at 28; Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 119-20 (2000). According to the second approach, choice (or willingness to pay) may not represent individuals' actual preferences for several reasons. Thus, for example, people have preferences for things that are not traded in markets and express their preferences in nonmarket behavior as well. See Sen, *supra* note 37, at 323-24; Sumner, *supra* note 27, at 118-19. In addition, willingness to pay depends on ability to pay and hence favors the wealthy over the poor. Lucian A. Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 Hofstra L. Rev. 671, 677-84 (1980). Another reason for the possible divergence between preferences and choices is that market behavior does not always reflect people's highest-ranking preferences due to a prisoner's dilemma situation or the phenomenon of counter-preferential choice. The former problem is discussed in Lewinsohn-Zamir, *supra* note 16, at 386-88, 391-94; Penz, *supra* note 83, at 37-38. The latter problem is analyzed in Sumner, *supra* note 27, at 120-21; Sen, *supra* note 37, at 326-29. For the purposes of this Article, the differences between the two approaches are largely immaterial, since the discussed flaws of an actual preference theory are present in both.

<sup>86</sup> See Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 Fla. St. U. L. Rev. 241, 262, 265 (2000) (arguing that objective goodness cannot advance person's well-being if it is contrary to her preferences); Adler & Posner, *supra* note 16, at 201-02 (claiming that objective theories fail to respect person's own point of view regarding her well-being); Kaplow & Shavell, *supra* note 16, at 980 n.35, 1353-54 (asserting that objective conception of well-being unjustifiably imputes analyst's tastes to citizens at large).

actual and ideal preference theories. That is to say, it typically and conveniently is assumed that although ideal preferences are superior to actual preferences as a criterion of well-being,<sup>87</sup> there usually will be no practical, empirical differences in the application of the two measures. People, as rational maximizers of their well-being,<sup>88</sup> will strive to advance what is good for them (from the ideal preference point of view).<sup>89</sup>

How can one explain the prevalence of preference theory, the very limited awareness of the distinction between actual and ideal preferences, and the almost total disregard of objective theories of well-being? There are two main explanations for these phenomena: Preference theories have the allure of both antipaternalism and simplicity.

The AP theory is obviously antipaternalistic, purporting that well-being consists of giving people whatever they happen to want. Each person's level of well-being is determined according to her judgment and sovereign decisions.<sup>90</sup> Objective theories, in contrast, hold that the things that make life better do not necessarily depend on whether they are desired.<sup>91</sup> Although an objective theory of well-

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<sup>87</sup> Adler & Posner, *supra* note 16, at 202, 243-44; Chang, *supra* note 13, at 194; Kaplow & Shavell, *supra* note 16, at 984, 1330-34.

<sup>88</sup> In theory, maximization of well-being is wide enough to embrace not only a person's self-interest, but other-regarding preferences as well. Gary S. Becker, *Accounting for Tastes* 4, 139 (1996); Kaplow & Shavell, *supra* note 16, at 975, 982, 1350, 1363; Carol M. Rose, *Environmental Faust Succumbs to Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference*, 87 *Mich. L. Rev.* 1631, 1633-35 (1989). Economists, however, usually prefer to analyze and explain behavior using narrowly defined self-interest. This is due, in part, to a belief "that altruism is a relatively rare phenomenon outside the family sphere and therefore has little practical significance." Lewinsohn-Zamir, *supra* note 16, at 385; see also Sen, *supra* note 53, at 16; Amitai Etzioni, *The Case for a Multiple-Utility Conception*, 2 *Econ. & Phil.* 159, 163 (1986). In addition, if other-regarding preferences are admitted into economic models, then the ability of these models to predict and explain human behavior would be greatly diminished. Brennan, *supra* note 62, at 201; Etzioni, *supra*, at 162-63, 171; Zamir, *supra* note 16, at 249-50.

<sup>89</sup> See Sen, *supra* note 53, at 16-18 (describing and criticizing common economic assumption); Kaplow & Shavell, *supra* note 16, at 984 (noting that they will "usually assume that individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them"); Nussbaum, *supra* note 13, at 1197 (stating that economic analysis of law involves idea that "rational agents are self-interested maximizers of utility"); Zamir, *supra* note 16, at 251 (arguing that although "economic analysis does not rest on the normative claim that rational preferences are a superior criterion for human well-being than actual ones," it does rest "on the empirical claim that people's actual preferences are rational").

<sup>90</sup> The antipaternalistic feature of the AP criterion is noted in Griffin, *supra* note 28, at 10; Hausman & McPherson, *supra* note 38, at 73; Sumner, *supra* note 27, at 123; Adler, *supra* note 86, at 248; Gibbard, *supra* note 48, at 170; Griffin, *supra* note 38, at 49.

<sup>91</sup> See *supra* notes 79-80 and accompanying text; *infra* notes 158-60 and accompanying text.

being definitely does not give carte blanche to coercing its standards on nondesiring individuals, it invites less neutrality from the state in promoting people's welfare.<sup>92</sup> The IP theory of well-being, like an objective theory, allows for interference in the content of people's mistaken, actual desires, since it rests on what individuals would desire were they fully aware of everything involved.<sup>93</sup> This may explain why economic analysis of law tends to either disregard IP or downplay its incidence and importance.

In addition, the criterion of AP is seemingly simple and easy to apply. The state need not concern itself with the difficult question of what makes its citizens' lives flourish. It need not debate the *content* of well-being, but, rather, can leave this issue to its citizens. The state should bother only with the *procedural mechanisms* that enable it to identify people's wishes and assist people in realizing them.<sup>94</sup>

Both attractions of preference theories should be resisted, since they are false. The advantages of preference theories are much less significant than they appear at first glance: First, *plausible* preference theories involve a great deal of objectivity and intervention in people's actual preferences.<sup>95</sup> The difference between a reasonable preference theory and an objective theory is small—a matter of degree. Second, implementing a preference criterion of well-being is not easier, and probably more difficult, than applying an objective criterion.

An AP theory of well-being requires the identification, measurement, and aggregation of the preferences of every individual. In addition, since people's preferences vary greatly and often conflict, the state must estimate the intensity of different preferences and conduct interpersonal comparisons of well-being.<sup>96</sup> Even under AP, not all preferences can be satisfied; some must be frustrated. These tasks are certainly not simple.<sup>97</sup> An IP theory of well-being, if taken seriously,<sup>98</sup> intensifies these measurement problems. It adds the need to judge

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<sup>92</sup> For discussion of why objective list (OL) is not necessarily paternalistic, see *infra* Part II.C.

<sup>93</sup> For this reason, Zamir argues that an IP theory may support paternalism. Zamir, *supra* note 16, at 233-54.

<sup>94</sup> Hausman & McPherson, *supra* note 38, at 72, 74.

<sup>95</sup> See *infra* Part I.D.

<sup>96</sup> See, e.g., Penz, *supra* note 83, at 123-36 (discussing various measurement problems that are involved in maximizing preference satisfaction).

<sup>97</sup> See, e.g., Griffin, *supra* note 28, at 75-124 (analyzing difficulties in measuring well-being); see also Adler & Posner, *supra* note 16, at 171, 175, 192, 226-29, 238-43 (discussing commensurability problems in context of cost-benefit analysis).

<sup>98</sup> "Seriously" in this context means a genuine effort to gauge each person's ideal preferences, that is, what he or she would have actually desired were they properly informed. If, in contrast, one simply and automatically assumes that any person ideally placed would

whether people's identified preferences are rational or informed, and if not, to hypothesize on their preferences in ideal circumstances.<sup>99</sup> Problems of measurement and comparability are reduced by adopting an objective theory of well-being, since well-being depends, to a great degree, on the extent to which the various objective goods are realized in people's lives and less on the accurate identification and satisfaction of all of their specific desires.<sup>100</sup>

An AP criterion of well-being is indeed simple and easy to "apply" when, according to the preference-satisfaction theory itself, there is no need for any investigations or applications, i.e., when there are no market failures and the free market is assumed to maximize welfare. However, if this is not so, and society-wide decisions are required, employment of preference theories is more difficult than application of objective theories. Consequently, objective criteria may often be the only practical solution for governmental intervention. Lacking knowledge of individuals' utility functions (and resources to verify them), the state would be justified in acting in accordance with what generally is considered desirable in life—the goods endorsed by objective theories of well-being.<sup>101</sup> The alleged simplicity of preference theories is thus misleading.

#### *D. The Inescapable Objectivity of Well-Being*

In this Section, I argue that the "anti-interventionist" attraction of preference theories is misguided as well. In reality, any plausible theory of well-being, including preference theory, must and does include objective elements. The objectivity of well-being cannot be avoided.

As discussed above, theories of well-being are commonly divided into three distinct categories: mental state theories, preference theories, and objective-list theories.<sup>102</sup> According to conventional wisdom, the former two categories are subjective, and only the latter—as its

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have wanted the goods listed by the objective theory, then we have, in fact, adopted an objective theory of well-being.

<sup>99</sup> Hausman & McPherson, *supra* note 38, at 80-81; Kymlicka, *supra* note 68, at 16-18.

<sup>100</sup> Griffin, *supra* note 28, at 107; Hausman & McPherson, *supra* note 38, at 81; Geoffrey Scarre, *Utilitarianism* 17 (1996).

<sup>101</sup> Griffin, *supra* note 38, at 68; Griffin, *supra* note 28, at 121-24, 299. In fact, Lionel Robbins has argued that interpersonal comparisons of people's utilities are often "more like judgments of value than judgments of verifiable fact." Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *Econ. J.* 635, 640 (1938); see also Griffin, *supra* note 28, at 119-20 (accepting in large part Robbins's claim and concluding that many interpersonal comparisons of utility "involve appeal to a general profile of prudential values").

<sup>102</sup> See *supra* note 22 and accompanying text.

name clearly indicates—is objective.<sup>103</sup> In truth, however, most theories contain highly objective components, albeit often without admitting that this is so. Indeed, this must be so if they aspire to provide a plausible account of well-being. Waiver of any measure of objectivity will render a theory a noncontender in the competition for the most adequate criterion of well-being. This is why even advocates of a preference-satisfaction theory who are aware of the different variants of desire theories admit that IP is a superior theory to the AP theory.<sup>104</sup>

The following argument focuses on objectivity in preference theories. Before turning to this argument, it should be noted that even mental state theories contain salient objective facets. First, such theories make a substantive claim about what is objectively good for a person: happiness, pleasure, etc.<sup>105</sup> The goodness of the mental state is not founded on a person's desiring it. Hedonism, according to this interpretation, can be seen as an objective theory of well-being, with only one item on the list: pleasure.<sup>106</sup> Second, the more sophisticated MS theories differentiate between various kinds of pleasures and reject the view that all pleasures are equally valuable. A notable example is John Stuart Mill's distinction between "higher" and "lower" pleasures. A given quantity of higher pleasures advances a person's well-being to a much greater extent than does a similar quantity of lower pleasures.<sup>107</sup> The categorization of pleasures into more and less valuable types introduces objectivity into the MS criterion of well-being. It allows a value judgment that a person's extremely enjoyable experiences do not advance her well-being, either at all or to a significant extent.<sup>108</sup>

Turning to preference theories, objectivity most obviously may be found in the *ideal* preference theory of well-being. An IP theory posits that well-being is advanced not by satisfying a person's actual preferences, but rather, by satisfying those that she *would have had* in certain specified ideal conditions.<sup>109</sup> Examination of those conditions determines the degree of objectivity in an IP theory.

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<sup>103</sup> See, e.g., Brink, *supra* note 33, at 68-69, 220-21 (describing conventional division between subjective and objective theories of well-being).

<sup>104</sup> See *supra* note 87 and accompanying text.

<sup>105</sup> See Hausman & McPherson, *supra* note 38, at 72, 81; Kagan, *supra* note 22, at 175-76; Penz, *supra* note 83, at 143-44, 147-48; Scanlon, *supra* note 23, at 113. In this respect, MS theories differ from a strict actual preference theory of well-being, which makes no claims regarding the content of people's desires. According to such a preference theory, there is no standard apart from a person's desires by which to assess the quality of her life.

<sup>106</sup> Hausman & McPherson, *supra* note 38, at 72; Scanlon, *supra* note 23, at 113.

<sup>107</sup> See *supra* notes 25-27 and accompanying text.

<sup>108</sup> Kagan, *supra* note 11, at 32-34; Brink, *supra* note 27, at 69-70, 72-78, 82-83, 92.

<sup>109</sup> See *supra* notes 48-49 and accompanying text.

IP can retain its banner of subjectivity by confining itself to correcting relatively minor faults in individuals' actual preferences, such as factual or logical errors. Thus, suppose persistent chain smoking is based on an erroneous belief that smoking improves lung functioning. Then it reasonably can be assumed that if the smoker knew the true facts about the hazards of smoking, she would change her preferences. One can presume that the ideal preference regarding the issue of smoking indeed represents what *the specific subject would have desired* if properly informed. Subjectivity gradually diminishes the more we try to correct a person's actual circumstances in order to place her in ideal conditions for forming preferences, and it diminishes the more we insert value judgments in the criterion of IP. Let us revisit the examples discussed earlier to illustrate these points.<sup>110</sup>

Amartya Sen raises the problem of the poor, the starved, or the oppressed, who are so deprived that they desire very little from life.<sup>111</sup> We could certainly hypothesize about their preferences were they formed in circumstances that would have facilitated thorough, clear, and calm deliberation of all alternatives and their consequences, with full, relevant information and no reasoning errors. This may require that the deprived are properly fed, are in good health, have a roof above their heads, and have at minimum a high school education, a reasonably well-paying job, supporting family and friends, and so on. But can we still claim that we are talking about the same subjects?<sup>112</sup> In truth, we have replaced these people and their impoverished actual preferences with abstract, imaginative guesswork, and with our own value judgments of the good life.<sup>113</sup> The real people, consequently

<sup>110</sup> See *supra* notes 52-57 and accompanying text.

<sup>111</sup> See *supra* notes 53-54 and accompanying text.

<sup>112</sup> For this reason, Sen argues that the IP criterion is inapplicable to these cases and cannot solve the problem of "the circumstantial contingency of desires." Sen, *supra* note 11, at 191 (emphasis omitted).

<sup>113</sup> Cf. *id.* at 191 (stating that since determination of preferences in such unspecified circumstances is imaginary exercise, "we need not live in the fear of being proved wrong"). Mozaffar Qizilbash is even more extreme when he asserts that the plausible versions of desire theory "require that desires are idealized in such a way that they are not, for the most part, *human* desires at all. . . . [T]he desire account, when followed to its limits, becomes a list view of well-being—an account which lists the values which make a characteristically human life go better." Mozaffar Qizilbash, *The Concept of Well-Being*, 14 *Econ. & Phil.* 51, 61 (1998). Similarly, Anderson argues that the

retreat from the desires people actually have to the desires they would have if their causal powers were wildly inflated, and if they could somehow step outside their lives and choose at once how their whole life would go, suggests trouble for rational desire theory. Why have any confidence in our ability to frame rational desires or make good decisions in such *inhuman* conditions?

Anderson, *supra* note 29, at 131 (emphasis added). A similar criticism applies to Railton's notion of "objectified subjective interest," which asks what a highly idealized self (who is

affected by these judgments, may never attach any value to the satisfaction of “their” IP.

The other examples describe the gifted person who prefers idleness to learning or accomplishment<sup>114</sup> and the KKK member whose preferences are racist and malicious.<sup>115</sup> These preferences might not stem from lack of information, inconsistency, or logical errors, but from a failure to properly appreciate the value of different activities or a failure to develop appropriate capacities and relationships with others. Theoretically, we can extend IP’s scope of correction to include not only irrationalities, but also the lack of proper appreciation of the good things in life. But the insertion of such value judgments into the IP criterion transforms it into an objective theory of well-being, since it implies that a person is mistaken not about some states of the world but, according to an external standard, about the value of certain things.<sup>116</sup>

Analysis of the literature reveals examples of both “weak” and “strong” IP. Many IP theories require high emotional and intellectual capacities, as well as appropriate understanding of the true value of the objects of desire.<sup>117</sup> A few theories suffice with relatively undemanding requirements of rationality, such as no factual or logical

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fully rational and fully informed about her nature and circumstances) would want her actual, nonidealized self to have or want. Railton, *supra* note 38, at 173-74.

<sup>114</sup> See *supra* note 52 and accompanying text.

<sup>115</sup> See *supra* notes 56-57 and accompanying text.

<sup>116</sup> Brink, *supra* note 33, at 228-31; Scanlon, *supra* note 22, at 188.

<sup>117</sup> Griffin’s theory of well-being is an excellent example of a very demanding IP criterion. Griffin states, for instance, that a “prudential value such as accomplishment is valuable for everyone; anyone who fails to recognize it as valuable lacks understanding.” Griffin, *supra* note 28, at 137. Similarly, he argues that an individual who, although in possession of full information and making no logical errors, insists that his life’s aim is to count blades of grass in various lawns cannot be seen as fully informed. Griffin, *supra* note 38, at 49-50. Griffin’s sense of an “informed” person demands that the preference is formed by proper appreciation or perception of the nature of the object of desire, and blade-counting cannot be intelligibly viewed as making a life valuable. *Id.*; Griffin, *supra* note 28, at 323-24. A broad, highly objective IP criterion can also be found in the writings of Peter Railton, Thomas Scanlon, and Henry Sidgwick. See Railton, *supra* note 38, at 173-74 (employing preferences that individual with “unqualified cognitive and imaginative powers, and full factual and nomological information about his physical and psychological constitution, capacities, circumstances, history and so on,” would want his nonidealized self to want, in latter’s actual condition and circumstances); Scanlon, *supra* note 23, at 114 (“[I]nformed desires are ones that are based on a full understanding of the nature of their objects and do not depend on any errors of reasoning.”); Sidgwick, *supra* note 29, at 111 (defining desirable as “not necessarily what *ought* to be desired but what would be desired, with strength proportioned to the degree of desirability . . . supposing the desirer to possess a perfect forecast, emotional as well as intellectual, of the state of attainment or fruition”); see also Parfit, *supra* note 22, at 500 (stating that Sidgwick assumed that there are certain things we have good reason to desire or not to desire, and that “[t]hese might be the things which are held by Objective List Theories to be good or bad for us”).

errors in reasoning.<sup>118</sup> The former can no longer claim to be subjective theories of well-being, since they contain strong objective components.<sup>119</sup> The latter can retain the banner of subjectivity but must consequently pay a heavy price: Without sufficient correction of the problems associated with the AP theory, an IP's criterion of well-being is likewise implausible.<sup>120</sup>

A refusal to acknowledge the objectivity involved in the move from actual to ideal preferences is prevalent in law-and-economics scholarship. A clear illustration may be found in the recent work of Louis Kaplow and Steven Shavell,<sup>121</sup> and of Howard Chang.<sup>122</sup>

Kaplow and Shavell discuss the principles that should guide society in evaluating legal policy. They argue for the supremacy of the welfare economics principle of well-being maximization over independent fairness considerations, and for the exclusive use of the former in the formation and assessment of legal rules.<sup>123</sup> According to welfare economics, the well-being of individuals is determined according to

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<sup>118</sup> Richard Brandt, for example, uses a relatively narrow criterion of "rational desire," which excludes value judgments and contends that knowledge of all relevant facts and no logical errors is sufficient. Brandt, *supra* note 35, at 10, 115-26. Note, however, that Brandt criticizes and eventually rejects all preference theories and advocates a mental states-happiness theory instead. *Id.* chs. 6, 7, 13. In a similar vein, Connie Rosati adopts an "ordinary optimal conditions" constraint, preventing the use of "alienated conditions," such as theoretical judgments that are irrelevant to the actual person's inquiry about her good. Connie S. Rosati, *Internalism and the Good for a Person*, 106 *Ethics* 297, 303-08 (1996). Ordinary optimal conditions require "that a person not be sleeping, drugged, or hypnotized, that she be thinking calmly and rationally, and that she not be overlooking any readily available information." *Id.* at 305. John Harsanyi's notion of "true preferences" is somewhat more demanding and embraces the preferences that a person "*would* have if he had all the relevant factual information, always reasoned with the greatest possible care, and were in a state of mind most conducive to rational choice." Harsanyi, *supra* note 49, at 55.

<sup>119</sup> Griffin quite readily admits the intimate connection between his IP criterion and objective theories of well-being and acknowledges that IP is closer to such theories than to subjective theories such as AP or MS. Griffin, *supra* note 28, at 34, 47-48, 107. Railton acknowledges that the idealization involved in his IP theory is severe and concludes that "the notion of idealized desires is an unabashedly theoretical one." Peter Railton, *Facts and Values*, 14 *Phil. Topics* 5, 19 (1986).

<sup>120</sup> Although the IP criteria of Brandt and Harsanyi are less objective than those of Griffin, it can be claimed that they too do not "escape" objectivity. The hypothetical person conducting thorough, calm, and careful deliberation of all possible alternatives with full relevant information and no errors in reasoning bears little resemblance to the actual subject whose preferences are corrected through the IP criteria. The resulting new preferences are often not that person's "true" preferences, but rather those that we wished she would have had, that we wished would be true. See Scarre, *supra* note 100, at 6-7, 133-35 (viewing even Harsanyi's theory as very close to objective theory of well-being).

<sup>121</sup> Kaplow & Shavell, *supra* note 16.

<sup>122</sup> Chang, *supra* note 13.

<sup>123</sup> Kaplow & Shavell, *supra* note 16, at 967, *passim*.

their preferences.<sup>124</sup> Kaplow and Shavell emphasize the subjectivity of welfare economics on the one hand,<sup>125</sup> while criticizing and summarily dismissing objective theories of well-being on the other hand.<sup>126</sup> Although briefly admitting that IP, rather than AP, is a more appropriate criterion of well-being,<sup>127</sup> they downplay the possible divergence between the two criteria<sup>128</sup> and disregard IP's inherent objectivity.<sup>129</sup> This attempt to hold the stick at both ends results in conflicting statements. Thus, Kaplow and Shavell acknowledge that preferences are not exogenous and that the law can change people's preferences.<sup>130</sup> They admit that changes in preferences may be desirable in terms of well-being if, as a result, "individuals would actually be better off."<sup>131</sup> Examples include teaching people to like healthier

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<sup>124</sup> Id. at 968, 975, 980.

<sup>125</sup> Id. at 980 (stating that notion of well-being is comprehensive and incorporates anything individuals may value: "The only limit on what is included in well-being is to be found in the minds of individuals themselves . . .").

<sup>126</sup> See id. at 980 n.35 (stating briefly that they do not use objective criteria of well-being "specified by an analyst, rather than according to what the individuals under consideration really care about"); id. at 1341 ("The idea of an analyst substituting his or her own conception of what individuals should value for the actual views of the individuals themselves conflicts with individuals' basic autonomy and freedom."); id. at 1353-54 (criticizing view that even if people do not have taste for fairness, they should have one: "[T]here is no sound justification for imputing an analyst's tastes to citizens at large. Although one might argue that if individuals 'tried on' a notion of fairness they would like it . . . there is no particular reason to expect such a prediction to be true.").

<sup>127</sup> See id. at 984 (writing that although they assume that individuals are usually correct when judging their own well-being, if this is not so, then "our argument may be applied to . . . what they would prefer if they correctly understood how they would be affected—rather than to individuals' well-being as reflected in their mistaken preferences"); see also id. at 1330-34.

<sup>128</sup> Thus, for example, Kaplow and Shavell state that they will "usually assume that individuals comprehend fully how various situations affect their well-being and that there is no basis for anyone to question their conception of what is good for them." Id. at 984. In another place, they presume that we need not worry that welfare maximization will lead us to implementing people's objectionable preferences because such preferences would "lose out" in the economic calculus. In other words, they argue that the adverse effects of objectionable preferences will always outweigh their benefits to the people holding them (for instance, a sadist's benefits from satisfying his sadistic preferences will be outweighed by their adverse effects on his victims and on numerous third parties who oppose torture and sympathize with the victims). Id. at 1346-49. To my mind, it is very doubtful that we can rest assured that all objectionable preferences will be weeded out through simple welfare maximization and the noble preferences of the majority. In truth, Kaplow and Shavell's optimistic argument rests on wishful thinking and their own value judgments, rather than on empirical data.

<sup>129</sup> Kaplow and Shavell's conception of IP is, seemingly, relatively weak, aimed at correcting information problems such as erroneous data or absence of relevant information and related cognitive errors such as wishful thinking, myopia, and addiction. Id. at 1330-31. They do not acknowledge that adequate "correction" of these problems might be tantamount to applying an objective theory of well-being.

<sup>130</sup> Id. at 1334-35.

<sup>131</sup> Id. at 1337.

food or to be less racist.<sup>132</sup> Kaplow and Shavell come dangerously close to an objective theory of well-being. They, in effect, acknowledge the desirability of the law's interference with people's actual preferences in an effort to align them with objective values which would, according to an external judgment, improve their well-being.<sup>133</sup> Apparently aware of this danger, Kaplow and Shavell hurriedly add that "it is not appropriate under welfare economics to use the law to shape preferences when individuals' actual well-being will not be improved as a result, but rather the analyst wishes to impose on society his or her own view concerning what other people's preferences 'ought' to be."<sup>134</sup> But is it really possible to distinguish between the two cases? In attempting to correct mistaken actual preferences using an IP criterion of well-being, we inevitably assume that individuals, ideally placed, would indeed come to value the things objectively worth valuing.

A different kind of example from Kaplow and Shavell's inaccurate portrayal of welfare economics' subjectivity relates to the "aggregation issue." To maximize well-being in society, policymakers employing welfare economics must aggregate individuals' well-being into a social welfare function. Kaplow and Shavell acknowledge that there is more than one possible method for such aggregation: They rightly state that welfare economics enables one to address distributional concerns by giving additional weight to the well-being of the worst-off individuals.<sup>135</sup> However, they do not elaborate this point and refrain from advocating any specific method for aggregating individuals' well-being.<sup>136</sup> The choice of an aggregation method is extremely important to the subjectivity/objectivity issue. It requires policymakers to assign a certain "weight" to each person's preferences, and to multiply every individual's preferences by this allocated weight. The possibility of granting unequal (nonunitary) weights to the preferences of different individuals is tantamount to the insertion of objective, substantive value judgments into the preference theory of well-being. This is because such differential "distributional" weights are not derived from people's *actual* (or even *ideal*) preferences and "tastes" for fairness. In truth, they represent deci-

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<sup>132</sup> *Id.*

<sup>133</sup> As explained above, having racist preferences does not, necessarily, involve errors of rationality. See *supra* notes 56-57 and accompanying text. Even Kaplow and Shavell accept that objectionable preferences can be "entirely informed and rational." *Id.* at 1339.

<sup>134</sup> *Id.* at 1338.

<sup>135</sup> *Id.* at 987-88.

<sup>136</sup> *Id.* at 988.

sionmakers' independent views regarding the fair distribution of well-being in society and the proper valuation of various goods.<sup>137</sup>

It is therefore misleading to claim that under welfare economics the importance of fairness depends solely on an empirical inquiry into "what individuals' tastes happen to be,"<sup>138</sup> and that policymakers' views on "which notions of fairness should be endorsed by members of an enlightened society are irrelevant."<sup>139</sup> On the contrary, welfare economics recognizes and legitimizes the use of external value judgments.<sup>140</sup> Allowing such objectivity improves its chances of enhancing people's well-being.

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<sup>137</sup> Dorff makes a similar point. Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. Cal. L. Rev. 847, 863-66 (2002). The social welfare function, distributional weights and their role in welfare economics are discussed in Robert Sugden & Alan Williams, *The Principles of Practical Cost-Benefit Analysis* 198-210 (1978); Abram Bergson, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. Econ. 310, 322-33, 327-28 (1938); James M. Buchanan, *Positive Economics, Welfare Economics and Political Economy*, 2 J.L. & Econ. 124, 133-34 (1959); Tibor Scitovsky, *The State of Welfare Economics*, 41 Am. Econ. Rev. 303, 312 (1951). Sugden and Williams explicitly acknowledge the objectivity of distributional weights by stating that "[t]he role of distributional weights . . . is to express decision-makers' judgments about the relative social values of increments of income accruing to different individuals. There are many similarities between the idea of distributional weights and the idea of using decision-makers' valuations of goods." Sugden & Williams, *supra*, at 202. In a similar vein, Buchanan states,

The "social welfare function" is an explicit expression of a value criterion. It incorporates fully the required information concerning the relative importance of conflicting aims, including the relative importance of separate individuals within the social group. The function orders all possible social situations and allows an external observer to select one as "best."

Buchanan, *supra*, at 133. Likewise, Scitovsky writes,

[T]he shape of the social welfare function must somehow be determined; and this, to put it crudely, amounts to determining the relative weights attached to each individual's preferences when these are aggregated into the social preference function. Should everybody's preferences be given equal weight, or, if not, on what principle should different weights be allotted to different people's preferences?

Scitovsky, *supra*, at 312. Scitovsky therefore concludes that

the introduction of the social welfare function has not really solved the economist's problem. It has indeed taken off his shoulders the responsibility for attaching weights to different people's satisfactions or welfare; but it has imposed upon him the new and very similar responsibility of attaching weights to different people's opinions and preferences.

Id.

<sup>138</sup> Kaplow & Shavell, *supra* note 16, at 983.

<sup>139</sup> Id. For similar statements, see *id.* at 975, 1350.

<sup>140</sup> The economic concept of "merit goods" (or "merit wants") is another example of the existence of objectivity in seemingly subjective, preference-based theories of well-being. According to this concept, certain goods are so meritorious that they should be provided by the state, regardless of consumers' effective demand for them. A "merit good, in effect, is any item of public expenditure that seems socially reasonable but cannot be accounted for within the ordinary economic theory of demand." Howard Margolis, *Selfishness, Altruism and Rationality: A Theory of Social Choice* 75 (1982). Such goods are publicly

Interestingly, when discussing fairness issues, Kaplow and Shavell revert to an AP criterion of well-being and do not mention the IP criterion at all. This is surprising since they consider IP the better measure of well-being.<sup>141</sup> As a result, they argue that welfare economics should take into account fairness considerations only if people “*in fact* have tastes for notions of fairness” and if they “*actually possess*” such preferences;<sup>142</sup> that this is an empirical question, best answered by statisticians and opinion researchers and not by philosophical inquiry.<sup>143</sup> But these statements are inconsistent with their earlier general admission that we should form legal rules in accordance with what people would have desired in ideal conditions.<sup>144</sup> The insistence on *actual* preferences in this context may be understood as an attempt to disguise the very close relation between the implementation of people’s *informed* preferences regarding fairness

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supplied not as a response to any specific market failure, or to satisfy individuals’ preferences for them, but in response to decisionmakers’ value judgments regarding the importance of these goods to the overall social good. Examples of merit goods include free education, school lunches, and subsidized low-cost housing. Richard A. Musgrave, *The Theory of Public Finance: A Study in Public Economy* 13-15 (1959); Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice* 78-80 (4th ed. 1984). For various applications of merit goods arguments in the legal literature, see Timothy J. Brennan, *Economic Efficiency and Broadcast Content Regulation*, 35 Fed. Comm. L.J. 117, 130-31, 138 (1983) (discussing public television, public libraries, and museums as merit goods); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. Chi. L. Rev. 1, 25-27 (1993) (discussing possibility of treating certain contractual rights as merit goods); Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. Rev. 795, 817-18 (1987) (citing local telephone service as merit good); Timothy Stolfus Jost, *Private or Public Approaches to Insuring the Uninsured: Lessons from International Experience with Private Insurance*, 76 N.Y.U. L. Rev. 419, 484 (2001) (citing health insurance as merit good); Russell Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality and Market Failure*, 35 Cornell L. Rev. 1, 7-8 (1999) (citing view that health care is merit good); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 Tex. L. Rev. 1145, 1159-63 (1992) (citing savings as merit good); Timothy C. Shepard, *Termination of Servitudes: Expanding the Remedies for “Changed Conditions,”* 31 UCLA L. Rev. 226, at 244 n.101 (1983) (citing education, food, and clothing as merit goods). The concept of merit goods is very similar to an objective theory of well-being because it accepts that some things are valuable in any person’s life, that private preferences do not always correspond to people’s best interests, and that therefore these things should be provided by the state not in accordance with individuals’ desire for them.

<sup>141</sup> Kaplow & Shavell, *supra* note 16, at 984.

<sup>142</sup> *Id.* at 1350 (emphasis added).

<sup>143</sup> *Id.* at 1350. Immediately following this assertion, Kaplow and Shavell admit that it is very difficult to identify people’s tastes for fairness, since no market for this good exists, and because they dismiss opinion research and polling information as unreliable. *Id.* at 1350-51. If, indeed, philosophical inquiry is impermissible and empirical data is not attainable, it is unclear how we can take fairness considerations (whose existence is recognized by Kaplow and Shavell) into account at all, even within the confines of welfare economics.

<sup>144</sup> *Id.* at 984, 1330-34.

issues and the employment of preference-independent or objective fairness considerations, against which Kaplow and Shavell argue.<sup>145</sup>

Another example of the inevitable objectivity in preference theories may be found in Howard Chang's article on social welfare.<sup>146</sup> Chang embraces an ideal preference theory of well-being: He accepts John Harsanyi's view<sup>147</sup> that only "true" (as opposed to mistaken) preferences should be taken into consideration<sup>148</sup> and that certain external preferences, including objectionable preferences, should be disregarded by policymakers.<sup>149</sup> This "laundering" of objectionable (racist, sadistic, malicious) preferences injects a great deal of objectivity into the seemingly subjective preference theory. It allows policymakers to employ preference-independent value judgments in order to judge certain preferences as "bad," derogatory, or otherwise antisocial, and disqualify them from entering the social calculus.

The laundering technique is not identical to an objective theory of well-being. The latter method applies objective criteria from the outset and regards objectionable preferences as ones that do not enhance people's well-being. The former technique, in contrast, only employs objective values at the second stage. It identifies the existence of objectionable desires among an individual's preferences and, hence, is willing to assume that their satisfaction might contribute to the person's well-being, but then excludes them from any influence in shaping social policy.<sup>150</sup> This difference between the two methods does not bear, however, on the subjectivity/objectivity issue: This is because the laundering technique, like objective theories of well-being, uses objective criteria to disregard nonvaluable preferences in maximizing social welfare.<sup>151</sup> Another difference between the two is that the laundering technique succeeds in excluding only a certain category of nonvaluable preferences—those that are bad for *others*. In contrast with objective theories of well-being, it does not deal satisfactorily with other types of problematic preferences—for example, those that are bad for *oneself*.<sup>152</sup> Nevertheless, with regard to the category of "desires that are bad for others," the laundering method

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<sup>145</sup> See, e.g., *id.* at 1353-54.

<sup>146</sup> See Chang, *supra* note 13.

<sup>147</sup> See *supra* note 118.

<sup>148</sup> See Chang, *supra* note 13, at 193-94.

<sup>149</sup> See *id.* at 179-96. For an explanation of these categories, see *supra* notes 59-67 and accompanying text.

<sup>150</sup> See *supra* notes 65-66 and accompanying text.

<sup>151</sup> A similar "objectivity argument" can be made with respect to the suggestion that AP should be restricted to those that affect a person's own life and its success. See *supra* notes 40-43 and accompanying text.

<sup>152</sup> See *supra* notes 66-67 and accompanying text.

shares a lot in common with objective theories of welfare. Such objectivity poses a problem for an alleged “satisfaction of subjective preferences” theory of well-being.<sup>153</sup>

These two examples illustrate that objectivity cannot be avoided, even in preference theories of well-being. A *reasonable* criterion of well-being must include strong objective components, which bring it very close to an objective account of well-being. Although, in theory, one may adopt a strictly subjective preference account, such a move results in an inadequate criterion of well-being. In practice, scholars aware of the variant preference theories admit that a criterion based on *ideal*, rather than *actual*, preferences is the superior criterion of well-being, but tend to obscure the objective consequences of this choice. The concealing of objectivity is done in several ways: assuming (explicitly or implicitly) that actual and ideal preferences usually coincide and that ideally informed people will indeed come to desire the objectively good things in life;<sup>154</sup> “laundering” objectionable preferences;<sup>155</sup> using nonunitary weights to correct the consequences of simple preference-satisfaction maximization;<sup>156</sup> and claiming that problematic preferences will “lose out” in the maximization process, and therefore policymakers need not satisfy them in practice.<sup>157</sup>

One cannot have her cake and eat it too; significant subjectivity can only be achieved at the price of diminished plausibility. In the final analysis, the difference between an acceptable preference theory and a reasonable objective theory of well-being is very small—a matter of degree. Objective theories are more honest about their objectivity than are preference theories of well-being. In the following Part, I take a closer look at the objective theory of well-being, its advantages, and its appropriate scope.

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<sup>153</sup> Kaplow and Shavell acknowledge this point and criticize the laundering technique for its objectivity, that is, for not respecting people’s autonomous and rational, albeit objectionable, preferences. Kaplow & Shavell, *supra* note 16, at 1339-41. A similar “subjectivist” critique can be raised against the various methods that Kaplow and Shavell accept as legitimate, such as the use of informed (as opposed to actual) preferences, and the employment of nonunitary weights in aggregating people’s well-being. See *supra* notes 125-37 and accompanying text.

<sup>154</sup> See *supra* notes 86-89, 127-29 and accompanying text.

<sup>155</sup> See *supra* notes 146-53 and accompanying text.

<sup>156</sup> See *supra* notes 135-37 and accompanying text.

<sup>157</sup> See *supra* note 128.

## II

## THE OBJECTIVE THEORY OF WELL-BEING

A. *In General*

Objective theories of well-being hold that certain things are good for people, and that having such things makes for a better life. These good things have intrinsic value independent of whether individuals desire them, either actually or hypothetically under ideal conditions. Similarly, some things can be considered bad for individuals, even if they are unaware or do not wish to avoid them. Having these negatives leaves one worse-off, in terms of well-being.<sup>158</sup> Objective-theory advocates do not argue that people's preferences or pleasures are unimportant in assessing their well-being. What they reject, however, is the impossibility of judging a person's well-being by an external standard that is distinct from desires, tastes, or mental states.<sup>159</sup> The objective approach to well-being usually is accompanied by a nonexhaustive "list" of the goods worth having; thus the term "objective list" (OL).<sup>160</sup>

A classic objective theory of well-being is found in Aristotle's *Nicomachean Ethics*.<sup>161</sup> Aristotle offers an account of the ideal human life in which human nature flourishes and reaches perfection. According to Aristotle, well-being consists of the exercise and full development of various intellectual and moral virtues—of theoretical and practical rationality; he argues that the best life is the philosophical life.<sup>162</sup>

Contemporary objective theories, including those patterned after Aristotle's perfectionism, provide more pluralistic lists of objective goods. They deny that there is a single ideal of human life fit for everyone and recognize the value of a broader, more flexible list of wel-

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<sup>158</sup> Kagan, *supra* note 11, at 39; Parfit, *supra* note 22, at 499; Scanlon, *supra* note 23, at 112-13.

<sup>159</sup> Griffin articulates this point nicely: "When [objective values] appear in a person's life, then whatever his tastes, attitudes, or interests, his life is better." Griffin, *supra* note 28, at 54.

<sup>160</sup> Derek Parfit coined the term "objective list theory." Parfit, *supra* note 22, at 493, 499. Scanlon regrets this term, which might mistakenly imply arbitrariness and rigidity, Scanlon, *supra* note 22, at 188, and prefers the term "substantive-good theory," since it holds "that there are standards for assessing the quality of a life that are not entirely dependent on the desires of the person whose life it is," Scanlon, *supra* note 23, at 113.

<sup>161</sup> Aristotle, *The Nicomachean Ethics* (David Ross ed., 1980).

<sup>162</sup> *Id.* at 12-14, 263-69. Discussions of Aristotle's theory of well-being include: Thomas Hurka, *Perfectionism* 23-24, 37-44 (1993); Bernard Williams, *Ethics and the Limits of Philosophy* 34-53 (1985); Kraut, *supra* note 30, at 170-76, 181; Gavin Lawrence, *Aristotle and the Ideal Life*, 102 *Phil. Rev.* 1 (1993).

fare-promoting goods.<sup>163</sup> Although no unanimously agreed-upon list exists, there is considerable overlap between the various objective theories of well-being.<sup>164</sup>

In the following Sections, I discuss values that commonly are endorsed by objectivists: autonomy and liberty, understanding, accomplishment, deep and meaningful social relationships, and enjoyment.<sup>165</sup> How is this list construed and how are the specific values chosen? Some writers do not attempt to explain or justify the items on the list.<sup>166</sup> Thus, John Finnis readily states that “knowledge” is an objective good, an “aspect of authentic human flourishing,” and that “[t]he good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration.”<sup>167</sup> Other scholars deduce the goods on the list from the distinctive and essential characteristics of human nature,<sup>168</sup> or from the common, widely

<sup>163</sup> Aristotle’s narrow version of well-being is criticized in Griffin, *supra* note 28, at 57-59; Charles E. Larmore, *Patterns of Moral Complexity* 33-35 (1987); Kraut, *supra* note 30, at 181, 191-96. A sophisticated neo-Aristotelian theory of the good life is developed in Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *The Quality of Life*, *supra* note 22, at 242; Nussbaum, *supra* note 85, at 70-96.

<sup>164</sup> Throughout the Article, I concentrate on objective theories that are not confined to basic needs, which are the all-purpose means needed for whatever else a person may want. The concept of “basic needs,” although objective in nature and less controversial than objective theories that go beyond necessities, is too narrow to capture the richness and complexity of the notion of well-being. Griffin, *supra* note 28, at 50, 53-54; Scanlon, *supra* note 23, at 111; Sumner, *supra* note 27, at 54; Qizilbash, *supra* note 113, at 70.

<sup>165</sup> People’s well-being embraces much more than necessities. It should be noted, however, that some of the objective values discussed below, such as autonomy and liberty, are also endorsed by basic-needs theorists. Discussions of basic-needs theories include: Griffin, *supra* note 28, at 41-51; Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in *Oxford Studies in Ancient Philosophy* 145, 150-55 (Julia Annas & Robert H. Grimm eds., *supp.* vol. 1988); Penz, *supra* note 83, at 164-75; Rawls, *supra* note 52, at 62, 78-81, 348-49; John Rawls, *Political Liberalism* 178-90 (1993); Sumner, *supra* note 27, at 53-60; Sen, *supra* note 11, at 197-203.

<sup>166</sup> Philip Kitcher distinguishes between two types of objective theories: “bare objectivism” and “explanatory objectivism.” Philip Kitcher, *Essence and Perfection*, 110 *Ethics* 59, 59 (1999). The former simply offers a list of the things that make people’s lives go well, and does not justify it by any explanatory theory. *Id.* In contrast, the latter attempts to defend the specific items on the list. *Id.*

<sup>167</sup> John Finnis, *Natural Law and Natural Rights* 64-65 (1980). In a similar vein, Butchvarov claims that anyone who would deny that pleasure, knowledge, or affection are good and that pain, ignorance, or hatred are bad, would be “no more comprehensible to us than someone who denied that yellow is a color.” Panayot Butchvarov, *That Simple, Indefinable, Nonnatural Property Good*, 36 *Rev. Metaphysics* 51, 75 (1982). Butchvarov therefore concludes: “If this is so, then . . . we have a demonstration of our knowledge of the existence of the property of goodness . . . : our finding it unthinkable, inconceivable, that we should be mistaken in holding that certain entities exemplify it.” *Id.*

<sup>168</sup> See Griffin, *supra* note 28, at 70 (“There are prudential values that are valuable in any life. . . . They let us say, roughly . . . how good the life is and how it could be better. They do, because they rest on general features of human nature . . . .”); Hurka, *supra* note 162, at 3 (“Certain properties . . . constitute human nature or are definitive of humanity—

shared values of people.<sup>169</sup> Admittedly, there is no unified theory of “goodness” that explains what makes the things on the list “good for” people.<sup>170</sup> Consequently, one might expect to find numerous, vastly diverse lists. This, however, is not the case. Somewhat surprisingly, lists constructed by different people from diverse backgrounds and times have much in common.<sup>171</sup> Although people may certainly differ on what constitutes a good life, it is quite evident that the content of these lists is not arbitrary, capricious, or just “a matter of taste.”<sup>172</sup>

Let us elaborate on the values commonly included in objective-goods lists:

a. *Autonomy and liberty.* These values include the ability to decide one’s own course in life and the freedom to act according to one’s choices. Autonomous living is necessary for a meaningful

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they make humans humans. The good life . . . develops these properties to a high degree or realizes what is central to human nature.”); Kagan, *supra* note 11, at 40 (“[T]he objective goods are those that are elements in an ideal or perfect human life, one which fully realizes the distinctive and essential characteristics of human nature.”); George Sher, *Beyond Neutrality: Perfectionism and Politics* 202 (1997) (“[C]ertain human capacities are especially fundamental, and . . . their links to certain traits or activities are what make the latter inherently valuable . . . . [A] fundamental capacity will be one whose exercise is both near-universal and near-inescapable.”); *id.* at 229 (“[W]hat unifies the diverse elements of a good life is their connection(s) to near-universal, near-unavoidable goals.”).

<sup>169</sup> See Griffin, *supra* note 38, at 51-52 (“[A] certain set of values . . . must be shared for there to be a language, for us to be able to understand one another, for us to be able to see one another as human persons . . . . [a] basic set of prudential values is involved in the intelligibility of human persons . . . .”); Nussbaum, *supra* note 85, at 74 (discussing “central elements of truly human functioning that can command a broad cross-cultural consensus”); Penz, *supra* note 83, at 171-72 (suggesting that objective formulations of well-being be derived from “a normative consensus-based evaluation of various kinds of interests” and from “the moral importance that the collectivity attaches to them”); Raz, *supra* note 70, at 308-09 (claiming that well-being is promoted through pursuit of valuable goals based upon “socially defined and determined pursuits and activities”); Qizilbash, *supra* note 113, at 63, 69-70 (arguing that values on list are shared human values that enhance any distinctively human life); Sen, *supra* note 11, at 192 (stating that objective criterion can be founded on consensus of values about content of well-being).

<sup>170</sup> See Scanlon, *supra* note 22, at 191. For a similar, though harsher, critique of objective theories of well-being, see the comment of Sissela Bok in *The Quality of Life*, *supra* note 22, at 203-05 (discussing practical difficulties in applying objective criteria). See also Sumner, *supra* note 27, at 45-46 (arguing that objectivists do not explain nature of welfare, but only present inventory of welfare-promoting sources).

<sup>171</sup> Arguably, the above lists represent Western liberal values that are not universally held. This argument is itself contested. See, e.g., Nussbaum, *supra* note 85, at 34-59 (defending existence of universal values). However, for the purposes of this Article, which focuses on the legal rules of democratic Western societies, it suffices that the values on the list are commonly accepted in such societies.

<sup>172</sup> See Griffin, *supra* note 28, at 54 (“[Objective, nonneutral values] are not capricious or accidental or arbitrary. [Nor are they] a matter of taste. And it is odd to think even that we choose them; generally they choose us, by being the sorts of values that we have only to perceive clearly to adopt as goals.”); *id.* at 72 (stating same proposition).

human existence.<sup>173</sup> Autonomy and liberty assume the existence of certain basic capabilities to act—being in a state of physical and mental health. This requires adequate levels of nutrition, health, and sanitation; freedom from anxiety and pain; certain levels of self-respect and aspiration; as well as sufficient material goods, such as shelter and household property.<sup>174</sup>

b. *Understanding*. An important ingredient in a good life is knowledge about oneself and about the world. Likewise, lack of ignorance, confusion, or error is good in any person's life.<sup>175</sup> This value requires that every individual receive an adequate education that enables one to appreciate the good things in life, adopt worthwhile goals, and realize one's potential.<sup>176</sup>

c. *Accomplishment*. The pursuit and successful achievement of worthwhile goals is valuable. It is objectively good to adopt meaningful goals that give our lives weight and substance, exercise our capacities, and fulfill our potential as best we can.<sup>177</sup> Accomplishment

<sup>173</sup> See *id.* at 67 (stating that autonomy "is at the heart of what it is to lead a human existence. And we value what makes life human, over and above what makes it happy."); Sher, *supra* note 168, at 177 (arguing that it is better "to exercise control over one's own fate than to be governed by other people or external forces"); Qizilbash, *supra* note 113, at 65 ("[W]ithout the autonomy and liberty to choose our own way in life, we are deprived of the dignity associated with a characteristically human existence.").

<sup>174</sup> See Griffin, *supra* note 28, at 67 (stating that basic capabilities needed for autonomous living include "limbs and senses that work, the minimum material goods to keep body and soul together, freedom from great pain and anxiety"); Nussbaum, *supra* note 85, at 78-80 (describing such functional capabilities as life, bodily health, and bodily integrity); Qizilbash, *supra* note 113, at 65, 67 (arguing for importance of adequate levels of nutrition, health, sanitation, shelter, rest, and security).

<sup>175</sup> See Griffin, *supra* note 28, at 67 ("Simply knowing about oneself and one's world is part of a good life. We value, not as an instrument but for itself, being in touch with reality, being free from muddle, ignorance, and mistake."); Finnis, *supra* note 167, at 64-69, 87 (discussing basic value of knowledge as aspect of authentic human flourishing); Hurka, *supra* note 162, at 99-100, 136 (analyzing "the good" of knowledge); Kagan, *supra* note 11, at 39 (noting that knowledge is typically found on objective lists); Parfit, *supra* note 22, at 499 (same); Scanlon, *supra* note 23, at 87 (noting that knowledge is "generally listed as intrinsically valuable"); Sher, *supra* note 168, at 178, 199-201 (demonstrating broad recognition of value of knowledge); Qizilbash, *supra* note 113, at 64-65, 67 (explaining why understanding makes life better).

<sup>176</sup> See Brink, *supra* note 33, at 231, 234 (viewing education as necessary condition for human welfare); Nussbaum, *supra* note 85, at 78-79 (same); Qizilbash, *supra* note 113, at 65, 67 (including literacy in his suggested list of values).

<sup>177</sup> See Brink, *supra* note 33, at 231-33 (discussing importance of forming and pursuing projects that realize one's capacities of practical reason, friendship, and community); Griffin, *supra* note 28, at 64-67 (regarding accomplishment as one of major ends of life); Griffin, *supra* note 38, at 63 (defining accomplishment as "an achievement of the kind of thing that gives life weight or substance"); Hurka, *supra* note 162, at 37, 99-100, 136 (arguing that humans are essentially rational and that they develop their practical perfection by successfully achieving long-term and challenging goals); Kagan, *supra* note 11, at 39 (listing accomplishment as objective good); Parfit, *supra* note 22, at 499 (listing "the devel-

depends both on the identity of the chosen goals and on their successful realization.<sup>178</sup> Contrarily, it is objectively bad to waste one's life on petty, trivial, self-debasing, or otherwise unworthy aims.<sup>179</sup>

d. *Deep and meaningful social relationships.* This value concerns the existence of significant, authentic, and reciprocal relations of friendship and love. The developing and sustaining of deep bonds and the exercising of concern and respect for others are good in themselves, apart from the happiness that these relationships may provide. Humans are social beings, and a solitary life is an impoverished life.<sup>180</sup>

e. *Enjoyment.* Experiencing pleasure and satisfaction in different aspects of life (at home, at play, at work) and being able to enjoy beauty or nature contribute to the objectively good life.<sup>181</sup>

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opment of one's abilities" as objective good); Scanlon, *supra* note 23, at 87 (listing intellectual, artistic, and moral excellence as intrinsically valuable); Kraut, *supra* note 30, at 180-81 (discussing objectivist view that "people should not be considered happy unless they are coming reasonably close to living the best life they are capable of. . . . [E]ach person has certain capacities and talents which can be fully developed under ideal conditions. . . . [I]f someone is very distant from his full development, he is not and should not be considered happy, even if he meets the standards he imposes on his life."); *id.* at 184-86 (similar argument); Qizilbash, *supra* note 113, at 64 (asserting that accomplishment is "the sort of thing that makes any human life go better").

<sup>178</sup> See Brink, *supra* note 33, at 233 (arguing that pursuit of personal project is valuable if it is both aimed at appropriate goals and is realized); Raz, *supra* note 70, at 307 (claiming that well-being "consists in large measure of the success of one's important pursuits"); Raz, *supra* note 65, at 3-4, 38 (arguing that only valuable, appropriate activities contribute to well-being and that well-being is advanced when such activities are successful); Scanlon, *supra* note 23, at 121-25 (asserting that well-being depends both on worth of one's chosen aims and on their success); Sher, *supra* note 168, at 177 (noting value of serious and challenging pursuits).

<sup>179</sup> See Raz, *supra* note 70, at 298-99 (claiming that "[a] person who spends all his time gambling has, other things being equal, less successful a life, even if he is a successful gambler, than a live stock farmer busily minding his farm"); Raz, *supra* note 65, at 4-5 (arguing that life is not good life if it is spent on petty, vindictive, or self-debasing pursuits); see also Kraut, *supra* note 30, at 185 (stating that people "can have radically false beliefs about what goals they should pursue" and concluding that such people are not living happy life, "though they may *feel* happy").

<sup>180</sup> See Brink, *supra* note 33, at 233 ("We have social capacities for sympathy, benevolence, love, and friendship whose realization makes our lives better than they would otherwise be."); Finnis, *supra* note 167, at 88 (discussing fundamental good of friendship); Griffin, *supra* note 28, at 67-68 ("[D]eep, authentic, reciprocal relations of friendship and love . . . have a value apart from the pleasure and benefit they give."); Hurka, *supra* note 162, at 134-36 (emphasizing virtues of enduring, stable, and complex relationships with other people); Nussbaum, *supra* note 85, at 79 (explaining importance of personal emotional development); Scanlon, *supra* note 23, at 87-89, 123-25 (elaborating on value of friendship); Qizilbash, *supra* note 113, at 64, 67 (noting that significant relations with others are among those things that give value to human lives).

<sup>181</sup> See Finnis, *supra* note 167, at 87-88 (discussing objective values of play and aesthetic experience); Griffin, *supra* note 28, at 67 (including enjoyment and pleasure in his list of prudential values); Nussbaum, *supra* note 85, at 80 (same); Scanlon, *supra* note 23, at 124 (same); Sher, *supra* note 168, at 200-01 (listing sources on value of play and enjoyment of

Before proceeding further, two important caveats are in order:

*First*, it is not claimed that people would usually reject the goods on the objective list. The values on the list usually are desired by us and assist us in achieving favorable mental states. In other words, the three types of theories—mental state, preference satisfaction, and objective list—often point in the same direction. This happy state of affairs does not detract, however, from the importance of the debate regarding the most adequate criterion of well-being. The test of any theory is in the hard cases—those in which different theories lead to different conclusions concerning well-being. When people desire what is bad for them, or obtain pleasure from base activities, both mental state and preference theories fail, and only an objective theory can explain why well-being is diminished, rather than promoted, in these circumstances. This is so because only an objective theory judges well-being by an external standard that is not necessarily dependent on a person's subjective preferences or pleasures. Value, according to OL, is not conferred by the act of desiring or by the favorable mental state experienced by the person. Rather, people may form a preference or enjoy a certain thing because they correctly perceive that it is indeed valuable—worth desiring or enjoying. But people's judgments of worth certainly can be mistaken.<sup>182</sup> In these "moments of truth"—demonstrated by the examples discussed above of the idle person, the oppressed poor, and the KKK member<sup>183</sup>—the OL theory can clarify why these people's lives are not as good as they could have been.

*Second*, it should be stressed that the OL theory is neither rigid nor elitist. There is no single ideal of the good human life, fit for everyone; the objective values on the list are broad enough to allow sufficient flexibility and pluralism. Well-being is a mixture of the listed values, and the particular compound of these values varies from one individual to another.<sup>184</sup> In addition, the content of each specific

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beauty). Property is important for the realization of the values on the objective-goods list. See *infra* Part III.A.

<sup>182</sup> It is unrealistic to assume that nonconvergence between goodness and desire or enjoyment is a rare, and thus unimportant, phenomenon. Griffin, *supra* note 28, at 9, 10; Kagan, *supra* note 11, at 40; Parfit, *supra* note 22, at 467-68, 499-500; Sher, *supra* note 168, at 180.

<sup>183</sup> See *supra* notes 51-57 and accompanying text.

<sup>184</sup> Brink, *supra* note 33, at 232-33; Griffin, *supra* note 28, at 58-59; Qizilbash, *supra* note 113, at 67. It should be noted that Griffin, at the end of the day, prefers an ideal-preference account of well-being over an objective theory because he claims that the former is more sensitive to the differences between individuals. Griffin, *supra* note 28, at 33, 54-55, 107. However, any plausible, nonsimplistic OL theory would allow much flexibility and would not prescribe a rigid, identical set of goods for everyone. Griffin acknowledges that a pluralistic objective theory is indeed possible, *id.* at 58-59, and admits that it is

value on the list necessarily will be different for every individual, and so there are many ways to achieve a good life.<sup>185</sup> Thus, for instance, the good of “accomplishment” may mean scholarly research for one, cultivating the land for another, and community work for a third. If, in pursuing these diverse activities, the individual has realized her potential and pursued goals that are as worthwhile as anything she could have done, then she has attained the good of “accomplishment.” Contrarily, a life wasted in idleness or unworthy pursuits (such as gambling) lacks accomplishment and, consequently, that person’s well-being is diminished.<sup>186</sup>

### B. *Objective Well-Being and Fairness Considerations*

This Article has thus far argued that the popular criterion of preference satisfaction has severe flaws, and that an appropriate criterion of well-being must include objective components. In the context of the ongoing debate on “welfare maximization vs. fairness considerations,” this argument pertains to the “welfare” component of the equation.<sup>187</sup> In other words, the issue of the appropriate criterion of well-being, used in evaluating welfare and in welfare maximization, is distinct from the “fairness” issue, which concerns the appropriate *distribution* of well-being—be it measured by subjective or objective standards—among individuals.<sup>188</sup> Even if one adopts a highly objective criterion of well-being, it might still be the case that the goal of maximizing overall well-being conflicts with the goal of equalizing people’s levels of well-being or justly distributing well-being throughout society.

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very hard to distinguish such an objective theory from an informed-desire approach, *id.* at 33.

<sup>185</sup> Griffin, *supra* note 28, at 59; Hurka, *supra* note 162, at 136; Nussbaum, *supra* note 85, at 105; Scanlon, *supra* note 22, at 189-90; Scanlon, *supra* note 23, at 120; Sen, *supra* note 11, at 196.

<sup>186</sup> Raz, *supra* note 70, at 298-99; Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 *Iowa L. Rev.* 761, 780-82 (1989). Similarly, the content of the good “enjoyment” greatly varies from person to person. Qizilbash, *supra* note 113, at 69.

<sup>187</sup> See *supra* notes 13-16 and accompanying text.

<sup>188</sup> There is agreement among scholars that well-being maximization can be based on various criteria, subjective as well as objective. See Brink, *supra* note 33, at 217 (asserting that Utilitarianism aims at maximizing welfare, and that since different concepts of welfare are possible, different concepts of Utilitarianism result from different conceptions of “the good”); Hurka, *supra* note 162, at 55-60 (explaining that his objective account of human perfectionism requires maximizing and consequentialist approach); Adler & Posner, *supra* note 16, at 202-04 (concluding that all theories of well-being can be accommodated within cost-benefit analysis aimed at maximizing welfare); Kaplow & Shavell, *supra* note 16, at 984 n.41 (noting that most of their analysis of welfare maximization in terms of preference satisfaction can be applied to welfare maximization in terms of objective criterion).

Another reason for the possible conflict between the goals of welfare maximization and distributive justice is that even an objective standard of well-being allows for variations among individuals. For instance, each person's well-being may be promoted best by different mixes of the various goods on the objective list.<sup>189</sup> Therefore, there is no guarantee that well-being maximization will be to everyone's benefit, or to the worst-off's benefit in particular.<sup>190</sup>

Nevertheless, adopting an objective criterion of well-being in lieu of the preference-satisfaction criterion diminishes the number and scope of the conflicts between the goal of well-being maximization and the goal of well-being distribution.<sup>191</sup>

The prospect of advancing both important goals simultaneously, without being forced to choose between them, is a possible advantage of an objective criterion of well-being. In many instances, this may be the case, for two major reasons.

First, the OL theory holds that certain things are good in any person's life, even if one does not form preferences or express desire for them in the market, in polls, or in public elections. These valuable goods often depend upon other important goods for their existence. For example, the goods of "autonomy and liberty" require adequate nutrition, health, and material property, as well as freedom from anxiety and pain. Similarly, the good of "understanding" necessitates sufficient education. These requirements support institutions, projects, and legal rules that promote objective well-being, resulting in a benefit for the worst-off, who are faring least well according to the OL criterion. However, since OL is a criterion of well-being and not a policy of redistribution, an improvement in the situation of the people that are worst-off is not guaranteed. Thus, increasing the well-being

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<sup>189</sup> See *supra* notes 184-86 and accompanying text.

<sup>190</sup> This fact does not detract from the importance of the latter. The state may be justified in foregoing certain improvements in overall well-being to remedy distortions in the distribution of well-being or tend to the plight of those worst-off. This issue, however, is beyond the scope of this Article, which focuses on the adequate criterion of well-being and its consequences for property law. On the importance of equality considerations in discussions of well-being, see Griffin, *supra* note 28, at 150-54, 176 (explaining that maximizing distribution of welfare may not be fair distribution); Kagan, *supra* note 11, at 48-54 (addressing various issues relating to conflict between welfarism and egalitarianism).

<sup>191</sup> There is even some convergence between fairness considerations and welfare maximization in preference-satisfaction terms. The phenomenon of the declining marginal utility of income supports redistribution from the rich to the poor as a way to maximize overall preference satisfaction, and, hence, total well-being. Kagan, *supra* note 11, at 50-51; Kaplow & Shavell, *supra* note 16, at 991. In addition, to the extent that people have other-regarding, altruistic preferences towards those who are worse-off, maximizing the satisfaction of such preferences will go hand-in-hand with distributive concerns. But see *supra* notes 61-65 and accompanying text for writers who advocate the disregard of external, other-regarding preferences in the process of welfare maximization.

of people enjoying average levels of well-being—and not the well-being of the very worst-off—may promote well-being maximization, but not address distributive concerns. Nevertheless, regulators may use the list of objective goods to justify redistribution of resources to those without a minimally acceptable level of well-being.<sup>192</sup>

Second, regard for others figures into some of the objective goods on the list, such as the good of “deep and meaningful social relationships,”<sup>193</sup> which values social connections involving mutual concern, commitment, and respect.<sup>194</sup> Although less evident, other-regarding components are also present in other values on the list, such as “accomplishment.” According to OL, well-being is promoted by pursuing valuable and worthwhile goals and projects. This requirement not only may condemn activities that harm others,<sup>195</sup> but it also may favor the adoption of personal goals that include fair terms and express caring for others.<sup>196</sup> Mutual cooperation and concern are not only good in themselves, but are also a way to achieve successfully long-term, complex, and challenging projects.<sup>197</sup> Thus, maximizing well-being according to an objective criterion may, more often than not, address distributive concerns as well.

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<sup>192</sup> See Hurka, *supra* note 162, at 65 (“[W]e can often provide necessary conditions for others’ good and have a moral duty to do so.”).

<sup>193</sup> See *supra* notes 179-80 and accompanying text.

<sup>194</sup> According to Brink:

By having friends and cooperating with others on a footing of mutual concern and commitment, we are able to exercise new capacities, secure ourselves against a variety of misfortunes, and generally extend our interests in new ways. . . . [T]he good of others is *part of* my good, and so I will benefit *directly* and *necessarily* by benefiting them.

Brink, *supra* note 33, at 73. Later, he states:

[I]t is part of any agent’s good to belong to a community in which each member treats others with mutual respect and concern . . . . [A] certain kind of distributive justice can be intrinsically valuable without being an impersonal good; it will be valuable *because* of how it contributes to the welfare of the individuals in the community.

*Id.* at 220.

<sup>195</sup> *Id.* at 264; Hurka, *supra* note 162, at 63.

<sup>196</sup> In Brink’s words:

In order for pursuit or realization of one’s personal projects to be valuable, they must respect the interests of others . . . . For distributions of goods and services to respect persons, they must express fair terms of social cooperation . . . . [.] this presumably excludes gross inequalities in the distribution of nonbasic goods among cooperators.

Brink, *supra* note 33, at 272.

<sup>197</sup> Hurka, *supra* note 162, at 132-34.

### C. Safeguards Against Excessive Objectivity of Well-Being

Notwithstanding the arguments in favor of an OL theory of well-being, the skeptic may still insist that the major problem of such a theory remains: An objective criterion seems to imply that a person's life could be going well if she possesses certain goods, even if that person does not enjoy these goods and prefers to be without them.<sup>198</sup> In addition, OL acknowledges the possibility that, sometimes, *others* may be better, more impartial judges of a person's well-being than the person whose well-being is being considered. OL can thus be accused of paternalism.<sup>199</sup>

Admittedly, an objective standard necessarily constrains the role of individuals' preferences or mental states in questions pertaining to their well-being. Were it not so, the OL theory could not have overcome the difficulties arising from subjective, internal accounts of well-being.<sup>200</sup> There are various ways, however, to guard against excessive objectivity of well-being or unwarranted interference with people's desires and enjoyments.

One safeguard is already built into the objective theory. As explained above, the objective goods on the list include "autonomy and liberty" and "enjoyment." Because these are not the only goods on the list, they consequently do not receive the same supremacy that they would have had in an AP or MS theory of well-being. To illustrate, according to an objective standard, sufficient increases in other goods may outweigh losses in autonomy.<sup>201</sup> Nevertheless, autonomy, free-will, and pleasure can and should be given substantial weight. Thus, even in the context of an objective theory of well-being, good reasons must be given to justify overriding a person's desires or choices regarding her own well-being.<sup>202</sup> Hurka, for instance, suggests that the value of autonomy may prevent us from forcing people to adopt a single best activity, but would not preclude us from the much

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<sup>198</sup> Kagan, *supra* note 11, at 40; Adler & Posner, *supra* note 16, at 201-02.

<sup>199</sup> Sumner, *supra* note 27, at 164; Adler & Posner, *supra* note 16, at 202. For further discussion of the connection between theories of well-being and paternalism, see *supra* notes 90-93 and accompanying text and Part I.D.

<sup>200</sup> See *supra* Parts I.A and I.B.

<sup>201</sup> Hurka, *supra* note 162, at 148-49, 152; Sen, *supra* note 53, at 41-42.

<sup>202</sup> See Brink, *supra* note 33, at 269-70 (concluding that autonomy might "outweigh the value of large magnitudes of other goods" such as "promotion of nonbasic goods and the realization of personal projects"); Griffin, *supra* note 28, at 71 (valuing autonomy as built-in check on paternalism and asserting that "any promotion of other prudential values must respect this (non-absolute but still important) one"); Scanlon, *supra* note 22, at 192 ("[A]ny plausible substantive good theory will count agreeable mental states among the things which can make a life better."); Sen, *supra* note 53, at 42 ("Even an objectively founded theory can give an important role to what people actually do value and to their ability to get those things.").

“milder illiberality of forbidding a certain worst activity,”<sup>203</sup> while leaving various other options open for free choice.

Another way to avoid overobjectivity is to adopt a “mixed” theory of well-being, which combines subjective and objective components.<sup>204</sup> The best situation, in terms of well-being, is when a person possesses the objectively good things and, at the same time, strongly desires or enjoys them. Both subjective and objective elements are necessary for the greatest promotion of well-being; neither is sufficient on its own. Thus, objective accomplishment has less value when unaccompanied by subjective pleasure or satisfaction. Likewise, subjective sensations are lacking in value (wholly, or at least partially) if not derived from valuable, worthwhile activities.

Most writers favoring at least some objectivity in the concept of well-being endorse either one of the above “safeguards”: an objective-goods list that includes values like autonomy, liberty, and enjoyment, or a mixed theory combining subjective and objective factors. Although theoretically distinct, there is not much practical difference between the two. Both theories highlight the importance of objective criteria in judging people’s well-being and, at the same time, provide ample weight to the subjective point of view. For the purposes of this

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<sup>203</sup> Hurka, *supra* note 162, at 149, 152, 156. In a similar vein, Joseph Raz argues that a pluralistic view of autonomy requires only the availability of a large number of different *morally acceptable* options. Raz, *supra* note 70, at 381. Governments’ legitimate efforts to discourage the worthless and the bad, however, should not include the criminalization or coercive prevention of victimless immoralities. Raz, *supra* note 186, at 785. Elsewhere, Raz states that the government should not intervene in those cases where “it is more important that their subjects should decide for themselves than that they should get the right results.” Raz, *supra* note 74, at 1231.

<sup>204</sup> For examples of contemporary mixed theories, see Parfit, *supra* note 22, at 501-02 (describing mixed theory as plausible solution to weaknesses of various theories of well-being); Penz, *supra* note 83, at 8-9 (overview of various theories of well-being: subjective, objective, and “mixed”). Raz concludes that well-being largely is determined by a person’s chosen goals, that these goals are held for reasons that usually are not merely his will but inhere in the value of the goals, and that well-being depends primarily on these external reasons. Raz, *supra* note 70, at 321. For discussion of Raz’s theory of well-being, see Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* 162-73 (1993); Raz, *supra* note 65, chs. 1-2. Raz defines well-being as consisting in whole-hearted and successful pursuit of valuable activities. See Raz, *supra* note 65, at 3, 6; Scanlon, *supra* note 23, at 124-25 (concluding that plausible theory of well-being must recognize following points: (1) Well-being is determined partially but not solely by experiential states such as satisfaction and enjoyment; (2) Well-being largely depends on person’s success in achievement of main goals in life, provided that they are worth pursuing; (3) There are other well-being-promoting goods such as valuable personal relations and achievement of excellence in art or science); Sumner, *supra* note 27, at 163-64 (briefly describing various mixed theories of well-being). Note that the Aristotelian ideal of the virtuous man is that of a person who not only leads the objectively good life, but desires and enjoys it as well. See Aristotle, *supra* note 161, at 20, 21, 31-32, 241; see also Kraut, *supra* note 30, at 168, 170-74 (discussing Aristotelian ideal).

Article, I do not need to decide between the two. It is sufficient to note that an adequate criterion of well-being cannot be too subjective, but must include significant objective components.<sup>205</sup>

Once we have adopted the above safeguards, we need not fear that an objective theory of well-being will lead to excessive interference in people's lives. True, objective theories contend that the best criterion of well-being has significant objective factors. Such a criterion may help us form (rough) judgments regarding different people's well-being. But whether we should *act* on these judgments by *coercing* any person to promote her own objective well-being is a totally different question and only this latter question involves paternalism.<sup>206</sup> One should, therefore, distinguish between choosing the most adequate criterion of well-being and deciding when and how to implement it. An individual's life might be lacking in value, but it would still be unjustifiable to interfere with that life.<sup>207</sup> On the microlevel, people are usually free to pursue trivial, unworthy aims or, more generally, their mistaken notions of well-being. The case of the macrolevel, however, should be different. A state wishing to promote well-being may decide to devote its scarce resources to creating institutions and rules in accordance with an objective criterion of well-being,<sup>208</sup> and to providing as many *valuable* options for choice as pos-

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<sup>205</sup> The above discussion enables the rejection of Sumner's criticism of objective theories of well-being. Sumner argues that well-being must be subject-relative, that is, going well for the person whose life it is, and therefore only subjective theories of well-being are plausible. Sumner, *supra* note 27, at 37-38, 42. Objective theories, according to his argument, exclude all reference to the person's attitudes and concerns. Therefore, they do not capture the essential subject relativity of well-being and cannot explain what makes a person's well-being her own. *Id.* at 43-44. But this assertion is certainly not true of most objective theories of well-being. As explained above, objective theories do accept that people's desires, feelings, and choices are relevant to the determination of their well-being. Objectivists will surely agree with Sumner that no reasonable objective theory would claim that a person's preferences or mental states are irrelevant to her well-being. For a similar criticism, see Sobel, *supra* note 72, at 502-03, 506-07 (arguing that objective theories can take person's pro-attitudes into consideration, without making them necessary condition of goodness). Sumner's definition of objective theories is very narrow: A theory is objective only if it assigns no essential role to subjectivity. According to this definition, all mixed theories of well-being are subjective, as are objective theories that list private autonomy and enjoyment as goods which promote well-being. Sumner, *supra* note 27, at 54 n.15, 163-64. This vast broadening of the category of subjective theories turns the debate into one of semantics, since Sumner will regard any plausible objective theory as subjective.

<sup>206</sup> Gibbard, *supra* note 48, at 172; Griffin, *supra* note 38, at 49. Raz, for instance, suggests that the question of whether to intervene or not should be "judged on the merit of each case, or class of cases, and not by a general exclusionary rule, as the so-called 'neutralists' would have it." Raz, *supra* note 74, at 1231.

<sup>207</sup> Brink, *supra* note 33, at 218; Raz, *supra* note 186, at 785.

<sup>208</sup> Hurka, *supra* note 162, at 66, 147; Scanlon, *supra* note 45, at 666.

sible.<sup>209</sup> Noncoercive promotion of the good can be achieved through institutions such as the public education system and the subsidy of valuable activities like the arts.<sup>210</sup>

Indeed, objective theories of well-being support nonneutrality of the state, but nonneutrality is not tantamount to excessive paternalism.<sup>211</sup> Education, easy access, exposure, and familiarization with objective goods may help achieve the ideal state of affairs in terms of well-being: Individuals would not only possess the good things in life, but desire and enjoy them as well.<sup>212</sup> In Part III, I shall focus on property law, and demonstrate both normatively and descriptively how the content of various property rules can be used to advance objectively defined well-being.<sup>213</sup>

#### *D. Summary*

This Article has analyzed three types of theories of well-being: mental state, preference, and objective list. The first two theories are seemingly subjective because they rely on people's feelings or existing desires, respectively. The latter, in contrast, is objective, because it judges people's well-being by external standards. Thus, mental state and preference theories initially may be viewed as respecting personal autonomy, while objective theories may seem excessively paternalistic. I have rejected these simple misleading assumptions regarding the various theories of well-being, highlighted the grave shortcomings

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<sup>209</sup> Brink, *supra* note 33, at 233; George, *supra* note 204, at 164, 167-68; Hurka, *supra* note 162, at 159; Raz, *supra* note 186, at 782-83, 785; see also Raz, *supra* note 74, at 1232-33 (arguing that state should use proceeds of taxation on such things as schools and public parks and not, for example, on free supply of pornography).

<sup>210</sup> Note that even under an actual preference theory of well-being, not all preferences of any person are guaranteed to be satisfied. Since people's preferences vary greatly and often conflict, the state must sometimes choose between them, for example, by conducting cost-benefit analysis between competing preferences or by employing the Kaldor-Hicks efficiency criterion.

<sup>211</sup> In addition, the state's omission to act in this matter is also a choice carrying moral significance. Raz, *supra* note 186, at 766. For sources supporting nonneutrality, see Griffin, *supra* note 28, at 71-72, 123-24; Hurka, *supra* note 162, at 158-59; Sher, *supra* note 168, at 245-46.

<sup>212</sup> To be sure, protection of values like autonomy and liberty can also be achieved by means that are external to the chosen theory of well-being. One may adopt, for example, a deontological position, according to which autonomy and liberty serve as constraints on the goal of increasing overall welfare. In this Article, however, I wish to demonstrate how these values can be adequately accommodated within an objective-consequentialist theory of well-being.

<sup>213</sup> On the role of legal rules in shaping and changing preferences, see Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1135-36, 1145-52, 1173 (1986) (arguing that legal rules do and should shape people's preferences); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. Legal Stud. 217, 230-42 (1993) (same) [hereinafter Sunstein, *Endogenous Preferences*].

of mental state and preference criteria of welfare, and argued for the relative advantages of an objective criterion of well-being.

The major deficiency of mental state theories—their potential lack of contact with reality—leads us to preference theories. The problems of the preference-satisfaction criterion, however, should convince us to adopt a more objective approach to well-being. Fulfillment of people's *actual* preferences might leave them worse off, in terms of well-being, if their desires are based, for example, on misinformation, mistakes, prejudice, or lack of self-respect and self-esteem. Neither a theory of *ideal* preferences nor the "laundering" of objectionable preferences sufficiently resolves this problem. Only an objective approach to well-being can evaluate people's welfare and ensure its enhancement satisfactorily.

The objective theory of well-being is neither elitist nor rigid. The goods and values advocated by this theory are broad enough to allow sufficient flexibility and pluralism. In addition, various safeguards of the objective theory prevent unwarranted interference with people's liberty. Thus, "autonomy" and "enjoyment" are also important, though not exclusive, goods on the objective list of values. Moreover, employment of objective criteria need not result in excessive coercion. It may be used to provide valuable options from which people may choose, or to prevent a certain worst result, while leaving many other options open.

This Article has also demonstrated that the supposedly sharp dichotomy between subjective and objective theories of well-being is quite misleading. On the one hand, any *reasonable* mental state or preference theory must include strong objective components that bring it "dangerously close" to an objective theory of welfare. On the other hand, no objective theory recommends the disregard of people's subjective desires and feelings. Consequently, a high degree of objectivity cannot be avoided in any plausible theory of well-being. Moreover, preference theories are both less individualistic and less easy to apply than they appear.

### III

#### OBJECTIVE WELL-BEING AND PROPERTY LAW

This Part demonstrates the importance of the objective theory of well-being for legal scholarship through the development of an objective-welfare approach to property law. It shows that various rules of property law clearly reflect an objective-welfare criterion. Moreover, legal rules that seem questionable from the perspective of an economic efficiency, distributive justice, or personhood theory of prop-

erty easily can be justified from an objective-welfare perspective. Thus, the objective theory of well-being may provide a more persuasive explanation and justification for many current rules than do rival theories.

#### A. *The Importance of Property for Objectively Defined Well-Being*

As elaborated upon above, the list of welfare-enhancing values endorsed by objective theories of well-being typically includes the following: autonomy and liberty,<sup>214</sup> understanding,<sup>215</sup> accomplishment,<sup>216</sup> deep and meaningful social relationships,<sup>217</sup> and enjoyment.<sup>218</sup> Private property is essential to the achievement of these values, and figures dominantly in the items on the objective-goods list.

The necessity of property is most obvious with regard to the values of *autonomy* and *liberty*. Ability to decide for oneself and to act according to one's choices, as well as freedom from the interference and coercion of others, require the ownership of sufficient property. Without enough material goods to ensure physical and mental health, personal independence and autonomous action are impossible. Similarly, lack of security in one's present or future condition significantly reduces the possibility of free choice. Property ownership assures us the long-term enjoyment of assets (such as our home and household goods) that draws a protective boundary between ourselves and the rest of the world, including the state. Consequently, private property enables us to attain and retain our capabilities to act, develop self-respect and aspirations, and maintain our independently chosen beliefs and convictions.<sup>219</sup>

Private property is important, however, not only for the objective goods of autonomy and liberty, but for the other goods on the list as well. The value of *understanding* necessitates adequate education, which greatly depends on the possession of material resources for attending good schools, buying books and newspapers, seeing movies, or exploring different countries and places.<sup>220</sup> Property rights assure

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<sup>214</sup> See supra notes 173-74 and accompanying text.

<sup>215</sup> See supra notes 175-76 and accompanying text.

<sup>216</sup> See supra notes 176-79 and accompanying text.

<sup>217</sup> See supra note 180 and accompanying text.

<sup>218</sup> See supra note 181 and accompanying text.

<sup>219</sup> See J.W. Harris, Property and Justice 303-05 (1996); Rawls, supra note 165, at 298; Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 124-25 (1969); Charles A. Reich, The New Property, 73 Yale L.J. 733, 771 (1964).

<sup>220</sup> Even in a society with an advanced system of public education, it is still true that private means significantly enhance the opportunities and chances of acquiring wide knowledge. Hurka, supra note 162, at 171.

their owners the continued existence of their material resources, which enables them to acquire the knowledge necessary for appreciating the good things in life, adopting worthwhile goals, and realizing their potential. Likewise, *accomplishment* relies much on the ownership of property: Property grants the necessary security to our daily existence to pursue long-term goals,<sup>221</sup> and the economic means to realize them. In addition, property is often the “material” upon which our projects are implemented, and our talents and creativity exercised.<sup>222</sup> It also is conducive (although certainly not crucial) to the attainment of *deep and meaningful social relationships*. With our property we can develop our ability to love, share, cooperate and care for others. Extreme poverty may cause self-centeredness. A hungry person, for example, who concentrates all his efforts on the next meal, may not be able to develop deep relationships.<sup>223</sup> In addition, giving a gift, a donation to charity, or a dinner invitation requires, respectively, an owned object to part from, spare cash, or a home. Similarly, one can learn to share or cooperate with the assistance of things that can be given up for the benefit of others. Finally, the various items of property and their many uses are clearly an important source of pleasure, thus contributing to *enjoyment* as well.<sup>224</sup>

*B. The “Double Objectivity” Requirement of Property Law:  
Identity and Content*

The connection between private property and well-being leads us to a few conclusions. The necessity of property to the realization of

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<sup>221</sup> *Id.* at 169-71.

<sup>222</sup> *Id.* at 184.

<sup>223</sup> *Id.* at 170.

<sup>224</sup> Psychologists have claimed that there is a fairly definite hierarchy of various human needs. Basic, lower needs must be satisfied before higher needs can be felt and then realized. Abraham H. Maslow, *Motivation and Personality* 35-58, 97-98 (2d ed. 1970). The most basic needs are the physiological, such as satisfying hunger and thirst. A hungry person will concentrate all of his thoughts and capacities on the fulfillment of this extremely urgent need. After satisfying the physiological needs, other sets of needs emerge, in the following order: the safety needs (security, stability, freedom from fear and anxiety, law and order), the belongingness and love needs (for a spouse, family, friends and a community), the esteem needs (high evaluation of oneself, self-respect, and the esteem of others), and the need for self-actualization (self-development and realization of one's talents and potential). *Id.* The higher the needs, the more preconditions that there are for their emergence and satisfaction. *Id.* at 99. Furthermore, better outside conditions, such as familial, economic, political, and educational resources, are required to make them possible. *Id.* The realization of the higher needs produces more happiness, serenity, and richness of inner life than does the fulfillment of the lower, more basic needs. *Id.* The higher needs, such as love and self-actualization, are less selfish and involve other people. *Id.* at 99-100. Private property, as explained above, can assist in the gratification of all types of needs, high and low.

well-being obviously creates a *quantity* requirement: A certain minimum amount of property is necessary for people to be able to fare even modestly well. Property surpassing this minimum can raise people's level of well-being by affording them greater freedom from others, more opportunities for acquiring knowledge, additional means for long-term goals, and more possibilities for enjoyment.<sup>225</sup> Thus, rules that aim at insuring people a minimal amount of property will tend to increase well-being.<sup>226</sup>

The quantity requirement is not unique to the objective theory of well-being. Indeed, a certain amount of property also should be deemed necessary in mental state and preference theories of well-being. It is evident that without some minimal level of material resources, people would experience unfavorable mental states such as anxiety and pain; or that they would be unable autonomously to form and satisfy their preferences.

The quantity of property, however, is not all that matters for an objective theory of well-being. The *quality* of property matters as well. Quality is the distinctive feature of "well-being enhancing property" that this Article emphasizes and focuses on. But what does a quality requirement in the property context mean?

In Part III.D, I demonstrate two types of quality constraints commonly found in property law. The first pertains to the *identity* of the items of property that are most conducive to the enhancement of well-being. From an objective perspective, not all objects of property are equally important for the advancement of people's welfare; some are more essential than others. Thus, in certain circumstances, the law may forbid the taking or even the voluntary relinquishment of particular items of property. This is the case in the categories of property exempted in bankruptcy.<sup>227</sup> The second quality restriction concerns the *content* of specific property items. From the standpoint of objectively defined well-being, a given property right must have certain characteristics in order to serve the goal of welfare enhancement. Property lacking these minimal "core" features cannot advance well-being at all, or can do so only to a far lesser extent. Property owners

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<sup>225</sup> It may be argued that above a certain quantity of property, well-being ceases to increase, or only marginally increases. Up to this point, however, raising the quantity of property beyond the minimum level significantly enhances a person's well-being. Hurka, *supra* note 162, at 171-75.

<sup>226</sup> See Brink, *supra* note 33, at 272 ("[T]he requirements of basic well-being, that is, basic goods such as health, nutrition, shelter and education, are minimally variable. Therefore, inequalities in basic goods cannot be justified as maximizing the total amount of welfare"); Griffin, *supra* note 28, at 299-300 (using principle of equal distribution of all-purpose means as starting point to maximize overall well-being).

<sup>227</sup> See *infra* Part III.D.1.

usually enjoy a good deal of freedom in shaping their rights beyond this core, but the state prevents the core from alteration by private parties. Examples of this type of quality restriction include the *numerus clausus* principle in property law,<sup>228</sup> the warranty of habitability in landlord and tenant law,<sup>229</sup> and the rule against perpetuities.<sup>230</sup>

The objective theory does not overburden personal autonomy.<sup>231</sup> The objective approach is comprised of a mix of values, including autonomy and enjoyment, thus allowing ample flexibility and variation among individuals.<sup>232</sup> As a result, objective considerations need not (and obviously should not) be used to override all desires or choices. They may be used justifiably to forbid a certain worst activity or to prevent an extremely well-being-reducing result, while leaving numerous other options open.<sup>233</sup> The objective approach can be applied or manifested in diverse ways, and not only through the creation of *mandatory rules*. In property law, noncoercive promotion of the good can be done by crafting well-being enhancing *default rules*.<sup>234</sup> These rules would be aimed at educating people by providing valuable options for their consideration and subsequent choice.<sup>235</sup> Another way to respect people's preferences (despite the derogatory effect on their well-being) is to honor the express wishes of the parties to the contract vis-à-vis each other (in personam), while not giving effect to such well-being-reducing clauses with respect to third parties, that is,

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<sup>228</sup> See *infra* Part III.D.2.

<sup>229</sup> See *infra* Part III.D.3.

<sup>230</sup> See *infra* Part III.D.4.

<sup>231</sup> See *supra* Part II.C.

<sup>232</sup> See *supra* notes 184-86, 200-04 and accompanying text.

<sup>233</sup> See *supra* notes 201-03 and accompanying text.

<sup>234</sup> Indeed, it sometimes may be difficult (or even practically impossible) to contract around default rules due to various reasons, such as high transaction costs and endowment effects. Sunstein, *supra* note 16, at 109-10, 112-15; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *Colum. L. Rev.* 1710, 1756-58, 1760-65 (1997). In such circumstances, the distinction between default rules and mandatory rules is blurred. It is still true, however, that default rules are usually less intrusive on personal autonomy than mandatory rules.

<sup>235</sup> See Sunstein, *supra* note 16, at 111, 128-29, 132-33 (advocating use of default rules and utilization of endowment effect phenomenon to shape people's preferences and "push" their subjective valuations in welfare-enhancing direction). This education rationale of default rules differs radically from two other influential rationales: reducing transaction costs by mimicking the parties' desires and providing incentives for optimal information disclosure ("penalty default"). The first rationale is discussed in Zamir, *supra* note 234, at 1755-56. The second rationale is developed in Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 97-100, 127-28 (1989). For a default-rule application of the objective approach to well-being, see *infra* notes 378-89 and accompanying text.

negating the in rem effect of the agreement.<sup>236</sup> Although the adoption of objective standards may be labeled “inefficient” by preference theory advocates, such standards are the most adequate for evaluating and promoting welfare.<sup>237</sup>

### C. *Objective Well-Being and the Personhood Theory of Property*

Before proceeding to the specific applications in property law, it is worthwhile to draw a comparison between the suggested theory of objective well-being and Margaret Radin’s personhood theory of property.<sup>238</sup> The personhood theory is not a general theory of well-being, but rather a theory of property law. Nevertheless, since it contains objective components, it is important to highlight the differences between it and the objective theory advocated in this Article.

Radin’s theory is based on Hegel’s justification of private property. Hegel emphasized the importance of private property as a means for developing personality and claimed that people need to exercise their will on things in the external world in order to progress

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<sup>236</sup> For an application of this property/contract distinction, see *infra* notes 360-65 and accompanying text.

<sup>237</sup> One may argue that it is futile to adopt rules that do not accord with preferences, since people will strive to avoid them, for example, by contracting around them if they are default rules or by passing on their costs if they are designed as mandatory rules. A thorough discussion of this question is beyond the scope of this Article. The following points, however, should be mentioned: First, such behavior will not always occur. This may be due not only to various economic factors such as high transaction costs or the relative elasticity of supply and demand in the relevant market. See *supra* note 234. Other influential factors, mentioned above, are the educative effect of legal rules that shape and change existing preferences and the existence of an endowment effect that alters and raises the value of legal entitlements to their recipients by the very act of allocating these rights to them in the first place. See *supra* note 235. Second, even when the imposition of objective standards is reflected in market prices, this is not necessarily a bad result. In effect, it means that people indeed value the objective goods and are willing to pay a higher price for a higher level of well-being. Richard Craswell first made this argument in the context of consumer protection. Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan. L. Rev.* 361, 370-72 (1991). Third, an objective theory of well-being focuses on the appropriate criteria for measuring and evaluating people’s welfare, and is distinct from fairness considerations pertaining to the distribution of well-being throughout society. See *supra* notes 187-90 and accompanying text. Therefore, from the objective perspective, “cheaper” rules that do not enhance well-being are not superior to more “expensive” ones that advance objectively defined well-being. Finally, the “avoidance” problem is not unique to the objective theory of well-being. It might occur whenever people’s actual preferences, as reflected in their market behavior, diverge from their own ideal preferences. Yet, virtually everyone agrees that, in such circumstances, ideal preferences, and not the mistaken, actual ones, are the appropriate criteria for efficiency maximization. See *supra* note 87 and accompanying text. Hence, one should differentiate between choosing the best theory of well-being and overcoming problems in its implementation, regardless of the identity of the selected criterion of welfare.

<sup>238</sup> See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982).

from abstract units of autonomy to developed individuals with a concrete existence.<sup>239</sup> The control, use, and disposition of objects granted by a system of private property provide the freedom, exclusiveness, and continuity necessary to achieve proper self-development.<sup>240</sup> Professor Radin relies on Hegel's justification of private property to determine the appropriate protection of property rights in various contexts. Radin suggests that assets be classified according to their relation to personality and their contribution to the fulfillment of the goal of self-actualization underlying Hegel's theory. The main distinction is between "personal" property, the loss of which cannot be remedied by their value equivalent or by a replacement (the family home, a wedding ring, or a family portrait) and "fungible" property, which is easily replaceable by similar objects (money, a contractor's parcel of undeveloped land, or a commercial landlord's apartment). Generally speaking, Radin argues that greater protection should be given to personal property than to fungible property.<sup>241</sup> Preventing even the *compensated* taking of a highly personal asset, such as the family home, may be justified.<sup>242</sup> In contrast, monetary compensation should suffice for claims involving fungible property, and sometimes no compensation is necessary.<sup>243</sup>

The objective theory of well-being and Radin's personhood theory sometimes will arrive at similar recommendations. Thus, for example, both theories justify legal protection of a person's home: The objective-welfare theory recognizes the necessity of a roof over one's head for the advancement of well-being,<sup>244</sup> and the personhood

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<sup>239</sup> G.W.F. Hegel, *Elements of the Philosophy of Right* §§ 41, 44, 46 (Allen W. Wood ed., H.B. Nesbit trans., Cambridge Univ. Press 1991) (1820).

<sup>240</sup> *Id.*, §§ 46, 50-51. Hegel's theory of property is discussed in Jeremy Waldron, *The Right to Private Property* 351-77 (1988); Radin, *supra* note 238, at 971-77; Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, in *NOMOS XXII: Property* 130, 130-48 (J. Roland Pennock & John W. Chapman eds., 1980); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 *Cardozo L. Rev.* 1283, 1289-90 (1989). See also Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* 38-86 (1995) (developing modern Hegelian approach to property).

<sup>241</sup> Radin, *supra* note 238, at 959-61, 986. These ideas are developed further in Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1686-92 (1988) [hereinafter *Radin, Liberal Conception*] and Margaret Jane Radin, *Residential Rent Control*, 25 *Phil. & Pub. Aff.* 350, 362-65 (1986) [hereinafter *Radin, Rent Control*].

<sup>242</sup> Radin, *supra* note 238, at 1005-06. The personhood theory also can justify the inalienability of things important to personhood and human flourishing. Margaret J. Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1903-36 (1987).

<sup>243</sup> Radin, *supra* note 238, at 988, 1014-15. I have criticized Radin's theory in the context of governmental takings of property in Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 *U. Toronto L.J.* 47, 120-22 (1996).

<sup>244</sup> See *supra* note 174 and accompanying text.

theory views the home as one of the most “personal” assets of the individual.<sup>245</sup> Nevertheless, the objective theory of well-being is both broader and narrower than the personhood theory.

The objective theory is broader since it rejects the personhood theory’s crucial and sharp distinction between personal and fungible property. The fact that money sufficiently can compensate for the injury to fungible property does not imply that monetary compensation or other forms of legal protection are unnecessary. In addition, fungible property, like personal property, is often essential for advancing people’s well-being and hence should be equally eligible for protection by legal rules. In particular, it may be unjustified to differentiate between commercial and consumer assets by classifying, as Radin does, property used for business needs as nonpersonal.<sup>246</sup> Consequently, the objective theory of well-being is relevant and applicable to a much wider array of types of assets.

On the other hand, the objective theory may recommend narrower protection than the personhood theory to those assets considered “highly personal” from the personhood point of view. The former focuses, in general, on necessary *types* of property (the *identity* requirement) and their minimal, core characteristics (the *content* requirement), whereas the latter emphasizes the importance of *particular* assets to *specific* people. Thus, for example, while the personhood theory may require that individuals be allowed to remain in their *actual* place of residence, regardless of its value, the objective theory may suffice with *some reasonable replacement* that provides adequate shelter.<sup>247</sup> Consequently, the objective approach is far less susceptible to criticism as being elitist and favoring people with large quantities of expensive “personal” property.<sup>248</sup>

#### D. Applications

Thus far, this Part has argued that the objective approach to well-being entails a “double objectivity” requirement of property law: If property is to fulfill its essential role in well-being advancement, then the applicable rules must pay heed to the qualitative demands of both identity and content. The following Sections demonstrate that this

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<sup>245</sup> Radin, *supra* note 238, at 991-92; Radin, *Rent Control*, *supra* note 241, at 364.

<sup>246</sup> See *infra* notes 285-87, 391-96 and accompanying text for specific illustrations of this difference between the two theories.

<sup>247</sup> See *infra* notes 287-96 and accompanying text for a demonstration of this difference between the theories.

<sup>248</sup> See Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 *Stan. L. Rev.* 347, 366-68, 375-79, 397-99 (1993) (criticizing Radin’s excessive protection of people’s existing homes).

normative recommendation is often satisfied in existing property rules: Various rules of property law, criticized in the literature for being inefficient (according to the preference-satisfaction theory) or as entailing problematic distributive effects, can be explained and justified as welfare-enhancing from the objective-welfare point of view.

### 1. *Property Exempted from Personal Bankruptcy Proceedings*

A major goal of personal bankruptcy law is to ensure orderly payment of multiple creditors when there are not enough assets to satisfy fully these claims.<sup>249</sup> Another important goal of bankruptcy rules is to guarantee debtors sufficient resources to be able to start afresh and rehabilitate in reasonable living conditions.<sup>250</sup> Accordingly, both federal law and state law protect some of a debtor's property from the reach of her creditors. Such rules are known as "exemptions" in bankruptcy.<sup>251</sup> Nonexempt assets are sold and their proceeds are used to pay the debts.<sup>252</sup>

The Federal Bankruptcy Code offers the debtor a choice between a particular list of federal bankruptcy exemptions<sup>253</sup> and the exemptions available under state law and nonbankruptcy federal law.<sup>254</sup> The Code enables states to "opt out" of the federal bankruptcy exemptions, thereby limiting their residents to the latter exemption option,<sup>255</sup> and a majority of states have done so.<sup>256</sup> Although local exemptions vary from state to state and from the federal bankruptcy exemptions, it is still possible to point out three common features.<sup>257</sup>

First, both federal and state exemptions identify *types* of protected property instead of ensuring debtors some global amount of wealth to distribute between different assets as they see fit. Furthermore, *certain types* of property are commonly found in the various

<sup>249</sup> David G. Epstein et al., *Bankruptcy* 2-3 (1993); Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 4-5 (1986); Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. Rev. 851, 853-54 (1999).

<sup>250</sup> Epstein et al., *supra* note 249, at 593-94; Jackson, *supra* note 249, at 4, 225; Mendales, *supra* note 249, at 853.

<sup>251</sup> Epstein et al., *supra* note 249, at 593-94, 597; Mendales, *supra* note 249, at 851, 853.

<sup>252</sup> Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. Legal Stud. 585, 587 (2000); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. Chi. L. Rev. 685, 687-88 (1998).

<sup>253</sup> 11 U.S.C. §§ 522(b)(1), (d) (2000).

<sup>254</sup> § 522(b)(2).

<sup>255</sup> § 522(b)(1).

<sup>256</sup> Epstein et al., *supra* note 249, at 594, 602; Mendales, *supra* note 249, at 859; White, *supra* note 252, at 688-89.

<sup>257</sup> See Epstein et al., *supra* note 249, at 612 (describing section 522(d) of Bankruptcy Code as "resembl[ing], in form and substance, a typical collection of state exemption laws").

lists, such as a debtor's home;<sup>258</sup> motor vehicle;<sup>259</sup> household goods and furnishings;<sup>260</sup> personal items such as books, musical instruments, pets, and jewelry;<sup>261</sup> and tools and implements of business or trade.<sup>262</sup> Second, exemptions are generally limited not only by *type*, but also by *value*. That is to say, exempted kinds of property are protected up to a certain "ceiling."<sup>263</sup> Any item on the exemption list surpassing this fixed maximum value can be sold, and creditors may usually capture only the excess value above the exemption amount.<sup>264</sup> There are states that expressly condition the exemptability of the proceeds from the sale on the purchase of another item of the kind sold within a reasonable period.<sup>265</sup> Third, exemptions are mandatory. Waivers in favor of unsecured creditors are unenforceable.<sup>266</sup>

Both economic efficiency (aimed at maximizing preference satisfaction) and the personhood theory can explain only certain limited aspects of these rules. In contrast, only the objective theory of well-being can give a unified explanation justifying all three characteristics of exemption law.

*Economic Efficiency.* Efficiency considerations support, in general, a personal bankruptcy system that protects some of a debtor's wealth from the creditors' reach. Such a system provides insurance, unavailable in the market, to risk-averse borrowers against the possi-

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<sup>258</sup> See, e.g., Fla. Const. art. X, § 4; Tex. Const. art. 16, § 50; 11 U.S.C. § 522(d)(1) (2000); Cal. Civ. Proc. Code § 704.730 (West 1987 & Supp. 2003); 735 Ill. Comp. Stat. Ann. 5/12-902 (West 1992); Mass. Gen. Laws Ann. ch. 188, § 1 (West 1991); N.Y. C.P.L.R. 5206 (McKinney 1997). Only a few states, such as Pennsylvania and Rhode Island, do not recognize an exemption for the home.

<sup>259</sup> See, e.g., 11 U.S.C. § 522(d)(2) (2000); Cal. Civ. Proc. Code, § 704.010 (West 1987); Fla. Stat. Ann. § 222.25(1) (West 1998); 735 Ill. Comp. Stat. Ann. 5/12-1001(c) (West 1992); N.Y. Debt. & Cred. Law § 282(iii)(1) (McKinney 2001); Tex. Prop. Code Ann. § 42.002 (Vernon 2000).

<sup>260</sup> See, e.g., 11 U.S.C. § 522(d)(3) (2000); Cal. Civ. Proc. Code § 704.020 (West 1987); N.Y. C.P.L.R. 5205 (McKinney 1997 & Supp. 2003).

<sup>261</sup> See, e.g., 11 U.S.C. § 522(d)(3)-(4) (2000); Cal. Civ. Proc. Code § 704.040 (West 1987); N.Y. C.P.L.R. 5205 (McKinney 1997).

<sup>262</sup> See, e.g., 11 U.S.C. § 522(d)(6) (2000); Cal. Civ. Proc. Code § 704.060 (West 1987); 735 Ill. Comp. Stat. Ann. 5/12-1001(d) (West 1992); N.Y. C.P.L.R. 5205(7) (McKinney 1997).

<sup>263</sup> 11 U.S.C. § 522(d) (2000); see also Epstein et al., *supra* note 249, at 603, 607. Although value limitations are the rule, there are some exceptions. Florida and Texas, for example, place no monetary cap on the value of an exempted homestead. Fla. Const. art. X, § 4; Tex. Const. art. 16, § 50.

<sup>264</sup> Epstein et al., *supra* note 249, at 607, 612, 614; Mendales, *supra* note 249, at 873.

<sup>265</sup> Epstein et al., *supra* note 249, at 614; *infra* notes 291-96 and accompanying text.

<sup>266</sup> See, e.g., 11 U.S.C. § 522(e) (2000); Cal. Civ. Proc. Code § 703.040 (West 1987) (declaring all waivers to be against public policy and unenforceable); 820 Ill. Comp. Stat. Ann. 405/1300 (West 1992); Epstein et al., *supra* note 249, at 609. On the possibility of voluntarily selling exempt property or creating a security interest in such property, see *infra* note 298.

bility of the inability to repay loans subsequent to sharp income fluctuations. The risk of a drop in income is thus shared by borrowers and creditors.<sup>267</sup> Insurance against risk, however, also creates a moral hazard problem by reducing a person's incentive to avoid bankruptcy.<sup>268</sup> Thus, there is a tradeoff between risk and incentives: The higher the exemption level there is, the greater the incentive for at least some borrowers to take advantage of the system.<sup>269</sup> Strategic behavior of borrowers raises the interest rates on loans and specifically harms those borrowers who do not "plan for" bankruptcy or who are relatively poor.<sup>270</sup> As a result, the latter might even be unable to obtain any credit.<sup>271</sup>

This conflict between risk and incentives supports a limited, "not-too-high" level of exemptions under economic efficiency analysis.<sup>272</sup> This conclusion coincides with the tendency of existing exemption rules to limit the maximum allowed value of the various items of property.<sup>273</sup> Economic analysis, however, rejects or at least casts doubt on the efficiency of the other common features of exemption rules.

First, commentators have argued that the list of exempted *types* of property should be abolished and replaced by a single bankruptcy exemption of a fixed monetary value.<sup>274</sup> As a result, debtors could choose which assets they wish to exempt, up to the limited statutory ceiling.<sup>275</sup> Such a rule, the argument goes, would sharply reduce incentives to convert assets from nonexempt to exempt categories, a costly and wasteful practice.<sup>276</sup> Furthermore, a global exemption is more efficient in preference-satisfaction terms since it allows debtors to choose, according to their preferences, those items of property

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<sup>267</sup> Hung-Jen Wang & Michelle J. White, An Optimal Personal Bankruptcy Procedure and Proposed Reforms, 29 J. Legal Stud. 255, 257-59 (2000); White, *supra* note 252, at 692.

<sup>268</sup> It is reasonable to assume that bankruptcy is to a certain extent endogenous, that is, that people have some control over its occurrence. Adler et al., *supra* note 252, at 589.

<sup>269</sup> *Id.* at 589, 595; Wang & White, *supra* note 267, at 265-71; White, *supra* note 252, at 708.

<sup>270</sup> Adler et al., *supra* note 252, at 589, 598; Samuel A. Rea, Jr., Personal Bankruptcy, in 3 The New Palgrave Dictionary of Economics and the Law, *supra* note 13, at 34; Wang & White, *supra* note 267, at 270-71; White, *supra* note 252, at 692-94, 696-97, 699-700.

<sup>271</sup> Adler et al., *supra* note 252, at 589-90, 597-98; White, *supra* note 252, at 699.

<sup>272</sup> Adler et al., *supra* note 252, at 608-11; White, *supra* note 252, at 700.

<sup>273</sup> See *supra* notes 263-64 and accompanying text.

<sup>274</sup> Mendales, *supra* note 249, at 867; White, *supra* note 252, at 713.

<sup>275</sup> Wells M. Engledow, Cleaning up the Pigsty: Approaching a Consensus on Exemption Law, 74 Am. Bankr. L.J. 275, 315 (2000); Mendales, *supra* note 249, at 867; White, *supra* note 252, at 713.

<sup>276</sup> Engledow, *supra* note 275, at 317-18; Mendales, *supra* note 249, at 874; White, *supra* note 252, at 713.

most dear to them.<sup>277</sup> For example, a person may prefer that her home and books be sold and the bankruptcy exemption apply fully to her business.<sup>278</sup>

Second, because economic analysis supports a global monetary exemption in lieu of a list of specific types of assets, it also rejects current rules that condition the exemption of the proceeds of the sale of a protected asset on the purchase of another item of the same kind.<sup>279</sup>

Third, narrow efficiency considerations cast doubt on the desirability of *mandatory* exemptions, as opposed to default rules in this context. If, indeed, bankruptcy exemptions are a form of insurance, why not permit borrowers to choose the extent of insurance that they wish to purchase, according to their degree of risk aversion or their degree of control over future affairs? Such freedom commonly exists with respect to most insurance policies, for example, by allowing consumers to determine the size of the deductible.<sup>280</sup>

*Personhood Theory.* Like economic efficiency, the personhood theory can explain only certain, though different, aspects of bankruptcy exemption law. According to the personhood theory, existing exemption rules are both too narrow and too wide.

In contrast to efficiency theory, personhood theory supports the differentiation between types of property, and the limitation of bankruptcy exemptions to *particular kinds* of property rather than to some fixed amount of wealth. Personhood theory, however, can only justify a much shorter list than that commonly found in federal and state bankruptcy statutes, due to the theory's sharp distinction between personal and fungible property and its insistence on affording much greater protection to the former.<sup>281</sup> Consequently, the theory supports exemptions for the home, personal jewelry, or family pets, assets that usually cannot be replaced by money.<sup>282</sup> It cannot justify, however, the exemption of such fungible property as the tools and imple-

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<sup>277</sup> William H. Brown & Lawrence Ponoroff, A Second Look at the Proposed Uniform Bankruptcy Exemptions: Tennessee as an Example, 28 U. Mem. L. Rev. 647, 663 (1998); Engledow, *supra* note 275, at 316-17.

<sup>278</sup> Mendales, *supra* note 249, at 864-65.

<sup>279</sup> See *supra* note 265 and accompanying text.

<sup>280</sup> Adler et al., *supra* note 252, at 591, 599-600, 609. The authors suggest one exception to the freedom to waive exemptions: assets necessary to the generation of income. The taking of income-generating assets can impair seriously borrowers' postbankruptcy earning capabilities, and thus might turn them into wards of the state or "wage slaves." The writers assume, however, that most consumer borrowers generate income by using their human capital, which is unimpaired by exemption waivers. *Id.* at 600-01.

<sup>281</sup> See *supra* notes 238-43 and accompanying text.

<sup>282</sup> Professor Radin uses the home and the wedding ring as prime examples of personal property. Radin, *supra* note 238, at 959.

ments of business and trade, most motor vehicles, or social security benefits.

On the other hand, personhood theory calls for much wider protection of the select assets considered highly personal than is currently provided by law. In particular, the theory supports the abolition of monetary caps and the granting of total exemption for very personal items of property, regardless of their value. Take, for example, the family home. A forced sale of the home, according to this theory, causes severe pain that cannot be remedied by receiving money or by purchasing a different residence.<sup>283</sup> In this respect, it is immaterial whether the home is an expensive mansion residing in the family for generations, or a modest new apartment. From the personhood perspective, both homes should be equally exempted from sale in bankruptcy.

*Objective Well-Being.* In contrast to both efficiency and personhood theories, the objective theory of well-being can justify all common characteristics of exemption law.

The objective approach to well-being recognizes the major role of private property in achieving and sustaining people's welfare. To fulfill this function, however, property cannot only be of a certain quantity. It must be of a certain quality as well, in terms of both *identity* and *content*.<sup>284</sup> In the context of bankruptcy exemptions, the requirement of *identity* serves as the essential qualitative factor. Exemptions should aim at ensuring each person some minimal assortment of assets that is necessary for both emotional and physical well-being. Given the diverse values on the objective-goods list, it is but natural that a variety of assets are needed to attain them. Furthermore, because people's preferences, though important, are not decisive in an objective theory of well-being, the state should guarantee debtors some minimum from every vital kind of property, and not just some global sum of money, as the efficiency, preferences-oriented theory would advocate. Therefore, the incentives of bankruptcy exemption law that prefer the acquisition of exempt assets over the purchase of nonexempt ones should not be seen as a disadvantage of the system. Quite the contrary: Ownership of certain types of property is necessary for the advancement of well-being. Thus the good and intended result is that individuals act upon this educative message of exemption rules.<sup>285</sup>

A roof over one's head is important, as are other kinds of property necessary for survival, such as food and clothing. Without them,

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<sup>283</sup> *Id.* at 1005-06.

<sup>284</sup> See *supra* notes 214-27 and accompanying text.

<sup>285</sup> This argument is conditioned on there being a "value cap" on each category of exempted property. See *supra* notes 263-64 and accompanying text.

the values of *autonomy* and *liberty* cannot be attained.<sup>286</sup> Other values on the list of objective goods, such as *understanding* and *accomplishment*, justify the exemption of additional types of property, including books, musical instruments, motor vehicles, and tools and implements of business or trade.<sup>287</sup> Thus, the objective theory of well-being can justify the extension of the law's protection to property that is considered "not personal," or fungible, by the personhood theory. The assets necessary to the fulfillment of life projects are no less important than narrowly defined "personal" items, such as a family portrait or a wedding ring.

The tendency of current rules to limit exemptions not only by *type* but also by *value* is also justified by the objective theory. Exemptions, according to this view, should aim at ensuring debtors in bankruptcy some minimal amount of property from various categories of well-being enhancing property. Fulfillment of this goal does not necessarily require that the particular items owned by debtors on the eve of bankruptcy be exempted. It is sufficient to guarantee debtors a certain amount of *ordinary* or *average* property of the various types. In addition, the objective theory does not support the abolition of value limitations on the different categories of important assets because such a rule would greatly reduce the well-being of creditors and enable the debtor to take advantage of the system through the artificial purchasing of luxury items or huge quantities of the protected types of property. On this issue as well, the recommendation of the objective theory differs from that of personhood theory, which supports exemptions of limitless value for personal assets,<sup>288</sup> thus favoring rich borrowers over poor ones and over unsecured creditors in general.<sup>289</sup> The objective theory of well-being avoids these elitist and regressive consequences.<sup>290</sup>

The objective-welfare rationale for limited-value exemptions is nicely demonstrated by existing bankruptcy rules which not only place monetary caps on the categories of protected property, thus allowing the sale of assets exceeding the prescribed cap,<sup>291</sup> but also expressly condition the exemptability of the sale's proceeds on the purchase of

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<sup>286</sup> See *supra* notes 173-74 and accompanying text.

<sup>287</sup> See *supra* notes 175-79 and accompanying text.

<sup>288</sup> See *supra* note 283 and accompanying text.

<sup>289</sup> Poor borrowers especially will suffer from the consequent rise in the interest rates on loans. See *supra* notes 270-71 and accompanying text.

<sup>290</sup> See *supra* note 248 and accompanying text.

<sup>291</sup> See *supra* note 264.

another, *more average* item of the same type.<sup>292</sup> The State of California, for example, exempts the proceeds from the sale of a homestead for six months,<sup>293</sup> and of a car for ninety days.<sup>294</sup> The exemption of household furnishings and personal effects is expressly restricted to items that are “ordinarily and reasonably necessary to” the debtor and his family.<sup>295</sup> Items of extraordinary value may be sold, and the proceeds are exempt for a period of ninety days, but only “in the amount determined by the court to be a reasonable amount sufficient to purchase a replacement of ordinary value.”<sup>296</sup>

The importance of having some level of different types of property supports the establishment of *mandatory* bankruptcy exemptions. Attempts by borrowers to waive their exemptions may be seen as a case where preferences and objectively defined well-being squarely conflict. Although personal autonomy is also a value on the objective-goods list, the total destitution that might result from the waiver of exemptions, with its horrendous impact on debtors’ well-being, justifies nonenforcement of consensual waivers.<sup>297</sup>

Exemptions thus may be viewed as insurance against a “total catastrophe,” the loss of all property important for well-being, and in

<sup>292</sup> Even when no express statutory condition exists, exemptions often are interpreted as extending to the proceeds only for a reasonable period of time that may allow debtors to purchase a similar type of asset. See, e.g., Epstein et al., *supra* note 249, at 614 & n.7.

<sup>293</sup> Cal. Civ. Proc. Code § 704.720 (West 1987 & Supp. 2003). The State of New York exempts the proceeds of a homestead for one year “unless before the expiration of the year he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property.” N.Y. C.P.L.R. 5206(e) (McKinney 1997). A grace period of one year is also found, for example, in other states such as Colorado. Colo. Rev. Stat. § 38-41-207 (2000). Arizona allows debtors eighteen months to establish a new homestead with the proceeds. Ariz. Rev. Stat. Ann. § 33-1101(c) (West 2000). Wisconsin extends this grace period to two years. Wis. Stat. § 815.20(1) (1994).

<sup>294</sup> Cal. Civ. Proc. Code § 704.010(b) (West 1987 & Supp. 2003).

<sup>295</sup> § 704.020(a)(1).

<sup>296</sup> § 704.020(c). Similarly, the State of Hawaii exempts only personal property that is “ordinarily and reasonably necessary to, and personally used” by the debtor and his family. Proceeds from the sale of such items are exempted for a period of six months. Haw. Rev. Stat. § 651-121 (Supp. 2002).

<sup>297</sup> Arguably, similar conclusions can be reached using the ideal preference theory of well-being. See *supra* notes 48-49 and accompanying text. It may be claimed that nonwaivable exemptions would have been preferred by individuals were they fully informed and rational. See Jackson, *supra* note 249, at 265 (offering bounded rationality justification for mandatory bankruptcy rules); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 Mich. L. Rev. 47, 52-53 (1997) (same). Hence, mandatory exemptions may be justified not only by an objective theory of well-being but by a preference theory as well. As explained above, any plausible ideal preference theory of well-being is highly objective, and therefore comes very close to an objective theory of well-being. It is more honest to admit this fact and directly accept objective criteria than to insist that people indeed would have changed their minds and desired different outcomes in very demanding, nonhuman circumstances. See *supra* Part I.D.

this respect exemptions differ from other cases of insurance. Indeed, a person is not forced to insure her property against theft or fire at all and is free, if she decides to insure, to determine the size of the deductible. Nevertheless, these events rarely will extinguish all of a person's property: Theft, for example, will not destroy the home itself and also will leave many household items intact; fire will not affect a person's bank account. The circumstances of bankruptcy therefore may support more immutable forms of protection that are less necessary in other circumstances.<sup>298</sup>

Finally, an important caveat is in order. I do not endorse any *specific* list of property exemptions, contained in either federal or state legislation, nor do I claim that the actual value limitations found in any existing list are satisfactory. It very well may be that certain types of exemptions are archaic, or that the maximum sums that they allow are either too high or too low to enable debtors to retain suffi-

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<sup>298</sup> A relatively similar issue is that of consensual transactions in exempted property. Some of the property exempted in bankruptcy can be sold freely in the market, and a security interest may be created in them. Jackson, *supra* note 249, at 264-65. A person may, for instance, sell her home or mortgage it as security for a loan. Secured claims in exempted property are generally enforceable in bankruptcy. Epstein et al., *supra* note 249, at 617, 619, 646-47. Why, then, distinguish between secured creditors of exempted assets and unsecured creditors with consensual waivers of exemptions in their favor? It should be stressed that this question is relevant only to some of the assets exempted in bankruptcy—that is, those that voluntarily can be alienated—and that a creation of specific security interests in them is a practical matter. Thus the question is irrelevant to social security benefits and pension funds, which are inalienable in general. 42 U.S.C. §§ 407(a), 1383(d)(1) (2000); 26 U.S.C. § 401(a)(13) (2000). Creating a security interest is impracticable with respect to such items as ordinary household goods and furnishings, books, and pets.

Although discussion of the complexities involved in secured debt is beyond the scope of this Article, a few short comments are in order. Usually, natural persons do not voluntarily sell all of their property, nor do they create security interests in all of their wealth. Therefore, the “total catastrophe” argument discussed in the text above is relevant in this context too, and may explain why borrowers' autonomy may prevail and enable them to sell a specific exempted asset or to create a security interest in it. In addition, if creation of security interests in important assets, such as the home, were impossible, then a person in need of cash would have been forced to sell the asset outright or would not have been able to purchase it in the first place. One also should note that the ability of natural persons voluntarily to create a “floating lien” over all of their present and future assets is not unrestricted. See, e.g., U.C.C. § 9-204(b)(1) (2000) (invalidating security interest in after-acquired collateral with respect to broad category of “consumer goods”); § 9-108(c) (deeming insufficient description of collateral as “all the debtor's assets” or “all the debtor's personal property”); 1 Grant Gilmore, *Security Interests in Personal Property* 361-62 (1965). In addition, the law of secured transactions includes various rules, such as the right to redeem the collateral, that are intended to protect debtors' well-being and cannot be waived away freely in favor of a reduction in interest rates. U.C.C. § 9-623 (2000); Epstein et al., *supra* note 249, at 561-64, 584-91. Hence, there is much less freedom in the sphere of secured transactions than first might appear.

cient, average property from every important category.<sup>299</sup> I do argue, however, that only an objective theory of well-being can justify all three characteristics of exemption rules: protection of a plurality of *types* of property and not some global amount of wealth, placement of value limitations on each category of exempted property, and nonenforcement of waivers in favor of unsecured creditors.

## 2. *The Numerus Clausus Principle in Property Law and Its Nonexistence in Contract Law*

In both common law and civil law systems, property rights are usually limited to specified, standardized types prescribed by the law. Individuals are not free to create new types of property rights.<sup>300</sup> In contract law, by contrast, the freedom of contract principle prevails, and parties are given much greater liberty to customize their contractual rights as they please.<sup>301</sup> The former doctrine is known in civil law countries as the *numerus clausus* (closed number) principle, and it exists (though not expressly named) in common law countries as well.<sup>302</sup> For example, the *numerus clausus* principle (NCP) is manifested in American property law in the limited, standardized forms of estates in land.<sup>303</sup> The NCP raises two major questions: First, can the NCP in property law be defended? Second, why does no such principle exist in contract law?

Advocates of the NCP have offered economic efficiency-oriented explanations for both queries. I claim that these explanations are not

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<sup>299</sup> See Mendales, *supra* note 249, at 855-56, 877 (criticizing archaic state exemptions); Alan N. Resnick, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L. Rev. 615, 627-29 (1978) (same).

<sup>300</sup> Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 Yale L.J. 1, 3-5 (2000); J.H. Merryman, Policy, Autonomy and the *Numerus Clausus* in Italian and American Property Law, 12 Am. J. Comp. L. 224, 224 (1963); Bernard Rudden, Economic Theory v. Property Law: The *Numerus Clausus* Problem, in Oxford Essays in Jurisprudence 239, 241-42 (John Eekelaar & John Bell eds., 3d ed. 1987).

<sup>301</sup> See Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics, 111 Yale L.J. 357, 386 (2001) (citing view that parties to contract can “achieve virtually any idiosyncratic use of resources they want”); Merryman, *supra* note 300, at 224 (noting that contract law allows contracting parties to mold their legal relations according to their needs and desires); Rudden, *supra* note 300, at 256 (contrasting property law and contract law, and asserting that “so long as we stay licit we can have any contractual figure custom-built”). But see *infra* note 361 (noting legal limitations on contractual freedom).

<sup>302</sup> Rudden, *supra* note 300, at 243-45; Merrill & Smith, *supra* note 300, at 4; Merrill & Smith, *supra* note 301 at 385-86. The *numerus clausus* principle (NCP), though common, is not universal in its application. Some jurisdictions have adopted an “open list” principle for property rights. See *infra* notes 316-20 and accompanying text.

<sup>303</sup> Merrill & Smith, *supra* note 300, at 12-24 (describing estates in land and other examples of NCP).

entirely persuasive, and that the objective approach to well-being possibly may provide a sounder justification for the NCP and for the divergence between property and contract law in this regard.

Some scholars have emphasized the NCP's role in preventing overfragmentation of property rights.<sup>304</sup> They argue that if property rights in a single asset are excessively fragmented between many people, it will be difficult (and sometimes impossible) for all rights-holders to reach an agreement and, consequently, efficiently use the resource. Problems in acquiring consent, such as high transaction costs, holdouts, and free riding, can greatly diminish the productivity of property. The NCP, by limiting the possible forms of property rights, can prevent situations in which too many people have veto power over the use of an asset.<sup>305</sup> Although the NCP can assist in combating overfragmentation, it only partially can achieve this result because it merely restricts the *types* of allowable property rights. The NCP does not limit the number of potential rights-holders in any of the recognized forms of property rights. Thus, for example, it puts no restrictions on the number of possible co-owners of a certain resource.<sup>306</sup>

A different efficiency rationale for the NCP, recently advocated by Thomas Merrill and Henry Smith, focuses on the information costs that property rights impose on third parties.<sup>307</sup> Property rights are rights in rem; that is, they bind not only the parties who originally created them, but third parties in general ("the whole world"). If it were possible to form novel types of property rights, third parties would bear an intolerable information-cost burden. To avoid violation of property rights or to decide whether to purchase an asset, this huge, indefinite group of duty-holders would have had to invest much more time and many more resources in acquiring the information regarding idiosyncratic property rights in every potential object of property or else risk suffering the sanctions from violating these rights. The risk of encountering unusual property rights would impose information costs with respect to every resource, not only with respect to the relatively few resources in which new types of rights were cre-

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<sup>304</sup> See, e.g., Rudden, *supra* note 300, at 259; Joshua Weisman, Some Fundamental Concepts of Property Law: A Critical Survey, 21 *Isr. L. Rev.* 529, 566 (1986).

<sup>305</sup> 2 A.N. Yiannopoulos, *Louisiana Civil Law Treatise* §§ 217-18 (4th ed. 2001); Michael A. Heller, The Boundaries of Private Property, 108 *Yale L.J.* 1163, 1176-78 (1999); Weisman, *supra* note 304, at 566-67.

<sup>306</sup> Merrill & Smith, *supra* note 300, at 52-54; Merrill & Smith, *supra* note 301, at 386.

<sup>307</sup> See Merrill & Smith, *supra* note 300, at 24-42. Bernard Rudden suggested the basic economic argument. See Rudden, *supra* note 300, at 254-56; see also Merrill & Smith, *supra* note 300, at 6 n.10 (mentioning information-cost theory as one of several economic justifications discussed by Rudden for NCP).

ated.<sup>308</sup> These additional costs to a vast number of people cannot be internalized fully by the original parties, thereby creating a negative externality.<sup>309</sup> The NCP, by standardizing and limiting the recognized forms of property rights, removes this harmful externality and prevents an insufferable information-cost burden to third parties.<sup>310</sup> According to this explanation, the NCP is redundant with regard to contractual rights since, by definition, such rights are protected in personam—they bind those who voluntarily agree to the terms of the contract and not third parties who are unaware of their existence.<sup>311</sup>

Merrill and Smith are fully aware of the major objection to their information-costs explanation<sup>312</sup>: The burden of acquiring the relevant information can be greatly alleviated by requiring notice as a condition for binding third parties to new types of property rights.<sup>313</sup> Thus, for example, recording novel property rights in land in a public registry would enable easy, cheap access to the necessary information.<sup>314</sup> Nevertheless, Merrill and Smith persist in their argument that notice is not a sufficient answer to the information problem. They emphasize the impact of idiosyncratic property rights on potential purchasers of assets that are not subject to such rights, claiming that even registries can require lengthy and costly searches.<sup>315</sup>

Their insistence on the necessity of the NCP to overcome the information-costs problem is not entirely persuasive. If narrow pref-

<sup>308</sup> Merrill & Smith, *supra* note 301, at 386-87 (“If in rem rights were freely customizable . . . [e]ach dutyholder would either incur great costs in informing herself, or would be forced to violate property rights wholesale . . .”); Merrill & Smith, *supra* note 300, at 26-33 (developing theory of measurement-cost externalities).

<sup>309</sup> Merrill & Smith, *supra* note 300, at 31-33.

<sup>310</sup> Merrill & Smith, *supra* note 301, at 387-88; Merrill & Smith, *supra* note 300, at 33-42.

<sup>311</sup> See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 *Colum. L. Rev.* 773, 776-77, 852 (2001); Weisman, *supra* note 304, at 565-66.

<sup>312</sup> Merrill & Smith, *supra* note 300, at 43-45.

<sup>313</sup> *Id.* at 43-44.

<sup>314</sup> See, e.g., Richard A. Epstein, *Covenants and Constitutions*, 73 *Cornell L. Rev.* 906, 909-14 (1988) [hereinafter Epstein, *Covenants*] (arguing that notice in context of freedom to create idiosyncratic servitudes is sufficient); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 *S. Cal. L. Rev.* 1353, 1355-58 (1982) [hereinafter Epstein, *Servitudes*] (same); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 *Wash. U. L.Q.* 667, 704-07 (1986) [hereinafter Epstein, *Past and Future*] (claiming that registration obviates limitations on creation of future interests, such as rule against perpetuities). Bolgár argues that recording the new rights in a public registry protects third parties sufficiently, and therefore “[t]he *numerus clausus* rule . . . which has no apparent practical value, might well be left to the museum of *Begriffsjurisprudenz*.” Vera Bolgár, *Why No Trusts in the Civil Law?*, 2 *Am. J. Comp. L.* 204, 214 (1953). The information-costs explanation is also criticized in Francesco Parisi, *Entropy in Property*, 50 *Am. J. Comp. L.* 595, 624-26 (2002); see also Merrill & Smith, *supra* note 300, at 6-7, 45-51, 54-58 (listing different objections to NCP).

<sup>315</sup> Merrill & Smith, *supra* note 300, at 44-45.

erence satisfaction is all that matters, then the above objection to the NCP seems sound indeed. Requiring either actual notice or recording in a public registry both minimizes the adverse effects of new property rights on third parties and enhances the autonomy and satisfaction of the originating parties. True, every potential purchaser of any parcel of land will have to check the registry for the existence of novel property rights. But is this so onerous? A careful buyer would be well advised to check the land registry in order to ascertain the possible existence of the many regular types of property rights in that land. One such examination should be sufficient to discover both the usual and unusual types of property rights in the asset.

Furthermore, contrary to Merrill and Smith's assumption, the NCP is not a universal doctrine.<sup>316</sup> Many legal systems have adopted it, while others, such as Denmark,<sup>317</sup> Norway,<sup>318</sup> and Louisiana<sup>319</sup> have opted for an "open-list" principle of property rights, considering the requirement of public notice sufficient. In the absence of notice, the new, privately created right only binds the originating parties.<sup>320</sup> Evidently, a system without the NCP is a practical possibility.

A more plausible justification for the NCP rests on the objective theory of well-being. According to the objective approach, property must be of a certain quality to fulfill its important function of sustaining and advancing welfare, in terms of both *identity* and *content*.<sup>321</sup> In the context of the NCP, the requirement of *content* is the crucial qualitative factor. With respect to any property right, there is some predefined "core" of minimal content, without which the property right cannot advance its owner's well-being.<sup>322</sup> Lacking such a core, the property right resembles an empty shell, devoid of well-being-enhancing content.<sup>323</sup> The NCP protects the core because it prevents private parties' attempted alterations to this core from becoming property rights. According to this explanation, the requirements of notice or registration are not acceptable solutions: Third parties' advance knowledge or identification of a coreless property right does not change the fact that the new creation does not enhance well-being,

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<sup>316</sup> See Merrill & Smith, *supra* note 300, at 4 (stating that NCP "appears to be a universal feature of all modern property systems").

<sup>317</sup> 6 *International Encyclopedia of Comparative Law*, ch.2, at 10 n.53 (Frederick H. Lawson et al. eds., 1975).

<sup>318</sup> *Id.*

<sup>319</sup> Yiannopoulos, *supra* note 305, § 217.

<sup>320</sup> Weisman, *supra* note 304, at 567, 571.

<sup>321</sup> See *supra* notes 225-30 and accompanying text.

<sup>322</sup> See *supra* text accompanying notes 227-28.

<sup>323</sup> See *supra* text accompanying notes 227-28.

either at all or far less than the forms recognized by the NCP, and thus should not be regarded as a property right.

Let us illustrate this argument with two examples. An owner of an estate in land may carve a leasehold out of her estate.<sup>324</sup> The tenant's lease is of shorter duration than the landlord's estate, and the latter retains the "reversion"—that is, the future part of the longer estate that follows the termination of the lease.<sup>325</sup> The law recognizes various kinds of leases: a lease for a term of years, periodic tenancy, tenancy at will, and tenancy at sufferance.<sup>326</sup> In addition, the parties enjoy ample freedom in defining the duration of the lease.<sup>327</sup> But one of the indispensable core features of a landlord-tenant relationship is that a reversion remains. Thus, according to the NCP, parties cannot create a new type of lease—a lease for an unlimited term, a lease in perpetuity.<sup>328</sup> This is because such a lease renders the landlord's property right devoid of all content. With no possibility of possessing, using, or enjoying the asset even in the distant future, the hollow, meaningless new type of "ownership" cannot advance the well-being of the landlord or the well-being of the successors in title.<sup>329</sup> Prior knowledge by potential successors, through actual notice or recording in a public registry, is immaterial. According to the objective approach to well-being, it simply is not worthwhile to allow the creation of new property rights that do not have the potential for furthering the welfare of their owner.

Another example is the "touch and concern,"<sup>330</sup> "reasonableness,"<sup>331</sup> or "public policy"<sup>332</sup> requirement in the law of servitudes.

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<sup>324</sup> William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6.1 (3d ed. 2000).

<sup>325</sup> Robert Megarry & H.W.R. Wade, *The Law of Real Property* 631 (5th ed. 1984); Stoebuck & Whitman, *supra* note 324, § 6.12.

<sup>326</sup> 2 Richard R. Powell & Patrick J. Rohan, *Powell on Real Property* §§ 16.03-16.06 (Michael Allan Wolf ed., 2003); Robert S. Schoshinski, *American Law of Landlord and Tenant* §§ 2:1-2:22 (1980); Stoebuck & Whitman, *supra* note 324, §§ 6.14-6.20.

<sup>327</sup> *F.H. Stoltze Land Co. v. Westberg*, 206 P. 407, 408 (Mont. 1922); see also Schoshinski, *supra* note 326, § 2:3 (general discussion of estate for years).

<sup>328</sup> See Schoshinski, *supra* note 326, § 2:8. In an Israeli case discussing a perpetual lease contract, the Supreme Court held that the right could not be considered as a "lease" or any other property right, because the parties cannot create a property right in land that the law does not recognize. *C.A. 46/74, Mordov v. Shechtman*, 39(1) P.D. 477, 481; see also Weisman, *supra* note 304, at 569.

<sup>329</sup> It may be true that the tenant's well-being is enhanced by the grant of a lease in perpetuity. But this result can also be achieved by using a recognized form of property—by the transfer of full ownership to the tenant. There is therefore no need to further the tenant's welfare by allowing the creation of a new, "empty" right of ownership for the landlord.

<sup>330</sup> See Stoebuck & Whitman, *supra* note 324, §§ 8.15, 8.24.

<sup>331</sup> See *Davidson Bros. v. D. Katz & Sons*, 579 A.2d 288 (N.J. 1990).

<sup>332</sup> See *Restatement (Third) of Prop.: Servitudes* § 3.1 (2000).

Servitudes are nonpossessory property rights in land,<sup>333</sup> providing their holders with a wide variety of possible enjoyments, such as a right of way through another person's land,<sup>334</sup> a right to sever and remove minerals from some land,<sup>335</sup> a right to restrict business competition on a specified parcel,<sup>336</sup> a right to prevent construction that would block a beautiful view,<sup>337</sup> and a right that neighboring landowners maintain their homes in adequate condition.<sup>338</sup> Thus, parties have ample freedom regarding the content of the benefits that servitudes supply. Furthermore, as property rights, servitudes bind not only the original promisors, but their successors in title as well.<sup>339</sup>

This freedom, however, is not without limits. One major precondition for promises to "run with land" is that the burden from the promissory obligation must be sufficiently related to the use or nonuse of some servient land.<sup>340</sup> Such use of land must not be merely incidental or collateral to the performance of the promise.<sup>341</sup> Traditionally, this requirement is known as the "touch and concern" doctrine.<sup>342</sup> Some jurisdictions have reached similar results by applying a "reasonableness" test instead.<sup>343</sup> Although the Third Restatement of Property Law formally abandoned the "touch and concern" doctrine,<sup>344</sup> it has retained its spirit and underlying goals<sup>345</sup>

<sup>333</sup> See Stoebuck & Whitman, *supra* note 324, § 8.1.

<sup>334</sup> See *Hyland v. Fonda*, 129 A.2d 899 (N.J. Super. Ct. App. Div. 1957).

<sup>335</sup> See Stoebuck & Whitman, *supra* note 324, § 8.1.

<sup>336</sup> See *Davidson Bros.*, 579 A.2d at 295; *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 248-50 (Mass. 1979).

<sup>337</sup> See Stoebuck & Whitman, *supra* note 324, § 8.1 (describing negative easements of "light, air, and view").

<sup>338</sup> See Restatement (First) of Prop.: Servitudes, Pt. III, at 3151 (1944) (recognizing as servitude "a promise to keep a particular house in repair . . . or to maintain permanently a particular fence").

<sup>339</sup> See Stoebuck & Whitman, *supra* note 324, § 8.10.

<sup>340</sup> *Id.* §§ 8.15, 8.24.

<sup>341</sup> See *id.* (using example of obligation to paint landlord's portrait as insufficiently related to use of land).

<sup>342</sup> See Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land*, 46 St. Louis U. L.J. 691, 691 (2002); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177, 1232-33 (1982).

<sup>343</sup> *Davidson Bros. v. D. Katz & Sons*, 579 A.2d 288, at 295 (stating, however, that "[w]e do not abandon the 'touch and concern' test, but rather hold that the test is but one of the factors that a court should consider in determining the reasonableness of the covenant").

<sup>344</sup> Restatement (Third) of Prop.: Servitudes § 3.2 (2000). The Third Restatement refers to the doctrine as "touch or concern." However, in this Article I use the more familiar term "touch and concern."

<sup>345</sup> Professor Susan French, reporter for the Third Restatement, has stated that its provisions "permit courts to afford similar protection" to that previously given under the touch and concern rule. Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 Neb. L. Rev. 653, 661 (1998). Likewise, in the general introduction to the Third Restatement it is stated that the roles of

through requirements that are no less, and arguably even more,<sup>346</sup> restrictive than the “touch and concern” rule: The servitude must not be illegal, unconstitutional, or in violation of public policy.<sup>347</sup> The latter requirement includes, *inter alia*, servitudes that are arbitrary, spiteful, or capricious; that are unconscionable; or that unreasonably restrain alienation, trade, or competition.<sup>348</sup>

As with other types of property rights, the NCP debate was raised in the servitude context as well: Why not dispense with the content restrictions on servitudes? Why not enforce any legal<sup>349</sup> servitude arrangement against successors with notice?<sup>350</sup> The narrow efficiency-oriented explanation, focusing on information costs to third parties,<sup>351</sup> gives but a partial answer to these queries.<sup>352</sup> The objective theory of well-being, in contrast, can better justify the restriction on the content of servitudes.

Servitudes may indeed enhance well-being by offering individuals a flexible device through which a wide variety of possible enjoyments can be realized. The minimal “core” requirement, however, is that the burden of the servitude be connected to the use (or nonuse) of a certain parcel. Burdens that have no bearing on the utilization of land are potentially problematic because of their significant adverse effect on the liberty and autonomy of numerous distant parties. Property rights such as ownership that are subject to such burdens are much less capable of advancing their holders’ well-being.<sup>353</sup> As Uriel Reichman has claimed, limiting servitude burdens “to an objective purpose of land planning eliminates the possibility of creating modern

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the touch or concern doctrine “are retained in this Restatement, but in a much more direct form.” Introduction to Restatement (Third) of Prop.: Servitudes, at 4 (2000).

<sup>346</sup> See Stoebuck & Whitman, *supra* note 324, § 8.15, at 480 (discussing proposed Restatement of Servitudes); A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 *Neb. L. Rev.* 804, 810-11 (1998).

<sup>347</sup> See Restatement (Third) of Prop.: Servitudes § 3.1 (2000).

<sup>348</sup> *Id.*; see also §§ 3.4-3.7 (elaborating further upon these requirements).

<sup>349</sup> Illegal obligations—such as those furthering racial discrimination—can be struck down using general principles of constitutional and statutory law. Epstein, *Covenants*, *supra* note 314, at 918-19.

<sup>350</sup> See Epstein, *Servitudes*, *supra* note 314, at 1355-58 (discussing advantages of registration system and concluding that “with notice secured by recordation, freedom of contract should control”); Epstein, *Covenants*, *supra* note 314, at 909-14 (arguing notice and recordation render unnecessary many traditional restrictions on covenants); Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 *Cornell L. Rev.* 956, 964-65 (1988) (stating libertarian-utilitarian argument supporting complete contractual freedom).

<sup>351</sup> See *supra* notes 307-11 and accompanying text.

<sup>352</sup> See *supra* notes 312-20 and accompanying text.

<sup>353</sup> See *supra* notes 218-19 and accompanying text; see *supra* text accompanying notes 227-28.

variations of feudal serfdom.”<sup>354</sup> Thus, a landowner’s promises to refrain from drinking alcoholic beverages,<sup>355</sup> to draw a portrait,<sup>356</sup> to render chauffeuring services for a neighbor,<sup>357</sup> to provide support for someone until his death,<sup>358</sup> or not to live with another before marriage,<sup>359</sup> which lack this core requirement, should not be regarded as property rights. Since we are dealing with possible intrusion on people’s autonomy or dignity, it is no sufficient answer that novel forms of servitudes, if allowed, may be reflected in a lower price of the encumbered lands. Third parties need not be obliged to choose between submitting to a personal burden, unrelated to the utilization of land, or “buying” its removal.

Thus, the objective theory of well-being justifies a *numerus clausus* principle with respect to property rights. Should such a principle apply to contractual rights as well? At first thought, an affirmative answer seems reasonable. As explained above, the argument in favor of the NCP in property law is based on the idea of a “core” of minimal quality. Coreless property rights do not advance objectively defined well-being, and so should not be recognized. This idea seems equally applicable to the contract arena: Why allow the creation of contractual rights that lack some minimum characteristics that enhance well-being?<sup>360</sup>

Further thought, however, supports a distinction between property and contract in this regard, as is the case in current law.<sup>361</sup> It is true that new forms of contract rights might reduce the well-being of one or sometimes even both of the contracting parties. Nevertheless,

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<sup>354</sup> Reichman, *supra* note 342, at 1233; see also Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. Legal Stud. 139, 144-50 (1978).

<sup>355</sup> See Reichman, *supra* note 354, at 151-52.

<sup>356</sup> See Restatement (Third) of Prop.: Servitudes § 3.5 cmt. b, illus. 2 (2000); Stoebuck & Whitman, *supra* note 324, § 8.15, at 475.

<sup>357</sup> See Reichman, *supra* note 354, at 145.

<sup>358</sup> See *Dunn v. Ryan*, 88 A. 1025 (N.J. 1913); *Butterhof v. Butterhof*, 86 A. 394 (N.J. 1913).

<sup>359</sup> See Restatement (Third) of Prop.: Servitudes § 3.1 cmt. h, illus. 6.

<sup>360</sup> Note that the economic efficiency justifications for the NCP clearly support a distinction between property rights and contractual rights. Merrill and Smith’s theory, for example, is based on the idea of negative externalities: the information costs that new property rights impose on third parties. Merrill & Smith, *supra* note 300, at 26-42. According to this explanation, the NCP is unnecessary in contract law, since contractual rights bind only those who voluntarily agreed to them, and hence no externalities are involved. Merrill & Smith, *supra* note 311, at 776-77.

<sup>361</sup> See *supra* notes 300-01 and accompanying text. The differences between property law (NCP) and contract law (freedom of contract) should not be exaggerated, however. Although an NCP does not exist in contract law, contractual freedom is still limited by various devices, such as mandatory (as opposed to default) rules and the doctrine of unconscionability. E. Allan Farnsworth, *Contracts* §§ 4.27-4.28 (3d ed. 1999); Zamir, *supra* note 234, at 1738-39.

in the contractual sphere we must give weight to the fact that the originating parties have *expressly created* a well-being-reducing term. Assuming that the contract is not illegal and was not affected by mistake, misrepresentation, duress, or undue influence, it represents the will of the parties. "Autonomy" is an important value on the objective list of goods.<sup>362</sup> Respect for autonomy may therefore entail caution from intervention and some freedom to form contracts that reduce well-being, but allow the parties to exchange their allotted entitlements with those that are more in line with their subjective preferences.

We may decide to let the will of the parties prevail if convinced that the new, unusual contractual term is the result of direct, positive, unequivocal, and informed agreement to diverge from the objective-goods list. These strong evidentiary requirements usually are not fulfilled by third parties in the property context: If a right is recognized as "property," it generally binds the whole world. This in rem characteristic of property rights is not conditioned on third parties' willingness to accept or honor these rights. Even notice of the existence of an unusual right, be it actual or constructive, is not tantamount to explicit, unequivocal consent.<sup>363</sup> Consequently, there is less frustration of autonomous will in the context of property, when idiosyncratic rights are not enforced upon distant parties, than if such rights were not enforced on the originating parties in the contract arena. Without direct and convincing evidence to the contrary, it is reasonable for the state to assume that people, in general, value the goods on the objective list. Therefore, it may be presumed that people usually would not be frustrated by the unenforceability of new, well-being-decreasing property rights. Of course, if a third party has expressly and unequivocally agreed to respect a novel right created by others, she may be bound by her agreement. In such a case, however, she ceases to be a "third" party and is actually a party to the contract. Her duty to abide

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<sup>362</sup> See *supra* notes 173-74, 200-03 and accompanying text.

<sup>363</sup> On the difference between notice and consent, see, e.g., Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 *Cornell L. Rev.* 883, 892-95 (1988) (arguing that even actual, as opposed to constructive, notice is not equivalent to consent, due to various psychological biases in formation of preferences, such as phenomenon of "sour grapes"). Central discussions of various psychological biases in favor of the status quo include: Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (1983); Tyler Cowen, *The Scope and Limits of Preference Sovereignty*, 9 *Econ. & Phil.* 253 (1993); Sunstein, *Endogenous Preferences*, *supra* note 213, at 221-42; Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 *J. Econ. Behav. & Org.* 39, 43-47 (1980).

by the term results from a voluntary obligation in personam, and not from the in rem consequences of a new type of property right.<sup>364</sup>

In conclusion, since nonenforcement of idiosyncratic property rights causes little injury to the autonomy of third parties, there is no countervailing reason to depart from the well-being-enhancing principle of NCP in the property sphere.<sup>365</sup>

### 3. *Landlord/Tenant Law: The Implied Warranty of Habitability and the Implied Covenant to Deliver Actual Possession*

The implied warranty of habitability and the implied covenant to deliver actual possession are prime examples of two major rights of tenants. These rights are more persuasively justified by the objective theory of well-being than by economic efficiency or by reference to distributive justice considerations alone.

*Habitability of Leased Premises.* The implied warranty of habitability (IWH), imposed on landlords in most jurisdictions, holds that residential premises must be fit for human habitation.<sup>366</sup> The requirement of habitability encompasses not only health and safety hazards

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<sup>364</sup> According to current law, when a new form of property right is struck down as violating the NCP, it usually continues to bind the parties who expressly agreed to it as a contractual right. See Weisman, *supra* note 304, at 571 (stating with regard to NCP in real property: "If two parties conclude an agreement purporting to create a new property right in land, the right contained therein may be enforceable as a personal, contractual right but it will not have property characteristics.").

<sup>365</sup> Note that the NCP's important function as a core-protecting device is not without its price. By generally preventing the contractual creation of new types of property rights, it precludes not only coreless property rights, but also the formation of novel property rights that are not problematic from an objective-welfare perspective. A good example is the application of the NCP in civil law systems to deny the institution of trusts. Continental courts have held that absent enabling legislation, contracting parties cannot create a trust—that is, the simultaneous property rights in an asset of both beneficiary and trustee—by agreement. 4 *International Encyclopedia of Comparative Law*, *supra* note 317, ch. 11, at 89-90. I believe that this price is worthwhile, since the probable danger of allowing welfare-reducing property rights is greater than the risk of preventing well-being-enhancing property rights that are not yet prescribed by the law. It has also been noted that Continental law offers other legal devices (such as the foundation, which is a type of corporation), which substitute for the lack of the trust. *Id.* at 90, 92, 104-08. Furthermore, novel rights, unrecognized due to the NCP, usually would not be void, and thus would be enforced on the originating parties. See *supra* notes 310-11 and accompanying text.

<sup>366</sup> 1 Milton R. Friedman, *Friedman on Leases* § 10.101, at 610 & n.17 (4th ed. 1997); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 *N.Y.U. L. Rev.* 293, 299-301 (1987); Schoshinski, *supra* note 326, § 3:16; Stoebuck & Whitman, *supra* note 324, §§ 6.38-6.39. The warranty of habitability appears in both case law and statutory form. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-73, 1077-80 (D.C. Cir. 1970); *Lemle v. Breeden*, 462 P.2d 470, 472-75 (Haw. 1969); *Unif. Residential Landlord & Tenant Act* §§ 1.201, 2.104 (amended 2003), 7B U.L.A. 566-67 (1972) [hereinafter URLTA]. Many states have either adopted the URLTA or enacted statutes that incorporate similar provisions. Fred W. Bopp III, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases—An Alternative*

(such as unsound ceilings or rodent infestation), but the provision of essential services or basic fixtures, such as hot water, heating, electricity, elevators, unbroken windows, bathing facilities, and adequately maintained common areas as well.<sup>367</sup> Courts have generally refused to uphold even express waivers by tenants of the habitability warranty.<sup>368</sup> A landlord's breach of the IWH entitles the tenant to various contractual remedies, including recovery of damages, withholding of rent, abatement of rent, termination of the lease, and specific performance.<sup>369</sup>

Both efficiency and distributive justice explanations for the IWH are not indisputable. With regards to the efficiency justification, one can argue that even assuming most tenants prefer a habitable residence,<sup>370</sup> and landlords are usually superior and cheaper suppliers of this favored condition,<sup>371</sup> it is far from clear that a *mandatory* warranty of habitability, as opposed to a default rule of similar content, is justified by efficiency considerations.<sup>372</sup> Merrill and Smith, for example, are aware of this difficulty, but nevertheless attempt to justify an immutable IWH by landlords' superior information about the quality of the premises, and prohibitive costs to tenants of acquiring information about the meaning of warranty-of-habitability waivers and of thoroughly investigating the condition of the premises.<sup>373</sup> But these facts alone do not suffice. One needs to explain why requiring

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Approach, 41 Vand. L. Rev. 1057, 1064-67 (1988); Stoebuck & Whitman, *supra* note 324, § 6.39.

<sup>367</sup> Schoshinski, *supra* note 326, § 3:17; Stoebuck & Whitman, *supra* note 324, § 6.38, at 304; Freyfogle, *supra* note 366, at 298-301.

<sup>368</sup> 1 Friedman, *supra* note 366, § 10.101, at 616 & n.24; Schoshinski, *supra* note 326, § 3:27; Stoebuck & Whitman, *supra* note 324, §§ 6.38, 6.40. The Restatement permits waivers that are not "unconscionable or significantly against public policy." Restatement (Second) of Prop.: Landlord & Tenant § 5.6 & cmt. e (1977). According to a comment on this section, an agreement to decrease the landlord's obligation to provide habitable premises "will be construed strictly against the landlord." *Id.* § 5, cmt. d. The URLTA does not give effect to a blanket waiver in the lease contract. It, however, permits, for example, a separate written agreement entered into in good faith and supported by adequate consideration, in which the tenant expressly agrees to perform specified repairs, not including violations of safety and health requirements of housing and building codes. URLTA, § 2.104(d), 7B U.L.A. 567.

<sup>369</sup> See Restatement (Second) of Prop.: Landlord & Tenant § 5.1 (1977); Schoshinski, *supra* note 326, §§ 3:19-3:26; Stoebuck & Whitman, *supra* note 324, §§ 6.41-6.45.

<sup>370</sup> Merrill and Smith, for instance, state that the implied warranty of habitability conforms with "probable majoritarian preferences" of contracting parties. Merrill & Smith, *supra* note 311, at 826.

<sup>371</sup> See Restatement (Second) of Prop.: Landlord & Tenant § 5.1 cmt. b (1977); Freyfogle, *supra* note 366, at 298.

<sup>372</sup> See Anthony J. Vlatas, An Economic Analysis of Implied Warranties of Fitness in Commercial Leases, 94 Colum. L. Rev. 658, 690-707 (1994) (offering efficiency arguments to support default rule of fitness of leased premises for intended use).

<sup>373</sup> Merrill & Smith, *supra* note 311, at 826-27.

landlords to disclose the relevant information is an inadequate solution to the lack-of-information problem, and why landlords would prefer to contract around a default rule of IWH instead of granting their tenants' wishes of a habitable residence for a higher price.<sup>374</sup>

The distributional justification for the IWH—reducing the inequality between landlords and tenants by transferring power and wealth from relatively affluent landlords to relatively poorer tenants<sup>375</sup>—has been subject to even wider criticism. Some scholars have claimed that mandatory quality standards, such as the IWH, do not succeed in redistributing income in favor of low-income tenants, because increasing landlords' costs subsequently causes higher rents (albeit, for better quality housing) and reduces the supply of low-rent housing, thereby harming the poorest tenants most.<sup>376</sup> In addition, by applying generally to all residential leases, the IWH might redistribute wealth from small, unaffluent landlords to middle class, unpoor tenants.<sup>377</sup> Even writers arguing to the contrary admit that successful redistribution in favor of low-income tenants is not a guaranteed, universal consequence of mandatory quality standards, but rather depends on the existence of certain restrictive market conditions.<sup>378</sup>

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<sup>374</sup> The imperfect information rationale for intervening in the content of contracts is criticized in Alan Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 *Ind. L.J.* 8, 11-18 (1973-1974); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 *Va. L. Rev.* 1387 (1983); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. Pa. L. Rev.* 630 (1979). For this reason, Dean Kronman bases his efficiency justification of a mandatory IWH on the risk that landlords would intentionally defraud their tenants with regard to severe latent defects in the premises, and argues that such fraud is both widespread and difficult to prove. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *Yale L.J.* 763, 766-70 (1983). Kronman admits, however, that lacking a comprehensive theory of fraud, "any conclusion regarding the efficiency or inefficiency of nondisclaimable warranties must remain tentative." *Id.* at 770.

<sup>375</sup> Kronman, *supra* note 374, at 770-72.

<sup>376</sup> See Richard A. Posner, *Economic Analysis of Law* 482-84 (6th ed. 2003); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 *Yale L.J.* 1175, 1186-92 (1973); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 *Stan. L. Rev.* 879, 889-97 (1975); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 *Cornell L. Rev.* 517, 558-59 (1984); Daniel P. Schwallie, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 *Case W. Res. L. Rev.* 525, 537-41 (1990).

<sup>377</sup> Posner, *supra* note 376, at 483 n.3; Rabin, *supra* note 376, at 560-62; Schwallie, *supra* note 376, at 531-32.

<sup>378</sup> These include the lack of exit of landlords from the market or the provision of supplemental, subsidized housing, and the existence of a group of tenants who do not attach much value to improved housing. The various conditions enabling redistribution in favor of tenants are discussed in Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *Yale L.J.* 1093, 1097-98, 1102-19, 1186-88 (1971); Craswell, *supra* note 237, at 368-83;

*Delivery of Possession by the Landlord.* The majority of American jurisdictions follow the so-called "English rule" that affords tenants the right to delivery of actual possession of the premises. According to this rule, the landlord impliedly warrants that the property will be *physically* free from the presence of any wrongful possessor on the day the tenant is entitled to take possession, absent an express covenant in the contract. If this duty is breached, the tenant may recover damages or repudiate the lease.<sup>379</sup> The implied covenant to deliver possession (ICP) comes in addition to the landlord's more obvious duties, for example, to grant the tenant a *legally* sound right to possess and to refrain from interfering (either personally or through others acting for the landlord) with the tenant's possession of the property.<sup>380</sup>

The efficiency rationale for the ICP is not entirely persuasive. The landlord is not necessarily the cheapest cost avoider, since we are dealing, by definition, with an independent, wrongful act by a third person whom the landlord does not control and who is not acting on her behalf.<sup>381</sup> Even in the case of a holdover tenant,<sup>382</sup> the landlord cannot take action before the previous tenant's term has ended, by which time the new tenant may have a right to eject the trespasser as

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Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 Fla. St. U. L. Rev. 485, 497-506 (1987); Kronman, *supra* note 374, at 772-74; Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 Harv. L. Rev. 1815, 1818-27 (1976).

<sup>379</sup> See 1 Friedman, *supra* note 366, § 4.1, at 85-87; 2 Powell & Rohan, *supra* note 326, § 16B.02[1]; Schoshinski, *supra* note 326, § 3:2. The English rule was adopted by both the Restatement, Restatement (Second) of Prop.: Landlord & Tenant § 6.2 (1977), and URLTA, 7B U.L.A. §§ 2.103, 4.102. Only a minority of jurisdictions follow the so-called "American rule," which does not recognize an implied covenant of actual possession and imposes upon landlords a duty to convey only a legal right to possession. See 1 Friedman, *supra* note 366, § 4.1, at 87; 2 Powell & Rohan, *supra* note 326, § 16B.02[1][a], at 16B-14. The leading case applying the American rule is *Hannan v. Dusch*, 153 S.E. 824 (Va. 1930).

<sup>380</sup> *Hannan*, 153 S.E. at 825; 3 Friedman, *supra* note 366, § 29.201; 2 Powell & Rohan, *supra* note 326, § 16B.02[1][a], at 16B-11 to 13; Schoshinski, *supra* note 326, § 3:1; Stoebuck & Whitman, *supra* note 324, §§ 6.21, 6.29-6.30.

<sup>381</sup> For example, in *Hannan* the court stated:

It seems to us that to raise by implication a covenant on the part of the landlord to put the tenant into possession is to make a contract for the parties in regard to a matter which is equally within the knowledge of both the landlord and tenant. . . . It does not occur to us now that there is any other instance in which one clearly without fault is held responsible for the independent tort of another in which he has neither participated nor concurred, and whose misdoings he cannot control.

*Hannan*, 153 S.E. at 828; see also 2 Powell & Rohan, *supra* note 326, § 16B.02[1][a], at 16B-13 (noting justifications for American rule).

<sup>382</sup> A holdover tenant is one who continues in possession after her tenancy has ended. See generally Schoshinski, *supra* note 326, §§ 2:23-2:24.

well.<sup>383</sup> Nor can the ICP convincingly be defended by fairness considerations, since it is used and, indeed, is needed by tenants precisely when no independent fault for the trespasser's possession can be attributed to the landlord.<sup>384</sup>

*Objective Well-Being.* The objective approach to well-being easily can justify the implied warranty of habitability and the implied covenant to deliver actual possession. Property must be of a minimal quality if it is to fulfill its important role of advancing people's well-being.<sup>385</sup> Lacking certain characteristics, property will fail to achieve the values on the objective-goods list, and in this respect is not "property," in substance, at all.<sup>386</sup> Both the IWH and the ICP can be seen as requirements of "core," qualitative content. A rat-infested, leaking, cold, broken-down apartment cannot grant the basic security, comfort, and means that are essential for the advancement of *autonomous action, understanding, accomplishment, or deep and meaningful relationships*.<sup>387</sup> Actual possession, likewise, is crucial to tenants' ability to further their well-being through their property; a legal right to possession is not sufficient for realizing this goal. Therefore, landlords who "give" their tenants only a legal right to a nonhabitable residence have given them, from an objective point of view, no residence at all.<sup>388</sup>

According to the objective approach, the IWH and the ICP are both well-being-enhancing rules, even if they do not always correspond to people's actual preferences (and hence may be inefficient in the narrow sense). It is not decisive, therefore, that some tenants do not value such rights enough to be voluntarily willing to pay a higher rent for their explicit inclusion in their leases.<sup>389</sup> Furthermore, since

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<sup>383</sup> See *Hannan*, 153 S.E. at 828.

<sup>384</sup> For the landlord's duty in cases of fault, see *supra* notes 379-80 and accompanying text.

<sup>385</sup> See *supra* text accompanying notes 227-29.

<sup>386</sup> See *supra* text accompanying notes 227-29.

<sup>387</sup> On the connection between property and these goals, see *supra* notes 214-24 and accompanying text.

<sup>388</sup> It should be noted that the ICP, in contrast to the IWH, is waivable by the tenant. This difference may be explained by the relatively "un-catastrophic" effect (in terms of well-being) of an opposite rule, requiring the tenant to exercise her legal right to evict trespassers. Therefore, the law can suffice with an educative default rule, and need not apply a mandatory one. See *supra* notes 206-13, 231-35 and accompanying text.

<sup>389</sup> See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 607-08 (1982) (suggesting that nonwaivable warranty of habitability is needed precisely because tenants do not value it enough to contract for it on their own accord); Kronman, *supra* note 374, at 773 ("[T]here may be nothing wrong with forcing tenants . . . to spend their money on better housing (or more exactly, on insurance against the risk of inadequate housing)."). Craswell has argued persuasively that, contrary to common intui-

the objective justification for the IWH and the ICP concerns the appropriate criterion for judging well-being and promoting overall welfare in society, this justification cannot be refuted by reference only to their distributional impact. I do not claim that the distributive effects of these rules are unimportant. Rather, I contend that the IWH and the ICP are best understood as objective-welfare maximizing rules and as such, cannot be criticized for not redistributing income in favor of the poorest tenants.

The IWH, for instance, sends the educative, preference-shaping message that some premises are not fit for human habitation and thus should not be considered a "home" or "residence" at all. We should not regret the consequence that some premises, for which it is not economically worthwhile to raise to the minimal standard, will be withdrawn from the market. The plight of those unable to afford habitable housing should be addressed by other means, such as housing subsidies, and not by legitimizing uninhabitable living conditions.<sup>390</sup>

Note that the objective theory of well-being supports the extension of a parallel warranty of suitability for intended purposes to commercial leases as well. Thus far, almost all jurisdictions have limited such a warranty to residential leases.<sup>391</sup> Professor Radin's personhood

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tion, the ability of sellers to pass on much of the cost of a legal rule is, in many cases, an indication that consumer benefit from the rule surpasses this cost and thus they are willing to pay the additional price. Craswell, *supra* note 237, at 370-76, 380-83. This analysis was based on the assumption that welfare is judged by reference to consumers' actual preferences. *Id.* at 368-69. The objective theory of well-being extends the welfare justification of rules to certain cases in which consumers subjectively would have preferred that the rules did not exist.

<sup>390</sup> Examination of the defects found by courts in habitability cases demonstrates the important fact that the IWH deals with basic essentials and does not impose a requirement to live in luxury. In *Robinson v. Diamond Housing Corp.*, for example, the court described the premises thus:

[L]arge pieces of plaster were missing throughout [the house], . . . there was no step from the front walk to the front porch, . . . the front porch was shaky and unsafe, . . . there was a wall in the back bedroom which was not attached to the ceiling and which moved back and forth when pressed, . . . nails protruded along the side of the stairway, . . . there was a pane of glass missing from the living room window, and . . . the window frame in the kitchen was so far out of position that one could see into the back yard through the space between it and the wall.

463 F.2d 853, 858 (D.C. Cir. 1972). Likewise, in *Lemle v. Breeden*, the court vividly described the uninhabitability of the premises due to the presence of rats. 462 P.2d 470, 472, 474 (Haw. 1969).

<sup>391</sup> 1 Friedman, *supra* note 366, § 10.101, at 615 & n.21; 3 *id.* § 27.402; Schoshinski, *supra* note 326, § 3:29; Stoebuck & Whitman, *supra* note 324, at 308-09 ("The only jurisdiction clearly to recognize such a warranty judicially is Texas . . ."). The leading Texas case establishing a warranty of fitness in commercial leases is *Davidow v. Inwood North Professional Group-Phase I*, 747 S.W.2d 373, 377 (Tex. 1988). See Paula C. Murray, *The Evolution of Implied Warranties in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145,

theory supports this prevalent distinction between residential and commercial leases because it emphasizes the importance of the home, which is viewed as a prime example of personal property, as opposed to commercial property, labeled as fungible and generally viewed as less worthy of legal protection.<sup>392</sup>

The main reason for courts' reluctance to recognize an implied warranty of suitability for commercial purposes is that commercial tenants have more bargaining power than residential tenants.<sup>393</sup> Even presuming this assumption to be correct,<sup>394</sup> it does not settle the issue from an objective-welfare point of view. Since objectively defined well-being does not depend entirely on the preferences of the parties, it can be argued that commercial premises, and not only residential ones, should conform to some minimal standard of quality. *Accomplishment* is an important good on the objective list.<sup>395</sup> Successful pursuance of our life's goals is often achieved through our occupation or workplace. A physician, for instance, cannot establish a flourishing practice if her rented office is dirty, infested with rodents, lacks hot water or electricity, and has a leaking roof.<sup>396</sup> According to the objective theory of well-being, one should not make a sharp distinction between people's homes and their business. Many people spend most of their time and efforts on their business. Their welfare and future plans depend on its success, and through it they develop their talents, independence, and character. Therefore, the quality of the commercial premises, like that of the home, is crucial to the advancement of well-being.

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168-72 (1993) (analyzing *Davidow* case and other Texas decisions). The Restatement takes no position on the issue whether the warranty should be available to commercial or industrial leases. Restatement (Second) of Prop.: Landlord & Tenant § 5.1 cmt. b (1977). German law, in contrast, recognizes a general obligation of lessors to hand over premises that are suitable for the stipulated use. § 535 Nr. 20 BGB; Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 La. L. Rev. 1, 11 (1991).

<sup>392</sup> See Radin, *supra* note 238, at 995-96 (justifying IWH with respect to residential leases); Radin, *Rent Control*, *supra* note 241, at 359-65 (supporting rent control for residential tenancies and claiming that "preservation of one's home is a stronger claim than preservation of one's business . . . non-commercial personal use of an apartment as a home is morally entitled to more weight than purely commercial landlording"); see also *supra* notes 238-43 and accompanying text.

<sup>393</sup> Schoshinski, *supra* note 326, § 3:29; Stoebuck & Whitman, *supra* note 324, § 6.38, at 308; see also Bopp, *supra* note 366, at 1081-82 (discussing economic-related explanations for maintaining distinction between residential and commercial leases).

<sup>394</sup> See Murray, *supra* note 391, at 172-74, for a contrary view on this issue.

<sup>395</sup> See *supra* notes 177-79 and accompanying text.

<sup>396</sup> These, indeed, were some of the defects found by the court in the leading *Davidow* case. *Davidow*, 747 S.W.2d at 374-75.

#### 4. *Restrictions on Owners' Power to Control Their Property After Death*

Property owners are generally free to choose their successors in title after their death. Various legal devices, however, limit owners' ability to control property excessively beyond the grave.<sup>397</sup> One major device restraining the "dead hand beyond the grave" is the rule against perpetuities. The common law rule against perpetuities imposes a time limit on the creation of a future interest chain, commonly known as "lives in being plus twenty-one years."<sup>398</sup> Accordingly, a contingent property interest is invalid at the time of its creation, unless it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive.<sup>399</sup> The Uniform Statutory Rule Against Perpetuities,<sup>400</sup> adopted by many states,<sup>401</sup> replaced the traditional common law rule with a two-pronged test: (1) A property interest meeting the former common law requirement is initially valid;<sup>402</sup> and (2) an interest invalid according to the first test is not automatically void, but subject to a "wait-and-see" period of ninety years.<sup>403</sup> Only if the property interest does not actually vest or terminate within ninety years after its creation does it become invalid.<sup>404</sup> A flat period of ninety years can be viewed as a surrogate for the time limit imposed by the common law rule,<sup>405</sup> and both tests

<sup>397</sup> In this Section, I focus on the transfer of property through wills. It should be noted, however, that the theoretical discussion may easily be extended to other forms of control after death, such as trusts. See *infra* note 413 (noting legal limitations on duration of trusts).

<sup>398</sup> Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 Cal. L. Rev. 1867, 1868 (1986).

<sup>399</sup> See William E. Burby, *Handbook of the Law of Real Property* §§ 184-185 (3d ed. 1965); Dukeminier, *supra* note 398, at 1868-69; 10 Richard R. Powell, *Powell on Real Property* § 72.02[1] (Michael Allan Wolf ed., 2003); Jeffrey E. Stake, *Darwin, Donations and the Illusion of Dead Hand Control*, 64 Tul. L. Rev. 705, 711-13 (1990). The rule against perpetuities was adopted by the American Law Institute in *Restatement (Second) of Prop.: Donative Transfers* §§ 1.1-1.6 (1983).

<sup>400</sup> Unif. Stat. R. Against Perpetuities, 8B U.L.A. 223 (2001).

<sup>401</sup> See *id.* at 223 (listing jurisdictions where rule has been adopted).

<sup>402</sup> *Id.* § 1(a)(1) & cmts. A, B.

<sup>403</sup> *Id.* § 1(a)(2) & cmts. A, C.

<sup>404</sup> *Id.* A version of a "wait-and-see" rule also was adopted by the *Restatement (Second) of Prop.: Donative Transfers* § 1.4 (1983). See generally Dukeminier, *supra* note 398, at 1880-87 (discussing arguments in favor and against wait-and-see doctrine).

<sup>405</sup> As a comment to the Uniform Statutory Rule Against Perpetuities explains: [T]he permissible vesting period of 90 years is *not* an arbitrarily selected period of time . . . [but] represents a reasonable approximation of . . . time that would, *on average*, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

can be seen as limiting owners' control to a maximum of two generations, the generation living with the original owner and the generation immediately following her death.

Can such restrictions on the power to control property after death be defended? Standard economic efficiency analysis, focusing on preference satisfaction, cuts both ways. Consequently, according to the preference theory of well-being, the traditional conflict between the goals of fairness (toward future generations, whose ability to own and enjoy property is reduced by unfettered testator discretion) and welfare maximization (present owners' ability to satisfy their preferences concerning their property) is intact and unresolved.

In contrast to preference theories of well-being, an objective theory unequivocally justifies such restrictions on testators' powers. A clear showing that unfettered powers are unjustified even from the standpoint of well-being maximization, and not only from the fairness point of view, strengthens the argument for rules designed to limit the control of the "dead hand."

According to an AP theory of well-being, present owners' preferences regarding the ownership and use of property after their death—like any other preferences they may have—should be taken into consideration and satisfied to the greatest extent possible. There is no reason to presume, in general, that such desires regarding the future are either irrational or mistaken, and therefore even an *ideal* preference theory will tend to support these types of desire. In other words, preference theories assume that, in principle, desires regarding the distant future are as legitimate as desires regarding the present and near future. Those who claim that such preferences should not be fulfilled thus bear the burden of proof.

Unsurprisingly, scholars are divided on the question whether overall welfare is more advanced by satisfying distant-future preferences or by ignoring them. On the one hand, it has been argued that because an owner can decide not to convey an asset at all, either by consuming or by destroying it, she should also have the power to convey the asset subject to whatever conditions she sees fit, provided they do not inflict external harms on others.<sup>406</sup> An unsatisfied grantee may reject the gift and acquire, on her own, a different piece of prop-

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Unif. Stat. R. Against Perpetuities § 1 cmt. C, 8B U.L.A. 245; see also Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 Ind. L.J. 1, 50 n.198 (1992) (same).

<sup>406</sup> See Epstein, Past and Future, *supra* note 314, at 704-05 (arguing that conditional grants of property compare favorably to legally permitted consumption of property).

erty, with more freedom of control over it.<sup>407</sup> In addition, limitations on successors' freedom to use and enjoy an asset will be internalized in its market value. Because people act rationally, long-term restrictions on property would not be a common phenomenon, or they would be accompanied by the needed mechanisms to adjust the restrictions to changed circumstances.<sup>408</sup>

On the other hand, it also has been claimed that curtailing distant-future preferences makes good utilitarian sense, in light of the increasingly high transaction costs associated with dead-hand control. As time goes by, owners multiply, administrative costs rise, and it might be extremely difficult to change old, outdated restrictions.<sup>409</sup> But even according to this argument, the case against distant-future preferences is not general in nature, but rather dependent on the content of the specific restriction examined: Are numerous people involved? Are management costs prohibitive? Did the original owner foresee the changed circumstances or provide for such contingencies (for example, by including a provision in her will that enables the alteration of restrictions)? And so forth.

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<sup>407</sup> *Id.* at 704-05. Epstein's article was the principal paper in a symposium entitled *Time, Property Rights, and the Common Law*. See Symposium, *Time, Property Rights, and the Common Law*, 64 Wash. U. L.Q. 661 (1986). In the "round table discussion" that followed the presentation of papers, economist Jack Carr supported Epstein's views on the inappropriateness of limiting distant-future preferences. See Round Table Discussion, 64 Wash. U. L.Q. 793, 843 (1986).

<sup>408</sup> These include those mechanisms commonly found in trusts, condominiums, and corporations. Epstein, *Past and Future*, *supra* note 314, at 714-21; see also Round Table Discussion, *supra* note 407, at 849-51 (comments of Epstein) (addressing various ways to deal with long-term restrictions on property); Round Table Discussion, *supra* note 407, at 848-49 (comments of Carr) (criticizing changed circumstances doctrine); Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. Rev. 727, 820-26 (1979) (advocating abolition of rule against perpetuities); Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 Emory L.J. 295, 306-07 (1988) (criticizing dead-hand control as unjustified paternalism, claiming that people creating trusts are rational and thus will take possibility of unforeseen contingencies into account). Macey argues that if creators of trusts still prefer to impose control restrictions "after the possibility of error has been factored into the individual's utility calculation, then a basic respect for property rights would require that settlers be able to establish trusts as they see fit." *Id.* at 307. Macey concludes that it is difficult to justify dead-hand control from an efficiency perspective. *Id.* at 308-09, 321.

<sup>409</sup> Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 Wash. U. L.Q. 723, 736-37 (1986). In a similar vein, see Posner, *supra* note 376, at 518-20 (citing problem of unforeseen contingencies). It should be noted, however, that Posner remains agnostic about the efficiency of thwarting the original terms of the will. *Id.* at 520; see also Hirsch & Wang, *supra* note 405, at 22-23 (discussing efficiency justifications for restricting dead-hand control). In the final analysis, Hirsch and Wang argue for distinguishing between harmful and unharmed types of perpetuities and applying different rules accordingly. Unproblematic after-death controls can be entirely released from the existing limitations of the rule against perpetuities. *Id.* at 49-58.

In contrast, the objective theory of well-being is unambiguous in its support of limitations on distant-future preferences. Its point of departure is antithetical to that of preference-satisfaction theories, namely, that the power to control property after death does not advance the controller's welfare. Indeed, people may have desires and wishes about any state of affairs at all, no matter how spatially or temporally remote, such as the prosperity of those living five hundred years from now, the chemical combination of a distant star, or the color most favored by Christopher Columbus. But preferences that do not affect a person's life and its success do not substantively contribute to her well-being, and thus should be disregarded in the process of welfare maximization.<sup>410</sup> This objective insight is highly relevant to dead-hand control. Owners' preferences regarding the ownership or use of their property after their death can be viewed, at least *prima facie*, as belonging to the category of preferences that do not affect a person's life. The burden to prove otherwise lays with those arguing in favor of upholding such property control.

Refutation of the "irrelevance to welfare" assumption is plausible with regard to the testator's close family and friends. As discussed above, two of the goods commonly included in an objective theory of well-being are *deep and meaningful social relationships* and *accomplishment*.<sup>411</sup> The welfare of children, for example, usually constitutes an important part of their parents' *own* welfare, and may constitute one of their major goals. Leaving property to one's children is a manifestation of both love and successful pursuance of a valuable goal. But gradually, as we look into the future, the connection between testators' welfare and their distant, unborn—and so unknown to them—descendants, grows weaker. As time advances, the original owner's well-being is less and less affected by what will happen long after her death to people she will never meet. With respect to these future lives, it may indeed be claimed that fulfilling testators' wishes regarding property restrictions enhances neither value on the objective-goods list. In such cases, the conflict is between testators' autonomy, the only good on the objective list that is potentially relevant to people's attempt to control the distant future,<sup>412</sup> and the well-being of future generations. In this conflict, it is reasonable to argue that the latter should prevail. True, the express wishes of testators would be frustrated. However, this injury to autonomy is mitigated significantly by the fact that the ignored preferences are ones that do

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<sup>410</sup> See *supra* notes 40-43 and accompanying text.

<sup>411</sup> See *supra* notes 177-80 and accompanying text.

<sup>412</sup> See *supra* notes 173-74 and accompanying text.

not affect testators' lives or affect them only marginally. In contrast, the ability of future generations to enhance their own well-being, using property unencumbered by inheritance, is advanced greatly by abolishing ownership restrictions. Consequently, the injury to testators, in terms of their objectively defined well-being, is clearly offset by the benefit to potential successors in title, granted an equal chance of furthering well-being by determining the ownership and use of property.

Thus, the objective theory of well-being can easily explain and support rules that restrict owners' control of property after their death. Generally speaking, legal rules, including the rule against perpetuities, usually limit such control to one or two generations.<sup>413</sup> These rules may be viewed as a reasonable attempt to draw the line between close, cared-for descendants, whose welfare is intimately intertwined with the ability of testators to achieve the goals on the objective-goods list, and distant, unknown successors. Thus, the objective theory of well-being does not embrace the extreme position that the dead should not be able to control property at all, but rather advocates limited, near-future control.<sup>414</sup>

It should be noted that prevention of dead-hand control beyond two generations can be achieved not only by the placement of time limits, as done by the rule against perpetuities, but also by restricting the number of heirs in the chain. This type of restriction is found in the Israeli law of succession. Section 3(a) of the Succession Law of 1965 explicitly states the general rule that only a person who is alive at the time of the testator's death may inherit.<sup>415</sup> It is reasonable to assume that a testator's own welfare is the most significantly affected by the well-being of people that she knew during her life. Section 42(a) of the Succession Law provides the exception to this rule, by allowing the possibility of naming two heirs in succession.<sup>416</sup> The second heir may inherit even if she is not alive at the time of the tes-

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<sup>413</sup> See *supra* notes 397-405 and accompanying text. Discussions of the limitations on the duration of trusts include: Restatement (Third) of Trusts §§ 29, 61 (2003); George T. Bogert, Trusts §§ 50-51, 68-69 (6th ed. 1987); 6 International Encyclopedia of Comparative Law 37, 88, 89, 105-07 (1973); Link, *supra* note 408, at 793-804; Joshua Weisman, Shortcomings in the Trust Law, 1979, 15 *Isr. L. Rev.* 372, 381-82, 386 (1980).

<sup>414</sup> For a more extreme position, see generally Mark L. Ascher, *Curtailing Inherited Wealth*, 89 *Mich. L. Rev.* 69 (1990).

<sup>415</sup> See The Succession Law, 1965, 19 *L.S.I.* 58, 58 (1964-65).

<sup>416</sup> Section 42(a) states: "The testator may make a bequest to two persons to the effect that the second shall take after the first; the second takes upon the death of the first or upon fulfillment of the condition, or at the time, fixed therefor in the will, whichever is the earlier." 19 *L.S.I.* at 64.

tator's death.<sup>417</sup> It is thus impossible to name a third heir in succession.<sup>418</sup> This type of limitation equally reflects the objective insight that beyond two generations—the one living with the testator and the one immediately following—attempts to control property should not be upheld because such distant successors are too remote to affect testators' well-being.

### E. Summary

This Part of the Article has demonstrated the vast potential of the objective theory of well-being for legal analysis, through its impact on the law of property. The objective approach highlights the intimate connection between private property and almost every aspect of people's welfare. Property is necessary not only for physical subsistence, liberty, and autonomous action, but also for the attainment of less basic, yet important, values of understanding, accomplishment, and deep and meaningful social relationships. Even more importantly, the objective theory of well-being draws attention to the crucial factor of *quality* for the goal of welfare advancement. True, individuals must have some minimum *quantity* of property to be able to fare even modestly well. But property lacking essential qualitative features can advance welfare only minimally. Most of the discussion has centered on the explanation and illustration of two types of such quality requirements—*identity* and *content*. As I have shown, these quality constraints are not only sound from a normative point of view, but are commonly found in diverse areas of property law. The objective theory of well-being can thus explain and defend various legal rules deemed problematic when analyzed in terms of rival theories, in particular by the economic analysis of law.

### CONCLUSION

Enhancement of people's well-being is justifiably regarded as one of the major goals of the state. It is decidedly good to assist individuals to fare as well as possible. But the crucial questions, "*What* is well-being?" and, "*Which criterion* of well-being should be chosen by the state?" are very controversial and, as such, extensively debated in the philosophic literature. Three types of theories compete among themselves to be the most appropriate criterion for measuring and

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<sup>417</sup> According to section 42(c), however, the second heir must be alive at the time her right matures. 19 L.S.I. at 65.

<sup>418</sup> Section 42(d) explicitly states: "A testamentary provision in this manner in favor of more than two persons is void save in so far as it is in favor of a person alive at the time when the will was made." 19 L.S.I. at 65.

advancing well-being: mental state, preference, and objective list. This complex, rich issue is mostly ignored in legal writing, due to the dominance of the economic-analysis-of-law scholarship. Consequently, it is usually assumed that “well-being maximization” is tantamount to “preference-satisfaction maximization,” and the latter goal is then contrasted with the potentially conflicting goal of “fairness” or “distributive justice.”

This Article seeks to remedy this state of affairs by drawing attention to the vast possibilities presented by the consideration of objective theories of well-being. On the one hand, preference theories suffer from grave deficiencies that cannot be overcome satisfactorily within the bounds of subjectivity. On the other hand, an objective theory of welfare may often succeed where preference theories fail. Furthermore, this Article demonstrates that careful consideration of various suggested theories of welfare—particularly those based on the preference-satisfaction criteria—reveals that even seemingly subjective theories contain substantial objective elements. Hence, objectivity in well-being and nontrivial intervention in people’s preferences cannot be avoided. The difference between an acceptable preference theory and an adequate objective theory of welfare is primarily a matter of honesty and degree.

This Article focuses on the implications of an objective theory of well-being for property law, demonstrating its advantages with regard to diverse issues relating to property. The objective theory of welfare, however, is equally relevant in other legal contexts. By generally justifying the use of objective criteria in evaluating and advancing well-being, objective theories can be applied to any legal field. I leave detailed analysis of these possibilities to future scholarship and suffice with the mentioning of a few examples.

Contract law precludes the specific performance of a promise to render a personal service.<sup>419</sup> A court will not issue an injunction if its probable result would be to force an employee to perform the contract.<sup>420</sup> A different mandatory contract rule limits the enforceability of clauses with respect to liquidated damages. An unreasonably high amount of damages is unenforceable as a penalty.<sup>421</sup> These rules can

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<sup>419</sup> Guenter H. Treitel, *The Law of Contract* 958-60 (10th ed. 1999) (stating British common law position); Restatement (Second) of Contracts § 367(2) (1979) (stating American common law position).

<sup>420</sup> Restatement (Second) of Contracts § 367(2) (1979) (“A promise to render personal service . . . will not be enforced by an injunction . . . if its probable result will be to compel a performance.”); Farnsworth, *supra* note 361, § 12.7.

<sup>421</sup> U.C.C. § 2-718(1) (1989); Farnsworth, *supra* note 361, § 12.18 (discussing limitations on liquidated damage clauses); Restatement (Second) of Contracts § 356(1) (limiting liquidated damages to “an amount that is reasonable in the light of the anticipated or actual

be justified according to the objective theory of well-being, which protects the dignity, long-term autonomy, and prosperity of the party in breach, even contrary to that party's actual, contractual preferences. The unenforceability of an enslavement contract is a similar example. Another illustration is the moral rights given to authors of works of visual art.<sup>422</sup> The author is entitled to attribution of the work to her,<sup>423</sup> and has the right to prevent any intentional modification of the work prejudicial to her honor or reputation.<sup>424</sup> Moral rights are given only to the *author* of the work, regardless of whether she is the copyright owner (that is, even if she has no property rights in the work). These rights are nontransferable.<sup>425</sup> They may be viewed as promoting such objective values as self-respect, self-fulfillment, and accomplishment. Yet other examples of objective welfare-enhancing rules and policies are the taxation of cigarettes,<sup>426</sup> the subsidization of museums and public television, and the partial exclusion of victim consent as a defense to certain criminal offenses<sup>427</sup> and torts.<sup>428</sup>

Thus, both normatively and descriptively, the objective theory of well-being is superior to the conventional, more popular preference-satisfaction theory. Once again, it should be emphasized that an objective theory of welfare does not entail excessive intervention in people's lives. On the microlevel, even the Bartlebys of this world would normally be left alone to pursue their hearts' desires. Objective criteria figure, more dominantly, on the macrolevel. Legal institutions and rules should be designed with a view to furthering objectively

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loss caused by the breach and the difficulties of proof of loss"). The efficiency of such mandatory rules is questionable. See Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 *Yale L.J.* 369, 383-87 (1990) (criticizing judicial refusal to enforce fully liquidated damages clauses).

<sup>422</sup> 17 U.S.C. § 101 (2000) (definition of "work of visual art"); § 106A; see also 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8D.01[A] (2003).

<sup>423</sup> 17 U.S.C. § 106A(a)(1) (2000); see also Nimmer & Nimmer, *supra* note 422, § 8D.01[A].

<sup>424</sup> 17 U.S.C. § 106A(a)(3) (2000); see also Nimmer & Nimmer, *supra* note 422, § 8D.01[A].

<sup>425</sup> 17 U.S.C. §§ 106A(b), (e). Although transfer of moral rights is not possible, an author may expressly waive her rights in a written, sufficiently detailed, and signed document. § 106A(e); see also Eric J. Schwartz, *United States*, in 2 *International Copyright Law and Practice* § 7[4] (Paul E. Geller ed., 2002).

<sup>426</sup> Such taxation was criticized as inefficient because smokers are aware of the risks involved in smoking. W. Kip Viscusi, *Promoting Smokers' Welfare with Responsible Taxation*, 47 *Nat'l Tax J.* 547, 555-56 (1994).

<sup>427</sup> George P. Fletcher, *Rethinking Criminal Law* § 10.1, at 770-71 (2000); Wayne R. LaFare & Austin W. Scott, *Criminal Law* § 57 (1972).

<sup>428</sup> J.F. Clerk & W.H.B. Lindsell, *Clerk & Lindsell on Torts* § 3-60 (Anthony M. Dugdale et al. eds., 18th ed. 2000); W. Page Keeton et al., *Prosser & Keeton on The Law of Torts* § 18, at 114, 122-24 (5th ed. 1984).

defined well-being and providing as many valuable options as possible for people to choose from. Coercive intervention should be limited mostly to the prevention of certain worst activities and outcomes. Beyond the vital “core” elements, guarded by objective standards, there is ample room for personal freedom and innovation.