

ESSAYS ON RESPONSIBILITY SENSITIVE EGALITARIANISM

by

ROBERT CHRISTOPHER ROBINSON

(Under the direction of Professor Alexander Kaufman)

ABSTRACT

I defend Justice as Fairness against some of its most persuasive attacks, including GA Cohen's incentives argument. I show that Cohen's most important objections do not apply to the difference principle, as he suggests, but rather to the democratic principle of fair equality of opportunity. I show that Justice as fairness does not treat responsibility in an adequate way: Rawls allows particular entitlements that may not be justified by the two principles. Instead, taking responsibility seriously means defending a theory of distributive justice which is largely, though not entirely, egalitarian. I ask whether parties in a well ordered society can escape alienation and exploitation. I look to Marx and Mill, and conclude that one can be a liberal, defend a socialist political economy, and avoid Marx's most important worries. I next argue that considerations of fraternity and community make it impossible that, in a well ordered society, large disparities of wealth and income will exist.

INDEX WORDS: Egalitarianism, Luck, Responsibility, Rawls

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ROBERT CHRISTOPHER ROBINSON

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Robert Christopher Robinson

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ROBERT CHRISTOPHER ROBINSON

Approved:

Major Professor: Alexander Kaufman

Committee: Nicholas Fotion
Sean Ingham
Daniel Kapust
Piers Stephens

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
December 2012

Essays on Responsibility
Sensitive Egalitarianism

Robert Christopher Robinson

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Chapter 1

Introduction

1.1 Introduction

Among egalitarians, should responsibility play a deciding factor in assessing the acceptability of inequalities? So-called luck egalitarians agree that instances of genuine choice are decisive in attributing responsibility for disadvantage, and in justifying unequal distributions of social goods.

This strand of thought reflects Rawls' concern that we eliminate as decisive those factors which influence the distribution of social goods, and which affect one's life chances, but which are arbitrary from a moral point of view. At the same time, Rawls argues, so long as people are operating under a basic structure that is fair, as governed by the principles of justice, they then have a legitimate expectation for compensation for the fruits of their labor, where that labor is in high demand, is socially desirable, etc. Ronald Dworkin, a prominent early contributor to the luck egalitarian literature, argues centrally that our egalitarian duty is to hold constant those factors which affect life chances, but which are out of the control of the individual (viz., bad brute luck), and yet hold people morally responsible for inequalities that result from instances of genuine choice (e.g., option luck). He argues that our egalitarian duty is to guarantee a distribution of social goods that is ambition sensitive, but endowment insensitive. In an early work, Richard Arneson argues that if individuals have similar access to opportunities for advantage, then any inequalities that are the result of what those individuals make of their opportunities are just. Gerald Cohen similarly argues that our egalitarian duty is satisfied if individuals are ensured equality of access to advantage. If the person identifies with the disadvantage, the inequalities that result from subsequent choice are, thus, just.

Some critics of the luck egalitarian literature have noted that a theory that relies on the distinction between choice and luck in assigning a just distribution, must offer an account of genuine choice. And any account of genuine choice is certain to find itself in the middle

of a metaphysical morass. Other critics charge that the focus on choice and chance neglects what is most important to egalitarians – viz., eliminating the deleterious effects of economic exploitation and social domination on the life chances of many of the least advantaged people. Instead, the argument goes, we should focus on what we owe to one another as free and equal moral agents.

In the dissertation, I have two goals: to locate my own position in the literature, and to help to relocate the role that responsibility has come to play there. I will argue that, as a concept, responsibility has played too little role in establishing what expectations should be considered legitimate in a well ordered society. Taking responsibility seriously means supporting a basic structure that is largely egalitarian. My own position will be based largely on GA Cohen’s *Equality of Access to Advantage*, though will contain considerable refinements.

Along the way, I will make a few more fine-grained points:

1. I examine and assess a few of the major ways that responsibility has been incorporated into egalitarian theory. This modest typology will include:
 - (a) Canonical moments in Dworkin’s *equality of resources*
 - (b) Canonical moments in Arneson’s *equality of opportunity for welfare*
 - (c) Cohen’s *equality of access to advantage*, and his attempt to draw a clear distinction between genuine and non-genuine choice
 - (d) Pure procedural justice (e.g., Rawls, Sen, Nussbaum)
 - (e) Theories that reject responsibility sensitive egalitarianism (e.g., Anderson, Kaufman, Matravers)
 - (f) Theories interested in exploitation or domination (e.g., Hinton, Pettit)

2. I argue that some of these theories deal more effectively with issues of responsibility than others.
3. Finally, I set out an agenda to develop relevant insights from those approaches.

In *this* chapter, I have two goals: to outline the relevant literature briefly, and to identify the locations where my own contributions will lie.

1.2 The Literature

The literature finds a solid foundation, in my view, when Amartya Sen asks in his 1979 Tanner Lecture, *Equality of What?*¹, or, put another way, what is the appropriate currency for egalitarian justice? That is, given our liberal commitment to egalitarianism, what, precisely is it that we should be equalizing? Though he offers preliminary suggestions in that work, his more important contribution to the debate comes later, and so that is where I will discuss it.

1.2.1 Equality of Welfare

In Chapter 1 of his *Sovereign Virtue*, Dworkin carefully sets up an egalitarian conception which he calls *equality of welfare*, only so that he can give a positive and full criticism of the position. His criticisms, in my view, are decisive, and lead into his positive thesis, i.e., equality of resources. Let us take a look first at the former conception.²

Dworkin's discussion is framed against the literature of those who attempt to answer Sen's question: "Equality of What?". That is, among those who think that equality is an important ideal to uphold, there is the further question of what is it that we ought to

¹In Sterling M. McMurrin, *The Tanner Lectures on Human Values*, Vol. 1 (Salt Lake City: University of Utah Press, 1980)

²See [Dworkin, 2002b].

equalize? The question may be appropriately stated this way: What is the appropriate currency of egalitarian justice?³

Consider first equality of welfare – which states that a scheme treats people as equals if it distributes resources in such a way that no other distribution would leave them more equal in welfare.⁴ There is something attractive about this ideal. First, it is consistent with the language of economists, who talk about what is essential, as well as what is instrumental. Instrumental goods are valuable only insofar as they do good, or affect people’s welfare.

Second, it seems that some people need our help more than others, or, in some cases, more urgently.⁵ If we must choose a distribution of goods which will help a handicapped person to walk, versus one which will only make me slightly happier, for example, then there is some intuitive appeal to a scheme that chooses a handicapped individual in this case. A system that gives priority to wheelchairs for the handicapped, over champagne for the thirsty, has some intuitive appeal.

However, notes Dworkin, a distributional scheme that rewards those with very expensive tastes in wheelchairs may have a conceptual difficulty separating them from those with very expensive tastes in champagne. All other things being equal, it is difficult to see how the theory may give a principled reason to equalize the welfare of handicapped people, but not people thirsty for champagne. And it does not seem correct to skew our distribution toward those who simply prefer, as a matter of taste, more expensive things.

Though this is a simplified example, Dworkin takes the expensive tastes argument to be decisive against equality of welfare as a guiding principle of egalitarian distributive schemes.⁶ Instead of welfare, he suggests, what if we were to aim our egalitarian approach toward equalizing resources?

³See [Sen, 1979].

⁴See [Dworkin, 2002b, pp. 11-12].

⁵For a discussion on the egalitarian duty to consider urgency, see [Scanlon, 1975].

⁶The full argument is developed in Chapter 1 of his [Dworkin, 2002b].

1.2.2 Equality of Resources

In its simplest form, it looks as though equality of resources precisely captures our egalitarian intuitions: if everyone had the same things, or at least started with the same things, or things of an equal value, then we would all be perfectly equal. Of course we are not all equal – we have different tastes, talents, and abilities. And it would not do to give us all tennis rackets if you like tennis but I like playing the guitar. Strict equality of resources will not do.

To satisfy this worry about strict equality of resources, Dworkin develops two mechanisms. First is the Walrasian auction. Simply put, if you divide all of the resources into bundles, and no one prefers anyone else's bundle, then we all have an equal set of resources. I would not trade my guitar for your tennis racket, nor would I envy any part of your set of resources to the exclusion of any part of mine. In that way, our distributive scheme passes the *envy test*.

This not only allows for differences in people's tastes and interests, but also in differences in their talents and capacities to transform resources into welfare. Of course, no one should be punished for working hard – indeed, they should be able to enjoy the fruits of their labors. And, furthermore, no one should be punished for deficits that are beyond their control. That is, we ought to compensate individuals for results of poor brute luck (that which is out of their control), but not for the results of poor option luck (that which was in their control). To ensure this, we need another mechanism.

In the second mechanism, Dworkin develops what has come to be known as a hypothetical insurance scheme, such that for any risk that I might face in the world (e.g., devastation due to nature, poor health, etc), we can model what a rational person would pay to hedge against the possibility of that event occurring, and charge that amount against everyone's bundle of resources. We can simply use the model of the insurance industry to help secure the entire society against the undesirable effects of poor brute luck.

Dworkin calls his view *equality of resources*.⁷ The literature has identified a few conceptual problems with the equalities of resources approach. Among the most persuasive, is what I will call the tame housewife – or alternatively, the problem of adaptive preferences.

Some egalitarian critics charge Dworkin with failing to characterize egalitarian intuitions correctly. The problem here is that resourcism fails to give the correct answer in the case of adaptive preferences, or preferences which are the result of preferences for which she has been socialized to have, rather than those which she genuinely chooses to have. A commitment to ambition-sensitivity in a way that allows for a person's preferences to be decided or otherwise influenced by restricting her options (such as by poverty, or political oppression) is an affirmation of the justice of cultures that socialize its members to have particular preferences.⁸ Dworkin acknowledges that resource equality does hold the tame housewife responsible for her particular preferences, but does so because these preferences are constitutive of her conception of the good life. That is, she would not exchange them for another person's bundle of goods. However, as we will see, the question arises whether, and to what extent, what is really important is that people's preferences are genuine or authentic, and not imposed by outside forces, either social, economic, or other.⁹

To better see why this problem of genuine, or non-adaptive, preferences is so persuasive, we look first to Richard Arneson, and then to GA Cohen.

1.2.3 Equal Opportunity for Welfare

Cohen's view is so similar to Arneson's, that in many cases, they are grouped together. According to equality of opportunity for welfare, our egalitarian duty is satisfied not when welfare is equalized, but when each individual faces a similar opportunity to achieve the

⁷For the full exposition of the position, see [Dworkin, 2002b, Ch. 2].

⁸This worry is taken up both in the literature, and *in the real world* by Martha Nussbaum. See her [Nussbaum, 2000] and [Nussbaum, 2001]. See also [Baber, 2008].

⁹See [Dworkin, 2002c, pg. 70].

same welfare. In this way, Arneson insists that we can focus our attention to what is intuitively correct about welfare equality, while simultaneously satisfying something like Dworkin's insistence that we do not compensate for deficiencies that are the responsibility of the individual. For Arneson, Equal Opportunity for Welfare is satisfied when we have all faced the same or equivalent *decision trees*.

Equality of opportunity for welfare obtains when each individual faces an array of options that is equivalent to every other person's array of options *in terms of the prospects for preference satisfaction it offers*. To begin to think about what this means, for any individual, we could imagine constructing a huge decision tree which outlines all possible choices and outcomes, over the course of her life. It would contain many possible life histories, one for each long set of choices and outcomes. Using this decision tree, we could calculate, for our individual, an expected preference satisfaction score for each life history. This may look graphically like what game theorists call an "extensive form game". Equality of opportunity for welfare, then, obtains if the expected preference satisfaction score for their ideally considered second best preferences is equivalent for all persons.¹⁰

Ideally considered second best preferences are those which an individual would hold under ideally considered conditions. They are "those I would have if I were to engage in thoroughgoing deliberation about my preferences with full pertinent information, in a calm mood, while thinking clearly and making no reasoning errors."¹¹ Imagine the case of Richard, who would like nothing better for his Friday night than six domestic beers and three Arnold Schwarzenegger movies with his buddies. Richard, however, has always wished that he had studied harder in college, so that he could have gone to graduate school to learn to appreciate fine art, sophisticated conversation, and expensive wines. Richard seems to suffer a deficit of welfare, since he is not enjoying life as fully as he could, or as well as many of the rest of us.

¹⁰See [Arneson, 1989, pp. 85-86].

¹¹See [Arneson, 1989, pg. 83].

And he seems to suffer a resource deficit, since he envies the bundle of resources that others have, versus his own. His ideally considered ‘first best’ preferences are not being satisfied.

Assume further that if you were to ask Richard, he would admit that, though he wishes he had those more expensive tastes, *ceteris paribus*, as it stands he would not prefer to undergo the effort it would take to develop those tastes, even if we were to compensate him. He simply considers it too costly of his time to develop them. This latter case is the relevant one for Arneson, and it is the end result of this deliberation that he calls Richard’s ideally considered ‘second best’ preference. After considering his first best preferences, Richard then takes the opportunity to consider information regarding actual costs, including personal costs in overcoming resistance to these preferences. What is reasonable to prefer is re-calculated in light of these costs. If, given this calculation, Richard prefers a beer and a movie, then Arneson concludes that society owes him no compensation for his welfare deficits. In this case, we may stipulate that he has had a similar, or equivalent, opportunity to achieve the same or similar welfare as anyone else (such as Sam).

Finally, consider Sam, who is also a beer and a movie guy. Likewise, Sam wishes that he had developed expensive tastes in friends, art, and wine. However, unlike Richard, Sam *is* willing to undergo the burden of training needed to increase his welfare. Arneson claims that then society owes him some compensation to ameliorate his welfare deficit (assuming, again, that he is not directly responsible for his current position).

In this way, Arneson explains, both Sam and Richard faced the same decision tree: both faced similar opportunities to achieve the same level of welfare. And if society can ensure similar opportunities for welfare, then it has duly discharged its egalitarian duty.¹²

¹²See [Arneson, 1989] and [Arneson, 1999].

1.2.4 Equal Access to Advantage

Cohen defends the view that he calls *equality of access to advantage*, which is very much like a welfare based approach. While Dworkin considers expensive tastes to be fatally problematic for welfare egalitarianism, Cohen (along with Arneson, Roemer) argue that compensation for expensive tastes was not counter-intuitive, so long as those tastes were not freely chosen. Cohen argues that people should be compensated for deficits in welfare which are outside the realm of their responsibility, except to the extent that they would not choose to be without them. That is, for example, a starving person, who finds himself in that position, but does not choose to be so, deserves compensation by us (to equalize his welfare). However, this would not apply to a man who is fasting for, e.g., religious purposes. The latter, of course, identifies with his welfare deficit, and would not choose to be without it, and so we owe him no compensation.¹³

This position relies heavily on a theory of genuine choice, which, as Cohen notes, could land the inquiry directly “in the morass of the free will problem.”¹⁴ That is, if we must first wait for an account of free will that generates a theory of genuine choice, we may have a very long wait, indeed. I return to this problem later, but Cohen notes two brief responses:

1. It may just be that the problem is genuine, and if so, that is too bad, but it is no reason to give up on the argument. If the correct investigation of equality takes us into metaphysical problems, then that is where we will go.
2. Probably, though, we can avoid (1), if what we are looking for is not a solid distinction between free and non-free choice. Instead, what we want is to be able to see some choices as more or less free, and we can map those on to choices for which individuals are more or less responsible. The amount of compensation due will be a function of, among other things, the extent to which a disadvantage does not reflect genuine choice.

¹³See [Cohen, 1989].

¹⁴See [Cohen, 1989, pp. 933-34].

I return to this problem below. First, though, the important ways that Cohen's *equality of access to advantage* differ from Arneson's are illustrated by two counter-examples. They capitalize on his admission that he cannot state in a clear way what suffices for an 'advantage,' but that both welfare and resource deficiencies count as disadvantages¹⁵. Rather than choosing one, therefore, Cohen relies here on what he takes to be the heterogeneous nature of his conception of advantage.¹⁶

In the first thought experiment, Cohen introduces us to Dworkin's Jude, who has "expensive cheap tastes".¹⁷ Jude has inexpensive tastes, but (perhaps after reading Hemingway), decides to cultivate a taste for bullfighting. He later becomes frustrated, and wishes that he could afford the expense of traveling to Spain. His tastes are cheap, relatively speaking, because they require fewer resources than others, for a similar level of welfare. But they are expensive, because his cultivation of this taste makes the additional expense of travel, and thus the addition of resources, necessary to achieve that level of welfare.

The resource egalitarian would approve the increased income.¹⁸ Arneson would not. Access to advantage would grant more resources than equal opportunity for welfare, but less than equality of resources. Cohen argues that both considerations are relevant and inform our egalitarian commitments, including welfare and resources: "Jude then still has fewer resources than others, and only the same welfare, so equality of access to advantage cannot say on that basis, that he is overpaid."¹⁹

In the second counter-example, Cohen is sensitive to the fact that his theory is in need of an independent argument to explain why resources should be given consideration.

Let us return to the handicapped individual who needs an expensive wheelchair just to be mobile. Egalitarians, Cohen suggests, will be disposed to agree that he be given one.

¹⁵See [Cohen, 1989, pg. 916-21].

¹⁶See [Cohen, 1989, pg. 925 n36].

¹⁷For Dworkin's discussion, see [Dworkin, 2002b, pg. 58].

¹⁸See [Dworkin, 2002b, pp. 58-59].

¹⁹See [Cohen, 1989, pg. 925].

And they will be so disposed even before they have heard considerations regarding the effect that the wheelchair will have on his welfare. Instead, egalitarians will be disposed to offer a wheelchair to compensate for the disability *as such*, even before considerations of how it will affect his welfare. Cohen does not think that egalitarians will be motivated primarily by the individual's decreased opportunity for welfare²⁰

Of course, *why egalitarians will choose to compensate* in any given situation plays a central role. For example, do we compensate on the basis of neutralizing deficits in welfare, or do we compensate for resource deficits. But Cohen seems to take it as given that in some situations, such as the one under investigation, egalitarian intuitions report that resources are unambiguously relevant.

1.2.5 Capabilities Equality

The latest, and in many ways, most persuasive contribution to the debate has come from Amartya Sen, and Martha Nussbaum, and can be referred to as *equality of capabilities*. For Sen and Nussbaum, the direction that the literature has taken, particularly among the so-called luck egalitarians, has moved far afield from the central concerns of egalitarian and distributive justice, *viz.*, the need to identify those interests that we are committed to protecting as equals, to help one another realize the conception of the good.

For Nussbaum, that involves the very real and practical project of going into the world, and guaranteeing a set of human rights which secure the protection of basic needs. She argues for a list which outlines those needs, and which are based on an Aristotelian conception of *eudaimonia*, (i.e., a broad conception of the good life). Nussbaum has her own rich and complex research and advocacy project, and thus for our purposes, though they stand well

²⁰Tiny Tim, for example, has a very high opportunity for welfare, even without the chair, since he is quite efficient at converting resources into welfare. Egalitarians would be disposed to give Tiny Tim a wheelchair even if it would do little to change his level of welfare – simply because he is handicapped. Of course, if others could be helped more efficiently than Tiny Tim, then resources might be diverted to them, instead.

on their own, it is best to understand Nussbaum's arguments in conjunction with Sen's more detailed and more complex theory of capabilities equality.

Capabilities, for Sen, can be thought of as the set of functionings (which span both beings and doings) that a person can achieve. Sen identifies a vector of functionings which ensure a person's ability to lead one kind of life or another. Functionings are those things that a person values, and has reason to value. Capabilities equality focuses less on what a person *has* (in terms of resources), and more on what a person *can do with* what she has. Sen argues that, for example, it's not enough to be sure that someone has enough food, when what we really care about is whether or not she is well nourished.

Central, then, to the capabilities approach, is a requirement of effective freedom. Effective freedom is stronger than simple freedom: it is not enough to have several choices, nor a simple maximization of choices. It is the capacity or capability to have one's efforts make a real change in the value of one's life. By concentrating on real value, rather than brute causation, Sen avoids the problem of adaptive preferences (a problem that's so central to the work of Nussbaum and others).²¹ If that is right, then the role of responsibility in distributive justice is severely weakened.

A theory which makes effective freedom a central focus will be unlikely also to worry directly about the relationship between responsibility and genuine choice. The choices of the worst off in particular are usually influenced by non-ideal considerations, such as poverty or political oppression. Thus, if a theory focuses on effective freedom, the role that the relationship between responsibility and freedom will play will be limited..²²

²¹For this reason, Capabilities Equality may be the most charitable way to organize Dworkin's Equality of Resources. Dworkin seems to concede this point: he says that if we interpret capabilities equality as requiring that an individual's capabilities to achieve complex achievements is the result of her personality and choice, rather than differences in bundles of resources, then capabilities equality just reduces to equality of resources. Nonetheless, framing the solution this way still allows Sen to avoid the problem of adaptive preferences. See [Dworkin, 2002c, pp. pg. 70 -03].

²²See [Sen, 1985] and [Anderson, 1999].

1.2.6 Replies to Sen

Though the capabilities approach is not the most recent contribution chronologically, I mention it last because of its relative importance for crafting the general shape of the subsequent literature. Most of the rest of the approaches are either direct replies to, or are shaped in reference to, capabilities.²³ Dworkin, in particular, accuses the capabilities approach of either collapsing into equality of welfare, or equality of resources, depending on how best one should characterize capabilities.

1.2.7 Other Considerations

Matravers and Choice

In an often cited, seldom discussed, and surprisingly influential article, Matravers outlines the relationship between freedom, individual choice, responsibility, and the luck egalitarian literature. In his article, he suggests that we may take the following sort of argument seriously:

1. Until philosophers solve the free will problem, any theory that relies on a conception of choice will also remain unsolved.
2. Luck egalitarian theories which include reference to personal responsibility in the argument will rely on a conception of choice
3. Therefore, probably, theories of egalitarian justice which make use of reference to personal responsibility will remain ultimately unresolved

If that is right, and if we want a theory that is useful, reliable, and practical, we should abandon, or call seriously into question, responsibility based theories, such as Dworkin's option luck/brute luck distinction.²⁴

²³See for example [Pettit, 2001], [Williams, 2002], and [Dworkin, 2002a].

²⁴See [Matravers, 2002b], [Matravers, 2002a], and [Matravers, 2007].

In my view, there is much that is wrong with this argument. I am somewhat persuaded by Cohen's own response to this line of reasoning, *viz.*, that its difficulty is no reason to abandon it, and further, we may be able to sidestep the problem by treating choice and responsibility along an axis. My own replies are best taken in conjunction with Cohen's.

1. The consequence of taking the objection seriously is that we should also abandon so many other philosophical endeavors which rely on a theory of choice. Meta-ethical theories, problems in the philosophy of mind, causation, and free will, also hinge on choice theory, but I would argue that it would miss the point to subsequently give them up.
2. Though a decisive solution is unlikely, well developed arguments exist on both sides of the debate, including the free will/compatibilist side. Though I may not convince you of the certainty of a position, it does not follow that I should not provide an argument to defend it.
3. Distributive justice relies on so many other undecidable (or undecided) philosophical positions, metaphysical, psychological, and meta-ethical. These are no reason to abandon the project.
4. I do not believe that, as Cohen notes, we will be stuck in the "morass of the free will problem". The free will debate centers on a strong metaphysical distinction about whether free will exists at all, or whether the universe is entirely deterministic. What we are engaged in here is a distinctive, and relatively less complex problem, of identifying instances of free choice, assuming that they exist.
5. (and this is the weakest of my points) In the unlikely case that the philosophical problem of free choice does reach a resolution, we will have squandered the opportunity to develop the theory based on one or another outcome. Philosophers are not wasting

their time in arguing about the nature of free will – to abandon my project on the basis that they will never agree amongst themselves minimizes and undermines the value of the work that they do.

For these reasons, and, more importantly, those which I develop in Chapter 3, I reject this line of reasoning.

Hinton and Republicanism

Hinton, and others, represent an important republican objection to Dworkin specifically, but to the luck egalitarian literature more generally. For Hinton, Dworkin did a dis-service to egalitarianism by introducing an emphasis on the brute luck/option luck distinction. What is important, for Hinton, is not whether an individual is or is not responsible for inequalities. What is important for us as egalitarians is that we adopt a view of equality that is focused on the moral attributes of economic and social relations between people. As egalitarians, our focus should be on ending and overcoming situations of exploitation and domination, not on assigning degrees of desert based on responsibilities and choices.

Take, Hinton suggests, the example of racial domination that existed under apartheid. What made this system unjust was not some arbitrary fact about one's skin color: what made it unjust was that one group subjected another to subjugation, humiliation, and deprivation. The evil of the system did not live in its foundation in brute luck (as, for example, being born with black skin), it lived precisely in the exploitation and domination of black people by white people.

And so Hinton's thesis is this: it is not the case that what makes inequality morally objectionable is its origin in brute luck. Our focus on controlling the effects of brute luck, while compensating option luck, is misplaced. Instead, egalitarian intuitions demand that we eliminate:

1. economic exploitation
2. social domination

Hinton calls this view *equality of status*.²⁵

He defines *economic exploitation* as,

... roughly speaking, social relations that empower one group to take systematic advantage of the work done by the members of another group.

He defines *social domination*, as

... roughly, social relations that permit one group to exclude another from access to important benefits, institutions, and liberties.²⁶

Though I am certainly sympathetic to Hinton's main focus, it strikes me as obvious that Dworkin's envy test and insurance model could explain the evil of apartheid. In my reading, in fact, Dworkin's equality of resources model sits along side Justice as Fairness. That is, Dworkin is offering a theory that is meant to fill in the deficits of Justice as Fairness, particularly in the area of the role that responsibility plays in the theory. As an internal criticism, Hinton owes us some concrete example of an intuitive injustice that is not well captured by the luck egalitarians. Even if Dworkin's theory does not demonstrate well what makes apartheid unjust, it does still account for the injustice. If Hinton's theory is meant to work as a criticism of Dworkin's equality of resources, there should be some intuitive injustice that it does not capture. But if Dworkin's model did not find injustice in apartheid, there would be larger problems with the theory besides misplaced focus.

²⁵See [Hinton, 2001, 79-80].

²⁶[Hinton, 2001, pg. 80].

Anderson

Anderson, with Hinton, argues that the literature has moved too far afield from its original goal. As theories become more complicated, and thought experiments and counter-examples are developed to deal with them, the field has concerned itself with stunt men, surfers, and hypothetical individuals washed up on remote islands. Instead, she suggests that it should be focused on how best to answer the question of how we should live together as equals, and what we owe to each other in that situation. Luck equality makes the notion of responsibility central, and that is a mistake. “Responsibility” is not something on which egalitarians should focus.

Furthermore, she notes, that arguments such as Dworkin’s, Arneson’s, and Cohen’s, are paternalistic, and disrespectful to those individuals that they have been applied to. They are paternalistic because as a premise, they assume that the theory can decide what is best for a person, and what she needs or deserves. Instead, egalitarians should focus on creating conditions such that we can stand as equals, not to determine who holds what responsibility for his/her disadvantage.²⁷

In his (2006), Kaufman suggests that, though her point is important, she is only partially successful in her suggestion that we remove (or at least reconsider) the role that responsibility play in our theory.²⁸ I say more about the problem of free choice in Chapter 3.

Urgency – Scanlon

Scanlon argues that in making judgments about distributive justice, an acceptable account of distributive justice should be ordered by an account of urgency. That is, some people are in greater need, and their need is more urgent, and should be a priority in distributing social goods.

²⁷See [Anderson, 1999].

²⁸See [Kaufman, 2004].

I think that there is something obviously right about this point. There are some people in the world who are situated such that if their needs are not met quickly, they will suffer permanent damage, or, in many cases, will simply die. Furthermore, there are people in the world who are currently suffering social domination and economic exploitation. Resources should be devoted to alleviate those situations, even to the extent that it takes away from the resources in which have an interest.

This, of course, leaves aside another puzzle. The puzzle is much less practically serious, in that the solution does not feed anyone, nor deliver them from exploitation. The end result of worrying about this puzzle lives somewhere between satisfying intellectual curiosity, and guiding public policy. That is, if we grant that the problem of urgency according to Scanlon is a real one that ought to be of central concern, there is still an interesting puzzle to be solved – i.e., what do we, as equals, with a right to press our claims upon one another, owe to each other? In a developed, western nation, with little or no destitution, how best should we distribute resources?²⁹ The answer here will almost certainly stand alongside positions such as Scanlon and Sen’s, in that the poor in places like the US will still receive the aid that they need and deserve.³⁰ But the issue here still remains: in a well ordered society, what level of expectation for unequal compensation would be judged to be legitimate?

1.2.8 Moving Forward

Fitting nicely into the more canonical literature, and yet being too newly published to have generated the attention that it certainly deserves, is Gerald Cohen’s newest book. This text will be the subject of Chapter 2 of this dissertation, though we can look at it briefly here.

²⁹I make a somewhat contentious distinction here by calling nations such as the United States, Japan, or Great Britain nations with “little or no destitution”. But the distinction I want to draw is this: there are places in the world where children die of malnutrition, and where the majority of citizens do not have a stable place to live, or a reliable source of food. Western countries are marked by increasing disparities of wealth and income, but for now, defining destitution in this way, Western nations have social safety nets in place to provide for at least these very minimal requirements.

³⁰See [Scanlon, 1975].

In Cohen's new book, he sets out to undermine the Rawlsian project of justice and equality. In the first half of the book, he attempts to relocate justice, from the basic structure, and into the individual. For Rawls, the primary subject of justice is the basic structure of society. The basic structure is primary, he says, because, "its effects are so profound and present from the start".³¹ By locating the subject of justice in the basic structure, Rawls side steps discussions about the justice of individual actions and choices. Talk of this latter sort represents a category error in justice as fairness. Cohen, however, gives a compelling (though ultimately flawed) argument that the proper place to locate the subject of justice is in the individual, in her actions and choices. I outline these in Chapter 2.

A successful criticism of the the basic structure as the subject of justice would demonstrate serious problems for our reliance on the difference principle in particular, and in Rawls' theory of justice in general. In doing so, he will have undermined the constructivist project itself, which is the main goal of the second half of Cohen's new book.

Relocating justice from the basic structure into the individual would have consequences for the role that individual responsibility plays in our judgments about justice. For example, current judgments about justice involve referring to the two principles, which would be decided in a situation that is fair. If judgments about justice also would include questions of individual choice and actions, then additional questions about the freedom and responsibility of individuals would come to bear. I do think that those judgments are important, but not for the reasons that Cohen indicates in this argument.

I take up a criticism of these positions in Chapter 2. But we can look at them in a more general way here.³²

³¹[Rawls, 1999, pg 6]

³²See [Cohen, 2008].

1.3 Early Insights

1.3.1 Cohen's Critique

In my own project, I defend something along the lines of Cohen's *equality of access to advantage*, although with some obvious amendments. Specifically, in his new book, Cohen presents a series of pretty compelling objections to Rawls' *Theory of Justice*. In particular, he attacks justice as fairness as being such that one cannot hold a commitment to the difference principle, and simultaneously insist on unequal incentives for work that is in high social demand. The happy talented, as he calls them, must reject the underlying principles which support the difference principle, if they are also to ask for greater compensation. They must know that the inequality which favors them is unjust because their extra incentives are not strictly required to benefit the least advantaged, which, according to Cohen, is the very intuition that supports the difference principle. Cohen calls this the *incentives argument*.

Presented as an internal criticism of Rawls, I will argue that the incentives argument fails. The parties in a well ordered society find themselves in a society governed by principles of justice that are chosen by free and equal persons under conditions of equality, behind the veil of ignorance. Those individuals will have designed their society so that it ensures a legitimate expectation of extra compensation for work that is in high social demand, so long as it is consistent with the difference principle (through, e.g., a graduated tax scheme). To attribute injustice to parties who, in good faith, work according to those principles, is to misunderstand, or mis-attribute, the relevant parts of Rawls' (albeit very complex) system.³³

³³In many well known passages, Rawls notes that matters of unequal distribution of compensation are matters of "pure procedural justice", so that the rules of the economic system are just, if it is generated by a decision procedure that is fair, i.e., according to the rules of the original position. If it is generated in conformity with those rules, it will be just, no matter what is the resulting distribution. There is no prima facie, or independent criterion by which we can judge an unequal economic distribution. See [Rawls, 1999, pp. 74-75], and [MacLeod, 2012, pp. 187-92]. On the differences in assumptions between Rawls (whose pure procedural justice makes no antecedent judgments about property rights or the best economic distribution) and Nozick's (which does assume a particular set of rights), see [Ryan, 1977, pp. 136-37].

The difference principle simply does not apply to the actions or choices of individuals. To answer the incentives argument, in other words, we must reply that the scope of justice in *justice as fairness* is the basic structure itself, not individual actions or decisions. Call this the *basic structure argument*.

Cohen anticipates this objection, and argues that the basic structure argument is insufficient to answer the initial criticism. There is an inherent ambiguity in the basic structure, and on this ambiguity, he builds what I call the *basic structure objection*. The ambiguity in the basic structure looks like this: Either the basic structure applies only to coercive elements of the legal structures, or else it also applies to uncoerced elements of the legal structure as well. If only coerced, then it seems that individual actions and choices are immune from the basic structure argument, and the incentives argument fails. However, Cohen believes that he also shows that the basic structure, and therefore justice itself, ranges also over uncoerced elements of elements of the legal structure – *viz.*, the family. In short, the structure of the family itself is reinforced not by coercive law, but instead by tradition, affection, etc. Nonetheless, structures within the family may be considered unjust, as e.g., when boys but not girls have access to education or health care. And if that is correct, he concludes, the basic structure argument fails to deflect the initial worry motivated by the incentives argument. A just society, therefore, cannot be driven by deep inequality, no matter what form this inequality takes.

Again, however, taken as an internal critique of justice as fairness, this objection fails. While the subject of justice is to regulate the basic structure of society, it also regulates individual practices when those practices depart from background justice. Rawls requires that when individual choices mitigate or undermine rights, liberties, or equal opportunity, we are obliged to repair the departure from justice through compensation or other adjustments. For example, Rawls explains, even when individuals act in good faith and according to the principles of a just basic structure, many individual transactions over time can move the

accumulated configuration to support a system that undermines equal opportunity and unjustified inequalities. Thus, we require special institutions to preserve background justice.³⁴

As I note elsewhere, though I will argue that the internal critique fails, there is still something substantively important and compelling about Cohen's vision for egalitarian justice. It is unfortunate that he offers it as an internal critique of Rawls' justice as fairness. I say this because, although the internal criticism of Rawls fails, as an external critique of Rawls' theory, Cohen's own arguments work quite well as a skeleton of a compelling stand-alone egalitarian theory of justice. In his long career, neither Cohen nor anyone else, ever developed these ideas as a separate competing theory of justice which may stand alone on its own merits.

The first part of my project begins, therefore, with the skeleton outline of Cohen's alternative set of considered judgments of justice, offered not as an internal critique of but as a competing set of considered judgments. There are many judgments of justice that Cohen and Rawls share. Both are egalitarian. Both are concerned with eliminating the effects of morally arbitrary considerations from one's life chances. Both are concerned to guarantee impartiality in the basic structure, or in the rules and laws that govern our interactions together.

However, there are points where my own (and, I believe, Cohen's) considered judgments about justice diverge from the Rawlsian system. Rawls argues that individuals deserve entitlements to unequal distributions of primary goods when they employ talents or endowments that are in high social demand, or are well compensated for other reasons, so long as these inequalities satisfy the principles of justice, and in particular, the difference principle. He calls these entitlements *legitimate expectations*, and he gives a few separate arguments to support their inclusion in the theory. First, and most simply, it is a liberty interest that

³⁴ "Individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and transform present tendencies. See [Rawls, 1993, pg. 267-68] See also [Rawls, 2001, pg 53].

the basic structure should protect expectations so long as they are legitimate.³⁵ Second, as an efficiency concern, if we did not respect individuals' legitimate expectations, markets and innovation would stagnate, since the talented would have no extra incentive to work harder or smarter.³⁶ Third, respecting legitimate expectations encourages entrepreneurs to do things that benefit the working class.³⁷ Respecting legitimate expectations thus works to the greatest benefit of all.

There is, however, no *prima facie* reason to accept the claim that inequalities in distributions of primary good are a requirement of justice. A case may be made, in fact, for a competing set of considered judgments which suggest that any system which is founded on deep inequality is unjust. In the first part of the dissertation I defend such a system: one which weights entitlements to claims for unequal compensation and distribution much less heavily than does Rawls. My claim is that our set of considered judgments will reject certain disparities in wealth and income as unjust, in considering the basic structure of society.

1.3.2 What challenge does he raise for Rawls?

In considering a criticism of Rawls' justice as fairness, it is fair to inquire about the exact location of the challenge for Rawls and his project.

A central concern for Rawls is the project of *justification*. Rawls goes to great lengths not only to enumerate, e.g., the two principles of justice, but takes nearly as much time explaining how, why, and under what circumstances they would be chosen. So why would they be chosen?

Remember that justice as fairness claims to move from, "widely accepted but weak premises to more specific conclusions" (16). That is, we begin by considering those presumptions that are natural and plausible, The idea here is that by identifying those with

³⁵[Rawls, 1999, pg. 275].

³⁶[Rawls, 1999, pg. 240].

³⁷[Rawls, 1999, pg. 68].

which all would agree, the social contract approach would impose bonds on all involved. If we're moving from propositions with which everyone agrees, then the principles which we derive must be acceptable by all.

Cohen presents his argument in such a way that it is meant to undermine the internal consistency of Rawls' project. That is, if Cohen's criticism works, then Rawls theory is internally inconsistent. In this, I argue that he fails.

In one sense, then, this investigation into the proper role of entitlements in a correct theory of justice poses no challenge at all for Rawls, and justice as fairness. This is so because redefining our considered judgments in light of new and thoughtful problems is perfectly consistent with the original project.

In another sense, however, redefining the role that entitlements plays in a correct theory of justice will completely undermine parts of Rawls' *justice as fairness*, which he was, at least, tentatively, committed to. With little argument, though with greater force, Rawls suggested that we respect people's legitimate expectations for compensation for work that is in high social demand or are well compensated for other reasons. Rawls himself seemed possibly apprehensive about this claim: he assumes that it's supported as a liberty interest, though he does not argue for this claim very forcefully.

As a liberty interest, however, entitlements, or legitimate expectations, are guaranteed only to the extent that they do not conflict with other liberty interests.

As I indicated, one way to demonstrate that we may need to revisit a considered judgment is by the method of *reductio ad absurdum*, that is, by showing that a commitment to that principle results in a 'horror story', or some other undesirable conclusion. The following examples, developed from Cohen's worry about incentives, are relevant:³⁸

Consider the Nigel Lawson tax cuts on 1988, in which he brought the tax rate of top earners in the UK from 60% to 40%. Or, the Bush-era tax cuts (viz., the Economic Growth

³⁸See [Cohen, 2008, Ch. 2].

and Tax Relief Reconciliation Act of 2001 and the Jobs and Growth Tax Relief Reconciliation Act of 2003), which lowered the tax burden of those Americans in the highest tax bracket.

The argument for such redistributions followed reasoning familiar from the difference principle: by allowing the most talented individuals to keep a larger share of their earnings, they will have an incentive to work harder, (or longer, or to invest in more places, etc), generating more revenue, which will benefit those least advantaged members of society, through job creation, tax collection, etc. This economic disparity is further ensured by our respect for people's entitlements for legitimate expectations for compensation for their work, assuming that it's consistent with the principles of justice, and in particular the difference principle. According to the liberty principle, people are entitled to what flows from their talents.

Unfortunately, the data do not support this conclusion. In the time since the Bush tax cuts, the disparity between the wealthiest class and everyone else has increased. The Lawson tax cuts were wildly unpopular for similar reasons, and were later repealed. The high respect that we place on entitlements, even when respecting the difference principle, in these cases, resulted in a harm to the least advantaged members of society that is counter-intuitive from the position of justice.³⁹

1.3.3 The Correct Cut

I argue, with Cohen, that we can cut into the distinction at a much more reasonable, and I think intuitive location along the continuum between responsibility, entitlement, and arbitrariness. Rawls argues for legitimate expectations. I have argued that Dworkin's work is best read as a refinement of Rawls on Legitimate Expectations. For Dworkin, as we have

³⁹This example is not meant to work as a counter-example to the difference principle, obviously, since thought these were justified by something like the difference principle, they were not carried out properly. Instead, this example is meant to show that, by neglecting important aspects of the rest of the theory, for example applying the difference principle without first ensuring democratic equality, our social institutions support vast inequalities in wealth and income.

seen, so long as an initial criteria of equality of *resources* is satisfied, then barring further complications due to bad brute luck (against which we are expected to insure), the outcome is just. To see why this reading is insufficient to capture our intuitions about justice, consider two final thought experiments: Juan, our bull fighting enthusiast, and the man with painful arms.

The man with painful arms has paralyzed legs. He needs a wheelchair to get around. As egalitarians, Dworkin suggests, we ought to see that he gets one, because otherwise, he suffers a deficit of *resources*. Furthermore, Dworkin suggests, he ought to receive a wheelchair even if he does not necessarily want it – that is, even if he suffers no welfare deficit. It may be, for example, our man turned out to be Tiny Tim. Tiny Tim is very efficient at converting resources into welfare, and may decide to forgo his wheelchair if it could make a small benefit to grouchy old Scrooge. Nonetheless, Dworkin argues, our man should receive his chair. Not because he suffers a welfare deficit – but to equalize his stock of resources.

But, of course, our man has an additional medical misfortune. It is very painful for him to move his arms. While it is not difficult for him to do so (he may do so as well or better than you and I), it is nonetheless costly for him to do so, since afterward he suffers extreme pain.

It may be again that the egalitarian recommend that our man be prescribed painkillers. But in this case, it cannot be because he suffers a deficit of *resources*.

What would Dworkin say here? He may try to reframe the issue thus: “we would want to compensate our man for a deficit that he suffers – a deficit in the resource of pain avoidance.” But that, of course, is just welfare concern in resource language. Dworkin would also be committed to something like the following: when we judge who is deficient in his stock of resources, we do so relative to the *satisfaction* that other similarly situated people feel to their own bundle of resources. People who just need more resources for a similar level of satisfaction have expensive tastes, and Dworkin would not compensate people for

their expensive tastes. Students with learning disabilities who need more time to complete examinations, individuals who are uniquely sensitive to the elements, such as cold or bright light, and who need extra clothing or fuel to be comfortable, have expensive tastes, though they are preferences that are beyond a person's control. Dworkin's cut is between a person's preferences and resources. With Cohen, I defend a cut that is between those conditions for which a person is responsible, and those for which she is not. Cohen's cut is more fine grained: while Dworkin would not compensate for expensive tastes, Cohen would not compensate for expensive tastes that are such that a person chose to develop (or for which she personally identifies).

Nonetheless, both Dworkin and Cohen agree that, as egalitarians, we should compensate our man for both of his disadvantages because they are both situations for which he cannot be held responsible.

However, what is clear from this is that the disadvantage does not track a pattern of choice, but rather his lack of it. Our egalitarian duty has little to do with establishing the "legitimate" level of compensation that flows from the choices for which a person can be said to be responsible. Instead, the appropriate focus is on addressing those instances in which a person suffers some relevant deficit but for which he could not be held responsible.

While Rawls and Dworkin will ultimately also be concerned to diminish the effects of arbitrariness on a person's life chances, diminishing arbitrariness is only one of a few central concerns which we must simultaneously respect, such as responsibility and liberty, and entitlements. That is, what I will develop will depend on a more nuanced view of responsibility and the role that it plays in a correct theory of justice.

However, if our man with the painful arms is a legitimate example, then the appropriate *focus* of an egalitarian concern is to diminish the effect of *disadvantage* on a person's stock of resources and welfare. But when evaluating whether our man should be compensated, we needed to decide whether (and possibly to what extent) he could have avoided the dis-

advantage, and whether he could now overcome it. The emphasis, then, will be the reverse of Dworkin and Rawls – for Cohen, the correct focus is almost entirely on overcoming arbitrariness, almost to the exclusion of respecting entitlements. Here a disagreement between Cohen and Rawls surfaces. For Cohen, we should focus on the elimination of arbitrariness as it exists at the level of the individual. For Rawls, of course, our focus is on mitigating the effect of arbitrariness by focusing at the level of the basic structure.⁴⁰

Cohen presents our man with the expensive arms as a reply to Dworkin and Rawls. The example of Jude the bullfighter is meant to answer Arneson, and other defenders of “equality of opportunity for welfare”. To briefly rehearse the example, Jude has meager tastes, but he reads Hemingway, and intentionally cultivates a love of bullfighting. To satisfy his preferences (viz., to equalize his welfare, relative to others), Jude needs tickets to a bullfight. These tickets are inexpensive, such that the cost of satisfying Jude’s preferences is still cheaper than the cost of most people’s preference satisfaction. Jude has, therefore *cheap expensive tastes*. They are expensive, since he intentionally cultivated them. They are cheap, insofar as they cost less than most people’s tastes to satisfy.

Arneson would deny Jude’s request, since he could have declined to develop this taste. Dworkin takes the opposite approach. He ignores Jude’s tastes and their history, and sees no reason that Jude should receive fewer resources than everyone else. But why insist that Jude receive equal resources, when he would be just as satisfied with fewer of them? Why overpay him, when an equal distribution of welfare could be had for less?

The lesson to learn from the examples of Jude, and our man with the painful arms, is that the standard cut (and in particular the one we inherit from Rawls and Dworkin) into our egalitarian duties cuts into the wrong place. Rawls’ focus on legitimate expectations commits him to a cut like Dworkin’s, which focuses on the continuum between preferences and responsibility, and sets out to equalize resources. It also shows that the welfarist cuts

⁴⁰See [Rawls, 1999, pg 74-79] and [Rawls, 2001, pg 50].

in at the wrong place. Instead, what we should focus on is something that Cohen has tentatively called “advantage”. And in the weighting of arbitrariness versus entitlements, advantage gives much more emphasis to diminishing the effect that arbitrary conditions make on one’s life chances.

At this point, a restatement of my project in light of these examples would be helpful. A central goal of my project is to complete the work that Cohen began but did not complete. In particular, my work attempts to identify the correct cut into the continuum between responsibility and arbitrariness, and entitlements – one that would compensate people for deficits to their well-being, and for which it would be inappropriate to hold them responsible. The advantage of this project, or so I will argue, is that it tracks our egalitarian intuitions regarding what we owe to each other as free and equal persons.

There are a number of problems which this project will need to overcome. The first relates to the free will problem, which I discuss elsewhere (§2.4, 2.7.1, & 4.3). In short, since the theory under investigation seems to require a position which identifies genuine choices to determine which well-being deficits an agent ought, or ought not, to be held responsible, it has the potential to be bogged down in a millennia-old debate about free will. That is, before we can identify genuine choice sufficient to suggest personal responsibility, we must solve the free will problem. I argue that for our purposes, despite arguments to the contrary, it is not necessary to solve the free will problem in order to support an egalitarian theory that relies on [genuine] preferences. A perfectly sufficient criterion would be a practical and workable distinction between well-being deficits for which a person ought, and ought not, to be held responsible.

The second problem which my project will need to overcome relates to the objection, addressed above, that the set of “genuine” preferences is probably close to empty. As the objection goes, a theory which rests on genuine, uninfluenced, or spontaneous preferences to decide responsibility will discover that they are few. This is a standard objection to

the compatibilist interpretation of free will and responsibility. Again, I will argue that the identification of so-called “genuine” preferences is un-necessary: instead, we need a workable distinction between those deficits in well being for which a person should, and should not, be held responsible. This is the subject of chapter 3. I develop a position somewhat similar to Elster’s, such that our judgement is that a choice or decision is “more genuine”, the more information we have.⁴¹

A third related problem involves pulling apart well-being deficits with which a person identifies from those with which she does not. We are probably obliged to feed a starving man, given that he finds himself in that situation in the relevant way. We are probably not obliged to feed him if his situation is one with which he identifies, e.g., for religious penance. Somewhere between these two extremes lies the correct cut.

As I mention above, my strategy is to work from within, rather than externally to, Rawls’ approach and argue from considered judgments that pass the test of reflection. This strategy involves considering counter-examples and thought experiments, such as those introduced above, and others.

1.3.4 Libertarianism

We might evaluate the correctness of the role that entitlements play in the correct theory of justice by looking at a theory which places a *very heavy weight* on them, such as Nozick’s libertarian treatment of justice. Nozick famously argues that (1) what flows from a just situation is itself just, and (2) whatever flows from a just situation where transaction are fully voluntary is just.⁴² Nozick concludes that only the very minimal state is legitimate, and that justice guarantees a person nearly complete entitlement to the product of his/her labor.

⁴¹See [Elster, 1985].

⁴²See [Nozick, 1974, pg. 151].

For Nozick, the argument begins with the primary assumptions about liberty and property rights, and so what follows must be derived from a strong commitment to them. Socialist or socialist democratic (or other “patterned” principles) are willing to temper individual liberty with other interests (such as equality), and so they fall short of Nozick’s requirement of justice. For Nozick, the cost of socialism to liberty is too high. Put another way, if we diminish the weight that entitlements play in the correct theory of justice to the level that Cohen would accept, then we have simultaneously diminished liberty to an unacceptable degree. For Nozick, only by guaranteeing liberty do we guarantee that we preserve justice.

Cohen’s criticisms of Nozick are relevant here.⁴³ Does liberty always preserve justice? Consider the problem of self ownership. Could we locate a situation that is unjust but which is generated by (2) above? Consider two individuals, A and B, both of whom would love so much to own a slave that they would be willing to enter a lottery where the benefit of owning a slave comes with the risk of becoming one. The two flip a fair coin, B loses, and A slaps the irons on him. The state of affairs in which one person own another is unjust, but sanctioned by (2), and so (2) is unjust (by *reductio ad absurdum*).

It looks like, for our purposes, our considered judgments about the correct relationship between justice, liberty, equality on the one hand, and the role that entitlements will play, on the other, comes up short of where Nozick would like. It is incorrect to place a weight so heavy on entitlements, as we have seen. But that does not answer the question: what role should entitlements play? As Cohen notes, Robert J van der Veen and Phillip Van Parijs concluded correctly, “all theories of justice have an entitlement component, and no theory of justice is a pure entitlement theory”.⁴⁴

It is clear then, that, to some extent we have an entitlement to what flows from our bodies, and from our talents, but contrary to Nozick’s much stronger claim, I, with Rawls, argue

⁴³See [Cohen, 1995, Ch. 1].

⁴⁴See [Van der Veen and Van Parijs, 1985, pp. 70-74].

that this entitlement must be *tempered by a process that is fair*. For Rawls, this fairness extends through the principles of justice, with certain strong requirements for legitimate expectations.

1.3.5 Basic Structure

In answering the incentives argument, as noted above, Cohen gives what I have called *the basic structure objection*. In my reply (above) I argue that Cohen's basic structure objection (as a reply to the basic structure argument) fails as an internal criticism of Rawls theory of justice. Cohen bases his objection on a supposed ambiguity within the basic structure which does not exist. After dealing what he takes to be the critical blow, he assumes that the basic structure, as Rawls has envisioned it, is the wrong focus for questions of justice. Since the ambiguity fails, however, so does the objection.

There is the further question, though, in treating Cohen's theory as an external critique of Rawls, and that is exactly this: is the basic structure the correct focus for questions about justice. Rawls suggests that the answer is yes, "because its effects are so profound and present from the start".⁴⁵ This is undoubtedly true, but is that sufficient reason to call the basic structure the correct domain of justice? Why should it have a specific domain at all? Rawls discounts the attribution of justice to single actions and choices, but those certainly seem relevant from the standpoint of justice. If the relevant concern for the egalitarian surrounds the issue of what we owe to each other as free and equal individuals, why should the domain of justice be any other than our relationship to each other? In Chapter 2, I explain how Rawls' commitments to "background justice" help him to answer these concerns.

⁴⁵See [Rawls, 1999, pg. 3].

1.4 Further Projects

Some further issues I resolve along the way are as follows. These topics will take on a central importance. They include issues of responsibility, heterogeneity, and freedom of the will. Let us look briefly at each.

1.4.1 Responsibility

The second part of the project lies at the meeting between the development of the external critique of justice as fairness, on the one hand, and responsibility, on the other hand. In particular, if our theory limits the role that entitlements play in distribution of goods, then an inequality in distribution will reflect something besides how hard someone works, or how high his/her skills are in demand. Instead, it will be a reflection of lots of different lucky and unlucky circumstances.

In one respect then, a just distribution will be a function of the basic structure. It will be dictated by the fair rules that we will agree upon in a just society. In another respect, too, however, a just distribution will have to take into consideration people's choices and actions, as they occur from within the basic structure. The resulting just distribution will be a sort of a vector which weighs these two considerations against one another.⁴⁶

The exact relationship between these two considerations, and thus the shape of such a vector, will need to be worked out.

1.4.2 Heterogeneity

In his [Cohen, 1989], as I have mentioned, Cohen describes what he calls an *unhappy heterogeneity* in the currency of egalitarian justice. He admits that, like Sen, both welfare and resource concerns are relevant when resolving our egalitarian duties. Jude, the bullfighting

⁴⁶[Cohen, 2008, pg. 126].

fan, the fellow in the wheelchair, and the man with painful arms, discussed above, are meant to serve as an example of this.

On this subject, Cohen's *equality of access to advantage*, like Sen & Nussbaum's capabilities equality, lives somewhere between the two more "extremist" camps, with Arneson on the side of defending equality of (opportunity for) welfare, and Dworkin defending his sophisticated version of equality of resources. While Cohen's arguments, in the end, rely on a heterogeneous mixture of both considerations, he admits that, like capabilities equality, the worry is that a heterogeneous currency must be principled. He argues that Sen's is not, but leaves open the question of whether or not his own is.

An important defense of a Cohen inspired theory must resolve this question.

1.4.3 Free Will Problem

A further worry that Cohen leaves unresolved is the "morass of the free will problem" problem, discussed above (§2.4 & 2.7.1). Namely, any theory of justice that relies so heavily on the moment of genuine choice must explain what is meant by 'genuine choice'. And any sophisticated explanation of that is hopelessly bogged down in the thousands-of-years long free will debate.

I will develop my thoughts, outlined above. Such a development will require some investigation into the free will literature itself, but will also require some treatment of more contemporary investigations of the intersection of freedom, responsibility and morality.⁴⁷ And, as noted above, this has caused many (Anderson, Hinton, Kaufman, Matravers) to give up on the project of luck egalitarianism entirely. I believe that a more serious treatment of the issue can work to undermine the motivation for giving up the project.⁴⁸

⁴⁷Cf. [Smiley, 1992], [Athanasoulis, 2005], [Mele, 2006], and [Matravers, 2007].

⁴⁸I mention the outline of my objections in §2.7.1 above, so I do not repeat them here.

1.5 Conclusion

In this document, I have set out the basics of the so-called “Luck Egalitarian” literature, along with their problems and replies, where relevant. I have also set up the remaining chapters.

- In chapter 2, I develop in more detail my objection to Cohen’s incentives argument. Chapter 2 ends with my argument that, while Cohen’s points fails as an internal critique of Justice as Fairness, it does work as an external critique, giving egalitarians an opportunity to re-evaluate the roles that responsibility should play in our best theory of justice. I conclude that our best theories will be largely (or much more largely than Rawls allowed) egalitarian.
- In chapter 3, I explore a much more egalitarian theory of justice by considering Rawls’ question, “Can a society which respects liberal property rights every be well ordered?” Or, put another way, “Are the citizens of a well ordered society nonetheless alienated?” Can we resolve liberal commitments to property rights with egalitarianism?
- In chapter 4, I return to Cohen’s worry that a theory which hangs on “genuine” free choice will be mired in the free will problem. I set out the free will problem, and demonstrate why it really is a problem. Nonetheless, I develop a contextual reading of freedom and responsibility, which I take from Bernard Williams, which allows us to resolve freedom, choice, and responsibility, while sidestepping the metaphysical problem of freedom of the will.
- In chapter 5, I apply the lessons of the previous chapters by asking again, “What challenge does all of this raise for Rawls?” I do so by looking carefully at the fundamental commitments of justice as fairness, impartiality and non-arbitrariness, equality and freedom, and applying the lessons which we develop about responsibility.

- In chapter 6, I conclude with a review of the main arguments from each chapter, along with an epilogue which includes thoughts on future research directions.

Chapter 2

On Cohen's Incentives Argument

In the first half of his new book, Gerald Cohen sets out to defend egalitarianism from the contemporary, liberal conception of equality which has developed in the Rawlsian tradition. Cohen's most important contribution there is developed, broadly speaking, in two parts. He criticizes liberal theories of equality first from the perspective of the free market economy, arguing that Rawls' difference principle is subject to counterintuitive commitments regarding incentives for higher levels of labor output. In considering a reply on behalf of the Rawlsian egalitarian, Cohen directs his gaze on Rawls' insistence that justice apply only to the basic structure and institutions of society. In the second part of this contribution, he argues that Rawls cannot intelligibly maintain this position.

I rehearse both arguments, and give a reply on behalf of the liberal egalitarian. In the first section of this chapter, I outline the relevant parts of Rawls' theory. In section two, I consider *the incentives argument*, along with a charitable, if somewhat obvious, response from the Rawlsian. That is, I defend Rawls' move to locate justice in the basic structure. In the third section, I rehearse Cohen's more direct criticism of the basic structure reply, itself. In the fourth section, I consider a few avenues that the Rawlsian might move to defend against the criticisms. First, though, we begin with an outline of the relevant bits of Rawls' theory.

2.1 Rawls

In his *Theory of Justice* (1971/1999)¹, Rawls gives a theory that is, in many ways, more ambitious than any one attempted in recent history. Consider, as evidence for this claim, Rawls' decision to focus the definition of justice only on "the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties . . ." ² Rawls focuses the theory on the basic structure is because "its effects are

¹Notes below are derived from the 1999 edition.

²[Rawls, 1999, pg. 6].

so profound and present from the start.”³ By focusing our egalitarian theory on the basic structure, then, we’re sure that our theory will address those inequalities that are so deeply pervasive in society that they are certain to effect men’s life chances, but which cannot be justified from the point of view of either merit, or desert.

Since Rawls’ project is to identify the principles of justice that are to govern the basic institutions of society, we are to imagine an original position, such that agents in this position, suitably epistemically constrained, determine egalitarian principles of justice that will ensure justice, impartiality, and non-arbitrariness in the basic social institutions. They will do this by applying Rawls’ famous thought experiment.

Begin with the thought experiment. Parties in the original position, suitably epistemologically constrained, will use a decision procedure to form principles that will ensure, for their own self-interest, liberty, non-arbitrariness and impartiality in the distribution of social goods. Because of their epistemological constraints, they will choose maximin as a decision procedure. Their decision procedure will involve reflections about how risk averse it is rational to be: they will take care primarily to avoid terrible outcomes, and ensue a suitable social minimum for themselves. Maximin is the only decision procedure that they can employ which is sure to satisfy all of those goals.⁴

Through the veil of ignorance, armed only with a thin conception of the good, they will arrive necessarily at the two principles of justice, or at least on two principles very much like them. Those, then, are the principles that will govern the basic structure of the society’s institutions.⁵ And it is important to remember that the liberty principle is said to be lexically prior to the second principle. That is to say, in any case in which they may come into conflict, liberty has priority.⁶

³[Rawls, 1999, pg. 7].

⁴See [Rawls, 1999, pp. 134-35], where he discusses others, like minimax, Bayes, maximax, and why none of them suffice. Rawls cites [Baumol, 1961] here). See also my [Robinson, 2009a].

⁵For a statement of the two principles, see [Rawls, 1999, pg. 53 & pg. 266].

⁶On the priority problem, and lexical ordering, see [Rawls, 1999, pp. 37-39].

From those two principles, we will begin constructing the basic structure, thinking about things like education entitlements, voting rights, graduated income tax rates, and all the other components of the basic structure.⁷ But at this point, we are making real institutions, and deliberating amongst ourselves as to which is the right ones, given the facts about society, and about ourselves. The institutions should primarily protect the liberty of each individual, and then secondarily govern the distribution of social goods, according to the second principle. It is this process of due reflection where we check our own intuitions against the intuitions of others, and the principles of justice. We continue in due reflection until we create a society that is well ordered,⁸ at which time it matches our considered judgments in reflective equilibrium. Then, if new facts or social situations arise, we may divert back into due reflection, until again we reach a state in which the society is in equilibrium.⁹

It is up to the actual people in a well ordered society to choose pay rates, speed limits, tax incentives, etc, that are consistent with the principles chosen in the original position, and consistent with their own conception of the good. The theory itself would be mute on the particulars of CEO salaries, individual pay scales, etc. What Rawls' theory would insist upon, though, is that something like a graduated income tax exist, so that the inequality of higher salaries would benefit everyone, and in particular the least advantaged.

This, then is my first conjecture: viz., that Rawls' theory is mute regarding the specific distributions, advantages, incentives, and legal structure of society, so long as they are consistent with the two principles. The social rules, duties, and obligations, will be slowly developed during the constitutional convention, and described by the specific legislature, constitution, and courts, and will be specific to the needs of the particular society.¹⁰

⁷ "... the legal protection of freedom of thoughts and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions." [Rawls, 1999, pg. 6].

⁸The well ordered society is defined and discussed on [Rawls, 1999, pp. 4-5 & 399-401].

⁹Due reflection and reflective equilibrium are discussed in [Rawls, 1999, pp. 18-19].

¹⁰[Rawls, 1999, 172-75].

2.2 The incentives argument

The incentives argument rests on a series of dilemmas. The first states that either the more talented, and ambitious, members of society are, or are not, entitled to fair compensation for extraordinary effort and labor that is in high demand. The second dilemma states that either they are, or they are not, individually committed to the difference principle.

For Rawls, remember, the difference principle ensures that economic inequalities work as part of a scheme that benefit the least advantaged. This assumes that it is just for inequalities to exist, but only if they have the effect of benefiting everyone, and in particular, the least advantaged members of society. In this way, the theory assumes that any particular inequality will exist *with the consent of the poor*, since, without that inequality, they would be made worse off. It is as if they are saying, “we don’t mind that your extra effort results in an inequality that favors you, since that inequality directly benefits us, and, in any case, if you didn’t get it, we couldn’t expect our benefits. Furthermore, we can bear this inferior status with dignity, since we know that no better is possible – without the legitimate expectations of compensation for the happy talented, we would be worse off. You can therefore expect our cooperation.” Since everyone has agreed to organize society in a way that fails to exploit the contingencies of birth or natural talent, the least well advantaged can bear their position with pride. This, Rawls argues, is the appropriate way to look at the legitimate expectations of additional compensation that the more motivated individuals have. It ensures the cooperation of the poor, and it provides incentives for the talented to develop and express their talents.¹¹

Looking at it from the perspective of the more talented, however, presents a quite different picture. For them, the unequal benefits are themselves the reason for working harder: it is irrelevant to them than there is a benefit that everyone else shares. It is as if, in a conversation

¹¹For Rawls on Legitimate Expectations, see especially [Rawls, 1999, §48].

with a poor person, they would put it this way: “I deserve this extra inequality, and you should agree. If I didn’t get it, you wouldn’t get any benefit at all. And I’m only doing what I’m doing because it benefits me, not because it benefits you. Since it results in an inequality that favors me, it is nonetheless just because it also benefits you – benefits that you otherwise would not be receiving.” Though parties in a well ordered society are personally disposed to conform to the principles of justice, it is as if Rawls is, in a sense, stuck including a principles with a built in reasonable expectation of compensation, because otherwise productivity would stagnate.

But, according to the argument under investigation, the poor should respond: “wait now. How can your choices reflect a disposition to conform to the principles of justice, while you simultaneously demand extra compensation for your work? Why is it that you require more pay to exercise your talent? If you really do have a disposition to affirm the principles of justice, and the difference principle in particular, how can you demand extra compensation? It is certainly not *necessary* to ensure higher levels of output, is it?” Remember that Rawls claims that the poor can bear their inferior status because they know that their position is the best that it can be. But is it true that it is the best that it can be, if the more talented demand higher compensation, and even if they do not require it to guarantee higher output? The incentives argument rests on the assumption that it is not true.

Let us formalize the argument, thus:

1. Inequalities are just IFF they are necessary to make the worst off better off than they would otherwise be (Cohen’s version of The Difference Principle).
2. Affirming the DP requires almost unmitigated equality, rather than deep inequality in initial life chances.
3. If (2), the talented will produce more, iff there is an incentive to do so. (if some of it benefits worse off – from (1)).

4. That inequality is just, and justified, because it is necessary to benefit the poor (they would be worse off otherwise).
5. Talented can choose to work hard or not, to do this job or not, to work here or not. (This is a happy position for them).
6. Either the talented affirm the DP, or they do not.
7. If they do not affirm the DP, then their society is not just (because in a WOS, everyone upholds the principles of justice)
8. If they do affirm the DP, we can ask them why they require more pay to exercise their talents.
9. If (9), then – either:
 - (a) it is necessary to help the least advantaged (viz., the only thing, according to DP, that could justify it)
 - (b) without it, they would decide to produce less, or take less productive/important jobs.
10. It cannot be (a), since there are very few cases where high rewards are literally necessary for high output.
11. So it must be (b), since it is they themselves who make the high rewards necessary, by demanding them.
 - (a) \therefore One cannot demand (b), while simultaneously basing individual choices on the DP.
12. \therefore The DP can justify inequality only in a society where not everyone actually accepts it.

So, what can be said? Friends of the liberal tradition would like to press *the basic structure* argument. According to this argument, remember, Rawls locates the principles of justice only in the basic structure of society, and the institutions themselves. The incentives argument commits a category error, by trying to relocate justice from the basic structure, into the individual himself. Put another way, to accuse the talented individual's choices of being unjust is to misuse or misunderstand the appropriate scope of the concept of justice. Individuals are certainly capable of acting from a commitment to the principles of justice, while simultaneously seeking compensation for work that is either difficult, or in high demand.

Before turning to the basic structure objection, however, let us look more closely at the assumptions underlying the incentives argument, for I believe it can be shown to rest on at least two mis-characterizations of Rawls' *justice as fairness*. The first occurs in premise 1 – Cohen's reading of the difference principle, which requires benefits to the least advantaged for any particular inequality to be judged as just. The second occurs in premise 10a, as Cohen's claim there obfuscate a subtlety about what it means to uphold the principles of justice in a well ordered society. This second confusion is derived from Cohen's version of the difference principle, particularly his use of 'necessary'. Let us evaluate each assumption in turn.

2.2.1 Must particular inequalities make the worst off better off?

Cohen phrases Rawls' difference principle thus:

inequalities are just if and only if they are necessary to make the worst off better of than they would otherwise be.¹²

¹²See [Cohen, 2009, pg. 121].

For example, then, we might evaluate an application for a tax exemption for an entrepreneur who wants to open a factory in an inner city neighborhood. Though the entrepreneur will be rewarded with extra income through his tax exempt status, this inequality is just, according to this reading, because the jobs it will create in that neighborhood will benefit the worst off, satisfying the difference principle. If, however, Cohen's so-called *strict* interpretation of the difference principle is the correct one, then it seems that we are also committed to an internal inconsistency, such that individuals in a well ordered society cannot hold fast to the DP and demand unequal compensation. Thus, the behavior of the entrepreneur would be permitted in justice as fairness, but is problematic, according to Cohen's reading of the DP.

Rawls, however, holds no such commitment in his principles of justice. Note the original working of the difference principle:

Social and economic inequalities are to be arranged so that they are ... to the greatest expected benefit of the least advantaged ...¹³

The actual difference principle does not *strictly require* that the worse off be made better off by a particular inequality: rather, Rawls insists that an inequality work as part of a scheme which benefits the least well off. Rawls is committed to no such principle which makes fine grained judgments about individual choices which result in inequality. Rather, for Rawls, what is of immediate focus is inequalities that are permitted by our basic structure, and we judge that they are justified so long as they works to benefit everyone in society.

If Cohen's attribution of the strict reading were indeed the correct reading of the difference principle, the result would be problematic for *justice as fairness*. Indeed, it would seem to protect the happy talented when they demand an unjust distribution, on the grounds that it has the larger consequence of benefiting everyone, and in particular the least advantaged. Further, on the same grounds, it would protect them even in the face that they *know* that their demands are unjust. Nevertheless, I have argued that since Cohen's strict reading is

¹³See [Rawls, 1999, Pg. 72].

not the only reading, the happy talented are making no such unjust claims. Furthermore, this conclusion rests, as I will now argue, on Cohen's mistaking the roles of agents behind the veil of ignorance (who decide on the principles of justice), for the parties in a Well Ordered Society, (who live according to, and with, a commitment to them).

2.3 The basic structure objection

As I noted above, the basic structure objection argues from an alleged ambiguity in the basic structure. It is not clear, claims Cohen, whether the basic structure includes only coercive legal institutions, or whether it also includes less formal, non-coercive elements, as well. If the latter, it would seem, then Rawls must also allow the individual choices that people make to be subsumed under the scope of justice.

Now, the elements that make up the coercive legal institutions are quite clear – they include the rules that we find in the constitution, as well as those additional relevant elements approved and decided by legislation. Broadly speaking, it includes the outline of society, particularly people's rights, and duties toward themselves and others. If the basic structure includes only the broad coercive outline of society, then individual choice can obviously be excluded.

The elements that make up non-coercive institutions in society are a bit less clear, but Cohen includes among them those whose structure depends on convention, usage, and expectation, rather than a more formal constitutional and legislative framework.¹⁴ If, however, we allow these less formal, conventional elements to make up part of the basic structure, then, since they include the day to day choices and actions of individuals, the basic structure argument, as I have presented it above, fails as a reply to the incentives argument. And so obviously, the liberal egalitarian must prefer to exclude the non-coercive elements

¹⁴cf. [Cohen, 2008, pp. 134-35].

of individual choices and actions from the institutions that comprise the basic structure of society.

As an example of a non-coercive institution, Cohen invites us to consider the family. The family has a structure which we can talk about, and that structure is certainly not identical with the choices that people within it make. But, Cohen claims, judgments about justice that apply to the family structure *do* apply to the choices that individuals within it make. The argument looks like this:

1. The coercive structure comes about independently of the day to day choices of the people within it.
2. Judgments about the structure and the choices that are made within it are distinguishable from the point of view of justice.
3. The non-coercive structure (e.g., of the family) comes about only *because* of the choices of the people within it.
4. The distinction between the structure and the choices in non-coercive structure is "*compromised extensionally*".¹⁵
5. Judgments about the structure and choices are indistinguishable in a non-coercive structure from the point of view of justice
6. ∴ In non-coercive social structures, principles of justice that apply to the structure also apply to the choices made from within it.

If this is so, then Rawls cannot reasonably hold onto both the the non-coercive structure, and the above answer to the incentives argument. The basic structure objection seems an

¹⁵That is, the characteristics that sustain the non-coercive structure live in the disposition of the family members. (i.e., when A decides to conform to the structure, B will be reinforced to do so. If no one does conform, then no one will be pressured to do so.) See [Cohen, 2008, pg. 135] (my italics).

anemic reply to the incentives argument, if we allow the non-coercive elements to enter the basic structure.

But why can we not omit them? Is Rawls committed to including the non-coercive elements? Cohen thinks so. Remember that the basic structure is the the primary scope of justice because its effects are so profound, and present, from the start. But of course it is not the case that only the coercive elements have profound effects on our lives, or that they are present from the start. Take again the example of the family. The values and choices that govern our conduct within the family govern “the very groundwork of our existence,”¹⁶ in precisely the same way that the more formal, coercive elements do. And yet this same reason is given for their inclusion in the basic structure. To include coercive, but not non-coercive, in the face of this reasoning, would, at best, leave the distinction arbitrary, and at worst, indefensible. By eliminating the non-coercive, his justification for focusing on the basic structure is contradicted, and the definition that he is left with is arbitrarily narrow.¹⁷

So we’re returned to the dilemma I identified above. Since justice applies to the basic structure, the dilemma is this. Either:

1. Justice applies to non-coercive, non-legally prescribed practices, or
2. Justice applies *only* to coercive legal elements.
3. If (1), then the restriction of justice to the basic structure collapses (b/c it applies to actions and choices).
4. If (2), then his delineation on the subject matter is arbitrary.
5. ∴ An attempt to restrict the scope of justice to the basic structure breaks down (i.e., collapses, or is arbitrarily narrow).

¹⁶[Rawls, 1993, pg. 139].

¹⁷cf. [Cohen, 2008, pg. 136].

While the family works as an ideal example to help motivate the basic structure objection, the original objection was aimed at economic models designed to maximize the size of the bundle of goods held by the least advantaged members of society, and so we can look back to them.

1. Assume that one can both hold a commitment to the difference principle, and demand incentives for high demand labor (incentives argument)
2. If (1), then individual actions and choices are outside the scope of justice (basic structure argument)
3. But the basic structure allows informal non-coerced elements, such as individual choice and action (basic structure objection)
4. Individual choice and action are within the scope of justice
5. \therefore One cannot both hold a commitment to the difference principle, and demand incentives for high demand labor

If sound, Cohen's basic structure objection shows that the incentives argument was correct all along.

2.4 Two Replies

I believe two sorts of replies can be given on behalf of the liberal egalitarian, first to the role that the example of the family played in Cohen's objection, and, second, to the appropriate liberal response to the economic free market reply to the incentives argument. I do not fully develop those replies here. Instead, in the following space, I provide an outline of the shape of the two replies to Cohen, and argue that defenders of Cohen's position must either answer my replies, or else be left with a much diminished theory.

2.4.1 The Family

What I have called the *basic structure objection* gets most of its mileage from the example of the family. The family is a social structure, informally defined by the day to day choices that are made by its members. If so, then any application of justice that applies to the structure will also apply to the individual choices and actions of its members. It would, e.g., be difficult to charge the sexist subordination of the wife to the husband with injustice, if we could not point directly to the actions that bring about the structure of this family. This is so, even if the relevant elements of the family are non-coerced (from a formally legal or constitutional perspective). Since we can easily apply this rule to the family, Cohen concludes, then the informal, non-coerced elements are also included in the basic structure.

And yet the structure of the family as a social institution, makes for an odd and uncomfortable model to hang this objection upon. The family is like no other social institution, in that it seems to straddle the line between the public and the private realm. Some of the elements that go into making up the structure of the family are indeed informal, and non-coerced: which functional roles are played by which member; what level of participate will each member play; and etc. But of course other elements to make up the structure of the family are formal, and coerced; the minimal degree of care that a child will receive; the minimum amount of education a child will receive; how inheritances are transferred from one generation to another; what access any family member has to the others; and etc.

The basic structure objection works so well against the incentives argument, because of the seeming ability to generalize from the elements of the structure of the family, to other non-coercive elements of society. But the family represent a singular example that sits between public and private, coerced and non-coerced, in a way that no other structure does. In the absence of generalizable examples, the force of the basic structure objection is greatly reduced.

2.4.2 The Free Market

Remember that of the two principles of justice, when there is some conflict between them, then the liberty principle takes priority. Rawls calls this the lexical ordering of the principles. It also means that before an institution is judged according to the standard of the difference principle, it has already been judged according to the standard of the liberty principle and the first half of the second principle (usually called the principle of fair equality of opportunity).¹⁸

In the case of the family example above, the sexist hierarchy may have already failed the liberty principle, since the inequality is not consistent with equal liberties for all. For example, in this case, overt pressure, or even psychological pressure, not to pursue one's career limits one's opportunities to pursue one's conception of the good, and to live the sort of life one finds to be desirable. Furthermore, the case above would fail the requirements of the principle of fair equality of opportunity, since the inequalities are not attached to positions open to all. It will never be necessary to apply the metric of the difference principle to the problem, since it will have already failed the two lexically prior principles.

Cohen's objection rests on the assumption that one cannot simultaneously hold fast to the difference principle, and legitimate expectations for compensation. The family example is meant to bring out that dichotomy. But an appropriate application of the lexical priority principle shows that Rawls is never forced to answer the dilemma. The real point is that the incentives argument fails, so that other responses – like the basic structure argument – are unnecessary.

2.5 Conclusion

There is something intuitive about the communitarian position that could be developed from Cohen's objection. In a more positive statement of Cohen's theory, individuals would

¹⁸The lexical ordering of the principles is discussed in [Rawls, 1999, pg. 88] and [Rawls, 2001, 46-47].

apply the principles of justice directly in their actions and choices, leading to a more directly egalitarian society – one striking in fact for equality of resources. Framed as a criticism of the liberal position, however, it fails to hit its target with the force that Cohen desires, or which would be necessary to show the error of the Rawlsian tradition.

In what follows, I abstract away the intuitions that drive Cohen’s objections. As he presents them, they show an internal inconsistency in Rawls’ Justice as Fairness. I have argued that this fails. However, generalizing those intuitions, we come to see not an internal problem of Justice as Fairness and the Difference Principle, but rather a good reason to rethink the role that certain inequalities play in a well ordered society. That is, which legitimate expectations for inequalities are we really committed to? Cohen argues that we should answer this question by saying, “none, or not very many.” I have tried to undermine the strength of his argument for this conclusion. But that does not mean that the conclusion is false. In the following chapters, I will continue to motivate the intuition that our best theory of justice is one which supports a basic structure that is largely, or much more largely, egalitarian.

Chapter 3

The Free Will Problem

3.1 Introduction

In this chapter, I develop the free will problem, and describe determinism, and both the libertarian and compatibilist solutions. I also describe an alternative reading of the free will problem, by considering a contextualist interpretation. I apply these back to Cohen's original worry that a theory of genuine choice runs the risk of being stuck in the free will debate.

3.2 Determinism and the free will debate

Why talk about free will in an essay on responsibility and justice? The existence of free choice, and problems of either determinism or regression are ones that must be dealt with if we are going to speak sensibly about agents' responsibility for x , or agents' choosing x . I will develop the position described by Bernard Williams, which he calls 'contextualism', and we will also develop the compatibilist position in some detail. I will then argue that either Williams or compatibilism gives a way out of the problem. This position shows the role that responsibility plays, and why we can rely on it in judgments about justice.

The free will problem is really two problems. First, there is the metaphysical question – if the world is governed by otherwise deterministic laws of nature, how it is logically or physically possible that human agents are exempt from such deterministic processes? I will not solve the metaphysical problem here, except to the extent that it informs the second problem. The second problem – the one that is more interesting from our perspective – derives from the first problem. At bottom it asks: if the world is governed by otherwise deterministic laws of nature, then in what meaningful sense are we responsible for our actions? Further, if we are not, strictly speaking, responsible for our actions – that is, we couldn't have done otherwise – how are we justified in holding an agent praise- or blame-worthy?

Galen Strawson, a leading figure in the free will literature, has described the free will problem as resembling a carousel. Investigating the problem, he says, just leads you around in circles, until you arrive back where you started. Let us see what he means.

Broadly speaking, there are three positions which one may defend. The dominant position currently is the compatibilist position, which says that free will is compatible with determinism. Since one must begin a ride on a carousel somewhere, that is where we will begin (and where we shall end). I will look at Hume's compatibilist position, before mentioning more contemporary defenses of compatibilism, such as Kane, Mele, and Fischer. The problems with compatibilism suggest a solution defended by libertarians, which says that human events are unique among events, such that they are themselves uncaused. And in response to the libertarian, we will look at the skeptic, or hard determinist, who, it may be said, simply "bites the bullet," and admits that since determinism is true, free will is false.¹

3.3 Hume on Compatibilism

Remember the problem: It seems that the world is governed by deterministic laws of nature. When I release a ball, it falls to the ground every time. It can't not. And all physical processes (events and states of affairs) are like that. And since human events are physical events, then human events are like that, too. The problem, of course, is that we are reluctant to hold someone morally responsible for an action that they did not cause, or that they couldn't have not committed. If my purely random muscular spasm knocks a bystander to the ground, you would not tend to intuitively judge that my action was morally wrong. However, if all human actions are the result of previous processes, states of affairs, and laws of nature which are outside of my control, it follows that all human actions are such that they fall outside the scope of moral judgments. But of course, we want to make moral judgments.

¹To avoid confusion between Hume's compatibilism and the skeptical position, I will use the term 'Determinist', lest the great skeptic be confused with determinism.

How, then, do you get agency out of otherwise deterministic laws of nature? Quantum mechanics and modern theories of physics tells us that not every physical event is determined – some are non-determined, random, or chaotic. If a lump of material has a half-life of 1000 years, this means that in 1000 years, 50% of the material will have decomposed. However, for any particular particle of that material, the time that it will decompose is completely undetermined. It will simply decompose at some random time. Maybe freedom is like that. Maybe my will depends on non-deterministic processes, in an otherwise deterministic world. The problem here seems obvious. If I am not morally responsible for causally determined events because I was not the cause of them, it is difficult to see how I can be morally responsible for causally non-determined events, since I was not the cause of them, either. If my actions are merely random, there seems to be no difference in judgment from my random muscle spasm.

How, then, do you keep moral responsibility, in a world governed by deterministic and indeterministic laws of nature? One position suggests that maybe, even if determinism is true, we can have free will anyway. Maybe they are compatible.

According to Hume, of course, the entire problem with the free will debate is that we are not very careful about how we are using key terms, such as liberty, freedom, necessity, etc. If we are very careful about how we define our terms, he argues, we will see that *liberty* can be made compatible with *necessity*. Let us look more carefully at our terms.²

3.3.1 Necessity

Determinism says that every event is the result of some cause. That is, every event is the necessary effect of its cause. For any particular cause, there could be no other effect. When a leaf eventually becomes dessicated and dead, it will loosen from a branch, and fall to the

²Hume develops his compatibilist position famously in the sections titled “Of liberty and necessity”, first in *A Treatise of Human Nature* (§2.3.1-2) and, later, somewhat amended, in *Enquiry Concerning Human Understanding* (§8).

ground. If you could reverse and replay time, it would occur in the same way every time. And that is because the event is the *necessary* effect of that cause.

So, it follows that, if an agent could have complete understanding of all of the laws of nature, as well as complete knowledge of the entire state of affairs of the universe at any time t , then she could predict every subsequent state of affairs, $t + n$, necessarily. This does not commit us to the view that there exists any such agent. Rather, it commits us to the position that every effect is the necessary result of its cause.

For the most part, Hume argues, this holds for people, too. For all people, in all societies, at all times, the same motives produce the same actions. People's actions are largely determined. People find themselves in particular situations, with particular motives, and then they perform particular actions. People are motivated by any number of motives: ambition, vanity, generosity, friendship, greed, etc. The entirety of human history consists of people finding themselves in a particular situation, and then acting on that situation, based on the motives, desires, and character. This applies so uniformly throughout history, that you would have no trouble understanding the actions of anyone, regardless of how different their situation is from yours. It applies to ancient Greeks, and modern rural Chinese. For Hume, that is all history is: put people in a situation, allow them to act according to their character, and get a reply. And just like other deterministic processes, no matter how many times you rewind history, people will react the same. A person's action is determined by his character, which is made up of his opinions, prejudices, desires, interests, etc.

Is Hume saying that all people always act the same in all circumstances? Obviously not. Differences in character, volition, opinions, etc, allow people to react with a diversity of outcomes.³ What he is saying is that psychology, economics, political science, history,

³How might Hume reply to the counter-example that some people or groups act in completely surprising ways? It is reported that upon the death of relatives, members of some societies react by eating their flesh. (See [Rachels and Rachels, 1986, Ch. 2].) That is pretty surprising. Hume says that, if you are surprised, then you have just not been exposed to enough diversity in character. After you come to understand the character (i.e., desires, opinions, beliefs) of the Callatians, you will be able to predict more closely their

ethics, etc, would be impossible if we could not rely on the necessary connection between motives and actions, and between character and conduct.

Remember that Hume says that the reason the free will problem looks like a problem is that we are just not careful about the way we use these words and concepts. In this case, he argues, we have tended to look at the problem backward. If you start with free will, it is difficult to see how it can be resolved with determinism. If, however, you instead start with our ideas of the necessary connections between causes and their effects, our ideas of history and the other social sciences, you see how people are influenced – even caused – to do the things that they do, but still simultaneously free. How do we reconcile necessary causal determinism with moral praise and blame?

When I act, it is generally either to avoid punishment, or to pursue reward. These motives are the cause of my actions. But those motives are guided by my particular character. Since I am kind and not cruel, I come to the aid of a person in distress. Because I am jealous and not generous, I hide my possessions rather than share them with others. And since your character is different from mine, your reaction will differ from mine, according to your own character. We thus hold people morally responsible, not strictly for their particular actions, but rather for defects in their character. Someone is morally praise- or blame-worthy when their actions are caused by a good or bad character. And so while it makes no sense strictly speaking to hold me responsible for my particular actions (since, after all, I could not have done otherwise), you can hold me responsible for the outcomes, since they were caused by the goodness or badness of my own individual character.

According to Hume we can hold moral responsibility to be compatible with a deterministic world governed by necessary laws of nature. This has the virtue of making a necessary behavior. What may work as a counter-example would be some individual or group which really does act completely randomly. Does such a case exist? Remember that even schizophrenics and other delusional individuals are acting according to their character (i.e., desires, opinions, beliefs) and their understanding of the world.

connection between will and action, a link that the libertarian cannot claim. And it has the virtue of connecting the will with responsibility, which the determinist cannot claim.

3.3.2 Problems with compatibilism

So what can be said? Intuitively, I am not morally responsible for some action or outcome if I could not have done otherwise. We can call this the *Principle of Alternative Possibilities*, (PAP). The Principle of Alternative Possibilities says that “a person is morally responsible for what he has done only if he could have done otherwise.”⁴ According to Hume, I am morally responsible for my actions and outcomes, since they simply involve applying my particular character to a given situation, and allowing my motives to direct the outcome. For Hume, the PAP is sufficient for moral responsibility, but not necessary.

But those two judgments are not really consistent. To say that I am responsible for my actions because it was caused by my character really just removes the problem one step from the determinist. That is, assuming determinism is true (as Hume does), certainly I did not ultimately choose my character. That I am kind but jealous is certainly the result of the influences of my parents and teachers, the time and place of my birth, my economic status, and many other factors, none of which are in my control. Hume wants to locate my moral praise- and blame-worthiness in a character which I did not, and could not, choose. If I rebel in the face of authority, it is not evidence that I have free will. It is evidence that my character, which was formed over so many years, and through so many influences, disposes me to rebel against authority. And if I did not choose my character, it makes no sense to hold me morally responsible for actions that flow from it.⁵

Hume’s compatibilist argument would never satisfy the determinist, who seeks a connection between necessity and responsibility, nor the libertarian, who seeks a wedge between

⁴See Harry Frankfurt’s [Frankfurt, 1969, pp. 829-39] as well as [Frankfurt, 1971], which I discuss later.

⁵This argument is due to [Strawson, 1994], which I develop in more detail below.

necessity and responsibility. Hume's argument will only convince those who already are committed to his conclusion – that responsibility is compatible with determinism.

3.4 Free Will Libertarianism

As the determinist holds that there can be no responsibility with necessity, the compatibilist holds that there can be. The libertarian position suggests that no such compromise is warranted: free will is indeed possible, but only because determinism does not apply to all human actions.

Take as an example the following action involving a shooting: Paul shoots Quentin. According to the Principle of Alternative Possibilities, if Paul was responsible, then the shooting was entirely *up to* Paul. That is, if Paul was responsible, it was in his power to do or not to do it. But of course, if it was in his power not to do, then it was not caused by something that was not in his power to control. This is true if his hand was literally forced, but also true if caused by beliefs or desires which he does not control.⁶ This claim that 'if he had chosen to do otherwise, then he would have done otherwise' is perfectly consistent with determinism, since the determinist is committed to the claim that he could not have chosen to do otherwise. And this claim is consistent with Hume's compatibilist argument, since determinism is true.

The determinist looks at the story and identifies two events. Paul shooting, and Quentin being shot. In the causal story, nothing else is relevant. When Hume looks at the story, he sees something else. For Hume, Paul chose to shoot, Paul shot, and Quentin was shot. For the determinist, Paul's choice was irrelevant, since he could not have not chosen. For Hume, it is unimportant that he could not have not chosen. Instead, exactly what is important

⁶“For if what we say he did was really something that was brought about by his own beliefs and desires, if these beliefs and desires in the particular situation in which he happened to have found himself caused him to do just what it was that we say he did do, then, since *they* caused it, *he* was unable to do anything other than just what it was that he did do.” From [Chisholm, 1964, pg. 4].

is that *he* was the author of the choice: his particular character, desires, beliefs, etc, were instrumental in bringing about the shooting.

But as I argued, if compatibilism is committed to the view that an agent could not have done otherwise, then we cannot derive moral responsibility from the “choice”, and so we should look elsewhere. We looked briefly at indeterminism – i.e., the position that there was no cause – but of course, if no one caused it, then no one is responsible. So what else is there? If we cannot say that the act was caused by nothing, and we cannot say that it was caused by a chain of events, how do we assign responsibility for the act to Paul?

One answer – the libertarian free will position – is that, while most events are caused by other events, some events are caused by a person. That is, the world is largely deterministic. When a first billiard ball hits a second billiard ball, the second ball moves away with a momentum that is equal to the momentum lost by the first. The causal connection between the two is necessary. Furthermore, the momentum of the first ball can be explained by some previous event, e.g., being struck with a cue stick, which can be explained by additional causes, forever. But some events are not caused by a chain of previous causes, and they’re not caused by nothing. And if an event is not caused by an infinite chain of previous causes, and it is not caused by nothing, but is instead caused by a person, then we can begin to put responsibility back into the picture. How does that work?

For Hume, and the determinist, events and states of affairs cause other events and states of affairs. Call this method *transeunt causation*. But, according to Chisholm, some events are caused by an agent. Call this *imminent causation*, or just *agent causation*.⁷ So we may say that, while the second ball was moved by the first, which was moved by the cue, which was moved by the hand, the hand was moved by me.⁸

⁷See [Chisholm, 1964, pp. 7].

⁸This, surely, is what Aristotle intended in the *Physics* (VII, 5, 256a, 6-8) “Thus, a staff moves a stone, and it is moved by a hand, which is moved by a man.”

3.4.1 Problems with Libertarianism

So what can be said? Here's one worry about the libertarian position: If we look back at the billiard ball, then, according to the libertarian,

(1) there must be some event E , which was caused by an agent A , not some other event.

But if (1), then

(2) no event, or agent, was the cause of the the agent's causing of E .

I.e., nothing caused the agent to cause E , not even an act of volition. We know that (2) must be true because if something caused the agent to cause E , then the agent was not the original author of E , and we have reduced the story again to a causal chain. But also,

(3) if nothing changed when the agent caused E , then it looks like there's no difference between:

(4) " A caused E "

and

(5) " E just happened".

It looks like with (4) and (5), we are left with what Chisholm (rather honestly) referred to as a "distinction without a difference". That is, if we follow the libertarian position to its logical conclusion, then (4) and (5) are saying the same thing, just using different words. Libertarianism collapses into either determinism (viz., if an agent's act of willing caused her to cause E), or else it collapses into indeterminism (viz., if an nothing caused her to cause E). And of course, neither determinism, nor indeterminism, are consistent with responsibility.

3.4.2 Determinism and the regression argument

Regarding the probabilistic thesis, Galen Strawson suggests that even if the causal laws which govern the universe, and therefore human choice, are probabilistic, the existence of these laws of nature undermine the possibility of the right sort of choice, viz., the responsibility

conferring sort. Matravers calls this ‘the regression argument’: one is the way one is, initially (say from birth) because of genetic or environmental causes, and due to early experiences. Certainly, one cannot be held morally responsible for the way one is at birth. However, after that, one may attempt to change the person one is, and therefore be morally responsible for the way he is. But, the type of person he will desire to change into, and the extent to which he will be successful, will be the result of his particular character, which will be due to those early genetic and environmental causes. So whatever sort of person he changes into will be determined by that earlier state, and therefore his choices and actions will be the result of the sort of person he is.⁹ The regression argument does not attempt to show that people cannot change who they are – of course they can. Rather, it attempts to show that those changes are not the sort of changes for which a person is wholly responsible, and so their actions are not of the sort for which they are wholly responsible, either. If the sort of person you are is causally determined, even if those causal laws are merely probabilistic, then your actions cannot be said to be of the responsibility conferring sort.

Janet Radcliffe Richards introduces the regression arguments through a debate between sociobiologists and evolutionary psychologists. She puts it this way: if genetic determinism is true, and we are forced to do as our genetic makeup dictates, it is impossible to hold us responsible for our actions. You might say, for example, that while a man’s infidelities are a matter within his control, and thus a matter for which we may hold him morally responsible, the man’s predisposition to infidelity is simply a part of his character, which is itself genetically induced in him by the history of his evolutionary past. The fact that this argument seems to equivocate on ‘man’ (as in the man who committed the relevant infidelity), and ‘men’ (as in the subject of the genetic disposition based on an evolutionary past shared by members of the same species) makes this conclusion less certain.¹⁰ Nonetheless, the lesson

⁹See [Matravers, 2007, pg 24] and [Strawson, 1994, pp. 115-16].

¹⁰Thus, the disagreement between evolutionary psychology and sociobiology makes apparent a number of disagreements, such as the unit of selection problem – does evolution work at the level of the species, or the

to take away is the same: my actions are the result of my character, which is the result of either my environment or my genetic disposition. My environmental background was out of my control, and so was the evolutionary impact on my genetic makeup. And one can hardly be held responsible for those actions or choices which are outside of one's control.¹¹

It seems that determinism cannot help us to identify the link between responsibility and freedom, since it denies that the latter exists. Furthermore, it is difficult to see how the seemingly random, or chaotic foundations of the libertarian position can identify the responsibility conferring sort of actions and choices. This leads us full circle to the compatibilist tradition, which maintains that free will is logically compatible with determinism. Before turning to Matravers' agnostic argument, let us look more closely at two compatibilist arguments, and see how they may begin to inform our view regarding the relationship between justice and responsibility – Richard Wallace's "reasons responsiveness compatibilism", and Bernard Williams' "contextualism".

3.4.3 Mesh Theories

First, I should say a word about so-called "mesh theories". Mesh theories are so-called because they describe a connection (or mesh) between selected elements of one's mental economy.¹² So for example, according to Frankfurt, we can distinguish between first order desires and second order desires, (i.e., desires about our first order desires). So, for example, as I sit here in the library, I may have a desire to pause my writing, and go outside and smoke a cigarette, due to its calming effect on my writing. I may also have a desire to refrain from smoking, due to its harmful effect on my health. These desires may be described as first order. Furthermore, I may have a second order desire that my desire not to smoke win out. Let us say that I do not smoke. On the mesh view, I am morally responsible for my individual?

¹¹See [Richards, 2000, Chapters 5 & 6].

¹²See [Fischer and Ravizza, 1998, pg 185].

choice (in the right way) because my second order desires (i.e., my desires about my first order desires) were in mesh.¹³

Mesh theories are *ahistorical*. The strategy behind mesh theories is to deny the importance of the regression argument, by denying the importance that history plays in our theory of responsibility. The regression argument shows that an agent cannot be held responsible for present choices and actions, because those choices and actions are dependent on historical elements which are out of the control of the agent. If those historical elements are not relevant to our valuation, then the regression argument can get no traction as a theory of responsibility. For the mesh theory, it does not matter what historical elements led to my desires to smoke and not to smoke. What matters right now is what I do with it – whether I act on it or not.

Some critics of the mesh theory cite ‘character’ as an important element in valuations regarding responsibility, and character has an historical element. Consider the following thought experiment from TM Scanlon: Yesterday, your friend whom you have always known to be friendly, helpful, thoughtful, and generally altruistic, suffered a head injury in a car accident. Upon awakening, you discover that she is now grouchy, rude, selfish, and cruel. You may at first attribute her actions to her injury, and excuse her from any moral responsibility. Suppose, however, that after 15 years, the latter description still fits. Not only might we say something like “she used to be so kind, but since her accident she is such a cruel person”, but after 15 years, our capacity to excuse her from moral responsibility would begin to degrade as well.¹⁴

Many compatibilist authors, of course, would deny the claim that history plays no part in our evaluation of the responsibility conferring nature of our choices and actions. In the case of the friend with the head trauma, the feature which changes over the fifteen years is

¹³See [Fischer and Ravizza, 1998, 185], [Matravers, 2007, 28-33], and [Mele and Robb, 1998].

¹⁴See [Scanlon, 1998, pp. 278-79].

the degree to which we can hold her accountable for her own character. At first, it seems that we cannot, since it is not obviously ‘hers’. But this intuition is less firm the longer she maintains this disposition.

Consider also the case of Jojo, the son of a cruel, oppressive, tyrannical dictator. Jojo grows up watching his father successfully dominate and exploit his citizens. Jojo obviously considers his father to be a role model and, many years later, when Jojo succeeds his father in power, it will come as no surprise that he will continue the cruel methods that he observed his entire life, and he often subjects people to prison or torture for the slightest offense. Jojo is free both in the sense that his actions are neither *caused* by elements outside of his control, nor *coerced* by forces or actors attempting to manipulate him. Let us also say that his first and second order desires mesh. Nonetheless, there is a sense in which Jojo is the result of his education and upbringing – which he was not able to control – and so should not be held responsible for the choices that he makes.¹⁵

I described Strawson’s metaphor, in which he describes the free will debate as resembling a carousel, on which we go around in circles: The world is obviously determined, but it is difficult to see how to rescue responsibility from hard determinism. However, it is likewise difficult to see how freedom can be rescued from a view of nature which is fundamentally chaotic or random. Which leads back to the compatibilist camp, trying to describe free will as compatible with determinism.¹⁶ I agree with Hume’s observation that the various camps are simply talking past one another: The determinist says that our actions and choices cannot be free if determinism is true. The compatibilist agrees that complete freedom of action is impossible, but suggests that free will doesn’t require *that kind* of choice. Instead, a diminished role, which sets freedom not against causation, but against coercion, is sufficient to rescue free will. And the libertarian objects, saying that what we want is the origins of

¹⁵This thought experiment is from [Wolf, 1987, pp. 53-54] and discussed in [Matravers, 2007, pp. 32-34].

¹⁶See [Strawson, 1998, pg. 753].

causation to rest with the agent. The camps cannot agree on what they mean by ‘freedom’, and so will never agree on a concept of free will. It is difficult to know how to break out of this circle of arguments (or how to get off of the carousel). Indeed, this is the morass of the free will problem which Cohen warns us about, and laments that we may not be able to escape.

I think that there is a compatibilist picture of free will which could help us find a way to escape the morass, while helping us to avoid problems of regression, but without depending on randomness, and which can avoid the criticisms of the mesh theories.

3.4.4 Williams

The libertarians, compatibilists, and determinists – that is, those metaphysicians responsible for digging us out of the free will problem (and, presumably, also responsible for keeping us in its morass), think of responsibility as a *problem*, one whose solution will be exposed when we expose the real nature of genuine choice. Bernard Williams, by contrast, looks beyond the metaphysical problems of freedom in order to get to responsibility, and then asks what we can do with it.

Williams identifies *cause, intention, state, and response* as the four fundamental elements to any concept of responsibility. That is, one is morally responsible for a state of affairs just in case all four elements are satisfied. First, we say that a person *caused* some state of affairs if it came about because of something that he did. Second, we say that his responsibility hangs on the *intention* if there is some relationship between choosing and acting (that is, he intended that state of affairs). Third, the issue of *state* refers to one’s state of mind – that is, we would not exempt him from responsibility due to insanity, brainwashing, or so on. And finally, the condition of *response* suggests that it is up to him, if anyone, to make up for it.¹⁷

¹⁷[Williams and Long, 1993, pg 55]. For additional thoughts on the relationship between causation and

The focus on these, and only these, elements allows for a theory of responsibility that is context driven. It allows us to determine on a case by case basis, or a society by society basis, how to approach the issue of responsibility, since, according to Williams, there is no singularly correct way to prioritize these elements, or to weight them against one another. It would be wrong-headed to insist that we can, have, or ought to, adjust these elements in exactly the right way in order to arrive at the exact correct conception of responsibility. Such a contextual account of responsibility reduces the need for analysis of the concept of responsibility almost completely since responsibility just becomes the concept that does what we want it to do.¹⁸

On first sight, contextualism may seem simply to reduce to relativism about responsibility – i.e., one is morally responsible just in case he (or I or our society) thinks he is, and there is no other fact of the matter. Such a reduction would be a mistake. Relativism, particularly about moral judgments, is dangerous and ought to be avoided as a serious meta-ethical position. First, if there is no more moral authority than a particular society’s consent, then it would seem impossible for one society to condemn another’s as morally wrong. After all, their actions would be “right for them” even if “wrong for us”. Second, it seems to rule out any idea of moral progress. We could not judge that previous generations got it wrong when they oppressed minorities, or held certain professions out of reach of women. After all, their society judged them to be morally correct at the time. For these reasons, and reasons like these, a theory that commits us to moral relativism is one that should be avoided. And, as I note, I believe that Williams’ contextualism does *not* commit us to any version of moral relativism.¹⁹

Contextualism is not relativism because it *does* rely on facts. First, remember the conditions of cause, intention, state, and response. We could not, for example, hold someone

responsibility, see [Robinson, 2009b].

¹⁸[Williams and Long, 1993, pp 55-56].

¹⁹For further development of these criticisms of moral relativism see [Rachels and Rachels, 1986, Ch 2].

morally responsible if he was absent as a cause, or if he can be deemed to be in an unfit state. The requirement of these four elements would prevent such judgments. But we can also make a more fine grained distinction. In Europe and elsewhere through about the 17th century, monarchs were commonly believed to derive their authority directly from God. We may, however, judge that our own form of government is superior to one founded on the divine right of kings, because we have access to more facts than were available at the time.²⁰ Likewise, it may have once been commonly accepted that poor crop yields or famine and plague were the result of the influence of a witch. Thus, by holding the witch accountable for her actions (in accordance with our four elements), in order to right the wrong of plague, the witch would have been held responsible. Now, however, we have more facts available, and so can make a more fine grained judgment about the role that responsibility plays in our valuations. This is not a case of relativism – we can certainly criticize concepts of justice that hold the witch responsible for the plague, because we have an updated set of facts from which to form our judgments. Contextualism does not reduce to relativism.

Now, what Williams is suggesting is that in the morass of the free will literature, the disagreement hinges centrally on a conceptual analysis of “intention”, or, as we have been using it, “choice”, along with its relationship with moral responsibility. What the libertarians, determinists, and compatibilists seem to agree on is the PAP, i.e., that an agent is morally responsible for X if he freely or intentionally chose to X, and then X’ed. What they disagree on, of course, is the conditions under which, or whether it is even possible for one to freely or intentionally X, or even choose to X. For example, according to Hume, as we have seen, if I choose to vote republican, that choice is influenced by my personality and political dispositions, which, as Strawson notes, are themselves influenced by my education, socio-economic status, my parents’ voting habits, my religion, and a number of other factors which are generally outside my ability to exert large amounts of control over. And so if free

²⁰See, for example, Locke’s First *Treatise of Government* in [Locke, 1690].

choice requires the ability to freely and genuinely exert complete control over my decisions, then, according to Strawson's arguments, my decisions are not free.

If Williams is right, then our focus on "responsibility" as a subject for conceptual analysis dwindles in importance, suggesting instead that the main focus of responsibility will depend on what role we want it to play in our theory of distributive justice. Thus, two societies, with two very different ideas of what role the state should play in evaluating and responding to certain harms (e.g., civil versus criminal, or religious versus secular), will need moral responsibility to stand in very different roles. So long as it is sensitive to, and revolves around, an understanding of the four elements of cause, intention, state, and response, the particular facts that it takes to be important will depend on the particular social structure that governs that society.²¹

Rawls has been accused of (or at the very least, has been well noted for) neglecting the role that moral responsibility plays in a well ordered society. This, of course, only tells half the story, since, as I have shown, Rawls *is* committed to holding people responsible for their actions. We know, for example, that one's entitlements flows from what one does with what one has. To say that Rawls ignores the issue of responsibility entirely misses the point. However, a strong analysis of responsibility, as described above, is missing, and thus here is left open to interpretation.

A contextualist interpretation, as in the one described by Williams, should be very attractive to defenders of Rawls' justice as fairness. Remember that, for Rawls, a society is well ordered if it is governed by the two principles of justice, as they would be decided upon by parties in a state of perfect equality. Those principles are meant to apply not to individual legislation, but rather to the basic structure of society – i.e., the more general institutions that govern people's interactions. The individual rules and laws – speed limits and income tax rates (along with the decision whether to have either) – will depend on the

²¹See [Williams and Long, 1993, pg 65].

particular facts of a given society. These facts may include factors ranging from geography and climate to the conceptions of the good that may be shared by citizens. It would be an error to apply the two principles directly to individual legislation, just as it would be an error to enforce tax laws to a small socialist commune which were developed to apply to a large nation at the beginning of an industrial revolution. What is important is that the two principles guide the formation of the basic structure, and then those institutions, along with a society's particular facts, will guide the formation of individual legislation.

Those same facts that help citizens to craft laws will influence the role that individual responsibility will play in that society. According to Williams, it should respect the four elements of cause, intention, state, and response. But the weight that they place on each one will depend on the particular circumstances, along with the role that they want responsibility to play in their interactions.

This discussion of the free will problem is meant to draw out the potential problem which Cohen highlights. Remember Cohen's worry: that any position which relies on a theory of genuine choice in assigning the correct cut between responsibility and equality runs the risk of being mired in a metaphysical problem which remains unsolved (and much unmoved) for more than two millennia.²² I have demonstrated that one certainly does run the risk of getting stuck on the carousel if one tries to solve the free will problem. What I would like to take away from the discussion of contextualism should not be overstated. First, it certainly does not solve the metaphysical problem of the nature of freedom of choice, or responsibility. Instead, I attempt to side-step that debate by suggesting that we can begin to make judgments about degrees of responsibility, depending on a particular context, and given a particular set of facts. This allows us to determine that, given a context, an individual is more or less responsible for the choices that he or she makes. And this allows us to draw

²²Plato had a position on the debate, of course, in which he suggests that only the rational, deliberative aspect of an agent's soul are capable of genuinely free willings. See, e.g., *The Republic*, Book IV; *Phaedrus*, 237e-238e; and *Gorgias*, 466 (all in [Cooper, 1997]).

some inference about the relationship between responsibility and justice. Let us apply these judgments to Cohen's *access to advantage*, and in particular, some of the more common objections leveled at it.

3.5 Cohen's View is Too Deep and Too Wide

Even if we dismiss the metaphysical problems of determinism, freedom and responsibility (which I think we can do), we are still left with social and environmental challenges to freedom, which puts moral responsibility at risk. This is what we mean when we say that Cohen's view is too wide – and what Strawson calls the regression argument, viz., anything you think you do freely can be explained by previous environmental and genetic factors, all the way to birth, if not the beginning of the universe.

Cohen's cut has been criticized as being both too deep and too wide. Cohen's view originates as a criticism of Dworkin's rejection of *equality of welfare* as the correct currency of egalitarian justice. Here, Dworkin is convinced by the expensive tastes objection: In considering two individuals, one with standard tastes and preferences, and Louis, who requires plover's eggs and expensive wine to reach an average level of welfare, it would seem that, if our focus were on welfare as the relevant currency, our duty to the second individual would commit us to diverting resources away from others in order to bring his level of welfare up to average. However, notes Dworkin, as personal tastes and preferences are a matter of a person's personality, they are beyond the reaches of our distributive commitments as egalitarians.²³

Though Dworkin famously claims to make the choice/chance distinction central in evaluating the correct way to include judgments of responsibility into distributive justice, he here introduces a new distinction. He views one's tastes and ambitions as aspects of one's

²³[Dworkin, 2002c, pg 253]

personality for which one can be held responsible, even if one cannot be held responsible for circumstances which are matters of “brute luck”. He distinguishes between a person and the person’s circumstances, and assigns his tastes and ambitions to his person.²⁴ Deficits in personal resources are a subject for mitigation or compensation, but differences in personality are not. And since one’s preferences are a reflection of one’s personality, they are not owed compensation. It is surprising to see Dworkin shift his focus in this way, and it provides the first point from which Cohen’s objection begins to gain traction.

Instead, says Cohen, the right cut is between choice and chance, or between luck and responsibility, even if it cuts right through judgments about personality and resources.²⁵ Remember our discussion of Louis, who requires plover’s eggs and expensive claret wine. We might make a further distinction and ask how Louis developed his special expensive taste. He either came to have it through special cultivation and effort (i.e., through choice), or else he finds himself with it (i.e., through chance). In the latter case, both Dworkin and Cohen arrive at the same conclusion, though for different reasons. Though Dworkin would deny compensation because it is unfair to finance expensive tastes, Cohen would deny compensation because it is unfair to finance expensive tastes which were intentionally cultivated.²⁶ For Dworkin the relevant distinction is between brute luck and option luck, for Cohen it is genuinely between choice and chance.

However, some people like Louis, rather than cultivating expensive tastes, simply find themselves with them. For those individuals with a genuinely involuntary expensive taste, our intuitions do not go so easily with Dworkin. If Louis just finds the taste of tap water unbearably bitter, it is not obvious that we should do nothing to aid him in achieving a level of welfare more similar to everyone else. And if that is the case, too, then it is not obvious that Dworkin’s interpretation, which cuts right along choice/chance, along with

²⁴[Dworkin, 2002c, pg. 81].

²⁵[Cohen, 1989, pp 922-23].

²⁶[Cohen, 1989, pg 923].

resources/personality, is the correct one. Thus, the “currency” of egalitarian justice is revealed: Cohen takes information about utility into consideration, while Dworkin, who prefers to focus exclusively on resources, refuses to do so.

3.5.1 Too Deep

Some critics have criticized Cohen’s cut as being too deep. That is, it appears that it would focus on defects or disabilities which we may think it inappropriate, or impractical to compensate people. Elizabeth Anderson, as we have seen, makes special note of this when she suggests that luck egalitarians may be obliged to compensate for the unwanted effects on the lives of the physically ugly or socially awkward. After all, she argues, those are defects that limit the life chances of the afflicted, and yet she reasons that it may require making judgments or policy decisions which would be difficult to carry out, or which would embarrass the recipients. She imagines a policy letter of the following form:

Dear ugly citizen:

As your physical deformities have limited your life chances, and relegated you to unpopular or uncomfortable job markets and social circles, government policy makers have decided to award you compensation in order to bring your welfare to an acceptable minimum, or to approach the average. Please take advantage of the enclosed check or tax benefit which may include compensation in the form of plastic surgery or social training.

Anderson claims that it would be not only impractical for this to be official policy, since we would require experts in the field to make and carry out these judgments, but it would also be inappropriate to make these judgments, and embarrassing to the afflicted. But nonetheless, it would appear that Cohen’s position does seem to commit him to judgments of this sort, at this stage of society. This is obvious, since the ugly suffer deficits which are outside of

their control, and with which they do not identify, and the socially awkward suffer deficits due to personality features that they (presumably) did not choose.

I think that Anderson's points are important to note, not because they are decisive, but because they bring into focus the correct way to think about what we owe to each other. Or, as has been said before, one man's modus ponens is another man's modus tollens.²⁷ That is, conclusions such as Anderson's are certainly correct, but not as damaging to Cohen's overall project as they might seem. Let me respond in two ways before looking at a much more important problem with Cohen's cut.

First, Matravers suggests that problems such as this might be undermined by circumscribing the scope of justice by appealing to other virtues which we also hold to be as important as those distributive principles which are currently defending. We may appeal, for example to the value of privacy as overriding this concern. We certainly value social comfort and self-respect as a social ideal, but if it comes into conflict with the value that we also hold for a person's privacy, then the latter may win out, undermining Anderson's letter. At least, a general decision procedure which helps to decide one or the other may be developed, in principle.²⁸

Secondly, let me say that Anderson's problem may not be a problem at all. If egalitarians are really committed to the principle which suggests that we should eliminate those arbitrary circumstances on a person's life chances which are outside of his control (i.e., which cut along the choice/chance parallel), then it would seem that Anderson's modus tollens is our modus ponens. It may be that subsidizing social skills training or plastic surgery (if wanted) is exactly what is required by taking our values seriously. Or, more likely, what our values require is that we re-evaluate and amend those basic institutions which govern society to be such that ugliness or social awkwardness does not have a harmful affect on one's life

²⁷I believe that this notable quip originated with the late Wesley Salmon, but not in print and, as I have only ever heard it uttered out loud by others, I cannot confirm this.

²⁸[Matravers, 2007, pp. 78-79].

chances, to include humiliating or embarrassing judgments associated with the policy. A society which favors beauty over ugliness in its distribution of rights and responsibilities is unjust. A theory of justice which does not find this fact among its set of principles is not one which takes seriously the duty to be ambition sensitive and endowment insensitive.

3.5.2 Too Wide

Despite the answers we may give to the above criticism to the apparent depth of Cohen's cut, it still remains that his view on responsibility cuts too wide. To see why, consider the discussion of Strawson and the problem of regression discussed above. Cohen's cut is too wide in that it seems that by taking it seriously, that is, by holding people morally responsible for only those choices which are not influenced by outside forces, we risk committing ourselves to a theory that holds people responsible for almost nothing. People's choices are largely, if not always, dictated by their tastes, ambitions, and personalities – factors which are nearly always outside the set that we have full control over. And if that is the case, we can never quite achieve the virtues which luck egalitarianism has over competing conceptions of distributive justice.

As Matravers notes on this point, the problem does indeed come to a focus on the free will problem: by focusing so narrowly on choice (i.e., which preferences did the individual genuinely choose, and which are the result of luck), we are simultaneously committed to a view of the importance of choice similar to Galen Strawson, while at the same time wanting to maintain a view about the possibility of free choice that is completely at odds with Strawson and the regression argument. We very much want to have it both ways. That is, we want to treat choice as central, and yet we also want to have it. Strawson holds that we cannot have it both ways, of course – the regression argument shows that if you take responsibility and genuine choice seriously, then you cannot have it. Put another way, either it is not the case that genuine choice is rampant, and all encompassing, or else genuine

choice is impossible.²⁹ However, I believe it can be shown that, by thinking about choice – the relationship between decisions and actions, and moral responsibility – in the way shown in the discussion of Williams above, I can undermine the force of this dilemma.

Treating responsibility the way that Williams does gives us a way to think about the worry that Cohen’s theory is “too wide”. As I say at the outset, the problem of free will is really two problems, but the first – the problem of moral responsibility – derives from the second, viz., the metaphysical issue of determinism and freedom. The second one is only a problem if the first one is. Of course, one solution strategy to solve the second is to solve the first. To follow this is surely to find one’s self in the morass of the free will literature, or roundly on Strawson’s carousel. I discuss Williams because his strategy – the better strategy for our purposes – is to deny that the first problem is really a problem for us at all. As Williams puts it, “Just as there is a ‘problem of evil’ only for those who expect the world to be good, there is a problem of free will only for those who think that the notion of the voluntary can be metaphysically deepened.”³⁰

The free will problem is only as deep as you need it to be. For our purposes, it is not necessary to delve into the depths of the problem. For us, it is enough that we do have a practical, common sense, working understanding of how and when to hold people morally responsible for their actions and choices. More specifically, a working conception that allows us to hold an individual more or less responsible, along some continuum.

I do not necessarily want to endorse the particular scheme which Williams defends (viz., Cause, Intention, State, and Response), although it does seem to me more or less consistent.³¹

²⁹[Matravers, 2007, pg 72].

³⁰See [Williams and Long, 1993, pg. 68].

³¹What Williams calls “state” – *that he was or was not in a normal frame of mind when it occurred* – is included due to a specific case that Williams had in mind. He was worried to show that after the dispute between Agememnon and Achilles, Agememnon was still responsible for his actions (in the story), despite the fact that Zeus had placed him in a deluded state of mind, because he did so intentionally. As Williams notes, “this situation is in several ways untypical.” See [Williams and Long, 1993, pg. 52]. Also, what Williams here calls “response”, I have elsewhere referred to as “fault.” See [Robinson, 2009b].

Instead, the important take away lesson is twofold: the problem of choice and responsibility need not be deep, so long as we have a working conception of more or less responsibility along some continuum, particularly given some principled criteria. Second, that treating responsibility contextually is the right way to treat responsibility in justice as fairness.

In the next chapter, I describe why that is the case. I also return to the question that Cohen raised earlier, which we might paraphrase something like, “does justice as fairness, and the difference principle in particular, commit citizens to an internal contradiction?”

Cohen tries to get to his conclusion in the incentives argument by showing an internal inconsistency with the difference principle, which he thinks justifies those large inequalities that we find in the US, UK, etc. I think that the DP is sound, and that those large inequalities that we find today reflect a failure not of the two principles, but of a larger failure to take seriously and apply the principle of fair equality of opportunity. In the US and UK, we satisfy perhaps formal equality, but not fair equality of opportunity (which for Rawls is foundational).

In the next chapter, I develop this line of reasoning, explain the foundational intuitions of justice as fairness, and point to the role that responsibility should play in our best theory of justice.

Chapter 4

Can a Liberal Society be Well Ordered?

There is an interesting, though little discussed, intellectual thread in the history of modern and contemporary philosophy, which unites the liberals, and the so-called critics of liberalism. It is the rejection of strong entitlements, and property rights that we inherit from Locke, and which forms the “libertarian” branch of liberalism. I shall refer to this rejection (both liberal and liberal-critic) as socialism, or communism. Socialism is defended by Marx, but also by Mill, and has strong influences on the liberal tradition through Rawls and GA Cohen.

4.1 Introduction

Let us read Marx as a critic of “liberalism”, and see if it bears any fruit. This starting point, however, poses its own immediate difficulty, as there may seem to be as many forms of liberalism as there are liberals. Liberals themselves seem to use the term a little loosely, making little attempt to eliminate any vagueness or ambiguity. Some of the definitions exclude almost nothing – e.g. “a social or political philosophy which has as its foundation liberty or freedom”. or again, the definition offered by Dewey “. . . there are, however, enduring values for which earlier liberalism stood. These values are liberty, the development of the inherent capacities of individuals made possible through liberty, and the central role of free intelligence in inquiry, discussion and expression.”¹

A claim that liberalism is “captured by the following intuitions: (1) All humans are of equal dignity and worth, (2) This worth is derived from a power of moral choice, and power to develop and pursue a life plan consistent with one’s ends, and that therefore, (3) it must respect the liberty of choice, and the equal worth of persons as choosers,”² comes much closer to the mark, equating liberalism with ideals concerning personhood, autonomy, rights, dignity, and self-respect.

¹See [Dewey, 1935, pg. 12].

²I take this definition from [Nussbaum, 1999, pp. 67-69].

The tradition goes back at least to Locke, a figure whose social contract theory certainly satisfies these requirements. He takes the rights of the autonomous individual person as central, and argues that a political commonwealth is formed only when it is to the advantage of the individual members who form it. A commonwealth does not exist to favor the community, but rather exists to protect the interest of the individual, and his property. And freedom and liberty are at the center of Locke's arguments, as it is only through the free consent of those who form it, rather than the coerced consent, or the will of some external authority, which gives legitimacy to a political institution.³ We may trace the thread of respecting the value of the autonomous individual, and protecting his/her liberties, through the literature from Locke into thinkers such as Hume, Smith, Kant, Mill, and into more contemporary authors such as Rawls and Nozick.

Traditionally, the work of Marx is seen not as a liberal theory, despite what I will argue is his strict commitment to freedom (broadly defined), but rather as a criticism of the liberal tradition. If there is a tension between the interest of the individual and the interest of the group (or community), Marx may be said to favor the latter. The communist revolution is meant to free all from the bounds of capitalism – not just the poor, or the landless, but also capitalist and the property owner. And when individual liberties come into tension with equality, Marx is known to favor the latter. The degrading and alienating effects of property take priority over any “rights” a capitalist may claim over his property. In section 4.2 I consider argument for both of these claims.

Much of the liberal tradition has been engaged in “softening” Locke's strong commitments to liberty over other considerations (while Locke's political considerations seem to favor the smart, the strong, and the brave). Central, then, to the positions of thinkers such as Smith and Kant, through Rawls, has been the intention to eliminate, as much as possible, the effects of arbitrariness on the life chances of individuals. Indeed, it seems to be the major

³See [Locke, 1690, §VII-VIII].

accomplishment of Rawls' *justice as fairness* that he resolves the tension between liberty and equality, and that he delineates very clearly what a theory of justice which mitigates the effects of arbitrariness and partiality on life chances would look like. Many different liberal authors, though they oppose this commitment in Locke, draw different implications from this rejection. I take up the issue of impartiality in section 4.4.1.

We need look no further than a contemporary of Marx, and in a figure no less important than John Stuart Mill, in order to find a socialist theory of justice that attempts to engage the same concerns as Marx, while answering similar problems with similar solutions.⁴ Mill's arguments, however, are decidedly liberal. Not only are they consistent with his well known positions in *Utilitarianism* and *On Liberty*, those works, when read correctly, can lead only to a political philosophy that is decidedly "of the people," and which favors the interests of the masses, the poor, and the working man. How else could a theory which sets out to maximize aggregate happiness, and respects a set of liberties limited only by their effect on the liberties of others, turn out, except to argue for strong socialist policies? If, for example, strong respect for entitlements and property rights harms the majority of living people (e.g., the poor and the working class), thus resulting in decreased aggregate utility, then such entitlements must be rejected. In section 4.3.2 I briefly consider and discharge the claim that Mill can be read chronologically as passing through different stages, ultimately abandoning his earlier philosophical commitments.

I introduce Mill's socialist political policy alongside a discussion of Marx in order to answer a few questions about Marx, in an attempt to inform a dialogue which takes place between Marx and Rawls (philosophically, if not historically). That is, I attempt to answer the question, "are citizens of a well ordered society emancipated, in the relevant sense that

⁴Though Marx and Mill were contemporaries (Mill was born 1806 and died 73, while Marx was a dozen years younger and lived until 1883. They also spent more than twenty of the same years calling London their home. Nonetheless, it is unlikely that they ever met, and both only rarely engage with the work of the other in each other's own writing. It is an historical peculiarity that they arrived at such similar conclusions, given such different assumptions, while observing the same situations.

Marx was interested in?” According to Rawls, most, if not all, of the narrowing and demeaning feature of capitalism would be overcome in a society in which the citizens are committed to the two principles of justice. Even the worst-off members of a well ordered society can face their position with dignity, since they know, and they know that everyone else knows, that their situation can not be made better without making the situation worse for everyone. Their general desire for justice limits the pursuit of more egoistic, or individual ends.

Of course, for Marx, no society with a capitalist economy, despite its adherence otherwise to democratic political ideals, could find its citizens fully emancipated. The very institution of bourgeois private property necessarily alienates individuals from the object, the productive activity, and from each other. Rawls admits that this is a serious difficulty, but insists that it is an open question whether or not a liberal socialist theory is better equipped to realize the two principles of justice than Marx’s communism would be. If so, then a liberal socialism would make a better candidate for the economic system from the standpoint of justice. At this stage in the theory, this is an empirical problem, and therefore an open question. I take up this question for Rawls.

A well ordered society is defined by Rawls as one in which (1) Everyone knows that everyone knows that others accept the principles of justice, and (2) the basic institutions of society *do*, and are generally *known to* satisfy those principles. It is also a society in which citizens are free to pursue their own ends and, where legitimate, may expect additional, or unequal compensation from work that flows from natural talents. Rawls calls these “legitimate expectations” (or just entitlements), and suggests that we respect them from both the perspective of liberty (legitimate liberties are protected by the liberty principle), as well as from the perspective of efficiency (incentives to express one’s talents is Pareto dominant).

The question at issue, then, may be stated as: Which expectations are legitimate? To avoid tautology, we must give a delineation of legitimate and non-legitimate. The correct distribution must lie somewhere between a libertarian view which respects strong property

rights, and a socialist policy that implements strict equality of resources. In section 4.3.5 I contrast Marx and Mill's socialist theory with Rawls' argument that a well ordered society is one in which human emancipation is achieved.

Finally, I take up the project of GA Cohen, who argues that the difference principle is self-defeating, in a so-called well ordered society in which entitlements are respected. In attempting to drive a wedge between the principles of justice, and our respect for entitlements, points to an important social problem: just which "expectations" are really "legitimate". In section 4.4.2, I take up this question for Cohen, and show that concerns for community should balance, if not over-ride in many cases our respect for entitlements. When asked which expectations for unequal compensation are really legitimate, the answer seems to be: not many. I take up the question of community in section 4.4.2. In section 4.5, I conclude.

4.2 Marx

Karl Marx was a philosopher primarily concerned with *freedom*. Marx wrote so prolifically, and on so wide a range of subjects, that it is difficult to see the picture of his ideas as a whole. However, I think there *is* a unifying theme, or vision of the world, that unifies all of Marx's writings – political, philosophical, and economic. And that is the understanding that in the current situation in Europe and America (both contemporary to Marx, as well as today in other places – Africa, China, the Caribbean and South Pacific), people everywhere are not free; their freedom is limited in ways that are both subversive, and also necessary; this lack of freedom is located in nearly every aspect of their life; this lack of freedom is inconsistent with people's nature; and finally, this situation can, and ought to be, reversed.

I will concentrate on three themes from Marx's writing, and try to show how they are inter-related, and how they apply to freedom. They are *alienation*, *exploitation*, and *emancipation*.

4.2.1 Exploitation

The central theme of the *Communist Manifesto*, *Das Kapital*, and the *Grundrisse* is the necessary exploitation of the worker by the capitalist under capitalism. Marx says that the worker:

sells labor itself as *objectified labor*; i.e., he sells labor only in so far as it already objectifies a definite amount of labor, hence in so far as its equivalent is already measured, given; capital buys it as living labor as the general productive force of wealth; activity which increases wealth.⁵

Objectified labor is the amount of labor that the capitalist buys from the worker. This transforms labor (and ultimately, the laborer) into a commodity – a thing that can be bought and sold. The price of a commodity, is equal to its marginal cost, in the case of the worker, the amount needed to keep him alive and producing. The consequence of this arrangement is a hidden relationship between the exchange of labor and capital. The capitalist pays for a certain amount of labor (say, an hourly or daily wage), and then gets to keep the entire value of the product of the worker’s labor.

Engels referred to this as one of Marx’s “great discoveries” – the concept of surplus value.⁶ Say that the wage to keep a worker alive for a day is \$10. Suppose also that over the course of eight hours, the worker can produce 8 pairs of shoes, which each sell for \$10. The worker has created \$80 of value, but only received \$10 in compensation. He loses the difference of the value between what he creates and what he is paid. This surplus value is then transferred to the capitalist, whose profit is derived from the exploitation of the worker. One might object that the capitalist has some stake in the value as well: he owns the factory, purchases the materials, assumes the risk, etc. Nonetheless, the nature of capitalist economics requires that the product derived from the worker by the capitalist include a surplus on the value of

⁵See [Marx, 1857, 307].

⁶See [Engels, 1883].

his labor. If there is no surplus value, there is no capitalist profit, and without profit, the capitalist will not be in business. Not only does the capitalist ruthlessly exploit the worker by taking the surplus of the value of his labor, he necessarily *must* do so, according to the principles of capitalism.

Furthermore, suppose that through advances in shoe-making technology or technique, the worker is able to double the output of shoes per hour. The value of the product that he creates doubles, but his wage remains the same. This is the second way that the capitalist is able to use the worker's creative power to maintain or increase his domination over the worker.

The aim of his work on exploitation was to remove the veil from the eyes of workers and capitalists, to show in full detail the processes by which workers are dominated and exploited by the system which governs their relations, and demonstrates that workers are in a state of alienation.

4.2.2 Alienation

The central theme of the *Economic and Philosophic Manuscripts of 1844* takes its language from its roots in Hegelian philosophy. Since capitalism requires that the capitalist profit from the surplus of the value of the product of the worker's labor, Marx argues, when the worker gives up the product, he simultaneously gives away a part of his own self, in the form of productive power, without compensation. This activity forever removes a thing that was created by the worker, and thus contains a part of him, thus alienating him from that thing.

Furthermore, since a worker is forced to earn a living working in a factory (or office, or shipyard, etc), the productive activity, which under ideal circumstances would reflect his choices or preferences, is determined for him by economic forces. For Marx, the essence of the person, the feature that sets him apart from other animals, his *species-being*, is his productive capacity. He can take some object with no value, add his labor to it, and convert it into

an object that has value. He can then benefit from that value. Instead, capitalism converts his reason for existing into a means for existing. Rather than direct his own productive capacity, Marx argues, instead, he must direct it at earning money, in order to ensure his and his family's subsistence. Because of this, the worker is alienated not only from the object of his labor, but the also from the productive activity itself.⁷

Worse, since subsistence requires money, and the pursuit of money requires one to sell one's labor in the marketplace, one is constantly in competition with other workers for the opportunity to trade labor for wages. Not only does this fact reduce wages to bare subsistence levels, it also sets one man in direct competition against all others, the prize being no less than continued existence. Under ideal circumstances, the expression of an individual's species-being in his work would be to the benefit not only of himself and his, but to everyone in common. If he were released of his need to trade his labor, and guaranteed a fair minimum level of subsistence, a shoe maker would make shoes not for the wages, but for love of the craft, and the pleasure of warming the feet of his neighbors. Scientists would invent new drugs and medical procedures not to gain professional recognition and promotion, but for the betterment of sick people. Instead, capitalist political economy strips that social element from one's work life, thereby alienating him from other people.

Never in the history of the world have economic forces put people into the situation in which they now find themselves. Marx describes the entirety of human history as leading to this point. While feudal farmers had their social lives, and their productive activities, everything under capitalism has been stripped from the individual. He literally has nothing of himself left to lose. If the necessary next step is the so-called communist revolution, the rejection of bourgeois private property and the capitalist as the owner of the means of production, then the philosophically necessary aim of world history is human freedom.

⁷See also [Marx and Engels, 1965, pg. 123] for a discussion of the human as a productive and social individual.

4.2.3 Emancipation

The solution to the problem of exploitation of the worker, and human alienation, of course, is the positive abolition of private property (by which he means bourgeois private property, or the capitalist as the owner of the means of production). By eliminating private property, we simultaneously eliminate human alienation, returning the object of production, and the productive activity back to the worker, while also returning man to his social nature, and therefore to each other. Says Marx:

Communism . . . is the genuine resolution of the antagonism between man and nature and between man and man; it is the true resolution of the conflict between existence and essence, objectification and self-affirmation, freedom and necessity, individual and species. It is the riddle of history solved and knows itself as this solution.⁸

Marx does not give a clear picture of what communism will look like – not in any practical detail, in any case. He does describe, in great detail, however, the enormous difference it will make. Private property degrades everything about the person, including his senses. The jeweler only appreciates a jewel for the price it will bring on the market, not for its beauty. A thing has value only insofar as it can be possessed. The abolition of private property returns a man's senses to himself, and lets him appreciate the world the way that he was meant to appreciate it.⁹

4.2.4 Freedom

If I have correctly described the institution of individual property as a prison in which man is forced to suffer and toil, then the abolition of property could be understood as an

⁸See [Marx, 1994a, pg. 89].

⁹See [Singer, 2010, pg. 53].

emancipation of the individual and of society. Though he discusses emancipation in his *On the Jewish Question*, Marx does not give a particularly clear account of what is involved in human emancipation. Certainly he distinguishes what we may call “political emancipation” from “human emancipation”, and argues that, while the liberal tradition, or a secular state can certainly and easily accomplish political emancipation (look, he suggests, at the USA, where so-called political freedoms are guaranteed to all), political freedoms do not ensure human freedoms. In fact, in many cases, they may even act as a barrier to human freedoms, as we have been discussing them so far. If, in his most free state, man is not alienated, but instead returned to his essential nature, then he is returned to his social and productive self. Political freedoms, however, are designed to protect us from the interests of others. They separate us from others, and separate us from threats of interference by others. By taking steps to ensure *political freedoms*, one is therefore taking steps to undermine *human freedoms*.¹⁰

Political freedoms guarantee what Constant referred to as the “liberties of the moderns”, or what Isaiah Berlin calls “negative freedoms”.¹¹ These include commonly protected constitutional liberties, and can be described as “freedoms from”. They comprise freedoms from interference, and so includes freedom of speech, freedom of assembly, freedom of religion, etc. And on the topic of human emancipation, these are precisely the liberties which are not at issue. Since freedom is found in our relations with others, in community, then if liberals focus on political rights, then that focus undermines real freedom, thereby undermining real chances for human emancipation.

What this means is that, for Marx, civil society is marked by a real emancipation, i.e., freedom from the constraints of one’s social class, one’s religion, etc. By focusing on the differences in birth, social place, occupation, education, the state partially frees individuals,

¹⁰See [Marx, 1994b, pg. 16-18].

¹¹See [Constant, 1988] and [Berlin, 1969].

by converting those characteristics into non-political distinctions. However, in doing so, it puts these distinctions into the forefront. By decreeing that one's economic status at birth should not affect one's life chances, the state leaves intact the world of self-interests, of class divisions, exploitation and competition. By focusing on these differences, the state sets the interests of these classes against each other. The best example of political emancipation still falls short of real freedom, because it is based on the contradiction between the political state and the civil society. When the state sets out the limit within which one may act without harming another, the state is marking a clear distinction between man and man – just as if he were planting a sign distinguishing one field from another.

Real human emancipation in civil society comes not from marking the distinctions between man and man – as if with a stake in a field. Rather, it comes from returning man to his creative and social nature, thus returning man to man and returning his work to himself. Political emancipation works to maintain social distinctions, by determining them to be non-political. This is counter-productive.

At this point we can leave the definition of human emancipation in its abstract form, identifying it with human freedom, which is achieved through non-alienated labor. I take the issue up again in a discussion of Rawls, below.

4.3 Entitlements – Locke, Nozick, and Libertarianism

Marx's critique of liberalism finds at its roots his rejection of the legitimacy, or propriety, of private property. A capitalist political economy necessarily exploits, devalues, and alienates those members of society who sell their labor in the production of goods. The solution, for Marx, is the rejection of our respect for private property rights, which in turn eliminates the exploitation of the worker, and returns him to his species-being.

Central, then, to his criticisms are theories of property rights such as Locke's (or, we may imagine, Nozick's), in which an individual is entitled to the exclusive use and disposal of what he produces, or receives through legitimate means, including his right to direct the disposal (in the form of bequest or inheritance) of that property.¹² For Marx, as we have seen, this introduces at least one important social problem, viz., the protection of political rights is at odds with the protection of human rights, such that the former may undermine the latter.

I think that Marx is right in his criticisms of liberalism as it is found in Locke (or Nozick, who argues that any distribution which begins as a just distribution, and satisfies legitimate rules of entitlement, is itself just).¹³ A strong respect for entitlements undermines our mutual respect for others as free and equal members of a moral community. However, are these criticisms therefore best aimed at liberalism in general, as I have defined it above?¹⁴ By relaxing our commitment to entitlements, we thereby weaken the force of Marx's criticisms. We can look at two alternative treatments of liberalism – liberal socialism, as defended by JS Mill, and *justice as fairness*, as described by Rawls.

4.3.1 Rawls on Entitlements

What are we committed to when we are committed to property rights in a capitalist economy? For Rawls' justice as fairness, most (but not all) of the features of capitalism described by Marx – the exploitation of the worker, and the demeaning nature of the division of labor – would be overcome. A well ordered society is characterized by a state of affairs in which everyone knows and accepts that everyone knows and accepts a basic structure which is

¹²Along with the disclaimer that he leave enough, and not let his property spoil. Nozick calls this the Lockean Proviso. See [Nozick, 1974, pp. 178-82].

¹³See [Nozick, 1974, Ch. 7].

¹⁴The definition above consists in two main parts: a foundational respect for the role of freedom in shaping people's lives, our social interactions, and our political institutions, and a focus on the liberty of the individual.

known to satisfy the principles of justice. Citizens of a well ordered society are committed to the principles which govern their society. The social contract guarantees the willing participation of all individuals, since each knows that any inequalities that characterize his/her position in society represent a state that is the best that it can be. Each member, therefore, can face his station in life with an inviolable dignity, knowing that his position could not be made any better without harming anyone else. Finally, if that is true of each individual, it is true of all individuals – there is no basis for the complaint that the division of labor demeans and exploits the worker for the benefit of the owner of the means of production.¹⁵

What might Marx say? He may respond that if we accept a liberal political economy that respects property rights, the result, even in ideal form, would vary too widely from the two principles of justice. That is, any society with private property cannot respect the two principles, much less respect people as free and equal. This is because a necessary feature of capitalist economy is that the owners of the means of production must benefit from the surplus of the labor of the workers, necessarily alienating them from the product of their labor, the object of their labor, and their species-being.¹⁶

The question at this point, according to Rawls, is this: which political conception is better able to satisfy the two principles of justice – a liberal socialism, or a non-liberal socialism? That is, even granting that holding the means of production in the hands of the capitalist is a universal and sufficient condition for alienation, does that undermine liberalism as a legitimate contender as the correct political theory? To decide, we look at the arguments regarding property, in JS Mill's *Principles of Political Economy*.

¹⁵See [Rawls, 1999, §69, pp. 397-99 & §79, pg. 463f] and [Rawls, 2001, pp. 176-79].

¹⁶See [Marx, 1994a, pp. 58-68].

4.3.2 Mill on Socialist Political Economy

Just as the principles of communism have never been fairly tested in any country, so it is also true that the principles of private property have never had a fair test – the laws of private property have never conformed to the principles on which the justification for private property rests. If the laws of private property were to minimize, rather than aggravate inequalities in wealth; to discourage the subdivision of social class; to ensure that all start from a position that is fair; the respect for private property would have no connection to the evils which Marx identifies. Could we maintain individual private property, while satisfying Marx’s concerns, by building a liberal socialism? What does a liberal socialism look like, and why is it preferable to liberal capitalism?

Mill’s approach to political philosophy in general, and his defense of socialism in particular, is decidedly utilitarian. He begins by considering “alleged” problems with socialism, and shows that typically either the same objections work as well as, or better, against capitalism, or else that the socialist policy tends to promote more happiness. For example, consider the free rider problem. It is urged that, in communism, everyone would endeavor to avoid his fair share of the work. This is because honest, efficient labor only comes from those who are able to individually benefit from the fruits of their labor. And, according to the objection, only a system which pairs remuneration with effort or efficient outcome (i.e., an hourly wage, or a commission-based system) rewards individuals individually for their labor. But does this free rider problem work against socialism only? Of course not. Under the current system, very little work is done for the worker’s own benefit – workers on an hourly wage have little stake in the product of their labor. Rather than working as an objection to communism, this free rider objection works better against capitalism. This is so, since under a communist political economy, individual workers may have an equal stake in the outcome of the labor, eliminating their desire to free ride. Communist laborers, not those who toil for the benefit of their capitalist masters, benefit directly from the fruits of their labors.

This manner of reasoning informs much of Mill's discussion of private property, viz., if we ought to have it, it is because it somehow maximizes advantage, understood as utility, or happiness. Historically, a defense of private property has centered around one concept: respect for property rights means that people should be guaranteed the right to benefit from the fruits of their labors. In judging the extent to which this is true, we must consider the consequences of this policy. Furthermore, for the present discussion (i.e., evaluating the benefits of liberal versus non-liberal socialism), we should assume two further things. The first is universal education, and the second is reasonable limits on population.¹⁷ For Mill, after granting these weak premises, of course, it is simply an empirical, or a historical, question – viz., which system produces the most *advantage* (which for Mill we may define simply as “utility”, but which we may make more precise later)?

Regarding property, Mill is skeptical of the legitimacy of claims to land as property. Raw materials from the earth such as oil cannot become property, because they are not produced by labor, though this argument does not exclude the owning through cultivation of crops, which *are* produced through labor. For the same reason, therefore, can land not become property. Mill suggests we allow it to *be used as* property, but only when such an arrangement is expedient, and is it not wasted, is it just. Further, the produce should benefit all, since land belongs to all.

So which is it? Which system (individual property, or equality) brings the most advantage? The answer will depend on a number of factors. First, it is an empirical question, as Mill has stated it, and so will require some means to calculate advantage. Second, and for that reason, it is difficult to predict. And third, it will depend on the particular social and historical circumstances that hold in any particular region. However one thing we can know,

¹⁷One may ask: why is this a safe assumption? That is, to avoid building a straw man, we should allow only those assumptions which would be granted by both sides of the debate. However, these assumptions are necessary in order to bring about the best social situation, regardless of economic or political institutions. Any politic which lacks them will be one which is not lacking in misery and degradation. See [Mill, 1998, Book II, Chapter i, §3].

is that it *will* depend on which is consistent with greatest liberty. Advantage, then, for Mill, seems to track not only utility, but also liberty.

Why would the correct politic maximize liberty? Assume, as we have done above, that people's subsistence needs are met. Once their physical requirements are satisfied, the next need they will want met is for liberty. Now assume an advanced society. In such as society, physical needs are easy to satisfy and control, and they diminish in intensity. However, the desires for liberty increase in intensity as intelligence and moral faculties increase. The most efficient expression of this state (or as Mill states it, the "perfection both of social arrangements and practical morality"), is to secure freedom of action only limited by injury to others. The perfect state will be one that ensures the most extensive set of liberties to each individual, consistent with a similar set of liberties for everyone else. Again, it is an empirical question that asks which social and economic system best satisfies this requirement. Both Mill and Marx agree here, though, that people today, who are locked into a particular occupation, who are stuck in a particular geographical location, and who have access only to a small amount of leisure time, are not ensured these liberties.

Now, Mill discusses the above considerations when evaluating the legitimacy of liberal socialism versus a socialism which proscribes equality of distribution of the product of labor. However, you may also proportion remuneration to labor, so long as the process is fair. Of course sharing equally the output, Mill claims, appeals to a higher standard of justice, and a high moral condition of human nature. However, historical evidence suggests that such a system is likely to fail, and so until conditions such as universal education are satisfied, proportioning remuneration to labor is more expedient. For Mill, the justice of the current arrangement depends on the following condition: the proportioning of remuneration to labor is unjust if it depends on strength or capacity (or what Rawls calls talent, or natural endowment). this arrangement would be to favor those who already have the most, and who already have more from nature.

For the reader only familiar with Mill's earlier, and more famous work (i.e., his *Utilitarianism* (1863) or *On Liberty* (1859)), a description of Mill as an iconic socialist may at first read as surprising, if not simply incorrect.¹⁸ For this reader, first let me persuade you that this view is not only consistent with utility and liberty, it is entailed by what one finds in early Mill. Second, let us look back to *On Liberty* to a section which is often overlooked, but which is an indication that Mill held these views throughout his corpus.

4.3.3 Utilitarianism

The more direct proof will come below, in *On Liberty*. However, when looking at the principle of utility, it should come as no surprise that, in fact, it is a philosophy “of the people”. According to the principle of utility, when we judge the right-making feature of an action, we are to apply the utilitarian calculus in such a way that we promote happiness, not in the individual, but rather in the aggregate of people. The principle of utility leaves little room for judgments that individual actions, policies, or economic principles ought to benefit the individual. Instead, economic and political principles should be designed so that they maximize the good for everyone, and so it should be no surprise that this principle favors an economic structure that benefits everyone.

4.3.4 On Liberty

The more surprising feature to the reader who is best acquainted with Mill's more popular work is that a socialist economy could be consistent with what may be the most well known element of *On Liberty*, i.e., the so-called “no harm principle”. As Mill notes in the introduction, the subject of the essay is social, not political, liberty: viz., the nature and limits of power that can be exercised by society over the individual. He sums these up later in the

¹⁸Note that, while the final edition of Mill's *Principles of Political Economy* was published in its 7th edition in 1871, the first edition was published in 1848, many years before his two more popular works.

introduction: “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹⁹ It *should* come as a surprise that such a maxim should result in a political economy that is governed by liberal socialist principles, since it is not intuitively obvious why a social structure that limits interference to instances of “harm” should entail a socialist social structure (which interferes quite regularly with the freedom of the market).

Thus, in the first 4/5 of the essay, Mill develops these principles in full. We may jump ahead to Chapter 5, which he titles “Applications”, and where he applies the two maxims developed in the rest of the text. He summarizes them as:

The maxims are, first, that the individual is not accountable to society for his [self-regarding] actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for [other-regarding] actions . . . the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.²⁰

That is, first, individuals have complete liberty over self-regarding acts, and second, that other-regarding acts do fall under the social authority of society to legitimately enforce rules.

Now, as we’ve noted elsewhere (§4.2.4), these two maxims – i.e., the liberty maxim, and the social authority maxim – do come into conflict, and some principle must be generated to either referee between them, or else show how they might be consistently applied.

¹⁹See [Mill, 1991, pg 11].

²⁰See [Mill, 1991, pg 292].

The first implication is that not every other-regarding action can be legitimately limited. Competition in sport or commerce means that often, while one individual benefits, another must be harmed. However, it would be inexpedient to intervene in the case of legitimate competition, and thus Mill concludes, the best economic system tends to be a free market system free of coercion by the government. As Mill argues earlier (pg 225), this is because either it would be more expedient to allow the individual to act according to his own devices, or else intervention would introduce other, more serious evils.

The second implication is that, for similar reasons, many self-regarding acts may be legitimately limited because those self-regarding acts take place in public. This opens the possibility that many actions which would be considered to be self-regarding when engaged in private, become other-regarding when engaged in public. Probably, Mill says, my right to gamble, or solicit the services of a prostitute, are self-regarding. However, I could be legitimately prohibited from opening a public gambling house, or being a pimp, since both of those activities may have detrimental effects on the community. On the other hand, Mill admits, the public may view coercion against pimping or public gambling as inexpedient, if so, it will continue to be private in that case.

These maxims are probably familiar to most readers. We are now in a position to turn the conversation back to the surprising conclusion that, while Mill's liberty maxim suggests that the free market is usually the most expedient, and thus, the preferable economic model, Mill's liberty maxim should *not* be confused with laissez-faire. That is, in drawing a distinction between what we are calling Marx's non-liberal socialism, and Mill's liberal socialism, Mill's liberal principle is not a libertarian free market principle.

To see why, we must look at what Mill meant when he famously remarked that, "trade is a social act." He goes on, "Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general, and thus his conduct, in principle, comes within the jurisdiction of society" (pg 293). Trading on the

open market is never a self-regarding action, by its very nature, and so always falls within the scrutiny of society. And so while the principle of laissez-faire is sometimes or even often more expedient, it is not always more expedient. And in those cases where it is not, society can legitimately impose rules and restrictions on trade.

This is similar to his conversation, in *Principles of Political Economy*, in which he describes “large exceptions” to the laissez-faire doctrine. General expediency dictates sanitary or safety conditions of workers, since these are other regarding actions, and so fall under the jurisdiction of society.²¹

Note the difference: the liberty principle says that an individual may enjoy any activity that does not harm others, and these rights may be enjoyed in harmony, since one’s actions does not directly affect another’s. This is not true of laissez-faire, which allows that, with regards to some other-regarding activities, individuals have no moral obligation to each other. Under scarcity of resources, laissez-faire makes it impossible to allow for, or guarantee, equal rights to opportunity, since it is a zero sum game. Mill allows for this only when the social benefits of the unequal outcome outweighs the needs of the individual. Laissez-faire allows this always. The equality of opportunity guaranteed by the liberty principle’s “no harm” clause is unavailable to laissez-faire.²²

The purpose of this diversion was twofold. First, my intention was to convince the lay-reader of Mill that a reading of Mill as an iconic socialist is consistent with, and entailed by, passages with which less specialized students will be familiar. Second, the reading of Mill as a socialist is correct, but Mill is certainly a defender of liberal property rights, in particular when they are most expedient in defending broad and aggregate utility (which I will defend as equality of access to advantage).

²¹See [Mill, 1998, pp. 936-71].

²²On this subject, the reader will benefit, as I have, from reviewing [Riley, 1998, pp. 110-20].

4.3.5 Liberal versus Non-Liberal Social Political Economy

So what would communism look like? As I noted above, Marx does not really say (though in many places Engels does).²³ To begin, as we have seen, it begins with the positive abolition of all bourgeois private property, i.e., all property whose *origins* are illegitimate, or derived from the surplus value of labor. In communism, then, all private property must be the *result of*, or *originated from*, non alienated labor. Under communism, people must be free to benefit from the full value of their labor.

Mill is much more specific. For Mill, a legitimate socialist political economy will respect people's entitlements to benefit from the fruits of their labor, and to dispose of it. It will not identify remuneration directly with exertion, talent, or natural endowment. It will assume universal education, and limitations on population. And if it is to be legitimate, it will maximize liberty (and utility, or advantage).

For Mill, though, there must be limitations on the distribution of wealth and property. Respect for private property means that people should be guaranteed the benefits of the fruits of their labors. However, to transfer the fruits of one's labor to another, who has not worked for it, but is allowed to benefit from it (in the case of, e.g., estate inheritance), conflicts with the legitimate goal of private property. The respect in our current economic system (and in Mill's London) of entitlements and inheritance rights widens the gulf between the rich and poor, encourages the subdivision of social classes, and ensures that some begin life with prospects for success and life chances superior to others – all conditions which are inconsistent with the liberal justification for property rights.

While property rights usually include the right to dispose of one's property as one decides, this does not entail intestate inheritance rights, as when the state locates the next closest relative, and awards the estate to him/her. Furthermore, Mill argues, the right to bequest one's property to one's children should be limited. Property, Mill argues, is a means to

²³cf. [Engels, 1847].

an end, not an end itself. Like any other power, the power to bequeath property may be exercised in a way that is in conflict with the interests of the community, and also inconsistent with the liberal justification for property rights.²⁴ If the liberty to bequeath fortunes from one generation to another has the net effect of harming many other members of society, then it should be prevented.²⁵ In very many cases, the appropriate application of this argument will result in estates being transferred in large part to the state, upon a person's death.²⁶ And the result of this would be to help to ensure that all members of society begin their lives with life chances that are similar to everyone else's; that inequalities reflect desert, rather than inheritance; and that one's station in life is not directed by conditions that are arbitrary from a moral point of view. This liberal justification for a more socialist political economy helps to undermine Marx's most urgent attacks on liberal property rights – i.e., the fragmenting of social classes, the exploitation of the working class (in the form of the bourgeoisie benefit from value of the surplus labor of the worker), and the lack of respect for the worker's human value. It also, in abstract form, shows an early anticipation to Rawls' two principles, which are founded on the intuition that justice be impartial, and that it apply non-arbitrarily.

4.3.6 Wealth

While wealth, for Mill, could be accumulated over the lifetime of an individual (assuming that it was accumulated according to just principles), limitations should be in place on the transfer of that property after his death, and in most cases it should return to the common state, to benefit everyone. What about for Marx? Common perception has it that according

²⁴Remember Mill's so-called 'harm principle', which states that the the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. [Mill, 1991, Ch. 1].

²⁵See [Mill, 1998, Bk II, Ch ii, §4, pg. 223-26].

²⁶More specifically, Mill means upon the death of both husband and wife, as the unit of measure for distributive justice is the individual, or the small family. See [Mill, 1998, Bk II, Ch ii, §3, pg. 220-21].

to Marx's description, all property is held in common, as if at the end of the work day, it's all carted back into a warehouse, and locked up for the night. Of course, the picture is much less austere, and much more complicated than that. If Marx's positive thesis regards the elimination of bourgeois private property, then it seems to apply only to that capital which has its origins in the surplus value of the labor of the worker. Non-alienated individuals, owing to their productive capacity, will of course be entitled to benefit from their labor, even while their labor likewise is to the benefit of all.

So in Mill's picture of a socialist political economy, an individual, or group of individuals could acquire wealth, but could we say the same about Marx's political economy? For Marx, then, could any individual accumulate disproportionate wealth? 'Wealth' under a communist political economy may be an anachronistic term, but could an individual amass individual property that is disproportionate to the individual property held by everyone else? Imagine a desert island, where the inhabitants arrive with the property that they have in common. Imagine next that some inhabitants dedicate their time to surfing, some to making music, while others tend to fishing or collecting coconuts. Their social impulse compels them to ensure that everyone has food, cloths, shelter: in short, subsistence, and education are provided in common.

Suppose next that Thurston, one of the island inhabitants, who does not care for surfing or singing, instead endeavors to spend his days converting plentiful beach sand into bricks, ubiquitous palm trees into furniture, and constructs an elaborate and large home, complete with amenities that everyone else is lacking in their own adequate huts. Suppose further that there is enough beach-side property for everyone who is so inclined to construct such a home, enough sand to be converted to bricks, and enough of whatever other raw materials comprise the remaining amenities.

Let us even say that what he ends up with is a grand palace. If we are in agreement that his palace did not benefit from alienated labor (he did the work himself, or with the

cheerful cooperation of neighbors), it would seem that Marx has no recourse to object, nor should he, to one individual amassing such a fortune, while others have so much less. If we must also agree that his wealth does not alienate anyone else, it seems that under a communist political economy, not only are his actions and this distribution just, but they are even encouraged, since emancipation is a state in which individuals express the productive capacity of their species being, and where the productive activity and the object of production are returned immediately to himself. Most importantly, it seems that emancipation can be achieved through non-alienated labor, satisfying the two principles of justice, while respecting individual property rights and entitlements to benefit from the fruits of one's labor.

The differences between Mill and Marx, on the subject of individual property, as they relate to the two principles of justice, then, seems almost negligible. Mill's system would strictly limit the extent to which individuals could benefit from the surplus of the value of the labor of others. The extent to which property may be used as capital is the extent to which allowing it is to the advantage of all. A focus on aggregate advantage, limits on the use of land as property, and low or non-existent inheritance rights ensures that the labor of everyone in a community is best aimed at benefiting each individual. Marx, of course, comes to many of the same conclusions, though due to different considerations. Marx would hold land and the means of production in common, though it seems he would also allow, or encourage, the individual to benefit from his own labor. In both cases, Mill's socialism, and Marx's communist political economy, both are consistent with the two principles of justice. But does it work the other way around?

Before we return to Rawls, and the question of whether citizens of a well ordered society are emancipated, I want to touch on an ambiguity in Marx that I exploit when I reduce Marx's socialism to a liberal socialism. That is, I assume that in Marx, there's an ambiguity on "Capital", or "Property", or as I have referred to it, "Wealth". My claim is that wealth generated by an individual, in the right way, is permissible, but wealth generated in the

wrong way is impermissible. Further, the right way to generate wealth is through the use of non-alienated labor, and the wrong way to generate wealth is through alienated labor. The question we should ask then, is: which labor is alienated? For Marx, non-alienated labor satisfies both criteria, both consistent with my species being: (1) I am not robbed of the surplus of the value of my labor, and (2) the object of my labor benefits not only me (because of my creative capacity), but also benefits everyone else (because of my social capacity).

Now let us ask about Thurston, my wealthy palace owner, does his wealth benefit everyone? Is his wealth owned publicly? Marx could certainly object that, freezing or hungry islanders should feel welcome to eat at his many tables, or sleep in his many fine rooms. In this story, however, there is plenty and adequate food and shelter for all islanders. My story turns on this fact. Mill's discussion above about which property should be owned in common is relevant here, which is the emphasis both Marx and Mill place on use value.

Some items derive their value from their being used by one person only, either because they fit my particular body type, or because it would be impractical to share them widely. We may take as an example of this, my medically necessary, prescription reading glasses. These were designed and constructed specifically for my eye condition, and have either no value, or rapidly diminished value, in the hands of others.²⁷ There is little dispute about whether I own them, as they are only really valuable if I do.

Some items derive their value from being freely available to everyone. Obvious examples include air, or clean drinking water. There is no question that air is best owned by everyone, cooperatively.

Most things, however, live in the middle. There is much dispute regarding items such as acorns, farm-able land, or ball bearing factories. And the ambiguity lives here: According to Mill, a factory may achieve its ends most effectively by being controlled privately, or

²⁷In William Golding's *Lord of the Flies*, "Piggy" learns this when the boys attempt to own his glasses cooperatively, because of their value in lighting a camp fire.

cooperatively, by a limited number of individuals. This will satisfy Mill when the profits of the factory benefit all the owners fairly (i.e., the owners do not benefit from the existence of alienated labor), and only when the private ownership of the factory, counterfactually, does not otherwise limit or restrict the liberties of non-owners, or more simply, fail the test of the greatest happiness principle.

Now these look very much like Marx's criteria, i.e., that no one is robbed of the surplus of the value of his labor, and the profits benefit everyone fairly. Now, either Marx would object to the co-op nature of the factory, and the individual ownership of the palace, or he would not. If he does, it is because the property is bourgeois property viz., the bad kind. If he does not, it is because it satisfies criteria (1) and (2).

According to Cheyney C Ryan, this comes down to an ambiguity between the *ownership* of the object, and *possession* of the object. Possession of a good is simply a physical relationship. Ownership is a normative relationship, which entails certain property rights that the person has over the thing, e.g., the right to use it, and the right to exchange it. And of course, the possession of an item does not entail ownership of that item, if it is acquired through illegitimate means, such as theft, or if it is the sort of thing an individual should not be able to hold, such as a community's entire supply of drinking water. If ownership is the relationship described above, i.e., the right of an individual to use and exchange it, does the story of the mansion owner entail a slippery slope into capitalism? That is, can he *thereby* own the means of production, becoming himself a force of exploitation and alienation?

Now of course the islanders could just vote to forbid him from doing these things. They could legitimately restrict his liberty to melt down his possessions, or exchange philosophy lectures for crank turning duty. This response seems ad hoc, and unsatisfactory. Remember that the question under investigation is this: Can we respect liberal property rights while undermining Marx's most serious objections to capitalism? If the islanders vote to restrict his use of the mansion which he possesses, the story would no longer stand up to answer the

question, since we would be ignoring what we take to be foundational property rights: the right to use and exchange what one has legitimately acquired.

Again, Nozick suggests that the answer is to be found by looking at exactly what are the available liberties, and which are relevant to our story. As we have noted, freedom of use and exchange are not the only liberties which are relevant in consideration of such cases: in the case of drinkable water, even if a community's entire source of drinking water could be acquired through legitimate means, there are other considerations which make it impossible for any individual to hold.

In the case of water, the consideration is power over others (think of the power that ownership of all the available drinking water would entail). And of course, power over others is central to the communist objection of ownership of other items, and in particular ownership of the means of production. We are obliged to limit the ownership of all water because of considerations of power over others, just as the Marxist is obliged to attempt to limit the ownership of the means of production for the same reason. In this case, then, it would seem not ad hoc that the islanders would limit the mansion owner's rights to convert his holdings into the means of production: considerations of the distribution of power may outweigh considerations about an individual's liberty to use and exchange his property.²⁸ But it is difficult to see why the worry of power differentials, which allows us to limit ownership of water, and other means of production, would justify the limit of the ownership of of a large opulent home, when others have their basic needs met, and when the home's owner is prohibited from converting it into a means of production, alienation, and exploitation.

In Justice as Fairness, the question of which rights ought to be respected in a Well Ordered Society is not built into the theory as an assumption, as it is for e.g., Nozick. Rather, it is a question that is decided upon and justified by parties in the original position. Justice

²⁸Nor do Marxist criticisms of the ownership of capital seem to apply to the sorts of small machines that Nozick envisions that Thurston may build from melted holdings. See [Nozick, 1974, Ch 8].

as Fairness gives us a means to evaluate whether we should have extensive property rights, which ones to respect, and which ones are over-ridden by other concerns – in short, which expectations are legitimate. In evaluating whether Thurston can melt his palace and convert it into the means of production, JAF gives us a mechanism to decide.

So does Thurston own his palace, or merely possess it? I believe that a case can be made that his relationship is greater than physical possession, and his ownership is consistent with similar property rights we see in the USA and UK. If Thurston were merely in possession of an object that is commonly owned, any rights he had over it would also be had by others. Thurston can improve his property, while others may not. (Assuming an abundance of space and resources for others) he can add an additional wing, or suite of apartments to his property, while others cannot. He could paint it, or otherwise decorate the outside of the structure, while others could not legitimately do so.²⁹ And finally, Thurston may have the right to destroy his palace, or at the very least, if anyone has the right to destroy it, only Thurston does.

It may be that he does not have the right to destroy it, because it is e.g., a public good that should not be destroyed. But this does not entail that he does not own it. Many objects, buildings, and other holdings in the US and UK are subject to limitations on the liberties of their owners. The Greenwich Village Society for Historic Preservation requires that certain facades in Greenwich Village, in New York City, cannot be improved or changed without a permit from the Landmarks Preservation Commission. Property owners are literally prohibited from hanging signs or other decorations on their walls, under penalty of law. The history of the neighborhood and its structures converts the parts of the buildings from privately owned, to publicly owned, structures. Similarly, in the UK, the National Trust governs the use and improvements of many privately held buildings and properties.

²⁹However, there is an interesting question about the “ownership” of public art. See [Lee, 1989, pp. 228-33].

We legitimately limit the property rights of the owners in order to ensure that they do not over-ride the rights of everyone else.

Ownership is not a right: it is a bundle of rights, usually (but not always) including the right to use, exchange, benefit from, exploit, and destroy a holding. Each of these rights represents a particular relationship to the object, and is derived based on historical and other elements in Justice as Fairness.³⁰ But as I have suggested, one can continue to own a property, even when some of the rights included in the typical bundle are restricted. If this is right, then Thurston owns his palace.³¹

Before moving back to Rawls, let me address one final criticism, viz., I do not think this analysis gets Marx's theory of history backwards. Remember that, roughly speaking, Marx tells the history of humanity as linked to the material conditions of people at any time. Historically, humanity began with a primitive communism – a sort of hunter-gatherer society, in which subsistence is a daily concern, and in which there is very little concept of individual possessions – through stages of greater production – and greater individual property claims – and ends with the communist revolution, marked by classlessness and propertylessness. That is, of course, a very rough sketch, but it will do to elucidate the criticism: the mansion owner story reads history backwards, such that my desert island inhabitants are governed by principles of primitive communism, and not the ideological principles of communist political economy. If I had gotten the story backwards, my conclusion about the relationship of wealth and property on the one hand, and alienation, exploitation, and well orderedness, on the other hand, would be called into question.

³⁰Remember that others, such as Nozick, assume, rather than derive, these property rights, and so would presumably not need individual justifications for each right in the bundle. I think that Rawls offers the stronger relationship between justification and individual property rights, but since this is far afield from the topic, I do not argue for it specifically here. In addition to Ryan's treatment of the topic, see [Kaufman, 2004].

³¹This discussion about the distinction between possession and ownership was suggested to me by Piers Stephens. See also [Ryan, 1977].

Let me answer with two brief comments. First, the situation that I set up in this thought experiment is not consistent with the primitive state. Note that on my island there is abundance, not scarcity, and so the fundamental economic principles which govern the primitive state do not apply. The primitive stage of history ends with the development of industry and agriculture, but the people on the island have those capacities already. Subsistence is not among their daily concerns. Furthermore, the “propertylessness and classlessness” originate out of a concern for all – remember that they are concerned to maintain a living standard for every individual – rather than out of a primitive lack of sophisticated access to those concepts.³²

I have argued that if the factory does satisfy Marx’s criteria (and most factories in a capitalist political economy probably do not), and if the history of the ownership of the mansion also satisfies the criteria, then they both could be privately owned. Under certain conditions, it is possible for individuals to amass a certain disproportionate amount of wealth, without invoking alienation or exploitation. Marx left the distinction between legitimate property and bourgeois property (or ownership and possession) imprecise. An interesting additional project remains: disambiguating this relationship. However, for the purpose of my conclusion (viz., that it is possible to respect some individual liberal property rights, while avoiding the most important of Marx’s objections), this ambiguity can for the time remain unresolved.

4.4 Return to Rawls

Let us return to the original question: are citizens of a well ordered society emancipated, according to Marx’s conception? Remember that, for Rawls, it is an open question whether a liberal socialism would satisfy the two principles as well as a non liberal system. I have shown

³²See [Lichtheim, 1964, §2.1 and 4.2].

that, on the relevant subject, it seems that whether one's society is liberal or not regarding property rights, one may still live in a well ordered society.³³ Nonetheless, Marx pressed the matter further, suggesting that no democratic society which respects property rights could be well ordered, since the existence of private property necessarily exploits, demeans, and alienates people. However, I have argued that it is not the existence of individual property which exploits, demeans, and alienates, it is the existence of alienated labor, and thus simply bourgeois private property that undermines well orderedness. Sufficient constraints on wealth accumulation, along with respect for broad individual liberties accomplishes similar, if not the same, ends.

I do not believe that this closes the question on the project of *justice as fairness*. Remember that, as part of the project, Rawls described the legitimate expectations for unequal compensation in a well ordered society. I have even shown that, on a desert island, Marx may be committed to respecting legitimate expectations, given that they are consistent with the two principles of justice, and therefore that they do not violate the sanctity of non-alienated labor. Like the desert island example, Rawls would argue that we should respect entitlements because they are most consistent with individual liberty and, if that respect is also carried out in a society governed by the two principles of justice, then it will also ensure that the worst off are as well off as they otherwise could be.

I will argue that Rawls' justice as fairness, in its current form, nonetheless allows too much inequality, by neglecting to take seriously the role that responsibility plays in our judgments about the legitimacy of expectations for unequal compensation.

³³This conclusion should hardly be surprising, since non-liberal societies are among those included under a "reasonable" pluralism. See [Rawls, 1993, pg. 36].

4.4.1 Libertarianism

We might evaluate the role that entitlements play in the correct theory of justice by looking at a theory which places a *very heavy weight* on them, such as Nozick's libertarian treatment of justice. Nozick famously argues that (1) what flows from a just situation is itself just, and (2) whatever flows from a just situation where transactions are fully voluntary is just.³⁴ Nozick concludes that only the very minimal state is legitimate, and that justice guarantees a person nearly complete entitlement to the product of his/her labor.

Nozick suggests that any definition of justice must be grounded in terms of individual liberty. Socialist or socialist democratic (or other "patterned" principles) are willing to temper individual liberty with other interests (such as equality), and so they fall short of Nozick's requirement of justice. For Nozick, the cost of socialism to liberty is too high. Put another way, if we diminish the weight that entitlements play in the correct theory of justice to the level that Cohen would accept, then we have simultaneously diminished liberty to an unacceptable degree. For Nozick, only by guaranteeing liberty do we guarantee that we preserve justice, since he ties property rights to the idea of liberty. However, the way that he ties liberty to property rights are rejected by many, including Cohen.

That is why Cohen's criticisms of Nozick are relevant here.³⁵ Does liberty always preserve justice? Consider the problem of self ownership. Could we locate a situation that is unjust but which is generated by (2) above? Consider two individuals, A and B, both of whom would love so much to own a slave that they would be willing to enter a lottery where the benefit of owning a slave comes with the risk of becoming one. The two flip a fair coin, B loses, and A slaps the irons on him. The state of affairs in which one person owns another is unjust, but sanctioned by (2), and so (2) is unjust (by the argument form of *reductio ad absurdum*).

³⁴See [Nozick, 1974, pg. 151].

³⁵See [Cohen, 1995, Ch. 1].

It looks like, for our purposes, our considered judgments about the correct relationship between justice, liberty, equality on the one hand, and the role that entitlements will play, on the other, comes up short of where Nozick would like. It is incorrect to place a weight so heavy on entitlements, as we have seen. But that does not answer the question: what role should entitlements play? As Cohen notes, Robert van der Veen and Phillip Van Parijs concluded correctly, ‘all theories of justice have an entitlement component, and no theory of justice is a pure entitlement theory’.³⁶

It is clear then, that, to some extent we have an entitlement to what flows from our bodies, and from our talents, but contrary to Nozick’s much stronger claim, I, with Rawls, argue that this entitlement must be *tempered by a process that’s fair*. For Rawls, this fairness extends through the principles of justice, with certain strong requirements for legitimate expectations.

We may put a further liberal question to Rawls at this point. Can any respect for entitlements that allows disproportionate levels of wealth satisfy our earlier concern over impartiality? Though the man on the desert island certainly has a claim to his property, do questions of community over-ride questions of entitlement?

4.4.2 Community

There is another factor which, I believe, will enter into our considerations, opposite our considerations about justice, and that is the consideration of *community*. Some states of affairs will be, or ought to be, forbidden, even if they do not fail the test of *justice as fairness*. And this result falls out of strict attention to what Cohen calls *equality of access to advantage*, or similarly, equality of opportunity. That is, though they will be allowed according to the principles of justice, closer consideration suggests that they may not be a part of a well ordered society.

³⁶See [Van der Veen and Van Parijs, 1985, pp. 70-74].

Consider the case in which, though you and I live in the same city or neighborhood, I have very much money, and you have just enough to subsist. Your and my experience living in the same place will be marked by different, and incomparable experiences. You will face challenges in living, in thriving, and in raising your children which I will not experience. And more importantly, your challenges could be solved if I shared with you some of my money. Though we may live geographically close, our quotidian experiences are so fundamentally different as to make it difficult to see how we can be said to be members of the same community.

An example will help to bring the point home. Suppose that as part of my health care routine, I drink only spring water imported from Fiji, and eat vegetables organically grown and shipped over-night from the Pacific Northwest. You, of course, could not afford to maintain such a diet, and opt for a more frugal daily routine of fast food, diet soda, and budget groceries. Suppose further that an airline strike halts the import and over-night shipment of my luxury food, and I am forced to shop temporarily at the same budget grocery store as you. A reader might agree that I have cause to complain about my misfortune, or inconvenience. My healthy lifestyle has run against an inconvenience which makes it impossible to live the sort of life that I choose. But it would make no sense for me to complain to you. While my complaints may be well received, if not intelligible, to another diner similarly disposed as myself, to do the same with you would be nonsensical, and probably insulting. Our experiences are so unlike that we cannot be sensibly said to be members of the same community. The advantages that I face are fundamentally different from the ones that you do.

In considering what we owe to one another, then, if we are to take seriously the doctrine that there is something that we should be equalizing, such as opportunity, or access to advantage, we need to understand what we mean by community, and how it relates to equality of access to advantage. There are of course two things which we might mean:

1. Equality of outcome 2. Equality of initial state, with fair differences made by option luck.
I consider both below.

Imagine that you and I both have \$100, and we decide to enter a lottery. We flip a coin, and the winner takes the \$100 of the loser. We flip, I win, and I now have \$200, and you have 0. You may even admit that, since the lottery was fair, and you are pre-disposed to that sort of gambling, even knowing the outcome, you would engage in the same lottery again, given the chance.

Take another example. We are all residents of a small community with a population of 200. It is a small mining town. There are enough jobs for everyone, but the income is meager, and we all live only slightly above subsistence, with an annual income of \$10,000. We may collectively decide to enter a lottery. the cost is \$200, which is a sum that each can afford, but only through some hardship. We roll a fair 200 sided die, and the winner takes all. My number comes up. My income is now \$50,000, to everyone else's \$9,900. I can afford a house five times larger, five times more leisure or entertainment. In fact, since most residents barely subsist, I can now afford leisure and entertainment, while others have none. I can now afford to live the quality of life that no one else in my community is able to live. My experience will be so unlike that of anyone else, in fact, that in a strong sense, it is difficult to claim that I am still a member of the same community as everyone else.

It seems that there is nothing unjust about the lottery (we begin from a situation of equality, everyone chooses in good faith to participate, everyone identifies with the outcome of the lottery, and would play it again given the chance – in short, everyone has the same access to advantage, or opportunity for welfare). Nonetheless, though the outcome is not unjust, one may give an argument that from the standpoint of community we have good reason to forbid this lottery.³⁷

³⁷Rawls makes a similar point in his discussion of “background justice.” See [Rawls, 2001, §14].

By community, I mean individuals organized by, at least, the following common elements:

1. Power – people situated with a similar power to care for themselves and their families
2. Care – people who care about each other, and care that they care about each other, etc.
3. Common elements – people are bound by basic common elements that dictate the way they live their lives.

Since large social or economic inequalities strain 1-3, we can add

4. Equality – lack of the great gaps in wealth and social power that mark current western capitalist countries.

That is, since community is difficult, or strained by large inequalities, if we care about equality as an virtue of justice, then we should care about community. And a commitment to community, as we see above, is strained exactly by those commitments to legitimate expectations and entitlements that we derive from Rawls.

Is this a point of departure for Cohen and myself? I do not know. It seems that strains on community such as I have described are not forbidden by equality of access to advantage, any more than they seem to be prohibited by Marx or Mill. And yet it would be surprising if community and justice were somehow incompatible.³⁸

What can be said? It would seem that, if I am right, there are aspects of social life that are not adequately captured by the two principles of justice, and yet are only alluded to by either Marx or Mill. Entitlements to unequal compensation, as defended by Rawls, or to strong property rights, as defended by Nozick and Locke, clearly allow too much. However, what is needed is a sensible set of principles which will allow us to determine any unequal

³⁸See [Cohen, 2009, pp. 30-37] and [Roemer, 2010].

distribution, beyond which is unjust, either from the perspective of advantage, community, freedom, or liberty.

At this point in the argument, I might take one of two strategies. Under the first, I defend a position that, in justice as fairness, inequality is problematic in itself, and is something that would be forbidden by the basic structure. I would give a moral argument that in addition to the points above, our considered judgments in reflective equilibrium favor equality broadly, and therefore inequality is to be avoided. It is something that is decided in the initial situation, and is built into the structure of society. I do not make this argument. It is not the case that I think that this argument is itself defective, but rather I do not see how the argument works. I leave it as an open question whether the parties in the original position, after considering my arguments, would favor equality, broadly speaking.

Under the second strategy, the consideration of equality comes in, not as a decision at the initial level, but as a moral reason for a particular way of acting in a well ordered society. If parties in a well ordered society are committed to preserving the principles of justice, promoting fairness, and preserving impartiality in the assignment of rights and duties, and non-arbitrariness of the distribution of natural talents, then they will also tend to avoid large disparities in wealth and income. That is, they will be moved by the ideals of community in their day to day actions and choices. Although I do not see why this would be built in as a requirement, in the way described in the previous paragraph, I have argued that, in a non-circular way, members of a community would be committed to preserving the principles of community, so defined.

To ground a rigorous definition of community, a positive theory would require us to identify what we owe to each other as members of a community of equals. The place to begin, as I have suggested, is what Cohen refers to as “equality of access to advantage”. Advantage is abstractly referred to by Mill as somehow related to freedom, though constrained by utility and other practical and social concerns.

4.5 Conclusion

Both Mill and Marx defend socialist political economies based closely on freedom – freedom to pursue one’s conception of the good life, and freedom from interference. These make up, in good proportion, the principles which govern a well ordered society. Such a society may still respect individual property, though in a form much diminished from the way we see it in use today. I have suggested, however, that additional work needs to be done to ensure that the distribution of profits and products are more equitable. What that would look like would be to redefine the limits of what we mean by legitimate expectations in a well ordered society.

Chapter 5

Rawls on Responsibility

5.1 Introduction

In this chapter, I have two related goals. First, I describe justice as fairness in a way that supports a contextualist reading of responsibility. It makes sense that the role that responsibility plays in a well ordered society would depend on the particular facts about that society, its constitutional and legislative system, the distinction it draws between retributive and distributive justice (or criminal versus civil law), etc.

Second, I develop a second defense of justice as fairness, and in particular, the difference principle, from the counter-examples that Cohen developed against them, both historical, and hypothetical. My argument for this claim takes the following parts:

5.2 Problems with the difference principle

I divide the discussion of the difference principle into two broad categories. In the first, we look at the ways in which the DP has been applied historically. In the second, we look more closely at the theoretical arguments that support the DP itself.

5.2.1 Historical problems with the Difference Principle

The difference principle seems to justify gross inequalities in wealth, income, and power. Cohen cites policies such as the Bush tax-cuts, and the policies in the Lawson tax cuts in the UK. Or at least that is the claim.

It seems that tax cuts for the wealthy are justified by something like the difference principle, particularly as it is described by Cohen. They go something like this: “by offering tax advantages and high salaries to small business owners and investors, we give them the incentive to invest in the economy and create job opportunities for middle class individuals. Without these tax advantages, they would have no incentive to invest, and the benefits for

the least advantaged would not otherwise exist.” A policy such as this may indeed create jobs, etc, but it also leads to great disparities of wealth and income, which have widened dramatically in the past decade. For Cohen, these disparities are reason to question the value of the incentive which is central to the strength of the difference principle. This is a violation of equality of opportunity, not the DP.

As I have noted, one of the areas which Rawls says very little, is on the topic of responsibility. For this reason, I have described Dworkin’s contribution as a valuable amendment to Justice as Fairness, and not as a criticism to it. Nonetheless, Rawls was not completely blind to the choice-chance distinction. What he does say is tied to equality of opportunity. In chapter two of *Theory of Justice*, Rawls gives his “informal argument” by beginning with the ideal of equal opportunity. But what conception of equality of opportunity will be decided in the original position?

Rawls considers, and then rejects, what he calls a “system of natural liberty,” in which the legal right to any social positions are open to all. He rejects this as unsatisfactory since, over time, the distribution of inequalities comes to be influenced by one’s natural talents and abilities, as well as one’s starting position in life. And of course, we take it as a fixed point in our moral judgements that no one deserves his set of natural talents, or his initial starting position in society.

To address this worry, Rawls adds what he calls the “liberal interpretation.” Under this conception, in addition to the formal barriers to equality of opportunity, we add that individuals with the same level of talent and willingness to exercise those talents should have the same prospects for success. That is, an individual’s life chances do not depend on his social status.

But this alone is not enough either. Since while it limits the extent to which one’s starting point effects one’s life chances, it does nothing to limit the effect of one’s natural endowment of talents and abilities. Rawls finally described a system of “democratic equality” as one

which eliminates both the effects of one's social and economic status, as well as one's share of natural talents and abilities. What we arrive at with democratic equality is a system that assures equal opportunity for success for all, by eliminating those individual characteristics that are irrelevant from a moral point of view.

Kymlicka notes this argument as a starting place to think of Rawls as respecting the choice/chance distinction, since under democratic equality people's life chances are determined by their choices and actions, not the particular circumstances of their lives that are outside their control. The requirement of democratic equality is ambition sensitive, but luck insensitive. Kymlicka goes on to note that, despite these early responsibility sensitive intuitions about equality, Rawls' sensitivity to this distinction ends there. In particular, the difference principle, which is the next step in the intuitive argument, does not distinguish between those who are worse off due to their choices and actions, and those who are so due to bad luck.¹

In fact, however, the difference principle is much less demanding than Kymlicka suggests. This stage in Rawls' argument does include important provisions to respect people's entitlements, and for good reason. As I've noted elsewhere, when the liberty principle and principle of fair equality of opportunity are satisfied, the difference principle not only allows for the payment of entitlements, it demands it. People have the right to expect that what they get depends on what they do. Once a suitable minimum is guaranteed by a fair tax system, matching a person's expectations with his/her activity is the most efficient way to organize the rest of total income. That assumption and requirement that people's legitimate expectations should be respected is built right into justice as fairness as a fundamental assumption. That is, despite Kymlicka's arguments to the contrary, Rawls' sensitivity to the the distinction between choice and chance makes up the entire foundation of justice as fairness. According to Rawls, society should protect people from what they cannot be held

¹See [Kymlicka, 2001, 69-74].

responsible for, and then once that requirement is met, respect all other inequalities that are subsequently generated.

The relevant take away from this discussion of the equality of opportunity principle, regards Cohen's historical criticism. That we find huge disparities in income and wealth is not a failure of the difference principle, but a social failure in the application of the principle of fair equality of opportunity. Cohen notes that Rawls would never endorse these particular inequalities that exist in western democracies, but nonetheless, he claims, the justification for Lawson and Bush tax cuts share elements of their justification with the difference principle. However, the difference principle justifies inequalities only if we have already satisfied both the liberty principle and the principle of fair equality of opportunity. Tax cuts which reward rich people for being rich through government subsidies and tax breaks and capital gains do not respect the fixed moral judgment that people's life chances should be immune to their starting position.

5.2.2 Hypothetical problems with the DP

I gave a reply to the incentives argument which, I believe, shows that that criticism does not fully connect with Rawls' justification for the two principles. There is an additional concern with the incentives argument, which I want to raise here. That is, the particulars of Cohen's version of the difference principle make it such that it would not be decided by parties in the original position, who are themselves rational and self-interested.

Here I show that Cohen's particular formulation of the difference principle would not be chosen in the original position, since it limits inequalities that everyone would judge as fair. I employ the thought experiment of academic tenure, but any earned hierarchy would do.

To motivate the thought experiment, let us look back at Cohen's formulation of the difference principle:

inequalities are just if and only if they are necessary to make the worst off better of than they would otherwise be.²

Now as I say, any earned hierarchy would do, but let us look at the academic tenure system in the United States. It works like this: Junior faculty members are hired at the rank of Associate Professor, usually out of a graduate program. After a number of years (usually four or so), the professor's work is evaluated by her peers, and if satisfactory, she is promoted to the next rank of Associate Professor. After another suitable number of years (again, three or four), her work is again evaluated by her peers, and again, if satisfactory, she is granted tenure. The tenure process is designed to protect an academic from threats to academic freedom, and it makes it difficult to fire her. After another suitable number of years passes, she is again evaluated by her peers, and if her work continues to satisfy their academic standards, she is promoted to the rank of Professor. Note that there are usually additional ranks which follow. Also note that, with each promotion, she earns additional privileges not afforded to those with inferior rank. Thus, those with higher rank have earned social and economic advantages which they do not share with those of lower rank. They vote exclusively on issues at the department and university level (including the hiring, promotion and tenure of more junior faculty). They qualify for reduced course loads and more generous leaves. And they tend to make more money.

Let us make the dubious assumption that the academic hiring and promotion process in the United States satisfies the liberty principle, and that candidates are guaranteed fair equality of opportunity in their training and education. We can thus look to see if these social and economic inequalities satisfy the difference principle, and thus, if they would be allowed by a just basic structure.

²See [Cohen, 2009, pg. 121]. Briefly, we can contrast this with Rawls' version: "Social and economic inequalities are to be arranged so that they are ... to the greatest expected benefit of the least advantaged ..." [Rawls, 1999, Pg. 72].

First, note that the system which I have described above would not satisfy Cohen's formulation of the DP. There may be several benefits which we might enjoy from promoting faculty. If she is better paid, and is guaranteed protections to her academic freedom, she is able to work more carefully, and develop more and better innovations in her field. She will be less fearful of offending those with disparate political views. She will be more inclined to remain at her institution over a longer period. In short, she will be a better, more efficient, and more productive member of the faculty.

But are any of those social and economic inequalities strictly necessary to get her to be better, more efficient, or more productive? I do not see why they are. In particular, if we appeal to Cohen's argument, in a well ordered society, effectively regulated by a shared conception of justice, she would be just as productive and efficient, and if she were committed to defending the principles of justice, she would do so without requiring unequal social and economic benefits. According to Cohen, the system of earned hierarchy fails to satisfy the difference principle, because it is not "necessary to make the worst off better off," and is thus unjust.

Cohen gets quite a lot of mileage from his formulation. But it is not a formulation that would be decided by parties in the original position. To see why, let us look in detail at the formal argument for a theory of justice, and see what intuitions are foundational in developing the principles, and in particular, the difference principle.

From the standpoint of the original position, Rawls argues, the first thing that the parties would choose is an equal distribution of basic liberties: there are no ways to win advantages for one's self, and no reason to give up advantage to benefit others. But of course in taking into consideration economic efficiency and the requirements of organization and technology, they will also permit additional inequalities in wealth and income, and differences in authority and responsibility, if these make everyone better off, as compared to the benchmark of equality. Thus, they are permitted if they are to the benefit of everyone. Note the difference

in Cohen's language, when he claims that inequalities are permitted if and only if they are necessary to benefit everyone. That 'necessary' is doing quite a bit of work, but it is not something that would be chosen by parties in the original position.³

In the actual argument, since we are starting from a position of equality, those who benefit least have a veto, as it were. They would object to any inequality that is not to their benefit, and so any justified inequality should be to their benefit. But from here it does not follow that any justified inequality should be necessary to be to their benefit. Let us look back to the system of academic tenure to see if the least off would be satisfied.

Start from the perspective of equal liberty. This is satisfied if every person's liberties are guaranteed, and if each person had achieved her position due to a system of fair equality of opportunity. Starting from equality, there is no reason that this equality should be final. The promotion of tenure to protect academic freedom has the result of increased innovation in technology, and with it comes increased security and income. The increase in innovation has the potential to benefit everyone, and so the least advantaged should see no reason to veto, and so it would seem to follow that it is justified by the difference principle.

We may see it from the other direction as well. When the parties are choosing the principles of justice, they will veto any principle which will support a system which would disadvantage themselves. They would not institute slavery since, no matter how attractive it may be to be a slave-holder, no one would want to be the slave themselves. But from this position, there is no reason to veto tenure, since it has the potential to benefit everyone, even if the resulting inequality is not strictly necessary to bring about those improvements.

It seems that Rawls' principles, and in particular, the difference principle, is safe from Cohen's particular criticism. Nonetheless, it is still an open question what level of inequality is justified. To see, we can appeal right to the underlying intuitions which support Rawls' theory of justice.

³See [Rawls, 1999, pp. 130-132].

5.3 Foundational Intuitions behind Justice as Fairness

Where I would like to end up is with a reading of Rawls that is more consistent with the foundational intuitions behind justice as fairness, viz., concerns about arbitrariness and impartiality. In particular, what it means to take those ideals seriously is that the most just distribution is one that is largely egalitarian. A distribution that is much more egalitarian than we currently see in western countries is one that garners the general consent of citizens in a well ordered society. Rawls suggests, but does not seriously defend, a system of liberal property rights which respects entitlements from legitimate expectations to unequal compensation, so long as those inequalities are consistent with the difference principle. I shall show that many such entitlements are inconsistent with our moral intuitions, if we take responsibility seriously. Cohen, for his part, saw an inconsistency of living in a society governed by the difference principle and the intuitions that support it. The result, he claimed, was to eliminate strong entitlements. I have attempted (in Chapter Two) to show where his specific reasoning goes wrong. On reflection, however, we will see that Cohen's success is that, while he arrived at the correct conclusion, he got the argument exactly backward. In neglecting to take seriously his own commitments to responsibility, he sought a target within the structure of Rawls' system. There is nothing wrong with justice as fairness (insofar as it is a reflection of our liberal democratic commitments to impartiality and non-arbitrariness). The place that Rawls' conclusions are too strong is that he is wrong about responsibility. For example, our judgements about which inequalities are justified should include judgements about which are the result of choice and which are the result of bad luck. Furthermore, it is incorrect to assume that people are responsible for their characters and preferences. Assuming this leads to improper judgements about when equal opportunity has been achieved.

When I say that Rawls is wrong about responsibility, I engage with the luck egalitarian literature. This literature, beginning with Sen's important question, and Dworkin's equality

of resources, attempt to reinforce justice as fairness in the area where it was most deficient – i.e., the proper role for responsibility in the institutions that govern a well ordered society. It would be difficult to speculate about why Rawls neglected this area. What we can say is that it has turned out to be a particularly rich and important area of concern: and one which, if we can get the arguments just right, will give us a clearer picture of the just distribution of wealth in a well ordered society. Or so I shall argue.

In neglecting to define a clear role that responsibility is to play in justice as fairness, Rawls leaves open the door for the rich discussion that has followed the luck egalitarian literature. However, it also invites injustice in the form of abuse, which I believe we see in Rawls' discussion of entitlements and legitimate expectations. In what follows, I make clear what I mean when I say that the place that Rawls relies on conclusions that are too strong is that he is wrong about responsibility. In particular, since he does not clearly and explicitly define responsibility and its role, the role that it comes to play was one which granted entitlements too strong a position.

Let me reiterate: by re-examining the place of responsibility in justice as fairness, I do not set out to give a counter-example to it. Instead, my claims about concerns relating to responsibility are the opposite of Dworkin's. As I've noted⁴, Cohen's incentives argument was designed as an *internal criticism* – one which would undermine justice as fairness itself, fundamentally. In my reading of Rawls, my criticism is not a criticism at all: rather, the formal mechanism of justice as fairness centers on our considered judgements in reflective equilibrium. This process, of course, is ongoing. My judgements about justice may be continually or occasionally updated, in light of new facts, through thought experiments, counter-examples, etc. There is no edict built in which claims that any one political or economic system is best for all societies. Nor does it claim that it knows the best system for any one society. Since justice as fairness is a system of pure procedural justice, it represents

⁴See chapter 2, and [Robinson, 2010].

a system that can grow, change, and evolve in the light of updated facts, as well as provide different advice to different societies given differences in content. This fact about pure procedural justice is what made Bernard Williams' contextualist account of responsibility so attractive for justice as fairness.

Rawls goes wrong when he allows one to make judgements about entitlements and legitimate expectations without reasoning carefully about responsibility. In particular, I shall argue, these judgements come into conflict with the fundamental intuitions behind justice as fairness. In addition to the tension between liberty interests, and interests of preserving equal respect for all persons, justice as fairness is founded on the concern that our political institutions apply to all without showing *partiality* to any one individual or group, and that it does not favor any characteristics that are *arbitrary*, and therefore irrelevant from a moral point of view. Let us look more closely at each and see how the rest of the theory is built on these concerns.

The fundamental concerns – *viz.*, fairness, equality, non-arbitrariness, and impartiality – are introduced in the tradition of the social contract through the point of the original position. Citizens of a well ordered society are committed to the principles of justice that are decided in the original position, though not necessarily *because* they are decided there. Though the contract is a hypothetical one, it is not the case that citizens are bound to the agreement because they would agree.⁵ Rather, they are committed to the principles of justice themselves even if they don't necessarily want to follow the demands it sets on them, individually. Rawls' theory of justice is a theory of pure procedural justice: once the procedure is correct, the principles which are decided are acceptable because they are chosen.⁶

⁵Dworkin 1977 Ch 6 §1 objects to the OP in this way. He argues that even if I would agree, only an actual agreement has any authority. Rawls, of course, answers that it is not the role of the thought experiment to bind us. Rather, it is to help to elucidate those considered judgements about justice which we're already committed to.

⁶Rawls discusses the theory of pure procedural justice in [Rawls, 1999, pp. 74-75].

So, the original position is meant to capture that liberal intuition that by starting from a position that treats everyone equally by respecting the equal moral worth of all persons involved, and nonarbitrariness in its distribution of rights and responsibilities, we are able to arrive at laws and institutions which everyone would agree to. What would laws and institutions look like, which everyone would agree to, and which respects the equal moral worth of all? To see the answer, look more closely at the original position.

5.3.1 Impartiality

Of note, parties are denied knowledge about any particular facts about themselves and others. The veil suggests that the decisions that they reach will be impartial, since no one would decide to favor any person or group based on any distinctive characteristic, given the chance that one would lack that characteristic. Those principles would affect a decision made from a fair initial choice, since it would not favor any individual or group. What justice demands is just whatever is agreed to under these conditions of fair initial choice.⁷

A theory of justice which has at its center respect for entitlements violates nonarbitrariness, since they reward those with talents for which they are not responsible. What sorts of talents get extra compensation, currently? Extra work, in the form of longer hours. High demand work like rocket scientists. Risky work, like starting a small business. Of course, one's preference or tolerance for a longer work week, one's technical or educational successes, or one's tolerance to risk, all flow from one's character. And as I have argued, the details about one's character are largely outside of one's control, as they depend largely on the influences of one's environment, teachers, parents, peers, etc. That we reward for hard work when some have instilled in them a strong work ethic is to reward for characteristics which one did not choose. That we reward for advanced technical skills when others have not had the same educational opportunities is to reward for a position for which one is not responsible.

⁷See [Rawls, 1999, pg. 12, 310-11].

5.3.2 Non-arbitrariness

Assume that, fundamentally, people are born free, and they are equal. When we say that they are free, we mean that they deserve to be unobstructed in their individual pursuit of the ends that they value. We mean that they ought to be allowed to identify and define what it means to lead a good and valuable life, and then pursue that goal. When we say that they have equal moral worth, we mean that each person deserves the same right to pursue his conception of the good life. The difficulty, of course, is that often these conceptions come into conflict with one another. Since there is no objective religious, philosophical, or moral authority to decide who is correct when interests come into conflict, or to settle disagreements about justice, the only way to arrive at principles of justice that are acceptable to all is by social agreement.

Thinking about justice in terms of the social contract is important because, if the above is correct, it is the only way to arrive at principles of justice that are fair. What does it mean to say that principles of justice are fair? A system of justice is fair if it respects individuals as free and equal persons, not because of any particular trait or characteristic they may have, but because of the fundamental moral worth that each person shares.

One way to model fairness, thought of in this way, is to have a restriction on which reasons we allow as morally acceptable, or morally relevant, in the arguments we give for the principles of justice which form the basic structure of society. Principles which favor individual differences are not those which respect the basic equal moral worth of individuals. JAF, therefore rejects, as reasons in arguments for principles of justice, accidental, contingent, or arbitrary traits or characteristics, as being irrelevant from the point of view of justice.⁸

Again, in the thought experiment, the veil is meant to capture this intuition that the principles should not be based on morally arbitrary factors. The epistemic restrictions of the veil stand in for the moral restrictions on reasons.

⁸See [Rawls, 2001, pg 17].

Let me stop here to say that the core liberal conviction is that a fair system of cooperation is one that starts from impartial distributions of rights and goods, and which is not arbitrarily based on any concerns which are irrelevant from a moral point of view. Everything else is just the details. Particular distributions, laws, tax schemes, etc, depend on the context of a particular society, and so are subject to interpretations and change, given the facts. However, if one abandons the idea that distributions should ignore morally arbitrary endowments, or the idea that the initial choice should not favor any one individual or group, then one has abandoned JAF. At the same time, a society which respects most strong property rights to unequal compensation for work that is in high demand, abandons the commitment to impartiality and non-arbitrariness. Or so I shall argue.

5.4 Positive argument

Justice as fairness is designed to capture our liberal democratic intuitions about equality and fairness, and the guarantees of impartiality and non arbitrariness in the distribution of primary social goods.

If I am right, the growing disparities in wealth and income violate not the difference principle, but fair equality of opportunity. But if we satisfied democratic equality, would disparities still exist?

5.5 What level of disparity is justified?

After we've guaranteed democratic equality of opportunity, inequalities will certainly still exist. Despite the fact that we consider it to be a fixed point of our moral judgments that no one deserves his distribution of natural talents or starting point in society⁹, we're also committed, due to our respect for bodily integrity, to the view that people are entitled to

⁹See [Rawls, 1999, 274].

whatever they can acquire through their talents, consistent with the rules of a fair system of social cooperation. Inequalities are certainly justified and legitimate, and we're committed to respecting these legitimate expectations in a well ordered society.

However, an additional idea is worth remembering here – the idea of fraternity, or what I've called elsewhere “community”. The ideal of fraternity is not specifically a political ideal, i.e., it is not something that would, strictly speaking, be decided upon in the original position.¹⁰ Fraternity, we may say, is the state of not wanting to have a greater advantage unless it also benefits others, in particular the least well off. Fraternity is, as I have noted (Sections 4.4.2 & 2.4.1), an ideal that applies in the family. In the family, we reject the idea of maximizing advantages. Something like fraternity is what Cohen had in mind in his formulation of the difference principle (Section 2.2). I think that Cohen knew this, but because of the relationship between fraternity and the difference principle, his strategy of using fraternity to criticize the difference principle could never succeed.

As Rawls notes, fraternity can be thought of as incorporating the requirements of the difference principle. If, for example, we dwell on those institutions which we confidently think of as just, we will see that they also tend to satisfy the demands of fraternity, at least insofar as the permitted inequalities contribute to the well-being of the least advantaged.¹¹

Our discussion of Marx and Mill on property rights also suggests a way to qualify the account of legitimate expectations. Recall that the liberal justification for property rights extends to Locke: we think that people ought to be able to benefit from the fruits of their labors. I trace this thread of thought right through Rawls, since this is the intuition which

¹⁰Rather, that the ideal of community is a political ideal is not something I am currently prepared to defend. However, as I note in 4.4.2, I leave open the possibility that a case can be made to defend the ideal of community at the level of considered judgement. Would parties, motivated by self-interest and free to press their claims upon each other decide under principles of equality to impose the requirements of community on one another? My larger argument does not require it, and so I leave it here as an open question. Note, however, that I do not claim that this position is defective – indeed, I do not think it. Rather, I have not worked out the argument to my own satisfaction, and so leave it as a principle to be decided later, by those more clever than I.

¹¹See [Rawls, 1999, 91].

underlies legitimate expectations. However, Mill reminds us that benefiting from the fruits of one's labors does not mean that one should benefit others with one's labors. Rawls imposes certain ideas of background justice to monitor the flow of capital across individuals and across generations, to ensure that no one individual or group comes to hold too much wealth and power. For this reason, Mill supports strong inheritance tax, and opposes intestacy. Your legitimate expectations flow from what you do, not what your parents did, or other more distant relatives.

Likewise, we know that any of the other rights associated with property rights are not absolute. Property rights are actually a bundle of rights, including the right to use, exchange, benefit from, exploit, and destroy one's property. But of course, each of those rights can in some way be limited. One may not have the right to destroy public art, even if one did create and does own it. One may not have the right to exchange one's property if it exploits or alienates others. The liberal justification for property rights allows many fewer actual rights than Nozick assumes.

When I say, then, as I have, that the most just society will be largely egalitarian, I mean that it will tend not to be marked by large disparities in income and wealth. Where inequalities exist, they will be consistent with the rules of a fair system of social cooperation, and in particular they will satisfy democratic equality of opportunity. And while it may not be a political ideal on its own, they will tend toward respecting fraternity, or the interest of community as well. In this way, Rawls concluded, we can associate the ideals of liberty, equality, and fraternity with the two principles: liberty corresponds to the first principle, equality to the principle of equality of opportunity, and fraternity with the difference principle. The difference principle expresses the fundamentals of fraternity from the standpoint of social justice.

Chapter 6

Concluding Epilogue

6.1 Concluding Epilogue

In this dissertation, I have tried to answer a number of related questions. In chapter 1, I surveyed a broad swatch of the luck egalitarian literature, and located my own position in that literature. I dive into the debate with Sen's question, "Equality of What", and I surface by defending something like Cohen's *equality of access to advantage*. My defense of this position takes the following form: the best position is either defended by Ronald Dworkin, or GA Cohen. Cohen presents some challenges to Dworkin which I believe the latter cannot answer. Thus, Cohen's position is the superior one.

Of course, Cohen left his argument for equality of access to advantage unfinished, with unresolved problems. I address two of the largest of these. First was what he called the unlovely heterogeneity of the position, viz., that it was committed to both welfare and resources in calculating the currency of egalitarian justice. I take it that this worry is a worry about parsimony. The principle of parsimony suggests that the simplest explanation is likely the preferred one, since the simplest answer will apply to more cases, and will be more easily testable (and thus more easily falsifiable).

The principle of parsimony is certainly an important consideration. However, it says that the simplest explanation from among the competing hypotheses is preferred. But of course, if the choice is between two hypotheses, and only one explains all the data (as, in this case, only Cohen's theory does), then it is, by default, the simplest. I take it that the worry of the unlovely heterogeneity is not really a worry at all. It simply means that the preferred hypothesis is somewhat more complex than the alternatives.

The second issue which falls out of equality of access to advantage is the worry about genuine choice. That is, if your position depends on a theory of genuine choice, then your position runs the risk of getting stuck in the middle of the free will debate. I take this to be a more serious concern, and devote much of Chapter 3 to it.

I begin chapter 3 by surveying the free will debate, as it has occurred in the philosophical literature. To motivate the conversation, I employ Galen Strawson's metaphor of a carousel, which just takes you around in circles until you're back where you started. The determinist position says that since all physical actions are determined by the laws of nature and the previous state of affairs, and since human actions are physical actions, then human actions are causally determined. If determinism is true, it is difficult to see how we can be held morally responsible for our actions.

The compatibilist view takes up this position, and claims that even though my actions are determined, I can nonetheless be held morally responsible for them, since, even if I could not have done otherwise, it was nonetheless *me* who was the author of the action. Since the laws of nature acted on me, then those laws, mixed with my character, determined the outcome. If I can be held responsible for my character, then I can also be held responsible for the outcome. Problematically, of course, it is difficult to see how I can be held responsible for my character, if it was just caused in me by deterministic forces.

The free will libertarian position says that, in fact, determinism is false. There are some actions that are caused by the laws of nature, and there are some actions that are caused by people. An agent can be the original cause of some actions. However, as I have described, looking closely at this view, the libertarian position collapses into either determinism, or else compatibilism.

In response, I introduce a view developed by Bernard Williams which he calls contextualism. The contextualist position of freedom and responsibility admits that, for our purposes, there is no single best definition of freedom that satisfies all intuitions, in all cases. Instead, there are several factors that go into our judgment about responsibility – he suggests cause, intention, state, and response – which stand in different relationships, and are weighted differently against one another, depending on the particular context. This acknowledgment that there is no single best way to characterize responsibility in every context is a useful

position to hold in justice as fairness. As I've shown, justice as fairness argues that justice is best applied at the level of the basic structure, i.e., to the social institutions that govern our interactions. It is not concerned directly with individual choices or actions. Instead, the judgment of the rightness and wrongness of those individual choices and actions is made at a later stage in the theory, by the individuals who live in that (well ordered) society, based on the facts of the society – geographical, legal, economic, philosophical, etc. The particular laws that will govern their society will depend in large part on the facts of that society. For that reason, the role of many normative judgments, including about the proper way to hold someone responsible, will depend on the facts of the society, as well as the particular context of the judgment. We need not insist on an antecedent commitment to a particular view of responsibility.

Taking seriously Cohen's theory means taking seriously many parts of it, and so in Chapter 2 I engage with a well known criticism of Rawls, from Cohen's new book. He calls the criticism the incentives argument. Briefly, the incentives argument claims that parties in a well ordered society cannot simultaneously hold the difference principle, and demand additional incentives for work that is difficult or in high demand. This is because the DP, in Cohen's reading, allows inequalities if and only if, they are necessary to make the worst off better off. And of course, few if any inequalities are strictly necessary in this way. I show that, as an internal criticism of Rawls' justice as fairness, and in particular, as a criticism of the importance of the DP, Cohen's argument fails.

However, there is some virtue in Cohen's conclusion. His conclusion states that few if any inequalities are justified by the difference principle. I think this conclusion is correct, not because the difference principle is problematic, but because Cohen's equality of opportunity for advantage is correct. Equality of access for advantage says that the right way to incorporate responsibility into our judgments about distributive justice is to hold people responsible for those welfare and resource deficits for which they are the cause, and not for

those which they are not. Furthermore, we should hold people responsible for welfare deficits with which they identify. Dworkin cuts into this question by holding people responsible for their tastes and preferences: for Dworkin, one's preferences is a constituent part of one's person. I have argued that Cohen is correct in his criticism of this view. In short, we should take the choice/chance distinction seriously. If we look again at justice as fairness, while taking responsibility seriously, we get a different view of distributive justice than we did previously without it. The correct distribution of goods and resources in society will be much more egalitarian.

In Chapter 4, I take up the issue of equality in a well ordered society. If one concludes, as I do, that a just society will be largely egalitarian, one must answer the question, "how egalitarian?" To avoid the risk of the slippery slope into full equality, I introduce the socialist arguments of both Marx and Mill, to answer this question: "can a well ordered society respect any liberal property rights?" Rawls left this as an open question, though he guessed toward the affirmative. I attempt to fill in this position by appealing to Mill's liberal arguments for a socialist political economy. I conclude by suggesting that a well ordered society which is largely egalitarian, can side step many of Marx's most serious worries about alienation and exploitation, while maintaining certain liberal commitments.

If the arguments of Chapter 4 push the position away from full equality, then the arguments of Chapter 5 attempt to pull it back. To see what level of inequality would be permitted in a well ordered society, I look back to the underlying intuitions which support justice as fairness – viz., non-arbitrariness and impartiality. I further take up the reason of community, and briefly discuss the roll it would play, and the justification for it. Insights from my discussion of Marx and Mill are considered, particularly as they suggest a way to qualify the account of legitimate expectations.

I leave the requirement or reason of community vague. On the one hand, I would like to argue that it is a political requirement that would be decided in the Original Position. One

reason that I would like this: wouldn't it be unfortunate if community were incompatible with Justice? However, wanting it to be so is not enough – and thus I leave this as an open question.

Bibliography

- [Anderson, 1999] Anderson, E. (1999). What Is the Point of Equality? *Ethics*, 109(2):287–337.
- [Aristotle, 1995] Aristotle (1995). *Physics*. In Barnes, J., editor, *Complete works of Aristotle*. Princeton University Press.
- [Arneson, 1989] Arneson, R. (1989). Equality and equal opportunity for welfare. *Philosophical studies*, 56(1):77–93.
- [Arneson, 1999] Arneson, R. (1999). Equality of opportunity for welfare defended and recanted. *Journal of Political Philosophy*, 7(4):488–497.
- [Athanassoulis, 2005] Athanassoulis, N. (2005). *Morality, Moral Luck and Responsibility: Fortunes Web*. Palgrave/Macmillan.
- [Baber, 2008] Baber, H. (2008). Adaptive preference. *Social theory and practice*, 33(1):105–126.
- [Baumol, 1961] Baumol, W. (1961). *Economic theory and operations analysis*. Prentice-Hall Englewood Cliffs, NJ.
- [Berlin, 1969] Berlin, I. (1969). *Four essays on liberty*. Oxford University Press.
- [Chisholm, 1964] Chisholm, R. (1964). Human freedom and the self. *Free will*, 2:26–37.

- [Cohen, 1989] Cohen, G. (1989). On the currency of egalitarian justice. *Ethics*, pages 906–944.
- [Cohen, 1995] Cohen, G. (1995). *Self-ownership, freedom, and equality*. Cambridge University Press.
- [Cohen, 2008] Cohen, G. (2008). *Rescuing justice and equality*. Harvard University Press, Cambridge MA.
- [Cohen, 2009] Cohen, G. (2009). *Why not socialism?* Princeton University Press.
- [Constant, 1988] Constant, B. (1988). *Political writings*. Cambridge University Press.
- [Cooper, 1997] Cooper, J. (1997). *Plato: Complete Works*. Hackett.
- [Dewey, 1935] Dewey, J. (1935). *Liberalism and social action*. Prometheus Books.
- [Dworkin, 2002a] Dworkin, R. (2002a). Sovereign Virtue Revisited. *Ethics*, 113(1):106–143.
- [Dworkin, 2002b] Dworkin, R. (2002b). *Sovereign virtue: The theory and practice of equality*. Harvard University Press, Cambridge MA.
- [Dworkin, 2002c] Dworkin, R. (2002c). *Sovereign virtue: The theory and practice of equality*. Harvard University Press, Cambridge MA.
- [Elster, 1985] Elster, J. (1985). *Sour grapes: Studies in the subversion of rationality*. Cambridge University Press.
- [Engels, 1847] Engels, F. (1847). The principles of communism. In Marx, K., editor, *Marx-Engels Collected Works. Vol. 5*. New York: International Publishers.
- [Engels, 1883] Engels, F. (1883). The death of Karl Marx. <http://www.marxists.org/archive/marx/works/1883/death/derso1.htm>.

- [Fischer and Ravizza, 1998] Fischer, J. and Ravizza, M. (1998). *Responsibility and control: An essay on moral responsibility*. Cambridge: Cambridge University Press.
- [Frankfurt, 1969] Frankfurt, H. (1969). Alternate possibilities and moral responsibility. *Journal of Philosophy*, 46:829–839.
- [Frankfurt, 1971] Frankfurt, H. (1971). Freedom of the will and the concept of a person. *The Journal of Philosophy*, 68(1):5–20.
- [Hinton, 2001] Hinton, T. (2001). Must egalitarians choose between fairness and respect? *Philosophy and Public Affairs*, 30(1):72–87.
- [Hume, 1978] Hume, D. (1739/1978). *A Treatise of Human Nature*. Oxford University Press, New York NY.
- [Hume, 2000] Hume, D. (1748/2000). *An enquiry concerning human understanding: a critical edition*. Oxford University Press.
- [Kaufman, 2004] Kaufman, A. (2004). The myth of the patterned principle: Rawls, nozick and entitlements. *Polity*, pages 559–578.
- [Kymlicka, 2001] Kymlicka, W. (2001). *Contemporary political philosophy: an introduction*. Oxford University Press.
- [Lee, 1989] Lee, K. (1989). *Social philosophy and ecological scarcity*. Routledge.
- [Lichtheim, 1964] Lichtheim, G. (1964). *Marxism, an historical and critical study*. Columbia University Press.
- [Locke, 1690] Locke, J. (1690). *Two Treatises of Government*. History of Economic Thought Books. McMaster University Archive for the History of Economic Thought. available at <http://ideas.repec.org/b/hay/hetboo/locke1690a.html>.

- [MacLeod, 2012] MacLeod, A. (2012). The domain of distributive justice: Personal choices, institutions, states of affairs. *Socialist Studies*, 8(1).
- [Marx, 1857] Marx, K. (1973/1857). *Grundrisse*. Harmondsworth: Penguin.
- [Marx, 1994a] Marx, K. (1994a). Economic and philosophical manuscripts of 1844. In Simon, L. H., editor, *Selected Writings*, pages 54–101. Hackett Publishing, Indianapolis, IN.
- [Marx, 1994b] Marx, K. (1994b). On the jewish question. In Simon, L. H., editor, *Selected Writings*, pages 1–26. Hackett Publishing, Indianapolis, IN.
- [Marx and Engels, 1965] Marx, K. and Engels, F. (1965). *The german ideology*. Lawrence & Wishart London.
- [Marx et al., 2002] Marx, K., Engels, F., and Jones, G. (2002). *The communist manifesto*. Penguin Classics.
- [Matravers, 2002a] Matravers, M. (2002a). Responsibility and choice. *Critical Review of International Social and Political Philosophy*, 5(2):77–92.
- [Matravers, 2002b] Matravers, M. (2002b). Responsibility, luck, and the ‘equality of what?’ Debate. *Political studies*, 50(3):558–572.
- [Matravers, 2007] Matravers, M. (2007). *Responsibility and justice*. Polity Press, Cambridge UK.
- [Mele and Robb, 1998] Mele, A. and Robb, D. (1998). Rescuing Frankfurt-style cases. *The Philosophical Review*, 107(1):97–112.
- [Mele, 2006] Mele, A. R. (2006). *Free Will and Luck*. Oxford University Press.
- [Mill, 1991] Mill, J. (1859/1991). On liberty. In Robson, J., editor, *Collected Works of John Stuart Mill*. University of Toronto Press.

- [Mill, 2007] Mill, J. (1863/2007). *Utilitarianism, Liberty & Representative Government*. Wildside Press.
- [Mill, 1998] Mill, J. (1871/1998). *Principles of political economy*. Toronto University Press.
- [Nozick, 1974] Nozick, R. (1974). *Anarchy, State, and Utopia*. Basic Books.
- [Nussbaum, 1999] Nussbaum, M. (1999). *Sex and social justice*. Oxford University Press.
- [Nussbaum, 2000] Nussbaum, M. (2000). *Women and human development: The capabilities approach*. Cambridge University Press.
- [Nussbaum, 2001] Nussbaum, M. (2001). Adaptive preferences and women's options. *Economics and Philosophy*, 17(01):67–88.
- [Pettit, 2001] Pettit, P. (2001). Capability and freedom: a defence of Sen. *Economics and Philosophy*, 17(01):1–20.
- [Rachels and Rachels, 1986] Rachels, J. and Rachels, S. (1986). *The elements of moral philosophy*. McGraw-Hill.
- [Rawls, 1993] Rawls, J. (1993). *Political Liberalism*. Columbia University Press, NY New York.
- [Rawls, 1999] Rawls, J. (1999). *A Theory of Justice*. Harvard University Press, Cambridge, MA.
- [Rawls, 2001] Rawls, J. (2001). *Justice as fairness: A restatement*. Belknap Press of Harvard University Press.
- [Richards, 2000] Richards, J. R. (2000). *Human nature after Darwin: a philosophical introduction*. Routledge Press.

- [Riley, 1998] Riley, J. (1998). *Mill on liberty*. Routledge Press.
- [Robinson, 2009a] Robinson, R. (2009a). A Defense of the Maximin Principle in Rawls' Theory of Justice. *Humanity & Social Sciences Journal*, 4(2):172–175.
- [Robinson, 2009b] Robinson, R. (2009b). The role of causation in decision of tort law. *Journal of Law, Development and Politics*, 1(2).
- [Robinson, 2010] Robinson, R. (2010). Rescuing Justice and Equality. By GA Cohen. *The Journal of Politics*, 72(04):1255–1256.
- [Roemer, 2010] Roemer, J. (2010). Jerry Cohen's Why Not Socialism? Some Thoughts. *The Journal of Ethics*, pages 1–8.
- [Ryan, 1977] Ryan, C. C. (1977). Yours, mine, and ours: Property rights and individual liberty. *Ethics*, 87(2):126–141.
- [Scanlon, 1975] Scanlon, T. (1975). Preference and urgency. *The Journal of Philosophy*, 72(19):655–669.
- [Scanlon, 1998] Scanlon, T. (1998). *What we owe to each other*. Belknap Press.
- [Sen, 1979] Sen, A. (1979). Equality of What? The tanner lecture on human values. *Stanford University, May*, 22:1979.
- [Sen, 1985] Sen, A. (1985). Well-being, agency and freedom: the Dewey lectures 1984. *The Journal of Philosophy*, 82(4):169–221.
- [Singer, 2010] Singer, P. (2010). *Marx (a Brief Insight)*. Sterling.
- [Smiley, 1992] Smiley, M. (1992). *Moral responsibility and the boundaries of community: power and accountability from a pragmatic point of view*. University of Chicago Press.

- [Strawson, 1994] Strawson, G. (1994). The impossibility of moral responsibility. *Philosophical Studies*, 75(1):5–24.
- [Strawson, 1998] Strawson, G. (1998). Free will. In Craig, E., editor, *Routledge Encyclopedia of Philosophy*.
- [Van der Veen and Van Parijs, 1985] Van der Veen, R. and Van Parijs, P. (1985). Entitlement Theories of Justice: From Nozick to Roemer and Beyond. *Economics and philosophy*, 1(01):69–81.
- [Williams, 2002] Williams, A. (2002). Dworkin on Capability. *Ethics*, 113(1):23–39.
- [Williams and Long, 1993] Williams, B. and Long, A. (1993). *Shame and necessity*. Taylor & Francis.
- [Wolf, 1987] Wolf, S. (1987). Sanity and the metaphysics of responsibility. *Responsibility, character, and the emotions: New essays in moral psychology*, pages 46–62.