



RESEARCH ARTICLE / ARTICLE DE RECHERCHE

## Welfarism and Person-Centred Justice

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### Abstract

Welfarism is the idea that government should always try to make individuals' lives go better, for them, than they otherwise would, overall. The goal of this paper is to demonstrate welfarism's compatibility with, and potential to support, the ambitions of person-centred justice. Welfarism is a normative theory applicable to public policy generally, but one which has distinct consequences in the realm of law and legal systems. They are considered just to the extent that they generate the best possible expected welfare consequences for all of the individuals who are affected by them. Welfarism is radically person-centred because it requires lawmakers to treat each individual affected by their work as a distinct locus of value, including those who have been subordinated or ignored.

**Keywords:** public policy; access to justice; law reform; philosophy

### Résumé

Le welfarisme est l'idée selon laquelle le gouvernement devrait toujours essayer d'améliorer la vie des individus, et ce, d'une manière à ce que la qualité de vie des individus soit supérieure à ce qu'elle l'aurait été sans ladite intervention gouvernementale. Dans cette voie, l'objectif de cet article est de démontrer la compatibilité du welfarisme avec les ambitions d'une justice centrée sur la personne et son potentiel pour soutenir cette forme de justice. Le welfarisme est une théorie normative applicable aux politiques publiques en général, mais qui entraîne toutefois des conséquences distinctes dans le domaine du droit et des systèmes juridiques. Les lois sont alors considérées comme justes si elles génèrent les meilleures conséquences possibles en termes de bien-être pour tous les individus qui sont affectés par celles-ci. Le welfarisme est radicalement centré sur la personne, car il exige que les législateurs traitent chaque individu affecté par leur travail comme un lieu de valeur distinct, y compris celles et ceux qui ont été subordonnés ou ignorés.

**Mots-clés:** welfarisme; politique publique; accès à la justice; réforme du droit; philosophie

## Introduction

Person-centred justice offers a fresh and compelling way to think about justice systems. The international and comparative perspective on access to justice offered by the OECD's *Framework and Good Practice Principles for Person-Centred Justice* is especially helpful, given the predominantly domestic focus of the scholarship in Canada and some other countries. This short paper seeks to trace connections between person-centred justice and *welfarism*. Welfarism is a normative theory of public policy—an account of what government should do in the justice sector or in any other sector. The central claim of welfarism is that *government should always try to make individuals' lives go better, for them, than they otherwise would, overall*.<sup>1</sup>

This article explains the central claim of welfarism by unpacking it word by word. It will emerge that, like person-centred justice, welfarism is focused on individuals, on their needs, and on evidence-based ways to make their lives better. The article concludes by suggesting how welfarism might helpfully support and expand the ambitions of person-centred justice.

## “Government ...”

Welfarism is a theory about *public policy*—the decisions and actions of governments. This includes national and subnational governments, municipalities, and public-sector agencies that are charged with pursuing the public interest. Law is a form of public policy, at least when it comes from a government entity of some kind. This includes the common law, which is made by government officials (judges) who are exercising public power and also enforced by state actors. Justice-sector systems and procedures, upon which person-centred justice focuses, are also manifestations of public policy.

Welfarism is a theory about what governments should do—not a theory about what individuals should do.<sup>2</sup> In particular, it is not about what individual agents of the government should do. For example, consider a corrections officer who is working in a prison. Although she works for the government, it does not follow that she should make every workplace decision on the basis of what outcome would, in her view, make individuals' lives go best overall. She might know with

<sup>1</sup> Welfarism is also known as welfare consequentialism or “welfarist consequentialism”—a phrase that first appears in the Introduction to Amartya Sen and Bernard Williams, *Utilitarianism and Beyond* (Cambridge, UK: Cambridge University Press, 1982). Two volumes offer important treatments of welfarism as a normative theory of public policy: Matthew D. Adler, *Measuring Social Welfare: an Introduction* (New York: Oxford University Press, 2019); Andrew Clark et al., *The Origins of Happiness: The Science of Well-Being over the Life Course* (Princeton, NJ: Princeton University Press, 2018). The idea is implicit in the texts of classical utilitarianism, which can be considered the predecessor of welfarism. Utilitarianism was first clearly enunciated in the work of Jeremy Bentham in the late 18th century (see note 37 below and accompanying text) and John Stuart Mill.

<sup>2</sup> Welfarism (more specifically, the utilitarian version of welfarism) has also been developed as a theory of individual morality. An accessible introduction can be found in the works of Peter Singer: Peter Singer, *Ethics in the Real World: 82 Brief Essays on Things that Matter* (Princeton, NJ: Princeton University Press, 2016).

certainly that helping a certain young person to escape from prison would do more good than harm overall, because the prisoner was wrongfully convicted and their life will be ruined if they do not get out. Welfarism does not claim that the guard should help this person to escape.

However, the officer's direct personal experience may well give her insight into how public policy in this area could be improved. Identifying and implementing good public policy are impossible without a vibrant democracy that draws on the knowledge of all citizens, especially those who understand a policy area best, including through lived experience. The OECD's call for a "people-centred culture in the justice sector" reminds us that insiders have special insight and a special duty to help the system to do the right thing.<sup>3</sup>

### "... should ..."

Welfarism is a *normative* theory about what government should do—not a descriptive theory about what government actually does. However, unlike some normative theories, welfarism does not depict an ideal or perfect world. Instead, it seeks to practically guide public policy and make things steadily better.<sup>4</sup> In other words, it is a remedial rather than utopian theory. Public policy decisions, about law or anything else, are inevitably made in a complicated context of history, personalities, and existing arrangements. Making decisions that really outperform the alternatives depends crucially on understanding what is actually happening.

Welfarism involves a sharp conceptual distinction between (i) government and (ii) the individuals who are affected by what government does. Each individual is a distinct locus of value, but the connections between individuals have enormous effects on their welfare, as will be explained below. Thus, welfarism lends itself to functionalism. It directs government to care like a physician for the body politic, to promote welfare-enhancing social phenomena, and to suppress welfare-reducing ones.<sup>5</sup>

### "... always ..."

Welfarism proposes a universal normative theory of public policy. Making individuals' lives better might be the *only* thing that lawmakers and policymakers should try to do. The theory seeks to guide the largest government decisions

<sup>3</sup> Organization for Economic Cooperation and Development, *OECD Framework and Good Practice Principles for People-Centred Justice* (OECD, 2021), 31.

<sup>4</sup> Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2009), 8.

<sup>5</sup> As F. A. Hayek wrote: "Human civilization has a life of its own, that all our efforts to improve things must operate within a working whole which we cannot entirely control, and the operation of whose forces we can hope merely to facilitate and assist so far as we understand them. Our attitude ought to be similar to that of the physician toward a living organism: like him, we have to deal with a self-maintaining whole which is kept going by forces which we cannot replace and which we must therefore use in all we try to achieve. What can be done to improve it must be done by working with these forces rather than against them": Friedrich A. von Hayek, *The Constitution of Liberty: the Definitive Edition* (Chicago: University of Chicago Press, 1960/2011).

(e.g. whether to join the European Union), the smallest ones (e.g. whether to install a stop light at a certain intersection), and the millions of decisions in between. Person-centred justice goals such as improving the quality of justice delivered and improving its accessibility are desirable because accomplishing them would make individuals' lives better than they would otherwise be.<sup>6</sup>

What about respecting human rights, obeying the Constitution, giving people what they deserve, and so forth? These certainly seem to be things that governments should do, but they are non-welfarist principles.<sup>7</sup> They propose to guide public policy on the basis of considerations other than the welfare of individual human beings.<sup>8</sup>

Yet they are things that should be done *because* they can be expected to make life go better overall. Non-welfarist principles are essential rules of thumb, given the impossibility of calculating all welfare consequences for all affected individuals whenever any government decision must be made.<sup>9</sup> The need for the law to respect human rights, for example, has gradually become evident over many centuries. The reason that human rights are entrenched in Canada and many other countries, and beyond the power of elected officials to easily tamper with, is *not* because they were engraved by any deity upon any tablet. They are entrenched because humans have learned over time that violating these rights leads to bad results in terms of individual welfare.

Identifying the welfare-maximizing course for government “requires the aid of more minds than one age can furnish,” as Edmund Burke wrote.<sup>10</sup> Our laws are a record of what seemed wise to officials of previous generations. Although the judgment of historical lawmakers was clouded by bias and self-interest, so too is our own and this is no reason to disdain their bequests. An entrenched Bill of Rights (like the *Canadian Charter of Rights and Freedoms*) enshrines principles that, to previous generations, seemed especially important and worthy of respect.

However, because they are rules of thumb, laws and other non-welfarist principles must be subject to exceptions and amendment based on welfare predictions. For example, a person who is refusing vaccination while continuing to visit indoor public spaces was arguably exercising an inviolable human right in 2019. By late 2020, amidst the COVID-19 pandemic, governments seem to have

<sup>6</sup> Noel Semple, “Better Access to Better Justice: The Potential of Procedural Reform,” *The Canadian Bar Review* 100, no. 2 (2022), <https://cbr.cba.org/index.php/cbr/article/view/4772>.

<sup>7</sup> Louis Kaplow and Steven Shavell, “Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle,” *Journal of Political Economy* 109, no. 2 (2001): 281–86, <https://www.jstor.org/stable/10.1086/319553>.

<sup>8</sup> Matthew Weinzierl, “A Welfarist Role for Nonwelfarist Rules (Plus a Preview of The Golden Rule of Taxation),” March 18, 2019, accessed July 25, 2021, [https://law.yale.edu/system/files/area/workshop/leo/leo19\\_weinzierl.pdf](https://law.yale.edu/system/files/area/workshop/leo/leo19_weinzierl.pdf).

<sup>9</sup> For another example, Steven Shavell and Louis Kaplow are pure welfarists regarding law. However, they suggest that “notions of fairness ... may serve as proxy devices to aid in identifying legal policies that tend to advance individuals’ well-being... given that notions of fairness often correspond to social norms that themselves serve to enhance welfare, it is not surprising that pursuing notions of fairness often promotes individuals’ well-being”; see Steven Shavell and Louis Kaplow, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2006).

<sup>10</sup> Edmund Burke, *Reflections on the Revolution in France* (London: James Dodsley, 1790).

had good reason to amend the scope of this right in order to protect welfare. The constitutional Bills of Rights in Canada and many other Western nations give elected governments opportunities to justify *prima facie* constitutional breaches, or even exempt laws from constitutional scrutiny.<sup>11</sup> Human rights are typically not inviolable sacred commandments, but rather topics of *dialogue* between lawmakers in the elected and judicial branches of government.<sup>12</sup>

### “... try ...”

It may seem ambitious—perhaps even arrogant—to boil down all of the things that government should do into a single principle. However intellectual humility—humbleness about how much can be known—counterbalances the normative audacity of welfarism. Government can only *try* to find the policies that will make individuals’ lives go best. It never has access to full knowledge regarding the welfare consequences of any policy option.

### Risk and Uncertainty

At best, the options that are open to lawmakers are subject to *risk*. For example, environmental regulators must decide whether to forbid or allow proposed private-sector activities and what conditions to impose upon them. They must do so without scientific certainty about the environmental and economic consequences of the proposed projects. For example, an Ontario regulator had to decide in 2012 whether to permit the construction of a quarry on the Niagara Escarpment near Collingwood.<sup>13</sup> Permitting the quarry was likely to generate welfare gains from new jobs and access to resources, but it also imposed the risk of welfare losses from water problems and other environmental risks.

In cases like this, *expected* welfare benefits and losses from the project can often be identified before the decision is made.<sup>14</sup> Expected welfare effects are calculated by factoring in the chance that they will not materialize. For example, the employment-related welfare benefits of permitting a mine should be discounted for the possibility of the mine becoming uneconomical and closing within a few years. Requiring rockfall fencing in a quarry in case of an earthquake-induced avalanche might turn out to be a job-killing waste of money if no earthquake occurs during the life of the mine. That does not mean that the regulator was wrong to require the fencing as a condition of the license. The expected welfare benefit of preventing a death or serious injury might more than

<sup>11</sup> *Canadian Charter of Rights and Freedoms*, ss 1, 33.

<sup>12</sup> Peter Hogg and Allison Bushell, “The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All),” *Osgoode Hall Law Journal* 35, no. 1 (1997): 75–124, <https://digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss1/2>; Aileen Kavanagh, “The Lure and the Limits of Dialogue,” *University of Toronto Law Journal* 66, no. 1 (2016): 83–120, <https://www.utpjournals.press/doi/abs/10.3138/UTLJ.3437>.

<sup>13</sup> *Re Walker Aggregates Inc.*, 2012 CarswellOnt 7715.

<sup>14</sup> John C. Harsanyi, “Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility,” *Journal of Political Economy* 63 (1955): 309.

justify the expense, even if there was only a small chance of the fence ever being needed.

Public policy questions are often much more complex than this scenario. Governments confront not only *risk*, but also deeper *uncertainty*.<sup>15</sup> No government can precisely quantify how a project will affect complex economies and ecosystems. Not only can they not accurately quantify the likelihood of the various outcomes that can be imagined, but they also cannot even list all of the possible ways in which a certain decision could affect individual welfare. A project such as an aggregate mine might lead to the arrival of an invasive species, previously unknown in the jurisdiction, that devastates agriculture. On the other hand, it might uncover unexpected minerals, which create local economic benefits far beyond anything anticipated. One welfarist tool for dealing with uncertainty, enshrined in Canadian law, is the *precautionary principle*. This states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures” to mitigate or prevent the threats.<sup>16</sup>

### Intellectual Humility

Humility makes a person respectful and cautious; this virtue should have the same effect on our thinking about public policy. Some decisions can be made by quantifying and calculating welfare impacts on individuals. One example was the dramatic expansion of mental health funding in the United Kingdom in the 2010s, based on the proven and powerful capacity of talk therapy to relieve human suffering.<sup>17</sup> But, in other cases, government must defer to less scientifically explicit ways of knowing what policies are most likely to make lives go best.<sup>18</sup> These include the rules of thumb mentioned above: respecting human rights, democracy, constitutions, and traditions. Those deep natural springs sometimes give forth progress that technocratic policymaking would never bring to the surface. For example, Canada’s constitutional rule of thumb against discriminatory laws, enshrined in the *Canadian Charter of Rights and Freedoms* and developed in a series of court decisions, led to the legalization of same-sex marriage by 2005.<sup>19</sup>

<sup>15</sup> See, for example, Judith de Neufville and Karen Christensen’s critique of simple policy analysis that “fails to confront directly and constructively the reality of uncertainty in the policy process.” This works only when “the goal has been reduced to a single one; the technologies for achieving them are known and have been applied; and it can be assumed with some degree of certainty that external changes in, say, prices or tastes will not affect the solution”: Judith Innes de Neufville and Karen Stromme Christensen, “Is Optimizing Really Best?” *Policy Studies Journal* 8 (1980): 1053.

<sup>16</sup> *Canadian Environmental Protection Act*, 1999, SC 1999, c 33, s 2(1)(a)(ii).

<sup>17</sup> Richard Layard and David M. Clark, *Thrive: The Power of Psychological Therapy* (London, United Kingdom: Penguin, 2013); Clark et al., *Origins of Happiness*.

<sup>18</sup> Richard D. French, “The Professors on Public Life,” *Political Quarterly*, 83 (2012): 536; Dan Priel, “COVID-19: Cost-Benefit Analysis and Politics,” *Osgoode Hall Law Journal* 57 no. 3 (2021): 537–65.

<sup>19</sup> *Egan v Canada*, [1995] 2 SCR 513, <https://canlii.ca/t/1frkt>; *Vriend v Alberta*, [1998] 1 SCR 493, <https://canlii.ca/t/1fq5t5>; *Halpern v Canada (Attorney General)*, [2003] 65 OR 3(d) 161, <https://canlii.ca/t/6v7k>; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, <https://canlii.ca/t/1jdhw>.

Litigation is inherently adversarial and can serve as a check on government misdeeds or negligence. However, litigation is also a process by which an intellectually humble state can learn about and respond to welfare needs in its population. In addition to remedies granted to the parties by the courts that are hearing their cases, litigation is a way to call the attention of the elected branches of government to problems.<sup>20</sup> In Canadian family law, for example, explicit statutory formulae for matrimonial property division, for child support, and for spousal support were all enacted because spates of family-law cases (none of which involved state parties) demonstrated that the common law was not providing sufficient clarity on which to ground out-of-court resolutions.<sup>21</sup>

A lawsuit with an individual plaintiff is inherently person-centred because it involves a person whose story will be heard and must be responded to, by the defendant and potentially by the court.<sup>22</sup> As David Luban wrote, “litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law.”<sup>23</sup> Institutions such as judicial independence support this process, with better public policy as the payoff.<sup>24</sup>

The intellectual humility within welfarism includes a willingness to respect arrangements that are already working, even if we do not understand exactly how.<sup>25</sup> In some cases, making individuals more free to pursue their own welfare is the course that can reasonably be expected to make lives go best.<sup>26</sup> Government should not lightly assume that it knows better than individuals do about what will make their lives go best for them. People tend to assiduously pursue their own welfare and the welfare of their loved ones. Sometimes, good public policy is a matter of getting government out of their way. On the other hand, liberty is not an end in of itself for a welfarist; only welfare is. Thus, laws requiring seat-belt usage constituted welfarist progress (they prevented hundreds of thousands of injuries and premature deaths), even though declining to buckle up mostly harms only the individual non-buckler themselves.

<sup>20</sup> Melina Buckley, “Layers, Snails and Bottles: The Creeping Pace of Change in the Law,” in *Why Good Lawyers Matter*, ed. David Blaikie, Thomas A. Cromwell, and Darrel Pink (Toronto: Irwin Law, 2012).

<sup>21</sup> Carol Rogerson, “Shaping Substantive Law to Promote Access to Justice: Canada’s Use of Child and Spousal Support Guidelines,” in *Delivering Family Justice in the 21st Century*, ed. John Eekelaar, Mavis Maclean, and Benoit Bastard (Oxford: Hart Publishing, 2015), 51; Noel Semple, “A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism,” *Windsor Yearbook of Access to Justice* 34, no. 1 (2017): 130–47, at 145–6, <https://www.erudit.org/en/journals/wyaj/2017-v34-n1-wyaj03386/1043019ar/>.

<sup>22</sup> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, at [22]–[34], <https://canlii.ca/t/fss7s>.

<sup>23</sup> David Luban, “Settlements and the Erosion of the Public Realm,” *Georgetown Law Journal* 83 (1995): 2619, at 2638.

<sup>24</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 17.

<sup>25</sup> Joseph Heath, *Enlightenment 2.0: Restoring Sanity to Our Politics, Our Economy, and Our Lives*, 1st edn (Toronto: HarperCollins Publishers Ltd, 2014), chapter 2.

<sup>26</sup> In *The Constitution of Liberty*, Hayek made the case for liberty based on human epistemic limitations.



### “... to make ...”

Welfarism is a consequentialist theory. Consequentialism is the idea that whether or not a thing should be done depends on what can reasonably be expected to happen if that thing is done. This approach “start[s] with a conception of what is good and define[s] [the] right choice in terms of that”.<sup>27</sup> Under welfarism, outcomes are good to the extent that individuals have welfare in those outcomes. Government choices are right to the extent that they can rationally be expected to bring about such outcomes. If consequences were off the table—because the world were to end tomorrow or because God were to control everything that happens—then there would be no such thing as good or bad public policy, or good or bad law.

Because public policy *does* have consequences, welfarism holds that we are morally bound to reform policy in order to bring about *better* consequences. Within the complex systems in which we find ourselves, predicting consequences of public policy is often challenging. Welfarism therefore demands evidence-based policy, thoroughly grounded in the natural and social sciences, to understand both needs and the likely consequences of alternative responses.<sup>28</sup> In this, welfarism is highly compatible with the focus of person-centred justice on evidence and empirical data.<sup>29</sup>

Canada’s court system does not excel in tracking and publishing data that would allow it to be improved.<sup>30</sup> Some adjudicative tribunals do better, systematically gathering and disclosing information such as average time-to-disposition and the number of cases that are resolved at the different procedural stages.<sup>31</sup> Surveys that assess tribunal users’ satisfaction with the procedure—a measure that was endorsed by the People-Centred Justice Framework<sup>32</sup>—are also very helpful. Again, in Canada, it is not courts, but rather tribunals such as the BC Civil Resolution Tribunal and the federal Social Security Tribunal that have taken the lead in providing such data.<sup>33</sup>

<sup>27</sup> Martha C. Nussbaum, *Creating Capabilities* (Cambridge, MA: Harvard University Press, 2013).

<sup>28</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 26.

<sup>29</sup> Andrew Pilliar, “Toward Justice Epidemiology: Outlining an Approach for Person-Centred Access to Justice,” *Dalhousie Law Journal* 46, no. 1 (2023): 171, <https://digitalcommons.schulichlaw.dal.ca/dlj/vol46/iss1/11>; Organization for Economic Cooperation and Development, *OECD Framework*, 74; Organization for Economic Cooperation and Development, “Recommendation of the Council on Access to Justice and People-Centred Justice Systems (OECD Legal Instrument 0498, Adopted on: 11/07/2023),” s 2(b)(i), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0498>.

<sup>30</sup> Lisa Moore, “The Data Deficit: The Case for Improving Court Records for Future Access to Justice Research—Fact Sheet (Canadian Forum on Civil Justice),” Canadian Forum on Civil Justice, May 1, 2016, <https://digitalcommons.osgoode.yorku.ca/cfcj/46>; Michael Lesage, “Benchmarking the Ontario Court System,” *Slaw*, May 21, 2021, <https://www.slaw.ca/2021/05/21/benchmarking-the-ontario-court-system/>; Jon Khan, “Canada’s Legal Data Deficit,” Canada’s Legal Data Deficit (Deliberate Legal Design), <https://www.deliberatelegaldesign.com/canadas-legal-data-deficit>.

<sup>31</sup> Civil Resolution Tribunal (British Columbia), “Civil Resolution Tribunal Annual Report 2022–2023,” app A, <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2022-2023.pdf>.

<sup>32</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 83.

<sup>33</sup> Social Security Tribunal of Canada, “Results for Canadians,” May 28, 2021, last modified August 21, 2023, <https://www.sst-tss.gc.ca/en/our-work-our-people/results-canadians>.



For some policy questions, there is no peer-reviewed scholarship or rigorous data available to inform the necessary decisions. For example, today, there is extensive evidence that legalizing same-sex marriage delivers major reductions in adolescent suffering and suicide, by sending a message of inclusion to young people.<sup>34</sup> However, this evidence emerged only in the period after 2010 because of a “natural experiment” in the United States in which some but not all states legalized it. This type of evidence did not exist to inform Canada’s debates on same-sex marriage in 2003 and 2004. Welfarism and person-centred justice call for evidence-based policy and yet, in some cases, the best available evidence is not written down or formalized. Instead, it is *tacit*, knowable informally by people who are close to the problem. We sometimes “know more than we can tell,” in the words of philosopher and scientist Michael Polanyi.<sup>35</sup> In the case of marriage legalization, the litigation process put before decision-makers the direct personal evidence of same-sex couples regarding the adverse effects of old law upon them. The OECD’s key text on person-centred justice refers to evidence-based policy dozens of times;<sup>36</sup> welfarism concurs but suggests that, in some cases, a more liberal approach to evidence might be required.

### “... individuals’ ...”

It is only the welfare of individuals that is inherently valuable in public policy. Jeremy Bentham, the father of welfarism, wrote 240 years ago that ‘the community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?—the sum of the interests of the several members who compose it.’<sup>37</sup>

Sometimes, people will say that a certain policy or legal reform would be in the “national interest” or the “public interest.” To a welfarist, such claims only make sense as a shorthand way to claim that the policy would favour the welfare of individuals who are (or will be) part of that nation or “public.” Normative individualism is a basic commitment of welfarism.<sup>38</sup>

<sup>34</sup> See, for example, Mark L. Hatzenbuehler et al., “Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment,” *American Journal of Public Health* 102, no. 2 (2012): 285–91, <https://www.proquest.com/docview/963359537/abstract/7BC3E324EA24458DPQ/1>; Alexander K. Tatum, “The Interaction of Same-Sex Marriage Access with Sexual Minority Identity on Mental Health and Subjective Wellbeing,” *Journal of Homosexuality* 64, no. 5 (2017): 638–53, <https://www.tandfonline.com/doi/full/10.1080/00918369.2016.1196991>; Julia Raifman et al., “Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts,” *JAMA Pediatrics* 171, no. 4 (2017): 350–56, <https://doi.org/10.1001/jamapediatrics.2016.4529>.

<sup>35</sup> Michael Polanyi, *The Tacit Dimension* (Chicago: The University of Chicago Press, 1966), 4; Noel Semple, “Everybody to Count for One? Inclusion and Exclusion in Welfare-Consequentialist Public Policy,” *Moral Philosophy and Politics* 9, no. 2 (2022): 293–322, at 306–08.

<sup>36</sup> Organization for Economic Cooperation and Development, *OECD Framework*.

<sup>37</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London, United Kingdom: T. Payne and Son, 1789), at chapter 1, s IV.

<sup>38</sup> Dietmar von der Pfordten, “Five Elements of Normative Ethics: A General Theory of Normative Individualism,” *Ethic Theory and Moral Practice* 15, no. 4 (2012): 449–71, <https://doi.org/10.1007/s10677-011-9299-2>.

However, Bentham went too far in describing communities as “fictitious.” The welfare of any individual depends crucially on the structures and systems within which they live. No one is an island. Good policy must pay attention to the connections between us and to the intangibles that sustain us. For example, the criminal law regarding parental corporal punishment of children must take into account not only the welfare effects of corporal punishment itself upon children, but also the welfare losses associated with justice-system intervention into families, and the potential for that intervention to be biased in terms of race, class, or other factors.<sup>39</sup> The welfare benefit of legalizing same-sex marriage includes the good it did for people who choose to enter such unions. But a larger welfare gain probably accrued to those who had no interest in marriage but heard the message of inclusion in the policy and experienced the resulting destigmatization of sexual difference.<sup>40</sup>

Welfarism is radical in its insistence that every affected individual matters and in its demand that government should make lives better if it can.<sup>41</sup> Justice systems have an unfortunate tendency to take seriously only the interests of individuals who can make themselves heard within the formal procedures of the systems. Welfarism calls attention to all those whose interests are affected. It is therefore a way to interrogate the selectiveness of the system in terms of who is heard. The OECD’s Framework notes an evolution in person-centred justice from “client-centred” approaches that are focused on those who actually seek assistance toward an acknowledgement that most people with legal needs do not present themselves to any formal process or service provider.<sup>42</sup> They may not come forward because they do not recognize the legal dimensions of their problems<sup>43</sup> or because they perceive the options for redress to be disproportionately expensive, stressful, or time-consuming.<sup>44</sup>

Welfarism aligns with movements to establish and vindicate the welfare-promoting legal rights of those who are politically invisible, such as migrant workers and unhoused people.<sup>45</sup> The high welfare cost of incarceration on the imprisoned must be weighed in any analysis of sentencing or bail law, along with whatever

<sup>39</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76.

<sup>40</sup> See note 31 above and accompanying text.

<sup>41</sup> Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (New York, NY: Oxford University Press, 2020), s 2.2.

<sup>42</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 20; Trevor C. W. Farrow et al., “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report (Canadian Forum on Civil Justice),” 2016, 9, <https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.

<sup>43</sup> Organization for Economic Cooperation and Development, “Recommendation of the Council”; Organization for Economic Cooperation and Development, *OECD Framework*, 26.

<sup>44</sup> *Hryniak v Mauldin*, [2014] 1 SCR 87, <https://canlii.ca/t/g2s18>.

<sup>45</sup> Relatedly, see the OECD’s choice to entitle their key document “people-centred” rather than “person-centred” justice. The former term “aims to additionally evoke the responsibility of governments and their justice systems to be designed and established to meet the needs of ... diverse groups of residents, refugees and visitors to an equal standard”: Organization for Economic Cooperation and Development, *OECD Framework*, 20.

welfare benefits are obtained through incarceration. Retributivism—in the sense of treating the suffering of offenders as an inherently worthy goal of policy—is incompatible with the commitment of welfarism to making lives better, not worse.

At the same time, deterrence and incapacitation in the criminal justice system have legitimate welfarist purposes. Victims remain an afterthought in this system,<sup>46</sup> despite the 2015 passage of the *Canadian Victims' Bill of Rights*.<sup>47</sup> Sometimes, the rights of victims (or potential future victims) must be balanced against the rights of accused people, such as in bail law. However, smart and evidence-based reforms that “bend the curve” and leave everyone better off are always preferable. Restorative justice, for example, can in appropriate cases leave victims much more satisfied than they would otherwise have been while reducing recidivism and allowing the offender to repair the damage that they caused in society.<sup>48</sup>

More than some other areas of public policy, justice policy has to interrogate and confront power within our economy and society. The OECD's *Framework* calls for reflection on the potential of the justice system to privilege powerful repeat players.<sup>49</sup> Access-to-justice problems are not necessarily accidents. If government allows tribunals in which benefit claimants assert their rights against government ministries and insurance companies to become so backlogged that claims are abandoned, then it is important to understand that this state of affairs may favour the bottom line for the government or its friends.<sup>50</sup>

### “... lives go better ...”

Welfare can be defined as “what we have when our lives are going well for us.”<sup>51</sup> But what does it mean for someone's life to go well? The question is an ancient, apparently bottomless well of debate. Three major schools of thought have emerged:

- *Hedonist* theories of welfare hold that pleasure, and the absence of pain, makes life good for the individual who lives it.<sup>52</sup>

<sup>46</sup> Benjamin Perrin, *Indictment: The Criminal Justice System on Trial* (Toronto: Aevo UTP, 2023), chapters 8, 9.

<sup>47</sup> SC 2015, c 13, s 2.

<sup>48</sup> Perrin, *Indictment*, chapter 16.

<sup>49</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 29.

<sup>50</sup> Noel Semple, “The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis,” *Toronto Metropolitan University Law Review* 2, no. 1 (2024): 84–118. <https://www.tmu.lawreview.com/current-issue/inaccessibility-justice>. See also, regarding the relegation of motor vehicle accident disputes involving British Columbia's state-owned insurer to a tribunal whose setup might systematically favour the defendant, Kaitlyn Cumming, “The Civil Resolution Tribunal, No-Fault and Motor Vehicle Accidents: Effective Justice or False Prophet,” *Windsor Yearbook of Access to Justice* 40 (2024): 184–210. <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/9185>.

<sup>51</sup> Valerie Tiberius, “Well-Being: Psychological Research for Philosophers,” *Philosophy Compass* 1 (2006): 493.

<sup>52</sup> Fertility and artificial human reproduction policy not only affects the welfare of the unborn, but also affects whether certain individuals will ever live, which places it squarely in one of the most

- *Objective list* accounts identify important capabilities or achievements—such as access to education or having friends. These things, according to objective list accounts of welfare, make an individual's life good to the extent that they are present in that individual's life.<sup>53</sup>
- *Preferentist* theories focus on the preferences that individuals have about their own lives. A “preference” can be defined as a “disposition to choose.”<sup>54</sup> Alternatively, a preference reflects a person's “comparative evaluation” of multiple outcomes.<sup>55</sup> Those in the preferentist camp suggest that an individual's welfare depends on the extent to which their preferences about their own life are fulfilled.<sup>56</sup>

If welfarism required a resolution to the debate between these schools of thought, then it would be useless as a practical aide to government. No government knows, and no government should act as if it knows, what makes life good in the deep philosophical sense. Fortunately—and perhaps counterintuitively—such knowledge is not actually necessary. Welfarism does not need to make judgments about the essence of welfare. It only needs acceptable ways to estimate the welfare of different individuals, as the next section will explain.

## “... for them ...”

### Subjectivism

How, then, can one estimate the welfare of the individuals who would be affected by a policy decision? There might be hundreds of millions of them, and many of them might not be alive yet.<sup>57</sup> Lifetime income would be one easy proxy for a person's welfare. Public policy could assume that the more money a person has, the more welfare they have. Indeed, growth or shrinkage in a country's gross domestic product has sometimes been taken as a grade on the government's performance. When law reform reduces incomes, that does constitute a welfare cost that must be compared to the welfare benefits of the reform. The law and

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controversial areas of welfarist theory; see Derek Parfit, *Reasons and Persons* (Oxford, United Kingdom: Oxford University Press, 1986); and Katarzyna de Lazari-Radek and Peter Singer, *The Point of View of the Universe: Sidgwick and Contemporary Ethics* (Oxford: Oxford University Press, 2014).

<sup>53</sup> See e.g. Adler, *Measuring Social Welfare*, chapter 5; Cass R. Sunstein, “Nonsectarian Welfare Statements,” *Regulation & Governance* 10, no. 2 (2016): 126–33.

<sup>54</sup> Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* London, UK: Penguin, 2017. Rutger Bregman, *Utopia for realists: how we can build the ideal world*. Boston: Back Bay Books, 2016.

<sup>55</sup> United Nations Human Development Index (HDI), <http://hdr.undp.org/en/content/human-development-index-hdi>.

<sup>56</sup> In other words, nothing can be considered intrinsically good for an individual unless that individual takes a “valuing attitude” toward that thing; Dale Dorsey, “Welfarism,” in *The Routledge Handbook of Philosophy of Well-Being*, ed. Guy Fletcher (London: Routledge, 2015).

<sup>57</sup> Noel Semple, “Good Enough for Government Work? Life Evaluation and Public Policy,” *Journal of Happiness Studies* 21 (2019), 1119–1140.

economics school has developed sophisticated tools to predict the effects of legal regulations on incomes and access to resources.<sup>58</sup>

However, economic growth is definitely not the same thing as welfare growth. This is most obviously so when economic growth imposes irreversible environmental costs and the new wealth flows to those who are already rich.<sup>59</sup> For this reason, the United Nations Human Development Index adds two other simple statistical measures to income—life expectancy and years of education—and ranks nations' performance on this basis.<sup>60</sup> Such straightforward statistical measures serve a purpose. And yet they also seem to miss a great deal about what makes life good. Knowing how long a person will live, how much money they will have, and how long they will go to school does not seem to allow one to say, even approximately, how well their life will go for them.

The author's view is that welfarism is on thin ice if it measures individual welfare by using these "objective" lists of attainments or capabilities. Government has no special insight into what actually makes life good. It is presumptuous to operate as if a person will have welfare just because their life has certain attributes that politicians or philosophers consider to be important.

Instead, estimates of individuals' welfare that drive policy decisions should be based on the values of the individuals themselves. You do not have welfare because your life conforms to what anyone else thinks your life should be. You have welfare to the extent that your life goes well *for you*.

Thus, the approach to estimating welfare effects needs to be *subjective*. Something should count as a welfare change in someone's life only if—and to the extent that—that person would see it as such.<sup>61</sup> If a person does not care about something and will not consider their life to be better if they get it, then the government has no business assuming that that thing will improve that person's welfare.

One subjective technique for evaluating welfare is *life evaluation*.<sup>62</sup> People are asked how satisfied they are with their lives overall, on a scale of 0 to 10. The higher the number a person gives, the more welfare they are assumed to have.<sup>63</sup> Another subjective technique is *preference fulfilment*. Individuals have certain preferences regarding their own lives. The more that one's preferences about one's own life are met, the better one's life is taken to be. The *People-Centred Justice Framework* lauds the trajectory in health policy from a focus on disease toward a holistic focus on people's needs, and calls for an analogous development of

<sup>58</sup> The *World Happiness Report* is created by an international research consortium. It compares countries and public policies on the basis of life evaluation data: <https://worldhappiness.report>.

<sup>59</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 19.

<sup>60</sup> *Ibid.*, at 16.

<sup>61</sup> *Ibid.*, at 17.

<sup>62</sup> Ab Currie, "Legal Aid Expenditures Over Time in Canada: A Complex Story," *Slaw*, October 2, 2019), <https://www.slaw.ca/2019/10/02/legal-aid-expenditures-over-time-in-canada-a-complex-story/>.

<sup>63</sup> Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report," 2013, <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srreportfinal.pdf>.

justice policy.<sup>64</sup> Holistic and subjective quantitative measures of individual welfare, such as life evaluation and preference fulfilment, are a step in this direction.

### Everybody to Count

Welfarism holds that government exists only for the benefit of the individuals who are affected by it. The interests of privileged people, and government insiders, should receive no premium weighting. This is one straightforward manifestation of the rule-of-law principle that is central to many legal traditions.<sup>65</sup> Scrutiny of the public sector often reveals arrangements that put insiders or privileged people first, and the justice system is no exception. As the *People-Centred Justice Framework* points out, “many justice pathways have been designed from a provider perspective,” without sufficient understanding of the needs of the people for whose benefit they purportedly exist.<sup>66</sup> This may reflect self-dealing by insiders, but it may also reflect a simple slowness to adapt public-sector institutions and programmes to changing needs and realities.

Canada’s civil justice system in the mid-20th century, for example, generally assumed that all parties would be represented by lawyers. It was mostly only corporations and affluent people who had reason to use the civil system at the time because the substantive law did not endow anyone else with rights that were worth asserting in court. That changed with the “Rights Revolution” that began in around 1960. Legislatures created extensive new rights for individuals, including employees, consumers, and people who were leaving intimate relationships. However, for many of those whom legislators intended to assist, the new rights remained mere words on the pages of law books, unless they could be successfully asserted against deep-pocketed and sometimes intransigent adversaries. The willingness of Canadian governments to establish new substantive legal rights was *not* matched by a willingness to pay for lawyers or others to help people assert those rights in court, especially after civil legal aid was pared back in the 1990s.<sup>67</sup> The result was a wave of self-represented litigants who were struggling in a court system that was not designed for them.<sup>68</sup>

The *Framework* notes a tendency for justice systems to evolve slowly over centuries, “often away from a people-centred focus.”<sup>69</sup> This might be because

<sup>64</sup> Organization for Economic Cooperation and Development, *OECD Framework*, 28.

<sup>65</sup> Margaret Hagan, “Legal Design,” *Law By Design*, January 26, 2015, <https://lawbydesign.co/legal-design/>.

<sup>66</sup> Lorne Sossin, “Designing Administrative Justice,” *Windsor Yearbook of Access to Justice* 34, no. 1 (2017): 87–111, <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5007>.

<sup>67</sup> Semple, Noel, “Tribunals for Access to Justice in Canada” *Canadian Bar Review*, 2025, Forthcoming. <http://www.noelsemple.ca/2024/04/tribunals-for-access-to-justice-in-canada/>

<sup>68</sup> See, for example, Organization for Economic Cooperation and Development, “Ease of Doing Business in Canada,” World Bank, <https://archive.doingbusiness.org/en/data/exploreconomies>. Access-to-justice problems in Canadian civil courts have led to very low scores for the “ease of enforcing contracts,” reducing the overall appeal of the country as a place to do business.

<sup>69</sup> The best known of these is cost-benefit analysis; see, for example, Cass R. Sunstein, *The Cost-Benefit Revolution* (Cambridge, MA: MIT Press, 2018).

only insiders (especially lawyers and judges) take an interest in the system or have the opportunity to shape it. Without denying the noble policy accomplishments of the common law, and in particular the evolution of procedural justice, justice-system reform that is driven by evidence and non-lawyerly ways of knowing seems to be crucial at this juncture. Design thinking—drawing on insights from disciplines including psychology and social work—is essential if we are to create systems that truly function for the real people who need to use them.<sup>70</sup> As Lorne Sossin observed, the “best way to design a tribunal may draw on expertise from retail and hospitality sectors as much as courthouses and government agencies.”<sup>71</sup> Canada’s tribunals are a promising site for major access-to-justice breakthroughs because, compared with courts, they can more readily be designed and held accountable for their performance.<sup>72</sup>

Everybody counts under welfarism, and that includes people who are affected *indirectly* by the operations of the justice system. For example, providing real access to justice for victims of domestic violence is also often very important for the welfare of their minor children. Reasonably prompt access to civil justice has also been identified as a crucial support for prosperity and business competitiveness.<sup>73</sup> The persons upon whom justice must be centred include those who are not parties or clients, but nevertheless have their interests at stake.

### “... than they otherwise would ...”

Welfare is a matter of degree; it is what one has *to the extent that* one’s life goes well for them. Comparisons are at the heart of welfarism. Policy options must be compared to alternatives, and individual lives must be compared to other lives, all in terms of welfare. The theory holds that the welfare levels of individuals’ lives can be compared in several different ways:

- First, it can be said that certain individuals will have more welfare if the government chooses one policy instead of another. Suppose, for example, that a legal services regulator starts allowing candidates who have only completed two years of law school to become lawyers, if they meet the other requirements. (At present, a three-year J.D. degree is required across the country.) Some people who aspire to become lawyers, but cannot afford the extra tuition and foregone income involved in the third year of law school, would be able to afford it after such a change. Their lives would

<sup>70</sup> Michael J. Trebilcock, “Framing the Issues: Normative Discourses, Political Imperatives,” in *Dealing with Losers: The Political Economy of Policy Transitions*, ed. Michael J. Trebilcock (Oxford University Press, 2014).

<sup>71</sup> Michael J. Trebilcock, “Agricultural Supply Management: Unraveling the Transitional Gains Trap,” in Trebilcock, *Dealing with Losers*, s 6(ii).

<sup>72</sup> Trebilcock, *Dealing with Losers*; “Phasing Out Supply Management: Lessons from Australia’s Dairy Industry,” Fraser Institute, July 17, 2018, <https://bit.ly/3hUyeHb>.

<sup>73</sup> American Civil Liberties Union, “Racial Disparities In Florida Safety Belt Law Enforcement,” 2016, [https://www.aclu.org/sites/default/files/field\\_document/racial\\_disparities\\_in\\_florida\\_safety\\_belt\\_law\\_enforcement.pdf](https://www.aclu.org/sites/default/files/field_document/racial_disparities_in_florida_safety_belt_law_enforcement.pdf).



almost certainly be better for them, due to the fulfilment of their career preferences, among other reasons.<sup>74</sup> This is an “intrapersonal” comparison, of the welfare of certain individuals under two different policies.

- Second, it is possible to estimate *how much* better individuals’ lives will be if a certain policy is chosen, and compare this benefit to the welfare consequences of other public policy decisions. Evidence about satisfaction and income in different careers should help the regulator to understand, and perhaps even quantify, the difference that the proposed change would make for the overall lifetime well-being of those who are favourably affected by the change. How many people would become able to afford the process if the mandatory law-school years were shortened, and how much better would their lives be?
- Finally, welfarism holds that similar comparisons can be made between individuals (*interpersonal* comparisons).<sup>75</sup> Reducing educational requirements for lawyers would impose welfare costs on identifiable individuals. This includes clients who will fall victim to forms of professional misconduct that a mandatory third year in law school currently prevents, and maybe even law professors or aspiring law professors who would lose their jobs if law schools reduce student bodies by one-third.

Because all of these welfare comparisons are possible, the gains and losses from a proposed policy can be analyzed together, allowing a rational and evidence-based conclusion about its advisability.

Applying numbers to welfare effects is often very helpful. Some welfarist techniques seek to quantify all of the welfare effects of a policy option in terms of dollars or other money units.<sup>76</sup> Welfare can also be quantified without any reference to money. For example, the effect of depriving someone of a career in law through the imposition of an unfunded and mandatory third year can be compared to the effect of depriving someone of their law-professor career by eliminating the third year, using techniques such as life evaluation and preference fulfilment.

However, full quantification is not always possible, and welfarism does not necessarily require it. Even if the law society cannot fully quantify the welfare effects of the policy options that are confronting it, it might be able to at least estimate the number of people in each of the affected groups. At the very least, welfarism requires the decision-makers to think and consult as broadly as possible to understand who will be affected and how. This may lead to the identification of practical alternatives that capture all or most of the welfare benefits of the original proposal, with fewer welfare costs.

### “... overall.”

This word has a couple of key meanings within the theory. First, welfare is an attribute of someone’s whole life, and not of moments or episodes within that life. If a government policy would make the next month of my life better than it

<sup>74</sup> Colleen Hanycz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform,” *Civil Justice Quarterly* 27 (2008): 98.

<sup>75</sup> *Rules of Civil Procedure* (Ontario), RRO 1990, Reg 194, r 76.

<sup>76</sup> *Elmardy v Toronto Police Services Board et al.*, 2015 ONSC 3710 (CanLII).

would otherwise have been, but would also impose burdens on me that will last for years to come, then that policy might reduce my welfare. Thus, each individual life must be considered overall.

Second, it is the overall welfare effects of a policy option that are relevant, taking into account all of those who gain as well as all of those who lose from it. In some cases, a policy might constitute a *pareto* improvement, making some people better off and no one worse off. The legalization of same-sex marriage seems to be an example. While some people disagree with same-sex marriage, there is no evidence that anyone's life is worse *for them* because of this policy change. It is only the fulfilment of preferences about an individual's own life that affects their welfare, according to the preferentist approach described above.

However, most public policies create real welfare losses as well as gains. They may be *Kaldor–Hicks improvements*, meaning that they generate welfare gains for some individuals that are more than large enough to compensate for those who would lose from the change.<sup>77</sup> For example, Australia was in the 1990s burdened with a dairy industry supply management scheme that drove up food prices and created numerous international trade problems. The government abolished all price controls in 2000, but earmarked \$2 billion to compensate producers who would otherwise “lose” from the reform. This was entirely funded by a 10-year surcharge on milk sales that was equivalent to 11 cents per litre, paid for by the chief beneficiaries of the reform: consumers of milk products. Despite the surcharge, the price of milk fell by at least 18 percent within six years<sup>78</sup> and fell further once the 10-year transition period had ended. The reform package was popular and profitable in the long run for producers as well as consumers.<sup>79</sup>

### Inevitable Trade-Offs

Unfortunately, most policy decisions impose welfare losses on certain individuals that cannot or will not be compensated. Policymakers must usually slice or re-slice the “pie” in addition to trying to grow it. Welfarism includes an extensive scholarship focused on distributional questions that are not always visible at first glance. Seat-belt laws, for example, save lives. However, in light of the reality of systemic racism, seat-belt laws may also mean more police traffic stops for “driving while Black,” generating many different types of welfare loss.<sup>80</sup>

In civil justice policy, some reforms may create “more access to less justice.”<sup>81</sup> To take a straightforward example, consider the simplified procedure that is

<sup>77</sup> Semple, “Better Access to Better Justice.”

<sup>78</sup> Sen and Williams, *Utilitarianism and Beyond*, 3; Adler, *Measuring Social Welfare*, chapter 3.3.

<sup>79</sup> Government of Canada, “Canada’s Cost-Benefit Analysis Guide for Regulatory Proposals,” <https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/requirements-developing-managing-reviewing-regulations/guidelines-tools/cost-benefit-analysis-guide-regulatory-proposals.html>.

<sup>80</sup> John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness and the Law* (Chicago: University of Chicago Press, 2015).

<sup>81</sup> Canadian Agency for Drugs and Technologies in Health, “Guidelines for the Economic Evaluation of Health Technologies: Canada, 4<sup>th</sup> Ed.,” Ottawa, CADTH, 2017, [https://www.cadth.ca/sites/default/files/pdf/guidelines\\_for\\_the\\_economic\\_evaluation\\_of\\_health\\_technologies\\_canada\\_4th\\_ed.pdf](https://www.cadth.ca/sites/default/files/pdf/guidelines_for_the_economic_evaluation_of_health_technologies_canada_4th_ed.pdf).

used for cases with monetary value less than \$200,000 under the Ontario *Rules of Civil Procedure*.<sup>82</sup> Parties are allowed only three hours in which to examine each other orally before trial, instead of seven hours under the normal procedure. This makes litigation quicker and more affordable, but may also lead to miscarriages of justice in cases in which the permitted time is insufficient to bring the truth to light.<sup>83</sup> For policy decisions of this nature, welfarism calls for reformers to maximize the expected welfare of all those who are affected by procedural reforms, taking into account both the welfare benefits of improved access and the welfare costs of reduced justice.<sup>84</sup>

### Utilitarianism and Beyond

How are welfare gains to a policy's winners to be totted up against losses to its losers? The simplest approach, known as utilitarianism, was proposed by Jeremy Bentham. Under utilitarianism, the goodness of an outcome depends on the *sum* of the welfare of the individuals in that outcome.<sup>85</sup> Suppose the expected welfare gains from eliminating the mandatory third year of law school (to aspiring lawyers, and to clients who would pay slightly lower legal fees due to increased supply of lawyers) are equal to  $x$ . Suppose the expected welfare losses (to clients who will suffer from reductions in lawyer competence, to aspiring law professors, etc.) are equal to  $y$ . The policy should be adopted if and only if  $x$  is greater than  $y$ , according to a utilitarian analysis.

Cost-benefit analysis (CBA) is the standard technique for applying utilitarian welfarist analysis to public policy initiatives. It is used in Canadian law for the analysis of regulations,<sup>86</sup> although it has been observed that CBA tends to conflate income with welfare.<sup>87</sup> The related technique of cost-effectiveness analysis (CEA) is deployed for decisions about public funding of drugs and medical technologies.<sup>88</sup> CBA and CEA, along with the newer and less widely deployed social welfare function technique,<sup>89</sup> are established ways to operationalize welfarism for public policy decision-making.

<sup>82</sup> Adler, *Measuring Social Welfare*.

<sup>83</sup> John A. F. Helliwell, "Three Questions about Happiness," *Behavioural Public Policy* 4 (2019): 177.

<sup>84</sup> Derek Parfit, "Equality or Priority?" The Lindley Lecture, University of Kansas, <https://www.philosophy.rutgers.edu/joomlatools-files/docman-files/3ParfitEqualityorPriority2000.pdf>.

<sup>85</sup> Sam Wren-Lewis, "How Successfully Can We Measure Well-Being through Measuring Happiness?" *South African Journal of Philosophy* 33 (2014): 417; Daniel Kahneman and Alan B. Krueger, "Developments in the Measurement of Subjective Well-Being," *Journal of Economic Perspectives*, 20 (2006): 3 (2021).

<sup>86</sup> E.g. Amartya Sen, *Development as Freedom* (New York: Oxford, 2001); Nussbaum, *Creating Capabilities*.

<sup>87</sup> Harriet Baber, "Is Utilitarianism Bad for Women?" *Feminist Philosophy Quarterly* 3 (2017): 6.

<sup>88</sup> Daniel M. Hausman, *Preference, Value, Choice, and Welfare* (Cambridge, United Kingdom: Cambridge University Press, 2011), 3.

<sup>89</sup> "Preference accounts analyze well-being in terms of an individual's actual or idealized preferences": Matthew D. Adler, "A Better Calculus for Regulators: From Cost-Benefit Analysis to the Social Welfare Function (Working Paper EE 17-01 March 2017)," 2017, last accessed July 25, 2021, <http://sites.nicholasinstitute.duke.edu/environmentaleconomics/files/2017/03/WP-EE-17-01.pdf>.

Utilitarianism is not the only option when it comes to determining the overall welfare effects of policies. Utilitarianism takes no account of the idea—which is entirely compatible with welfarism—that government should pay special attention to those with relatively low welfare.<sup>90</sup> Perhaps the individuals who would gain welfare from the elimination of law school's mandatory third year—students of modest means for whom this change would unlock a legal career—on average have less welfare than the law professors and clients who would lose from it. *Prioritarianism* attaches more weight to the welfare of these relatively badly-off individuals within the alternative outcomes and less weight to the welfare of better-off individuals.<sup>91</sup>

Under prioritarianism, a policy that makes the distribution of welfare between individuals more equal may be preferred over one that produces a higher sum of welfare. Prioritarianism and utilitarianism are just two of many possible “outcome-ranking rules” for determining the overall attractiveness of a policy option based on its expected welfare consequences. They are both compatible with the overall directive of welfarism: that government should always try to make individuals' lives go better, for them, than they otherwise would overall.

### Conclusion: Person-Centred Justice and Welfarism

Person-centred justice is an inspiring call to rethink our approach to law, to legal systems, and to the work that we need to do to make them better. This article has proposed that welfarism—an idea with ancient roots that has recently been rejuvenated by scholars from a variety of disciplines—is a helpful companion for person-centred justice. In particular, it may help to equip person-centred justice to tackle the distributional and philosophical questions that are inevitably associated with law. Another dividend could be a better understanding of how and why access to justice makes people's lives better than they would otherwise be. Finally, welfarist person-centred justice clearly situates access-to-justice initiatives as public policy initiatives, and provides a frame by which to analyze them normatively as such. Person-centred justice is a new idea; welfarism is a much older one—an alliance between them may do great things for access to justice in Canada and abroad.

<sup>90</sup> In addition to the inherent preferentist welfare gain, most will have higher incomes than they would if required to pursue alternative careers, and income is correlated with subjective welfare.

<sup>91</sup> Adler, *Measuring Social Welfare*, 11.