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SOME DECISION-THEORETIC REFLECTIONS ON WELFARE PROTECTION

Edward F. McClennen*

However useful, or even necessary, the stability of possession may be to human society, 'tis attended with very considerable inconveniences. The relation of fitness or suitableness ought never to enter into consideration, in distributing the properties of mankind; but we must govern ourselves by rules, which are more general in their application, and more free from doubt and uncertainty. Of this kind is present possession upon the first establishment of society; and afterwards occupation, prescription, accession, and succession. As these depend very much on chance, they must frequently prove contradictory both to men's wants and desires; and persons and possessions must often be very ill adjusted. This is a grand inconvenience, which calls for a remedy. To apply one directly, and allow every man to seize by violence what he judges to be fit for him, wou'd destroy society; and therefore the rules of justice seek some medium betwixt a rigid stability, and this changeable and uncertain adjustment. But there is no medium better than the obvious one, that possessions and property shou'd always be stable, except when the proprietor consents to bestow them on some other person. This rule can have no ill consequence, in occasioning wars and dissentions; since the proprietor's consent, who is alone concern'd, is taken along in the alienation: And is may serve to many good purposes in adjusting property to persons. Different parts of the earth produce different commodities; and not only so, but different men are by nature fitted for different employments, and attain to greater perfection in any one, when they confine themselves to it alone. All this requires a mutual exchange and commerce; for which reason the translation of property by consent is founded on a law of nature, as well as its stability without such consent.  

David Hume

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Hume's defense of the principles of private property reminds one of the close intellectual friendship between Hume and Adam Smith. The defense here is of markets in a pure, unqualified form. To transfer property rights, the consent of the parties to the transaction is both necessary and sufficient. Sufficiency is defended by the conception of the market as a mechanism for facilitating mutual gains between persons. The implicit rationale for the necessity clause is that it protects against a particular form of loss: an unconsented-to alienation of one's property right.

The rule of transferring property by consent, Hume claims, has the virtue of being without "ill consequence, in occasioning wars and dissentions; since the proprietor's consent, who alone is concern'd, is taken along in the alienation."\(^2\) This is not the sage Hume at his best. The familiar problems of externalities and monopolies remind us that proprietors are hardly the only ones concerned in any transaction. Even Adam Smith was quick to observe that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."\(^3\) Allowing for certain qualifications, however, the main thrust of the argument is clear. While one may be adversely affected by particular transactions of others, over the long run one can expect to benefit from a system of free markets. In general, the fewer the restrictions, the greater the expected return. The sufficiency part of the rule of transferring property by consent is, thus, to be recommended along classical laissez-faire lines: All forms of market restrictions (e.g., royalist, paternalistic, nationalistic, etc.) are to be viewed with the greatest of suspicion—as devices which can at best yield short-term gains and which impair the market's long-term wealth-generating capacity. Let us refer to this sort of argument as an argument from expected gain.

Consider now the necessity part of Hume's property rule. Property is to be transferred only with the consent of those who are party to the transaction. This part of the rule speaks to our interest not in expected gain, but in avoidance of loss. The necessity rule provides participants with a veto power over any alienation of their property. Participants can block any transaction involving their own property that they judge not to be in their own interest.

\(^2\) Id.

\(^3\) A. Smith, Wealth of Nations X, 2 (X. Cannan ed. 1937).
Of course, this rule does not protect against all forms of unconsented-to alienation of one's property: Acts of nature, or God, are not protected against, nor are the acts of criminals. Within the Lockean tradition, the necessity part of the rule is perceived as a bulwark against the state's arbitrary power—as providing the individual "trumps" against state action undertaken in "the public interest." Let us refer to this sort of argument as an argument from avoidance of loss.

Both kinds of argument—expected gain, and avoidance of loss—are familiar enough. But what is particularly interesting is that both emerge as major sorts of considerations, not only in support of Hume's property rules, but in support of a number of qualifications to these rules. The argument, as it has gradually evolved in contemporary public choice theory, is dialectical in this respect.

THE TWO BASIC ARGUMENTS

Avoidance of Loss

Consider first the argument from avoidance of loss. In a world of negative externalities, concern to avoid the losses which they imply can lead one to support at least some indirect restrictions upon the sufficiency part of Hume's rule. Thus, for example, zoning laws may recommend themselves as a way of protecting against my neighbor's selling his property to a supermarket chain. The restriction on use is, of course, only an indirect restriction upon transferring property by consent. In principle, where the buyer is willing to accept the restrictions on use, the transfer of property can be completed. But the effect of zoning ordinances is, plainly and simply, to control or regulate the market process.

Some would argue that the problem of externalities has been exaggerated. The suggestion is that if a sufficient number of persons are really affected, then there is a potential for some sort of market which will internalize the externality. For instance, con-


5. For this and the ensuing argument, I am chiefly indebted to Buchanan, The Limits of Liberty: Between Anarchy and Leviathan (1975) and Buchanan & G. Tullock, The Calculus of Consent (1962).

consumers can band together and buy out a pollution-generating factory. On this view, what is needed are more markets, not public choice mechanisms. Concerning the point under consideration, this argument can be granted. If markets can, at least in principle, deal with all externalities, it is necessary to reflect only upon the question of who is likely to bear the costs of removing the externality. The typical scenario would seem to be that the group which is initially adversely affected cannot expect to return to the level of well-being it enjoyed before the imposition of the externality; the group can only expect to recoup something of the losses which that externality imposed. Against the background of these considerations, it would appear that the representative person, concerned with avoiding the imposition of significant losses, will be willing to consider at least some restrictions upon transactions.

A second and, perhaps, even clearer case concerns the accumulation and concentration of property and power. Hume's sufficiency rule would prohibit any public regulation of the market for purposes of protecting against the formation of monopolies or, more generally, excessive accumulation and concentration of property. Once again, some have suggested that insofar as monopolistic practices tend to cause inefficiencies in the system, persons will have a motive to bargain their way back to an optimal state of the system. In this instance, however, the problem of loss-bearing is even more pronounced. Consumers presumably must bribe the monopolist to return to an optimal level of production (i.e., desist holding production down artificially). But it will be the consumers who must take the initiative in this case, and who must bear the costs of a return to optimal productivity. Faced with these possibilities, participants may well support some restrictions on monopoly formation and other forms of excessive accumulation—which restrictions will, in effect, be qualifications on Hume's sufficiency rule.

**Expected Gain**

Turning now to the other kind of argument—expected gain—it can be noted that this argument provides the basis for substantial

qualifications to the necessity part of Hume's rule. Two cases in particular can be distinguished. The first is the problem of providing public goods—that is, supplying goods, such as lighthouses and defense from external threats, the benefits of which cannot be exclusively assigned to those who are willing to pay for them. Voluntary markets do less well in supplying public goods. The usual argument is that such goods will be supplied by voluntary markets at a rate below that which all would prefer. A political arrangement is needed, by which the costs of supplying such goods are shared among all those who stand to benefit from the goods, and in which coercive powers are available to enforce the agreement.\(^9\) The second case turns on the consideration that the decisionmaking costs of purely voluntary, market forms of exchange may be so high, even if they are equitably distributed, that the representative person will be willing to have at least some activities organized in a collective fashion. In cases of this sort, the person's concern is, presumably, not with avoiding a loss that might be unilaterally imposed upon himself, but with reducing the costs that the group as a whole must bear. But savings in costs translate into an increase in expected gain. If collective-decision procedures designed to deal with either of the above two cases were always conducted in accordance with a rule of unanimity—so that the group could never undertake any action without the consent of all those involved—then no qualification upon Hume's necessity rule would have to be introduced. Each person would retain a veto power, in effect, over any transaction that would result in a loss to himself. But considerations of expected gain preclude the representative participant from insisting upon unanimity for all classes of collective decisionmaking. The decisionmaking costs of the unanimity rule itself are simply too high.\(^10\)

In the event that the group operates under a less-than-unanimity rule for some classes of decisions, however, the individual cannot count upon the inviolability of Hume's necessity rule. One must expect that at least some collective decisions will run counter to one's own interests, and result in some unconsented-to alienations of one's property. It may be argued, of course, that these will be takings to which the person did consent, tacitly or otherwise, by virtue of having participated in, and/or assented in principle to, the collective-decision procedure. But again, such consent

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9. See J. Buchanan, supra note 5, at 35-52.
10. See J. Buchanan & G. Tullock, supra note 5, at 85-96.
is no mere market agreement. Its presence signals a significant change in the contractual relationship between persons. What one agrees to is a complex system of interaction, which determines, among other things, the propriety of various takings; one agrees to this as part of a characterization of one’s fundamental position in the social system, and not merely as a position to which one has the option of moving (as in the case of market transactions).

Arguments for less-than-unanimity rules lead us dialectically back from considerations of expected gain to the problem of protecting against loss. If collective decisionmaking is more efficiently organized under less-than-unanimity rules, it remains the case that such political processes pose real dangers to the individual. In very general terms, less-than-unanimity rules raise the whole problem of the persecution of minorities by majorities. The representative person, faced with this consideration, is likely to insist upon at least some restrictions on the operation of majority rule, in the form, for example, of a "bill of rights," which sets aside certain liberties as being not subject to revision by ordinary political process. The argument is that there are classes of issues that are important enough to the typical participant that he will want them removed from the ordinary political process. Of course, by the nature of any constitutional process, such protection, in the end, must be procedural rather than substantive. The constitution itself will have to be subject to some revisionary process. Hence, any bill of rights will itself be subject to revision. By insisting upon a much greater plurality (e.g., two-thirds or three-fourths), the representative participant can lower the probability of being victimized. The logic of this reasoning is, of course, that which we encountered at the outset of this section, namely, protection against loss. As the plurality requirements for deciding any class of issues increase, one’s expectation of securing passage of legislation favorable to one's own interest decreases. But one gains in terms of increased assurance that others will not be able to enact measures posing a substantial threat to one’s own interest.

ECONOMIC AND POLITICAL MARKETS

The above remarks suggest a number of important parallels that can be drawn between economic markets and political markets. Both are human artifacts which take their rationale, at least in part, from considerations of mutual-expected gain. But mutual-gain arguments can also be cited in defense of certain modifications to these institutions. High decisionmaking costs in the case of eco-
nomic markets may recommend replacing or supplementing the voluntary market mechanism with political or collective mechanisms. But these mechanisms too will involve significant decision-making costs, especially if the proportion of participants required for decisive action is set very high. In each of these cases, we confront problems due to market failures, i.e., situations in which markets (whether economic or political) are unable to handle transactions in an efficient or effective manner.

But markets can also pose problems in cases in which they handle transactions quite effectively. Cases of excessive accumulation and monopoly, while not inevitable, can hardly be taken as cases of market failure. Similarly, the exploitation of minorities by majorities, while not an inevitable outcome of political markets, is a problem which arises as a concomitant to success and not failure of the political process. In both cases, the representative participant must at least consider the loss which such processes threaten to impose on him. The problem is not with costs that could be, if not avoided altogether, at least apportioned equitably, but with costs that, by their very nature, will be apportioned differentially.\(^1\)

One last parallel merits remark. The problem posed by political markets involves more than just minority persecution. The representative participant presumably understands that a majoritarian system can result in decisions adverse to his own interests; on a given vote, he can find himself in the minority. But there is a dual rationale for participating in such a system: First, over the long run, one expects such adverse decisions to be outweighed by favorable decisions; and second, the simple majority rule makes possible savings in decisionmaking costs. The case of majority persecution of a "discrete and insular" minority is one pathological case. There is, however, another case: It is possible for one to end up consistently on the minority side by losing not to a conspiracy of citizens, but simply to the actualization of a possible random sequence.\(^2\)

This problem arises with regard to political processes. Is there a counterpart in the case of economic markets? Quite clearly there is. The representative participant has to contend not only with

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1. In thinking about ways institutions can be the object of distrust I have been indebted to the ideas of John Hart Ely. See generally J. ELY, DEMOCRACY AND DIS-TRUST (1980).

problems of economic conspiracy—the problems of monopoly and other forms of excessive accumulation—but with the problem of non-intended disasters. The invisible hand of Adam Smith's market is simply no respecter of persons. Nothing in the nature of the mechanisms of economic markets offers any guarantee that a participant will survive, economically or physically. As Professor Robinson reminds us: "The hidden hand will always do its work, but it may work by strangulation."  

The standard treatment of markets and welfare economics is a study in conceptual avoidance. The focus is on optimality. The main theorems are designed to establish that markets will, under a suitable set of conditions, be optimal. That is, if there are mutual gains to be had, markets will, in principle, be able to achieve them. But optimality means only that change is not possible without some participants being worse off than they were before the change. Optimality is fully compatible with perishing, with a state in which slavery is the only live option, and with a state in which the haves have a great deal and the have-nots have virtually nothing. The argument, to be found from Adam Smith on, that great benefits may be achieved by letting markets function in as free a manner as possible, is powerful indeed. But the argument speaks to what the representative person can expect. It offers nothing by way of assurance to the person who is somewhat concerned with loss avoidance and not simply expected gain.

A characteristic of virtually any form of social existence is that loss-avoidance considerations are not treated lightly. The ideal of a pure, simple majority system, unadorned by any constitutional restrictions, can hardly be taken seriously as a basic social form. Trusting oneself to go where the greater number goes, regardless of the impact upon oneself, makes sense only against the background of some special account—of what one is forced to accept, say, in a world gone mad in some respect or other. In contrast, by supposing that one agrees to let certain issues be decided by ma-

14. So straightforward is this implication of the market model that one wonders why it is so rarely remarked upon. But it is, for example, carefully noted in Chipman, The Nature and Meaning of Equilibrium in Economic Theory, in Functionalism in the Social Sciences 35-64 (D. Martindale ed. 1965); T. Koopmans, Allocation of Resources and the Price System, in Three Essays on the State of Economic Science 62-63 (1957).
15. Perhaps this is why one is bound to feel that the concept of a social form of existence has been strained to the limit in the sort of case described, for example, in C. Turnbull, The Mountain People (1972).
majority vote—where the issues are such that how they are decided will affect one only marginally (or in ways from which one can reasonably hope to recoup one's losses)—one gives an account of conditions under which a majoritarian rule makes sense. The essence of this latter description lies in the notion that one imagines persons as entering into a majoritarian system of collective choice from a position in which certain essential interests are relatively secure (e.g., guaranteed to one under constitutional provisions). By a parallel line of reasoning, one is bound to consider the question of the reasonableness of a form of economic interaction that provides not even the minimum guarantee necessary for survival. It is not hard to imagine that one might find oneself in a world in which there is no choice but to accept such a system. It is also possible to imagine persons who are prepared to gamble on certain future events—persons who would venture from a position of relative security, in which they have made provision for various forms of adversity. Perhaps there are even some who would prefer a world in which they are exposed to such significant risks, and would choose such a world in "full deliberative rationality." But by any account, we enter here into a matter concerning the deepest interests of many persons. I know of no argument within the theory of rationality which concludes that concern for loss avoidance is irrational or imprudent. Persons who desire such protections, and who are forced to live in a social setting in which these protections are not guaranteed, cannot regard such arrangements as ones to which they have consented. They are bound to think of their social arrangements as something forced upon them. All of this actually suggests the obvious—namely, that societies tend not to differ from one another concerning whether or not they provide political and economic protections. Typically, societies do differ in regard to the institutional means by which such protections are provided, and in regard to the level at which they are provided.

LOSS PROTECTION IN THE ECONOMIC SPHERE

Against the background of these remarks, the remainder of this Article will focus upon the problem of loss protection with regard to economic matters. Specifically, I will consider how, and at what level, such protection should be provided. The point of the various parallels between political processes and economic markets, as developed above, is that the ways in which societies deal with

16. I take this term from J. Rawls, A THEORY OF JUSTICE § 64 (1971).
loss protection against political processes can illuminate the problem of economic loss protection.

**Constitutional Restrictions and Property Rights**

First, as devices intended to promote mutual gain, majoritarian procedures have been treated almost invariably as subject to "constitutional" restrictions. This is the case no matter at what level such procedures are invoked. Thus, even in relatively "innocent" areas of interaction, such as clubs designed to promote recreational or charitable interests—where one does not expect to find sharp and deep conflicts of interest—one typically finds substantial qualifications on majoritarian rules. Second, the protection which is thus afforded to individuals against the majority's will can be extended to all those who participate in the cooperative venture; it need not be restricted to just some. Third, nothing in the idea of providing restrictions on majoritarian rules precludes persons who are thereby guaranteed various protections from voluntarily agreeing to less protective arrangements. In this regard, the constitutional structure can be viewed as providing a secure base from which persons can move into their own preferred arrangements. Thus, there is no contradiction if a person supports the constitutional guarantees of freedom of religion, security against unreasonable searches and seizures, and equality in determining public policy, and then chooses to join, for example, a closed religious society which is organized in such a way as to violate all three of these principles.

In respect to economic markets, it might first be thought that property rights form a natural analogue to constitutional restrictions. It might be argued that individuals come into the market place with various bundles of goods (and/or services) over which they are guaranteed control by the system of property rights in effect in a society. Being secure in their possession of such goods, they can then choose whether to trade them for other goods. If they do not desire to trade them, then the system of property rights serves to provide them with a veto power over any alienation of their goods. Extending the analogy even further, one can remark that property rights typically carry with them entitlements to compensation for at least some activities of others which result in damage to one's property. In both these respects, then, property rights serve to provide one with loss protection.

The disanalogies between constitutional restrictions on majoritarian rules and property rights are, however, significant. In
the first place, the market can have a significant impact on the value of one’s holdings. Even if one does not choose to enter the market place and trade, the operation of the laws of supply and demand can radically and disadvantageously alter the value of one’s property. It can be argued, of course, that majoritarian processes can operate so as to seriously qualify the rights which the constitutional restrictions were designed to secure. But the analogy breaks down again, since actions of this sort by the majority are subject, in principle at least, to judicial review—whereas one has no recourse against the vagaries of the laws of supply and demand. Second, one can participate in majoritarian processes without in any way compromising or qualifying one’s constitutionally guaranteed rights. By way of contrast, to enter the market place is to alter, by definition, one’s property rights. There is no assurance that one can return from such transactions with the same security as when one entered the market. Third, and perhaps most importantly, the protection which property rights provide to one in a market economy is contingent upon a person having the resources, or means, to purchase such protections. Markets cannot guarantee that all will be able to enjoy these protections. In a pure market economy, property is simply not a birthright.

This last point is crucial. It may be suggested that, in principle, markets can deal quite effectively with the problem of loss avoidance. The suggestion is that one has only to make available a wide range of insurance packages. Of course, such a scheme has the great attraction that persons can then tailor protection to the level they desire—the assumption being that some will desire more and some less. In this manner, it can be ensured that no one is forced to pay for more protection than one wants. Given that unrestricted markets can be expected to generate substantial economic benefits, the representative participant may even be able to expect to have sufficient resources to provide for the level of protection desired. But one cannot count on this being the case. Whatever expectations they generate, markets actually provide only those with sufficient financial resources the opportunity to purchase the level of protection which they desire. Others must make do with less.

**Voluntaristic Approaches**

If markets, together with a system of property rights, do not offer the guarantees that persons may reasonably insist upon, we must consider what sorts of institutional structures could serve to
provide such protection. Clearly there are a variety of alternative structures to be considered. We should initially observe that here, as in a variety of other contexts, social institutions of a more informal sort may serve an important function. Historically, various kinds of voluntary organizations devoted to charitable causes have played a major role in providing protections of one sort or another to persons. Indeed, some think this sort of approach the only acceptable one, on the grounds that voluntarily organized charitable efforts share with the market the positive features associated with non-coercive forms of organization. In a community taking a voluntaristic approach, persons could enter into various ventures with a sense that the community will be there, in a quite personal sense, to provide at least some sort of minimum or floor, below which persons will not be allowed to fall. Such a powerful ideal is responsive to, among other things, the virtual universal need for a sense of personal ties to other community members. However, such an approach may be in conflict with fundamental market forces. To be effectively implemented, a voluntaristic approach would require a social system in which persons are organized into relatively small, localized groups, and in which there is relatively little movement from one group to another. Face-to-face encounters, occurring over a reasonably long period of time, would be necessary to enable the bonds of sympathy and the ethics of mutual help to take root. One must consider, indeed, that the market's "rationalizing" forces have had something to do with the decline of the influence of such informal, voluntaristic approaches.

The issue of the adequacy of such voluntaristic approaches to loss protection goes much deeper, however, than this. Assuming the existence of the conditions necessary for voluntaristic approaches to flourish, the representative participant cannot be sure that such assistance will be available—precisely because such approaches are voluntary. The question here is not one of comparing the merits of a purely voluntary system against those of a fully public or collectively organized system. It might be that the best system would be one in which collectively organized protection was treated as a "court of last resort," to be activated only when all other measures have been exhausted. The point, however, is that under such a system, each participant does have a guarantee that

17. For a useful discussion of the way in which such norms can function, see Arrow, *Social Responsibility and Economic Efficiency*, 21 *Pub. Pol'y* 303 (1973).
protection will be available. But insofar as protection is provided only in voluntarily organized forms, such a guarantee must, by definition, be lacking.

Establishing a Welfare Floor

Suppose that loss protection is something which the community, as a political entity, should guarantee. By way of keeping the discussion as simple as possible, let us suppose that the method of protection chosen is a "welfare floor" (defined in terms of some combination of goods and services), below which individuals are not to drop, and for which revenues are to be provided out of some combination of tax measures (the details of which need not concern us at this point). We may suppose that all, or almost all, participants agree upon a specifiable level of support, below which a person cannot expect to survive in a physically and psychologically healthy state. Let us also suppose that there is an upper limit of support, in the sense that any attempt to raise the level of support would at some point create incentive problems (for those who are beneficiaries of the welfare system, or for those whose earnings are taxed to finance the welfare programs) serious enough to impair the economic system's ability to continue providing protection at that level. Finally, let us suppose that the level of protection at which the incentive problem becomes serious is more than marginally above the level of the bare minimum necessary for physical and psychological health. Given these assumptions, the problem is to determine an appropriate level at which protection should be set.

Those familiar with recent developments in normative-choice theory, and its application to social and political policy, will recognize that we have here entered into a matter which has occasioned considerable debate. Questions concerning the reasonableness of criteria of choice that focus on loss avoidance are central to many recent analyses of the problem of defining a social-welfare function, or, alternatively, defining principles of justice. One characteristic approach has been to view the problem from the perspective of a representative participant who must come to a decision concerning basic social institutions without having any knowledge of what position he is to occupy in that society. In this way, the choice of a

18. The two most discussed versions of this sort of argument can be found in J. Harsanyi, Rational Behavior and Bargaining Equilibrium in Games and Social Situations 48-83 (1977) and in J. Rawls, supra note 16, at §§ 20-30. See
basic social arrangement is construed as a problem of decision-making under conditions of (radical) uncertainty. Alternatively, and even more abstractly, the problem can be approached as one of intuitively specifying acceptable conditions on a social-welfare function—with the objective of specifying a set of conditions that will uniquely define such a function. As it turns out, these two approaches are, from a formal perspective, very closely related. In each case, the problem amounts to one of specifying rules for the ordering of vectors. In terms of axiomatic constructions, two sorts of approaches have tended to predominate. The first defines a straight averaging rule, in which each component of the vector is given an equal weight. The second defines a maximin rule, in which one vector is ranked over another if the minimum entry of the first is greater than the minimum entry of the second. As one might expect, the first approach appears to be a formal analogue to the policy of evaluating social arrangements in terms of only expected return or benefit, while the second approach relates to a policy of maximal concern for loss avoidance or risk.

Nothing like a decisive adjudication of these issues has yet to appear in the literature. At present, there are simply rival sets of intuitions which, if combined, force one to the conclusion that there is no reasonable approach to the ordering of social alternatives. A number of cautionary notes need to be sounded here. There has been much forcing of different types of decision generally Harsanyi, Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility, 63 J. Pol. Econ. 309 (1955); Rawls, Some Reasons for the Maximin Criterion, 64 Am. Econ. Rev. 141 (1974). Harsanyi has sharply disagreed with Rawls on the question of the appropriate criterion for decisionmaking under conditions of uncertainty. See Harsanyi, Can the Maximin Principle Serve as the Basis for Morality?, 69 Am. Pol. Sci. Rev. 594 (1975).


problems in the same Procustean Bed of rationality requirements. There has been confusion over what is to be taken as a condition of rational choice, and what is simply a condition of measurability. There has been a tendency to conflate the notions of risk and uncertainty, and also to leave unexplored different senses in which one might be said to be either risk-averse or risk-oriented. The net effect has been, I believe, for the concept of rational choice to be defined or characterized in an overly restrictive manner. Matters about which one might have supposed reasonable persons could differ turn out to be settled in a somewhat precipitous manner by certain axiomatizations. In this connection, it is worth remarking that this would appear not to be the case with the original construction of measurable utility, due to Von Neumann and Morgenstern, and to which so much of the more recent work in this area is greatly indebted. Their construction does not legislate with regard to the degree of risk aversion or risk orientation with which it is rational to approach choice problems.

This last point serves to introduce a formal analogue to the issue of establishing a reasonable level of loss protection. The suggestion is that reasonable persons can differ in regard to attitudes toward risk. Correspondingly, perhaps one should not expect to be able to determine an appropriate social policy toward loss protection—by reference to purely formal constraints on the concept of rationality. But there must be a conflict of interest between those who desire a greater amount of protection and those who desire less. How can this conflict be resolved?

One can begin by recalling the objection raised above to letting market mechanisms take care of this issue, i.e., letting persons select for themselves, in the marketplace, the level of protection that they desire. The trouble with such an approach was simply that one could not be guaranteed of having the resources necessary to purchase the level of protection one desired. The issue now is determining a reasonable level of protection, which is to be established as a matter of public policy, that is, guaranteed by some set of public institutions. But it would seem that the objec-

21. I have sought to detail these problems in Constitutional Choice: Rawls vs. Harsanyi, in PHILOSOPHICAL PROBLEMS IN ECONOMICS (J. Pitt ed. 1981); Bayesian Uncertainties, PHILOSOPHY SCI. (forthcoming 1982).


23. For an excellent survey of utility constructions, see R. Luce & H. Raiffa, GAMES AND DECISIONS 12-38 (1957).
tion raised to a market approach to protection can also be applied in the case of a public approach to protection. Suppose that the level of protection is set below that which constitutes its natural upper limit (in terms of the requirements for an effective system of incentives—the requirements of economic efficiency). Then is it likely that some of the system’s participants will be unable to secure for themselves the level of protection that they desire. Such a line of reasoning, thus, would tend to support the policy of setting the level of protection as high as possible consistent with the demands of economic efficiency.

One might respond that such a policy would force some to accept a greater level of protection than they desire. From this perspective, it might be observed that a fairer policy would be to find some compromise between those who are more and those who are less concerned with loss protection. However, the positions of the two types of persons are not symmetrical—for a reason which, once again, parallels the case of constitutional restrictions on majoritarian rules. Fixing a certain level of protection as an established part of public policy would not, in principle, preclude those preferring less protection from arranging their affairs accordingly. Speaking somewhat figuratively, one could imagine offering those who desire less security the opportunity to exchange or trade their security shares for venture capital, with which they could engage in more speculative projects—projects which promised, in compensation for the risks they involved, the possibility of significant profits. The idea here, as in the case of constitutional rights, would be to provide individuals with a certain guarantee, but then allow them to voluntarily agree to a less protective arrangement.24

In view of the need which any society has to encourage a certain amount of risk-taking, it might even be a matter of public policy to facilitate choices of this sort, perhaps by offering incentives. Such an approach might even maintain and possibly improve the level of loss protection guaranteed as a matter of public policy. Whether any given society can guarantee a certain level of loss protection may critically depend upon its ability to maintain a vigorous, growing economy, in which a significant number of persons are willing to take risks. That is, society may not be in the position of merely tolerating the venturesome dispositions of some of its

24. I am indebted here to an idea to be found in Leibenstein, Longrun Welfare Criteria, in The Public Economy of Urban Communities 39 (J. Margolis ed. 1965).
participants; it may have a great stake in encouraging such risk-taking. The benefits which may be derived in this way may be such that it is appropriate to ask all to share in making them possible.

This last point should serve to preclude one other possible objection. The thrust of the argument so far has been that a scheme in which a relatively high level of protection is guaranteed can be recommended on the grounds that one will be able to secure the level of protection one desires. The public guarantee will define, as it were, a position from which persons can move to their most preferred arrangement. But a scheme which, under one description, provides all participants with what they desire, may, under a different description, satisfy the interests of some at the expense of others. Thus, it might be argued that, while the above scheme allows all participants to achieve the mix of expected return and protection that they desire, the scheme results in lower expectations for the more venturesome, whose greater earnings will have to be taxed to support the high level of protection to be provided. It is perhaps true that the average participant will have a lower expectation. This is likely to be the case, since a natural interpretation of the above scheme is that it mandates a social policy of foregoing higher expectations if the level of protection can thereby be raised. Of course, given certain assumptions, even this may not be the case. It might turn out, for example, that guaranteeing a high level of protection serves to make human resources available to society in the form of energies and abilities which would otherwise be lost or wasted. But however this turns out, the above scheme does not, in and of itself, imply that the expectations of the more venturesome must be less than they would be under a scheme in which the level of loss protection is set somewhat lower. The incentives that society might be prepared to offer the venturesome could be such as to offset the increased cost of the protection to be provided. The social policy might well count on the positive effects that vigorous incentives would have on the output of the more venturesome (and, hence, on the general level of the economy) to finance the increased level of protection. In effect, the less venturesome would bear formal responsibility for financing, through taxes on their own earnings, the level of increased protection that they desire; the more venturesome would indirectly provide the means for increasing protection, through their contribution to an economic climate in which the earnings of all are improved—a contribution that they are encouraged to make by the various incentives offered as a matter of public policy.
From a somewhat different perspective, the scheme outlined above would seem to have the following advantage: Some have recently argued, from the perspective of justice, as if there were a basic presumption against inequalities in life prospects. The notion, eloquently formulated by John Rawls, is that inequalities are arbitrary, unless it is reasonable to suppose that they will work out to everyone’s advantage. But one is bound to ask: Why this presumption? It is natural, of course, to think in terms of norms of equality when it comes to specifying how relations between persons are to be regulated and administered. The very notion of a rule requires that like cases be dealt with in the same manner. Satisfying formal equality is, however, fully compatible with persons ending up with significant disparities in their life prospects. Thus, for example, a central feature of a particular social system may be that it jealously protects the equal status of citizens as contractors of voluntary arrangements. Yet the way in which persons choose to exercise this equal right may result in significant disparities in life prospects.

The argument employed above, in support of setting the level of protection as high as possible, consistent with economic efficiency, cannot be taken to establish a presumption in favor of equality of life prospects. We have argued not for the reasonableness of equality as a basic norm, but the reasonableness of a public policy for providing significantly high levels of loss protection. In effect, the argument sketched above establishes no presumption for or against equality. One implication of this is that, even if the public did not have an interest in encouraging some to be venturesome, the greater life prospects of the more venturesome would not necessarily have to be justified in some other manner if they were to be regarded as forming part of an acceptable social system. Another implication, however, is that nothing in the above precludes arguing against inequalities on other grounds. Thus, for example, one might seek to control inequalities in life prospects on the grounds that when the disparities become too great, they can threaten the political stability of a society, or permit some to have

26. For a very powerful statement of this point of view, see R. NOZICK, ANARCHY, STATE AND UTOPIA 150-64 (1974).
27. In thus steering a middle course between Rawls and Nozick, I am under no illusion that either would find the position I have taken acceptable.
an undue influence upon the shaping of both economic and political policy.\textsuperscript{28}

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Returning to the main theme of the last section, and by way of summary, the case to be made for setting the level of loss protection relatively high is, thus, that such an arrangement provides persons with an opportunity to tailor their life plans to their own (subjectively determined) preferences with regard to balancing out considerations of risk and expected gain. Other arrangements would have the disadvantage of restricting the freedom of the less venturesome without augmenting the freedom of the more venturesome. One can think of the scheme described above as an agreement by all participants to allow those who are inclined to take greater risks to do so—subject to the restriction they do not force avoidable risks on those who would prefer a higher level of security. The argument can, in this respect, be thought of as being rooted in the liberal ideal that persons should be free to engage in activities that do not adversely affect the interests of others. From this perspective, the issue of security is seen as a challenge to design a social structure in which persons can tailor their life plans to their own conception of an appropriate balance between protection against loss and expected gain—a social structure in which persons have equal liberty to determine how they will confront an uncertain world.

\textsuperscript{28} See J. \textsc{Rawls}, \textit{supra} note 16, at § 43.