

**THERE'S ME, THERE'S YOU, AND THERE'S US:
SEPARATENESS OF PERSONS, CONTRACTUALISM,
AND THEIR ROLE IN ESTABLISHING A DISTRIBUTIVE
PRINCIPLE**

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ABSTRACT

In this dissertation, I embark on the exploration of the fundamental moral commitment that is shared by all deontological theories – the respect for separateness of persons. There is a shared belief that utilitarianism is incompatible with this requirement, but it is rarely demonstrated in what way exactly. I explore the question what it means for a theory to uphold separateness of persons, and conclude that all teleological theories fail to do so. This is, however, due to them starting from a fundamentally different idea of what represents an appropriate subject of moral concern – for them, it is not moral persons, but person-stages. Thus, our commitment to separateness of persons fundamentally depends on whether we accept that unified moral persons are the appropriate, essential starting point of a moral theory. Insofar they are, as deontological theories assume, we have good reason to reject teleology. This leads us to the next question, which is whether separateness of persons as a standard can be used to argue for a specific deontological theory. It is argued that separateness of persons represents a standard which cuts all the way down to the principles and policies, and it is not simply a milestone that needs to be reached only to be forgotten afterwards. Therefore, we need to see how the major rivals in the area of distributive justice, libertarianism and egalitarianism, perform in terms of respect for separateness of persons.

The dissertation engages with the two most prominent libertarian and liberal egalitarian thinkers, Nozick and Rawls, who both take separateness of persons as the starting point of their theories, ultimately ending up with very different conclusions as to what this commitment actually entails. Their conclusions are different in the ways they explore the issue and conceptualize the permissible trade-offs between individual gains and losses. This results in the fundamentally different distributive implications of their theories. The libertarian non-moral conceptualization

of individual sacrifice is explored and rejected as inconsistent with deontology; on the other hand, libertarian attempts at moralization are deemed implausible.

I further explore whether some form of (liberal) egalitarianism succeeds in offering a plausible account of individual burdens, specifically via a contractualist framework, which instructs us to minimize the maximal complaint, and offers a standard of justification: a principle is justified, i.e. cannot be reasonably rejected, if under any other proposed principle, someone else would fare even worse than the person with the greatest complaint. Since contractualism represents a general method and is not initially committed to any particular distributive principle, the compatibility of the most prominent liberal egalitarian contractualist theory, that one of Rawls, is critically evaluated. I conclude that Rawls's application of contractualism is not successful in demonstrating why principles established via contractualism should be of a distinctly egalitarian character. After Rawls's theory is expunged from its problematic features, the remaining luck egalitarian idea is examined within the contractualist framework, with the conclusion that it generally does not represent a good fit with individual reasoning within a contractual setting, and that we have good reasons to believe that a strong, distinctly egalitarian principle will not be supported within it. However, there are still reasons for adopting more egalitarian principles within contractualism, based on the experiential consequences of inequality. These kinds of arguments represent weaker forms of egalitarian arguments, because, instead of arguing for equality as a starting point, deviations from which need to be justified, they argue for a move towards equality. Thus, while contractualism rejects libertarianism, it does not make as strong of a case for an egalitarian distributive principle as egalitarians might have hoped for.

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INTRODUCTION

“Love rests on two pillars: surrender and autonomy. Our need for togetherness exists alongside our need for separateness.”

Esther Perel, Mating in Captivity: Reconciling the Erotic and the Domestic

Such advice for relationships, given by Esther Perel, famous Belgian psychotherapist, might sound trivial, maybe even like a commonplace. Yet, there is a lot of truth in it that is not just limited to the realm of intimate relationships, but can be applied in a much wider sense to the field of moral and political philosophy. In this field, we also invest a lot of effort into unpacking principles that will both satisfy the need to protect our status as individuals and maintain our duties to others. In the words of Perel, it is our task to arrive from “me” and “you” to a common “us”. Thereby, we will hopefully surpass the mere *modus vivendi* and genuinely capture the idea that we are more than just bodies that, more often than they would like to, find themselves on a collision course.

This dissertation project started with the ambition of vindicating some form of libertarianism, or at least, exposing the flaws of much of the contemporary egalitarian thought. It seemed to me that a great portion of egalitarian theorizing, although allegedly professing its individualistic roots, operates largely without much direct concern for the issues of individual liberty, simply assuming that it upholds. Moreover, it appeared to me that many of the ways in which the debates are framed display a puzzling amount of theoretical principles and provisions: This way, the discussion is elevated to the realm of completely abstract possibilities and “clever” solutions, without any reference to why and how exactly individuals are supposed to care about them. There is a tacit consensus that almost everyone in the field of political philosophy is some sort of an

egalitarian, and everyone is undoubtedly committed to the value of individual liberty and whatever it implies. People who do not have strong egalitarian commitments are usually straightforward utilitarians or libertarians, whose starting premises and mode of argument seem quite far-fetched. Yet, in mutual engagement with the respective theories, all sides demonstrated the tendency to judge others by their own standards of value. While I was aware of the problematic implications of the libertarian view, it seemed to me that rejecting it outright purely on the ground that it does not conform to many of our intuitions was insufficient; especially so because I also found many aspects of egalitarian theories similarly counter-intuitive. I did not buy the idea that, if libertarianism is flawed, we should automatically embrace one theory of the plethora of liberal egalitarian views, that itself occupies an incredibly wide spectrum. It seemed to me that it is necessary to unpack the very fundamentals of both liberal egalitarianism and libertarianism and see what lies at the core. Libertarians usually start out by appealing to the idea of self-ownership as their core tenet, and as such have been exposed to rigorous scrutiny and often spirited attacks. The most prominent and careful exploration of the concept was famously undertaken by G.A. Cohen, who identified self-ownership as the assumption operating behind most libertarian arguments.

In the same time, the concept of self-ownership¹ has been curiously underexplored by libertarians themselves. They often invoke it simply as a self-evident truth, a premise in the argument. Starting from the rather uncontroversial claim that self-ownership implies respect for the personal bodily integrity², they argue that we should also have full control over our talents, labor and the

¹ Cohen warns that we should distinguish between the concept and the thesis of self-ownership: while the concept might be vague, indeterminate or self-contradictory, it cannot be incorrect, like the thesis can be. Self-ownership can have a rather determinate content as a principle; whether the principle itself and its implications are plausible, is a different matter.

² As, for example, in the famous “eye lottery”. I will come back to this in an instant.

products of our labor. Eventually, we are left with no duties towards others but to respect their negative rights.

While Cohen is certainly right in his assessment that self-ownership plays an important role in any kind of libertarianism, he errs when he assumes that it constitutes the starting point of the theory. At least in Robert Nozick, I would argue, self-ownership is merely the result of a more fundamental concept: the separateness of persons. In this respect, Nozick has something in common with John Rawls, for whose ideas the separateness of persons is foundational as well. However, despite their shared foundation, both philosophers arrive at completely different conclusions. This is not surprising, as a commitment to this principle does not automatically result in a monolithic theory. Yet, the separateness of persons provides a framework and sets certain limitations. Coherently applied, it leads to deontological theories, and subsequently, towards contractualism. It is important, therefore, to assess critically whether the main proponents of liberal egalitarianism and libertarianism indeed remain faithful to their professed adherence to separateness of persons. I am doubtful about this, and will argue that actual respect for separateness of persons necessarily results in a conception which is neither libertarian in the classical sense nor mainstream liberal egalitarian.

My argument will proceed as follows:

In the first chapter, I will explore the concept of separateness of persons as the core moral commitment invoked by both Nozick and Rawls. Although they disagree over the further positive implications of this commitment, they stand in agreement that utilitarianism violates the separateness of persons. I therefore examine what it means for a theory to violate the separateness of persons, and conclude that not only utilitarianism is vulnerable to this objection, but also any sort of teleological theory. Respect for separateness of persons lies at the moral foundation of

deontological theories, those who define the right as prior to the good. Thus, the general way we see value and what it means to value things within a human life is what makes the crucial difference. This does not mean that disrespect for separateness of persons is a knockdown objection to teleological theories; it simply points to the fact that teleological and deontological theories tacitly rely on a radically different conception of what is the appropriate unit of moral concern – persons or person-stages. If one subscribes to Derek Parfit’s Reductionist View, one would consider some version of utilitarianism a plausible moral theory. However, insofar we subscribe to the classic conception of a person as an individual, and appreciate it as a moral locus, we have good reasons to reject teleological theories and accept some form of deontology.

In the second chapter, I will explore how to reduce seemingly unsurmountable barriers to interpersonal trade-offs that the separateness of persons purportedly erects. Most human actions inevitably result in some people faring worse and some better as a result. Therefore, the question is how to determine when and how imposing burdens on others is permissible, if we assume that each person has a veto. First, I explore the conceptualization of burdens in some non-moral terms, such as utilities. This approach basically says that individual interests can be sacrificed, but only if accompanied by an appropriate compensation. This is the way in which Nozick and many libertarians either explicitly or implicitly frame the issue, which explains their strong adherence to the importance of consent and negative rights. However, by doing so, I argue, they rely heavily on tacit moralizing assumptions in the background, assumptions that cannot be justified in this way within their preferred teleological framework. I then argue that even if libertarians abandon such a view and simply argue for a moralized version of sacrifice, in which negative rights are not only of paramount importance, but even of sole importance, they run into the problem of not being able to offer us a plausible moralization. A distinction between negative

rights and positive duties simply does not map completely on what we care about. Any plausible theory which truly appreciates the value of human life will include at least minimal positive duties. It is difficult to see how we can claim a special meaning and respect for our own life without offering consideration for the lives of others in return.

In the third chapter, I explore a way to offer a moralized conceptualization of sacrifice – instead of saying that sacrifice requires compensation, we could rather say that it requires justification. Intuitively, not all costs are morally on par, and we would want a deontological theory to be able to capture this, while still being committed to offering a justification to each. The abandonment of libertarianism could potentially push us straightforwardly towards adopting some form of (liberal) egalitarianism. However, I argue, the intermediate step that is missing is the choice of an appropriate method for assessing individual burdens. I believe that this method is contractualism, which is commonly associated with some form of egalitarianism, but is not precommitted to any particular distributive principle. Therefore, I first examine the most famous attempt to derive a distinctly egalitarian theory from contractualism – Rawls’s *Justice as Fairness*. By doing so, I show that the argument from the original position, which represents the contractual situation, does not successfully demonstrate that a distinctly egalitarian principle would be chosen, instead of, for example, some sort of social minimum. Another, intuitive argument, prominently put forward by Rawls, contains two ideas about the nature of justice – justice as impartiality, which relies on the notion of moral arbitrariness of unchosen circumstances and traits, and justice as mutual advantage, which postulates that justice needs to be productive in order to trigger egalitarian commitments to others.

In the fourth chapter, I detect the latter aspect of mutual advantage as the more problematic side of Rawls’s view, and explore in what way one can proceed from the assumption of moral

arbitrariness within a contractualist framework. This assumption basically translates into a form of luck egalitarian view, which holds that it is unjust when people are faring worse than others through no fault of their own. In contractualist terms, this results in a *prima facie* claim for compensation on behalf of others for such occurrences, which is, however, further constrained by considerations of liberty and efficiency. Here I assess how such a view, on its own, provides a poor motivational stimulus from the perspective of the contractual parties – they are primarily concerned with securing the appropriate means for living according to their conception of the good life and choosing principles and policies which will make sure that they treat each other as equals. The way that luck egalitarianism delineates areas of responsibility might have its force in certain circumstances, but it is a kind of delineation that leads to two problems: It is a) neither appropriate for a context in which we are trying to find a principle which will appropriately delineate what society and individuals are responsible for, respectively, nor does it b) correspond to our judgments about the circumstances in which people should be compensated. In such circumstances, people are supposedly more concerned with securing against the worst absolute outcomes than with securing against outcomes based primarily on the grounds of their genesis. Luck egalitarianism can also be expressed in terms of the Dworkinian auction, which indeed takes into account what people would hypothetically choose to insure against, while using the opportunity costs on the market for others as the way to take into account the burdens of others. I conclude that the intuitively plausible aspects of Dworkin's theory do not rely on distinctly luck egalitarian considerations; rather, once taken into account, such considerations make the theory less attractive. Since the plausible aspects are not distinctly egalitarian aspects, as they do not rely on the assumption of equal initial distribution at all, I conclude that a specifically egalitarian distributive principle is not supported by the contractualist framework.

However, while the strong egalitarian distributive principles seem unable to yield convincing support within a contractualist framework, instrumental reasons that egalitarians offer when opting for a more egalitarian society, or at least, for limiting significant inequalities, prove to be quite convincing, despite falling short of what a convinced egalitarianism usually endorses. They do not rely on egalitarian distributions as their support, but rather refer to the conditions for citizens treating each other as equals.

Finally, I conclude that, while contractualism, as a plausible way to moralize sacrifice, rejects libertarianism, it does not support strong egalitarianism either. Most plausibly, it endorses a theory which has a nuanced way of assessing individual burdens in particular cases. However, such a theory, which would command accepting a nuanced way of measuring what we have reason to demand from others, will probably in turn have a less determinately egalitarian distributive formula than anticipated. It also will, in terms of individual distributive shares, aim towards establishing a level of sufficiency or adequacy. I conclude that there is still much work to be done in devising the precise details of such a theory, and especially in applying it to specific areas of interest, such as the needs and burdens of the dependents and the discriminated.

CHAPTER 1: SEPARATENESS OF PERSONS: THE CORNERSTONE OF DEONTOLOGY

What should be the very foundation for establishing a solid and commonly acceptable distributive principle? For an answer to this basic question, it makes sense to refer back to Robert Nozick and John Rawls as major authorities of libertarianism and liberal egalitarianism, respectively. Despite their radical differences, both theories have one common denominator: separateness of persons as their core moral commitment. That is to say, they both rely on the same conception of personhood, which encapsulates a way people tend to see their lives and what makes them authentic and meaningful. Separateness of persons is more than just a well-sounding term that reminds us of the commonplace that we are separate beings; its requirements are based on what particular kind of separate beings we are – namely, persons. I will start out my investigation into this matter by having a look at Nozick and his famous eye-lottery, which, rather than being a convincing case for radical self-ownership, underlines the fundamental relevance of separateness of persons. Afterwards, I will relate this to the Rawlsian approach to separateness of persons.

1.1 Libertarianism, self-ownership and separateness of persons

When we talk about libertarianism, self-ownership is often taken to be its main tenet, and as such has been exposed to rigorous scrutiny and often, spirited attacks. The most famous and careful exploration of the concept was famously undertaken by G.A. Cohen, who identified self-ownership as the assumption operating behind most libertarian arguments. In the same time, the concept of self-ownership³ has been curiously underexplored by libertarians themselves. By

³ Cohen warns that we should distinguish between the concept and the thesis of self-ownership: while the concept might be vague, indeterminate or self-contradictory, it cannot be incorrect, like the thesis can be. In the previous

them, it is often invoked simply as a self-evident truth, a premise in the argument, underpinned by intuitively plausible cases such as the famous eye lottery:

Suppose that transplant technology reaches such a pitch of perfection that it becomes possible to transplant eyeballs with one hundred percent chance of success. Anyone's eyes may be transplanted into anyone else, without complications. As some people are born with defective eyes, or with no eyes at all, should we redistribute eyes? That is, should we take one eye from some people with two healthy eyes, and give eyes to the blind? Of course, some people may volunteer their eyes for transplant. But what if there was not enough volunteers? Should we have a national lottery, and force the losers to donate an eye? (Wolff 1991, 7-8)

....an application of the principle of maximizing the position of the worst off might involve forceable redistribution of the bodily parts. (ASU, 206)

Indeed, few would argue against the evident wrongness of such redistribution of bodily parts, no matter how fair the procedure for conducting it. Yet, libertarians aspire to derive a much stronger claim from such an example, the claim that self-ownership implies not only respecting our personal bodily integrity, but also grants us a full control over our talents, labor and the products of our labor. This has implications for taxation, which libertarians perceive as being on par with forced labor, and legitimate demands on us to provide any sort of a service to other people. It also, by extension, implies that we have no duties towards others besides the duty to respect their negative rights, and that we are not to be coerced into providing any sort of help to others, even if it would come at a relatively trivial cost to ourselves.

These implications of upholding a strong right to self-ownership seem, however, far less self-evident than the eye lottery example would suggest and indicate that self-ownership cannot be taken as a starting premise, but has to be underpinned by a more fundamental value. The idea that the self-ownership thesis lies at the core of libertarian thought has been mostly purported by G. A. Cohen, and it is accurate insofar it merely claims that the principle of self-ownership is one of

chapter I discussed the concept and concurred with Cohen that self-ownership can have a rather determinate content as a principle; whether the principle itself and its implications are plausible, is a different matter.

the main libertarian principles. However, it is not clear that the principle of self-ownership holds the status of a starting place in libertarian theory – at least not in the work of Robert Nozick, which stands in the center of Cohen’s critique. As a matter of fact, Nozick mentions the idea of self-ownership only once in *Anarchy, State, and Utopia*⁴, and part II of the book seems to function without relying much on the idea (Van der Vossen 2019), despite Cohen highlighting it as “(t)he polemically crucial right [of self-ownership]” (Cohen 1995, 215).

Therefore, the starting point of his theory must be located in a more fundamental concept, with self-ownership being a conclusion, rather than a premise (Brennan and Van der Vossen 2018, 200).⁵ In this respect, the principle of self-ownership is comparable to Rawls’s principles of justice. While they are crucial building blocks of their respective theories, they do not represent the starting premises in the arguments, but their conclusion. In this respect, it makes sense to criticize their implications, or inconsistencies with the other elements or principles of the theory. However, in both cases the principles are entrenched in a more basic idea, that of separateness of persons.

In several places, Nozick explicitly appeals to the separateness of persons, along with the Kantian idea of treating people as ends, and not (merely) as means, which he treats as interconnected:

[But] there ... are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more ... To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. He

⁴ “Seizing the results of someone’s labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a part-owner of you; it gives them a property right in you. (...) End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals’ notion of *self-ownership* to a notion of (partial) property rights in other people.” (ASU, 172, emphasis added)

⁵ Brennan and Van der Vossen point out that philosophers who use self-ownership as a starting premise are mostly those of left-libertarian leaning, while Nozick’s theory barely makes use of the concept at all.

does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him. (ASU, 32–33)

“The moral side constraints upon what we may do, I claim, reflect the fact of our separate existences ... There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints” (ASU, 33)

The underlying moral idea for Nozick, as we can see, is the moral fact of separateness of persons, which in turn supports the view of rights as side constraints.

1.2 What follows from separateness of persons?

In John Rawls’s form of liberal egalitarianism, separateness of persons plays the same crucial role as in Nozick’s libertarianism. We can specifically see this in his criticism of utilitarianism for failing to “take seriously the distinction between persons” (TJ, 24). However, despite sharing a similar view on utilitarianism and separateness of persons, and the idea that to a significant extent, morality is expressed through side constraints, Nozick and Rawls part ways when it comes to the content of these constraints. Nozick, unlike Rawls, proposes rights as absolute side constraints as the sole content of morality. While, for reasons I will explore in my second chapter, he does not stick to absolute constraints, his view of morality is significantly more minimalistic than Rawls’s, and side constraints remain as strong as they can get. Therefore, both philosophers disagree on what it means to treat people in an unacceptable manner: while Nozick thinks that eye lottery and taxation are basically on par, or at least both unjustifiable, Rawls argues for a moral difference between the two.⁶ This seems puzzling, as they both seem to suggest that the moral standard of separateness of persons not only excludes utilitarianism, but requires a specific

⁶ However, it is important to note that Rawls neither establishes nor argues for the distribution within the framework of his Difference Principle as a form of helping or a positive duty; yet, there is nothing in his theory that precludes the existence of the duty to aid, at least within the realm of natural duties.

theory⁷, or at least, supports a particular moral view that constitutes a significant part of a complete theory.

Despite being routinely invoked in arguments for various views, the exploration of, or the appeal to, the claim of separateness of persons has rarely gone beyond superficial assertions or scattered remarks. Philosophers who produced seminal works on the topic, such as Matt Zwolinski (2003; 2008), Dennis McKerlie (1988) and David Brink (1993), mostly expressed skepticism about the normative strength of the appeal to separateness of persons that has been assigned to it by Rawls and Nozick. Brink and McKerlie focus especially on debunking a purported natural connection between separateness of persons and egalitarianism. There is a consensus that, while separateness of persons as a standard can to some extent undermine the appeal of classical utilitarianism, it cannot convincingly support elaborate egalitarian views. The same is true for the connection between separateness of persons and libertarianism.

I will argue in this thesis that, while we certainly cannot derive a complete theory from separateness of persons, the notion certainly represents a significant constraint on the kinds of theories we find morally plausible. Accepting separateness of persons as a core moral commitment has implications that directly delineate a body of theories which are acceptable according to it. First and foremost, it straightforwardly excludes any theory that go against the principle. Therefore, I will explore in the following sections what exactly it means to violate the separateness of persons and which theories are guilty of this charge.

⁷ McKerlie distinguishes the claim of positive and negative connection in relation to theories and separateness of persons; the former arguing that separateness of persons counts in favor of a particular view or family of views, and latter arguing that it performs primarily the negative function of counting against a view (McKerlie 1988, 205). Similarly, Brink argues that the appeal to separateness of persons can play both a constructive and negative role in moral and political theory, by discounting teleological views and motivating the claims of contractualism and deontological theories in general.

1.3 Utilitarianism and separateness of persons

The prime example of a theory that allegedly fails to take seriously the separateness of persons is utilitarianism. But what does it really mean to fail to take the separateness of persons into account? It seems that it would be unfair towards utilitarianism to assume that it ignores the fact that people are, indeed, metaphysically separate individuals (Zwolinski 2003, 148). What is actually meant by this criticism is that utilitarianism does not take individual burdens and benefits into account, besides as a part of a greater calculus – utilitarianism is interested in maximizing total utility. How the burdens and benefits will eventually end up being distributed among different individuals does not matter, as long as the best total outcome is achieved. In this respect, utilitarianism has an aggregative notion of impartiality (Brink 1993, 252) – impartiality in the sense of giving everyone equal consideration. Indeed, utilitarianism does take everyone's interests into account when aggregating them. This is embodied in the famous dictum that John Stuart Mill ascribes to Jeremy Bentham: “Everybody to count for one, nobody for more than one”. While it is true that diminishing marginal utility would probably make sure that the outcomes of utilitarian social policies result in a rather egalitarian distribution of burdens and benefits, this effect would be only a lucky coincidence. People as units matter, inasmuch as they make a difference in total amount of social gain. If there would be a creature who would be an incredibly efficient converter of resources into utility, getting significantly more utility than anyone else, there would be no plausible reasons for us, as long as we subscribe to maximizing utility, to deny the sacrifice of everyone else for the sake of this “utility monster” (ASU, 41). Even if we would dismiss this famous example as a pure, unrealistic figment of philosophical imagination, we could not dismiss the complaint that a sufficient number of small losses for

many people can outweigh a serious loss for an individual⁸, which strikes us as intuitively implausible.

It is argued that unlike utilitarianism, egalitarianism “treats individual lives as morally important units” (McKerlie 1988, 205), because in order to achieve equality between different lives, it looks at each life as a single unit for comparison, without aggregating them. An outcome with a more equal distribution of gains and losses is intrinsically valuable in itself, independent of achieving the greatest net gain. It upholds a non-aggregative conception of impartiality, which can be expressed in a statement that provides a direct connection between separateness of persons and egalitarianism, according to Derek Parfit (1984, 330): “Since it is a deep truth that we live different lives, it is an ultimate moral aim that, in so far as we are equally deserving, the lives of each should go equally well.”

1.3.1 Distribution insensitivity

From the aforementioned, it seems to follow that the main distinguishing feature of utilitarianism, which renders it incompatible with respect to the separateness of persons, is its distribution insensitivity. While egalitarianism essentially cares how burdens and benefits are distributed between different lives, utilitarianism has no intrinsic concern for distribution. Yet, it appears that even an egalitarian principle could sanction intuitively unfair trade-offs, if not further qualified.⁹

⁸ Scanlon’s Transmitter room case: a worker has suffered an accident in a television stations’ transmitter room, and it is impossible to save him unless we turn off the transmitter, therefore interrupting a World Cup match in progress. Considering that millions of people are experiencing pleasure from watching the match, should we wait until the end of the match to save the worker, even if he is suffering excruciating pain, and does this fact depend on how many people are watching? For many people, it seems that spectators’ enjoyment of the football match does not merit consideration, no matter how many are there. (Scanlon 1998, 235)

⁹ It is important to note that the term “egalitarianism” and philosophers considered to be egalitarians is somewhat fuzzy. As egalitarians, McKerlie counts in Nozick, Nagel and Rawls, despite Nozick typically not being considered one. In the wider sense, all of the aforementioned philosophers could be considered egalitarian, as they all embrace the idea of an equal moral status of each person, and a subsequently equal concern and respect for them. Yet, the

For example, the eye lottery would not necessarily be sanctioned under an egalitarian principle concerned only with achieving an equal distribution – in this case, we would not distribute eyes with the aim of maximizing utility, but in order to achieve equality in eye distribution among people. Aiming for an egalitarian distribution, without further limitations, it would not be clear why it would be wrong to take eyes from some who have two in order to give them to some who have none. Yet, this would intuitively seem to be an impermissible sort of distribution. This sort of “wrongness” cannot be captured by simply looking at the final, equal distribution of eyes. In order to be able to say that such lottery is impermissible, we would have to ascribe intrinsic significance to certain kind of losses or ways in which losses are incurred. A similar point is made by Nozick when he criticizes end-state theories for omitting crucial pieces of information necessary for determining whether a distribution of burdens and benefits is just.

As we have seen, even a distribution guided by utilitarian principles might end up looking very similar to, or even indistinguishable from, an egalitarian one. This indicates that distribution insensitivity is not a distinguishing feature that makes utilitarianism insensitive to separateness of persons. In order to say whether a particular distribution of burdens and benefits in a given moment is morally acceptable, we also need to know something about the persons, and how the distribution came into being. There are two other closely related features of utilitarianism that have been identified as possible culprits of its running afoul of separateness of persons: its person neutrality and its teleological/consequentialist structure.

term egalitarian is usually applied more narrowly to philosophers favoring equal (re)distribution. Despite the subset of egalitarian theories being wider than that, it is important to note that the philosophers whose work is scrutinized in Brink’s and McKerlie’s papers (except Nozick) are being considered as liberal egalitarians. This is important, as such philosophers generally treat the “liberal” part of theories as the significant one. That part usually refers to the respect of individual liberty, which curtails, at least to some extent, the unrestricted application of egalitarian distributional principles. This is important to note, because, as we will see, the common denominator of all considered theories is not their egalitarianism, but their deontological structure.

1.3.2 Person neutrality

Zwolinski explores the possibility that utilitarianism's consequentialism is the main source of trouble; he rejects this option due to the possibility of the existence of a consequentialist theory which is not committed to maximizing some agent-neutral good. As an example of such a theory, Zwolinski offers the previously explored type of consequentialist egalitarianism, which defines such acts as right that tend to produce the closest to equal distribution, and argues that such a theory would not run into problems with implausible trade-offs. However, as it was argued, such a theory could run into the very same problems as utilitarianism, although it would not seek to maximize total good; it would expect from us to promote a certain value, irrespective of what kind of sacrifices, and by whom, would be necessary to achieve it. In this respect, this sort of a theory would also be person-neutral; it would give everyone a common goal of achieving equality in distribution. In person neutral theories, no loss is intrinsically more significant than the other; any loss, no matter how serious, can eventually be balanced by a sufficient number of benefits of some other kind.¹⁰

1.3.3 Teleological structure

Unlike Zwolinski, Brink sees the teleological structure of utilitarianism as the main source of trouble when it comes to separateness of persons; as a consequence, the set of theories incompatible with this principle goes beyond utilitarianism. But what does it mean for a theory to be teleological? Teleological theories define the good independently from the right, and the right is defined in terms of what maximizes the defined good (TJ, 21-22). “‘The good’ deals with how we have reason to want the world to be, while ‘the right’ has to do with what we may or must

¹⁰ Not all teleological theories are person-neutral, but utilitarianism and other kinds of consequentialism, theories offering alternative social decision-making principles to the ones offered by deontologists, are.

do.” (Scanlon 1998, 79) Therefore, in teleological theories, the duty or the right course of action is defined as that one which is promoting the good or the value in question (Brink 1993, 253). Utilitarianism is a teleological theory because it tells us what the desirable goal or the good is (maximizing utility), and then defines the right course of action as the one which promotes this good the best. First and foremost, our duties are defined as the ones that will bring about a certain state of affairs, and that state of affairs is the one which will maximize the value in question. As we have seen, the family of teleological theories includes more theories than just the utilitarian one, which sees the good in maximizing utility; an egalitarian theory, seeking to promote equality as the valuable end-state, could be teleological as well. Rawls contrasts teleological theories with deontological ones, and defines the latter primarily in negative terms: a theory is deontological if it does not “specify the good independently from the right, or does not interpret the right as maximizing the good.” (TJ, 26). In deontological theories, the concept of the right is prior to that of the good. Deontological theories purport that there is no predefined good that we should seek to achieve and which is prior to what we consider to be the right course of action. Instead of defining the good first, and then defining the right in terms of achieving or promoting this good, a deontological theory first defines what is right, and this right in turn limits the pursuit of the good.

If the teleological nature of utilitarianism is what makes it problematic, then, rather than its distribution insensitivity, the particular kind of sacrifices that it inflicts on people matters. The same applies to the aforementioned consequentialist egalitarian distribution – while it might end up distributing losses and gains equally, it might require great sacrifices on behalf of some in order to achieve the desired distribution. Strictly speaking, such a theory might treat people as separate, but it does not treat them as separate persons. Just like utilitarianism, it requires from

people to subscribe to the pursuit of the same kind of good and subordinate their own conception of the good to this pursuit.

From the perspective of utilitarianism, such personal sacrifices are considered unproblematic. Many scholars say that this derives from the utilitarian assumption that there is no difference between intrapersonal trade-offs (the ones made within a single person's lifetime) and interpersonal trade-offs (the ones between different persons' lives). When we are making choices as individuals, we are, for example, not only allowed but rationally required to forgo some benefits or suffer some losses now in exchange for some gains in the future. I could decide to have a painful medical procedure now in order to be healthier in the future. Utilitarianism applies the same logic to social choice and aggregate level; every individual has reason to maximize aggregate social good and is therefore expected to suffer a cost or forgo a benefit in order to spare any member of society greater costs.

However, claiming that forgoing some benefits or suffering through some sacrifices for the greater good alone is too difficult or too costly for the individual does not make a good argument against utilitarianism. (Cohen 2000; Ashford 2003). Many relatively uncontroversial moral demands could be difficult or costly to perform, and yet we would agree that this does not immediately disqualify a moral demand. Morality is sometimes demanding, full stop. "So the fact that a moral theory is sometimes extremely demanding is not in itself a forceful objection to it." (Ashford 2003, 274).¹¹ There must be a different factor that makes the utilitarian outlook problematic in the eyes of deontologists.

¹¹ Moral overdemandingness, due to its discouraging psychological effects, presents a worry for utilitarians, too. Therefore, it might be sensible to promote a less demanding public standard for (charitable) giving (Singer 2009). Yet, this worry does not emerge as a doubt in the correctness of the moral principle, but as an indirect strategy to secure a wider compliance and thus achieve the more demanding standard in the long run (Johannsen 2016). So,

1.4 Moral personhood and the plurality of persons

People are separate because they are persons, and not just any kind of beings. In this respect, the phrase “separateness of persons” might obscure this, as it seems to put emphasis on separateness as the important feature. Thus, separateness of persons does not invite us, first and foremost, to treat people as separate units, but to treat them as persons. The nature of personhood obliges us to treat people as separate, and in a particular way: By taking into account both special features of a moral personality¹², as opposed to features of a merely sentient being. People are more than just units; they are separate units in a very specific way, in virtue of their personhood. The problem, therefore, is not that utilitarianism does not treat people as separate (it certainly does so, by counting everyone as one and none as more than one), but that it expects from agents, insofar as they are rational, to treat their own losses and gains as no different from those of other members of society, thereby accepting an impersonal point of view.

People are persons because they have different conceptions of the good and final ends. They are “moral persons, that is, as rational beings with their own ends and capable... of a sense of justice.” (TJ, 11) By assuming the point of view of the “impartial spectator” (TJ, 24, 161-63) or “ideal observer” (Scanlon 1998, 105), utilitarianism and other consequentialist teleological theories ignore the plurality of persons and their ends, ascribing them instead a shared goal of achieving a predefined good. This is what Rawls means when he says that utilitarianism extends “to society the principle of choice for one man..., conflating all persons into one through the imaginative acts of the impartial sympathetic spectator”. (TJ, 24) Besides the obvious issue of whose perspective, based on what values, the spectator would take, this sort of decision-making

while a personal prerogative of a sort might find its place in such a theory, its importance will always hinge on a completely different set of reasons, which will not capture the intrinsic importance of this perspective.

¹² Rawls identifies two features: the capacity to form, revise and pursue their conception of the rational good, and the capacity for a sense of justice, which refers to person's ability to cooperate with others on fair terms.

would fail to appreciate that what it means to rationally direct one's life sometimes has a very different meaning for different people. The problem in determining moral principles, given this diversity of ends, lies not simply in the selfish conflict over their own personal interests, but in a diverse understanding of what the right principles are, even if people do have a genuine desire to treat other people with proper concern. It is not simply an unfortunate incidence that people have distinct ends and interests; this is precisely what separates people from animals. Nozick thinks it is "our capacity to shape one's life in accordance with an overall plan that one chooses to accept" (Otsuka 2011, 49) what makes our lives meaningful. It is crucial for this that we perceive ourselves as persons extended in time, that we feel a sense of unity of our identity.

1.5 Value and Promotion

This issue is further connected with the view of value. Teleological theories seem to be unable to convincingly account for many things that we value, and valuing of which does not find its best expression in promotion. Often it is not the case that we value things because they are good, but we rather consider them to be good because we find them so intrinsically valuable (Scanlon 1998, 97). Rawls's account of goodness¹³ goes as follows: "A is a good X if and only if A has . . . the properties which it is rational to want in an X, given what X's are used for, or expected to do and the like (whichever rider is appropriate)" (TJ, 350-351). So, it is rational to for us to want some X inasmuch as it has certain properties that make it good for us. This is especially clear in the case of values such as friendship. Even if we think that our life is better because we have friends, we

¹³ Rawls points out that in non-teleological theory, "something is good only if it fits into ways of life consistent with the principles of right already on hand" (348); so, in a way, it is not possible to predefine good before we know the principles of social choice. Yet, the concept of goodness is necessary so that people in the original position would understand the structure that their diverging conceptions of the good will take. This structure would, further, strongly hint at the kind of things that parties in the original position should strive for, despite not knowing their concrete ends: liberties and primary goods can generally help us advance our aims, no matter what they are.

do not think that this is the reason for us to strive to bring about as much friendship as possible; we value our friendships in a different way, and seek to value them via ways other than maximization. We care about a particular friendship, so to say, because we care about it, not directly because it brings us joy and pleasure (although it certainly does). While we might acknowledge that a friendship makes our life better, we do not choose to cultivate it and preserve it because of that. Therefore, we respect persons by recognizing their capacity to create their own meaning and value in life. In *The Examined Life*, Nozick claims that the question whether to plug into an experience machine or not is a question of value. He further suggests that we imagine a person whose whole life experience is fabricated (akin to the protagonist of *The Truman Show*), but it nonetheless makes him feel happy. Yet, Nozick says:

Few of us upon hearing this description would exclaim: “What a wonderful life! It feels so happy and pleasurable on the inside!” That person is living in a dream world, taking pleasure in things that aren’t so. What he wants, though, is not merely to take pleasure in them; he wants them to be so. He values them being that way, and he takes pleasure in them because he thinks they are that way. He doesn’t take pleasure merely in thinking that they are. (Nozick 1989, 106)

Therefore, the point that Nozick tries to make when it comes to the experience machine does not only rely on the idea that our experiences are real as opposed to the ones produced by the machine, but that they are having a real value. While Truman’s wife’s kiss on his cheek is undoubtedly real, in the sense that it is occurring outside of the experience machine, it is not genuine, and he would not value it if he knew the truth, even if the reality of the sensation and experience at the moment would be undeniable. The experience machine to some extent obscures this point (and makes others in the same time) by adding an extra layer to reality. Certainly, we want to do certain things, and not just have the experience of doing them. But in terms of value, even if we actually do things, we would not value them if they were not genuine, even if the experience took place in reality.

Of course, not all things are valued in this way, but many important things in life are. Promoting and protecting some values might be important, but we often have only derivative reasons to promote and protect – we do so because we find some things valuable. For example, it would be odd to think that, since we find respect for rights valuable, our goal should be the minimization of the amount of rights violation in society, even if this would require us to violate rights of some people in the process (ASU, 30). We would find it an inappropriate way of expressing reasons why we think that respecting individual rights is valuable in the first place, and would therefore think that establishing rights as constraints on pursuit of individual's or society's goals makes more sense. Scanlon points out that, for example, we do have good reasons to protect and promote human life, but not in a sense of thinking that it would be better if there were more human lives; rather, we think that this is what we are called to do out of respect for persons whose life it is, and not for the sake of the protection of human life as such, as an abstract value (Scanlon 1998, 104).

1.6 Value in human life

Generally, we tend to think that there is more to a human life than simply being a well-fed and well-treated animal. Some values in life, such as the absence of pain, generally agree better with the idea that they are something to be promoted.¹⁴ Nevertheless, this is far from what we generally think is enough to qualify a human life as worthwhile. Of course, it could be the case that with other creatures, such as (most) animals, things are very different, but this is because

¹⁴ There are some instances in which the presence of pain might be valued despite it generally being something unpleasant, because we think of it as the inextricable part of some experiences. In *Star Trek V: The Final Frontier*, captain Kirk, upon encountering a character with the ability to reveal and heal the innermost pains of a person, emphatically exclaims: "They're [pain and guilt] the things we carry with us, the things that make us who we are. If we lose them, we lose ourselves. I don't want my pain taken away! I need my pain!" Of course, as Nozick points out, the question is not whether plugging into the machine is preferable to extremely dire circumstances, but whether that kind of life could even compete for being the best life (Nozick 1989, 105).

most of them tend to experience life in a more momentous fashion. In such a life, which is closer to a sequence of states of being, raw experiences and the overall balance of positive as opposed to negative sensations probably matter more. For example, upon noticing a raccoon regularly feasting on french fries and mayo from the fast food restaurant's garbage can, it might occur to us that the animal is sad, as it is most likely going to die from a fatty liver syndrome or a similar condition. Yet, upon reflection, we realize that the raccoon probably does not have a concept of past experiences, future plans, regrets or hopes. It lives in the moment and is probably having the time of his life delighting in all that freely available food. If it would die painlessly (despite the chances for that being slim), it would not in a way be bad for it to cease to exist. It would die a happy raccoon. We would not think the same of a human who dies suddenly, no matter how painless the death is. Even if I am sad when my dog dies suddenly, and I regret not having time to say goodbye, I'm aware that it is my own loss, not dog's one, that I'm mourning.

1.7 A reductionist view of personal identity

While the conceptions of personhood and value outlined so far seem to resonate with our intuitions, not everyone would subscribe to such a conception of moral personhood and its importance. Maybe the crucial problem is not that teleological theories such as utilitarianism show disrespect towards the separateness of persons, but that they implicitly uphold not only a different conception of value, but also a completely different idea of what the appropriate units of moral interest are. It is not mandatory to accept the idea that persons, as defined by Rawls and implicitly supported by other theorists of deontological provenience, unequivocally signify the appropriate locus of morality. If our idea of what constitutes a fundamental unit of separateness

was radically different, there would be no reason for us to subscribe to standards that deontology imposes on us.

Derek Parfit offers convincing arguments that are questioning our intuitions about the nature of personal identity and the self through a series of engaging thought experiments. As opposed to the classical view of personal identity, Parfit argues for the so-called reductionist view, according to which “my existence involves nothing more than a body, a brain, and interrelated mental and physical events” (Gruzalski 1986, 760). What connects these is the relation R, or the relation of “physical and psychological continuity” (Parfit 1984, 262). While this relation is important, it does not, according to Parfit, give rise to personal identity. This does not mean denying that persons exist, but only denying that personhood exists separately from brain, body and experiences. Parfit compares personal identity with the way we think about nations. We use the category of nations in everyday language, but in the same time, we see them as only conceptually different from the sum of their citizens (Parfit 1984, 332). Akin to nations, persons exist only as *conceptual entities* (Gruzalski 1986, 762). While it might be useful to refer to them, there is no deep further fact that underlies a person's continued existence. The same way nations exist because we ascribe this concept to a group of people on a certain territory and their mutual relationship, persons exist insofar as we ascribe certain thoughts and actions to them.

The question is, does this practice of ascribing concepts such as nation or person also justifies ascribing particular responsibilities, duties, and rights to the collection of citizens and collection of body, brain and experiences, respectively. Parfit says that if we believe that, ultimately, there is nothing more to a nation than its citizens, we have reasons to think of a person's nationality as something morally less important. (Parfit 1984, 340) In the same way, if we accept the reductionist view, we have reasons to relax our assumptions about the fundamental importance of

personal identity. “It becomes more plausible, when thinking morally, to focus less upon the person, the subject of experiences, and instead to focus more upon the experiences themselves.” (Parfit 1984, 341) The appropriate unit of moral concern stops being a person, and shrinks down to people’s states at particular times. If personal identity does not transform the relationship of different selves extended in time into something special, a separate unity, deserving particular treatment, then it seems that we have less reasons to think that intrapersonal trade-offs are somehow morally less problematic than interpersonal ones. “If we move from the Non-Reductionist to the Reductionist View, it becomes more plausible to claim that there is less scope for compensation within the same life.” (Parfit 1984, 346) Then, it might be the case that we are equally obliged to be prudent when making trade-offs within our own life, as we are when it comes to potential trade-offs between lives. Typically, we think that people are more or less free to make imprudent choices within their lives, because those are their lives, belonging to their persons. Great imprudence need not be irrational, as it could be the case it fits someone’s overall life plan. Due to its high mortality rate, base jumping might be imprudent, but exercising it constitutes a sense of meaning for the base jumper. But if we abandon the classical idea of personal identity, the idea of temporal neutrality becomes less plausible, and paternalism becomes more justified. Maybe we are not morally justified in making choices that have a potential to diminish our future welfare, even if they do not diminish *overall* welfare within our life.¹⁵

¹⁵ It is not clear why it would be necessary for a deontological theory to unquestionably accept that only welfare of complete lives matters, or that individuals think of distribution within life in such a way. A theory can acknowledge the importance of various stages of life and of continuous welfare, without giving up on treating individual lifetime as a morally relevant unit for comparison. The relatively consistent level of welfare or primary goods might be perceived as intrinsically important, or it could be acknowledged that some life stages require more in terms of resources or goods, irrespective of one’s life plans, such as childhood.

Brink (1993) also thinks that proponents of separateness of persons should explain the disparity between person stages and persons. If person neutrality is guilty of failing to adequately recognize separateness of persons, maybe temporal neutrality fails to recognize the separateness of person stages. If the reductionist view is correct, there is no reason for a principled asymmetry between the way in which we evaluate interpersonal and intrapersonal trade-offs. With the asymmetry gone, both paternalism and utilitarianism become more plausible. The impersonality of utilitarianism, criticized as one of its main flaws, would suddenly turn out to be less implausible. "...it becomes more plausible to be more concerned about the quality of experiences, and less concerned about whose experiences they are." (Parfit 1984, 346)

This fits Rawls's description of the way in which utilitarianism sees "the self", as "one trying to maximize the sum of pleasurable experiences within its psychic boundaries" (TJ, 492). As this "self" has no separate ends from the rest of the people of society, and society as a whole, there is fundamentally no difference between goals of different people and social choice. Therefore, says Rawls, utilitarianism defines the good locally, for example, as a more or less homogeneous quality or attribute of experience, and regards it as an extensive magnitude which is to be maximized over some totality (TJ, 496).

According to him, such a way of thinking about persons and society goes against the way parties see themselves, that is, as moral persons who can choose their final ends, which are always ends in plural, emphasizes Rawls. Considering the nature of moral persons and taking into account "the plurality of distinct persons with separate systems of ends" which stem from it, making it into an essential and permanent feature of human societies, "we should not expect the principles of social choice to be utilitarian" (TJ, 25).

1.8 Moral personhood and deontology

If utilitarian person-neutrality, or impersonality, was plausible, it might be the case that utilitarian impartiality is precisely appropriate for such understanding of human beings and society. However, unlike Brink, I do not think that deontological theories need to explain why they see moral personhood as fundamental, beyond what has already been said and argued for. As we have seen, deontological and teleological theories offer two different ways of looking at the individual and society, and their subsequent interplay through principles. Some people think that the current state of the world might invite us to open to the possibility of a less agent- and more patient-centered outlook; to focus more on saveability and less on inviolability (Otsuka 2011, 51). Norcross claims that deontological constraints serve to rationalize and justify neglect for persons, as they are the basis for the distinction between doing and allowing, which in effect justifies our lack of concern for the deaths we did not directly cause. (Norcross 2009, 95). For such thinkers, utilitarianism represents a more plausible alternative, despite its inability to account for other values. However, if we think that the view of personhood and the subsequent standard of separateness it establishes corresponds to the way we think of our life and value of it, and how we should treat each other, it is possible to reject certain theories, or families of theories, from the get go. Furthermore, it is possible, based on the established criterion, to rank theories within the accepted range according to the extent they respect separateness of persons. It might be the case that separateness of persons is not the only thing that we should care about when we are specifying how to treat each other; but insofar we care about it, it is worth exploring how different theories perform.

1.9 Objection to balancing – the radical consequence of separateness of persons

By embracing the separateness of persons as a valid standard, we have established that, contrary to what utilitarianism purports, one person's losses cannot make up for other person's gains. This calls for a side-constraints form of morality. Side-constraints do not have a goal-oriented form, but rather draw a circle of inviolability around persons. However, at a first glance at least, it seems that our view that it is impermissible to balance gains and losses between lives obliges us to the very strict view that no balancing whatsoever is allowed between lives. This would not only exclude aggregating lives, or gross violations of one's person. It would also exclude inflicting banal losses on me, such as taking a hair of my hair if necessary for saving someone's life. While your life is undoubtedly dear to you, and it is a great loss for you to die, my loss of a hair simply cannot be subtracted from your loss. Moreover, it is not just positive rights that come into question, as we can imagine that there are ends of some lives which are seriously frustrated even by the introduction of the most minimal negative rights that would benefit others.

Parfit calls this view "objection to balancing" (Parfit 1984, 337). If this is the position that separateness of persons obliges us to take, it comes at great cost. A position in which all balancing is problematic is a moral and political non-starter, as almost all interesting issues include imposing at least some sort of gains and losses on different people. Even the most trivial tasks in life often demand some sort of "sacrifice" from us. The objection to balancing seems to be suggesting that any arrangement that sacrifices welfare or interests of some so that others would gain includes balancing between lives. Only in situations in which there would be a total unanimity, in a sense of no one putting forward a complaint to a particular distribution or principle, we would be allowed to take action. This extreme view seems to be suggested by Nozick, at first:

[But] there ... are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more ... To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him. (ASU, 32–33)

But egalitarians such as Nagel and Rawls also seem to be adhering to such a position:

Perhaps the model is no more than an image, but it seems to me a useful one, for it renders plausible the extremely strict position that there can be no interpersonal compensation for sacrifice.¹⁶ (Nagel 1970, 142)

Each member of society is thought to have an inviolability founded on justice or, as some say, on natural right, which even the welfare of everyone else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. (TJ, 24-25)

Clearly, such a strong view is extremely implausible. One might modify it and say that only uncompensated sacrifices are impermissible. Such a view includes a non-moralized conception of balancing, i.e. it measures the size of sacrifice by non-moral, objective criteria, such as utilities. All burdens are morally on par. This is the line of reasoning pursued by Nozick. On the other hand, Rawls proposes a different avenue of reasoning – instead of measuring the size of a benefit in some non-moral terms, he argues that it is impermissible to impose unjustified losses. What constitutes a justified, and what an unjustified loss is a matter of moral agreement between individuals – not all sacrifices are morally on par. However, in order to respect the separateness of persons, it is necessary that the proposed sort of sacrifice be acceptable to each person, and not just to the majority of people or to a representative individual. This eventually calls for applying the contractualist method.

¹⁶ Nagel thinks that from that starting point, one can work himself out all the way to something like Rawls's difference principle, because apparently one will naturally feel that if we need to prioritize anyone, that we should naturally give it to those who are the worst off. As noted by McKerlie, it is not clear that such a direct connection can be made between objection to balancing and Rawls's theory, which instead carefully builds its argument through several additional steps.

CHAPTER 2: HOW TO MORALIZE SACRIFICE? A NON-MORALIZED ACCOUNT OF SACRIFICE AND LIBERTARIANISM

We could moderate the prohibition on all balancing by saying that only uncompensated sacrifices imposed on people are problematic. Brinks call this the “strong interpretation” of the separateness of persons constraint: each sacrifice requires a compensation to be morally acceptable, and the sacrifice is to be measured by a non-moral criterion. This could be done, for example, in terms of utilities, which simply refer to the preferences of individuals – without us assessing either their justifiability or reasonableness. A person makes a preference order based on the relative utility she extracts from an option, based on her own assessment. Since individuals are the ones who shape their conceptions of the good life, they presumably know the best what sort of preferences contribute to the pursuit of their conception the most. Those preferences do not necessarily need to be egoistic, but they are decisively formed by the individuals themselves, without a reference to what other people want. Therefore, I am allowed to do something in order to satisfy my preference and increase my utility as long as this does not cause a decrease in someone else’s utility (which is in turn also dependent on their own assessment).

This effectively gives a veto to everyone over everyone else when they perform an action that decreases their utility. Brink calls this the “Pareto side-constraint” view, as it allows for improvement of someone’s situation only if no one else’s situation is worsened (Brink 1993, 256). This is an extremely stringent condition, which makes most regular activities impossible to perform. What good is the respect of our separateness, if this effectively means hindering us completely from pursuing our conceptions of the good life? This sort of position puts everyone’s burdens morally on par, no matter how trivial a burden; I might take a hair from your head in

order to save a life, but I cannot do that without compensating you, no matter how insignificant the sacrifice, and no matter how great the gain.

2.1 The strong interpretation, libertarianism and side-constraints

Brink thinks that libertarian views, such as the one purported by Robert Nozick, are “imperfectly motivated by the Pareto interpretation of SRC” (Brink 1993, 285n18). This is the source of the libertarian prohibition on non-voluntary provision of services to others: I am not required to sacrifice anything that I judge important to me, no matter how trivial it might seem to others; not even if this would confer a great benefit on someone else, like saving his life. The baseline for making comparisons in Pareto improvements is taken to be the state of nature – all that we have by birth, that is to say our body, mind and abilities. The side-constraints to what can be done to us are first and foremost rooted in the principle of non-aggression (ASU, 34): a constraint against (unprovoked) killing, assaulting, maiming or enslaving.¹⁷

2.1.1 Rights as side-constraints

Nozick thinks that our deontological commitments, stemming from the moral importance of the separateness of persons, should have a side-constraint form. But what constitutes a side-constraint? According to Nozick, a moral view treats some consideration, C, as a side-constraint, if it tells us never to violate C, no matter how this constraint might frustrate our goals. Nozick contrasts this view with a view that tries to build the constraint C into a certain goal G, aiming

¹⁷ Nozick admits that the principle of non-aggression is relatively vague: while it gives us permission to defend ourselves in the case of the attack, even if this would include killing or maiming the other person, it does not tell us what to do in situations in which we would be forced to defend ourselves from an innocent threat or risk perishing ourselves, or kill people who act as innocent shields to aggressors who are attacking us. Yet, he considers the principle to be intuitively clear enough to proceed further at this point of his argument.

thus for minimization of rights violations. In that case, C is not a side constraint at all, as it can be violated any time if its violation brings out fewer overall violations of the constraint.

For example, one might try to justify the violation of rights of an innocent person, whose alleged participation in a crime enraged a mob, in order to prevent greater rights violations that will inevitably ensue in a mob's rampage throughout the city (ASU, 29). Side-constraints embody inviolability and separateness of persons; therefore, it is not enough for a view that aims at respecting side-constraints to simply incorporate them in *some* way, as this example of utilitarianism of rights demonstrates. Under such a conception, rights of particular individuals have only the derivative status of being means to an end, and can be sacrificed if that turns out to be beneficial. This is not how we ordinarily think of rights and their protection.

Quite the contrary, rights as side-constraints should be treated as limiting us in the pursuit of our good, no matter what that good might be. This distinction maps neatly onto the previously mentioned distinction between deontological and teleological theories, and the different ways in which they treat value; for deontological theories, valuing something does not mean maximizing or promoting it. In them, right is defined independently of the good, and serves as a constraint in its pursuit. Therefore, side-constraints represent the most plausible form of morality. For Nozick, absolute negative rights represent the extension of this deontological moral form, supported by the separateness of persons, to moral content – the principle of non-aggression invokes some paradigmatic examples of gross right violations. But the moral form extends further to moral content, construing all states of nature moral rights as purely negative, specifying types of conduct that may not be done to individuals rather than types of conduct that must be done for them (Mack 2018).

Thus, the rights ascribed to individuals are primarily claim and liberty rights (Wenar 2020), according to the Hohfeldian classification. While the liberty rights, or privileges, give us liberty to do something as long as we have no duty not to do it, claim rights include claims we have against others to act or not to act in certain ways. You are at liberty to swing your arm as long as you have no obligation not to, because this will, say, result in someone being punched on the nose by your action. The person in danger of being punched, on the other hand, has a claim right not to be punched on the nose by you or anyone else. Of course, as long as it would not result in a punch, you also have a claim right not to be prevented from swinging your arm. Since people are the judges of their own preferences, they can decide to voluntarily loosen their boundaries for others, being judges of their own compensation. Therefore, if we make a voluntary agreement that I can punch you on the nose, I gain additional liberty to do so and your claim right not to be punched is diminished. Therefore, rights can be expanded and contracted, but through voluntary agreements only, effectively constituting the aforementioned veto.

2.1.2 Limits of the non-aggression principle

These aforementioned rights are also pre-political rights, as we have them in virtue of our status as inviolable persons, prior to any political arrangement or social contract. After mounting an emphatic (albeit not argumentatively strong) defense of rights as absolute side-constraints, Nozick finds himself confronted with the consequences of adopting the objection to balancing – by prohibiting any sort of trade-offs between individuals, we also make individuals incapable of much action (which poses a great problem for a theory that presumably understands individuals as agents who have special interest in pursuing their conception of the good life). The actions straightforwardly prohibited by the principle of non-aggression are few, and potential ways in

which others can diminish our welfare abound.¹⁸ As Brink points out, “such a theory would have to assign rights to people in such a way that each person has a veto over anyone’s actions...” (Brink 1993, 257-258), since we lack a shared view on what constitutes a legitimate hit on someone’s welfare, beyond obvious violations such as killing and maiming. Since side-constraints are absolute, we should, presumably, do absolutely everything that is in our power to prevent our actions resulting in the violation of someone’s claim. And, since we are measuring sacrifice in a non-moral way, by losses in welfare, it is obvious that this could have very strong implications as to what kind of claims people could have on us – they could potentially complain about each and every perceived negative externality that my actions might have, such as, for example, being extremely irritated by the color of my shirt, or even by the slightest possibility that my action could result in an externality that will reflect negatively on them. Nozick could complain that it seems obvious that hits on welfare are not supposed to include such banal examples, but it is doubtful that this is an acceptable recourse. The judgment that something is a banal violation is also a sort of a moral judgment on what reasonable and unreasonable demands for protection of one’s welfare are. It goes beyond the limits of the non-moral measure of such demands, which should presumably be neutral between the nature and the content of demands and focus on preferences of individuals.

However, as Barbara Fried points out, Nozick and libertarians are counting on the ambiguity in using the word „permissible“: we are at liberty to dispose of our person and property, but only in ways that are permissible, they say. Here, libertarians are counting on us thinking of uses that are intuitively permissible and fall within the realm of the non-aggression principle: for example, an impermissible use of my knife would be to plunge it into your back, without your consent. But

¹⁸ Even if we, for the time being, disregard the issue of usage and division of all of the outside world in which persons coexist.

once we leave the realm of bodily harm, it is not clear anymore what counts as permissible use. Even if we leave fanciful examples of offensive shirt colors aside, it is clear that there are many cases in which people's usage of their entitlements will come into conflict, and none of these need to be particularly eccentric. A spark from an electric generator on my property might burn down your crop, and we would have to decide whether I have wronged you or not, and subsequently, whether I owe you any compensation. The notion of "permissible" use will not be of much use here, as we were both using our tracts of land in what is generally thought to be intuitively permissible ways. Fried asks: "As between two conflicting uses, both of which have compromised ("harmed") the value of the other, on what normative basis do we decide which to privilege?" (Fried 2005, 217)¹⁹

Or if we stick to the realm of our bodies; I might have a claim to walk down the street without making any detours from my path, but you also have a claim to stand in the place where you are standing, because both actions are innocent enough in themselves. But how do we resolve the conflicting claims on who is going to budge in this case? Do I have a claim for you to move out of my way, or do you have a claim on me that I go around you? If it is never permissible to infringe²⁰ on someone's right, no matter how banal, the world would soon come to a halt. It

¹⁹ This has no bearing on the general debate on whether the rights are compossible – whether there can be a genuine conflict of rights (Steiner 1994). Because even if it is impossible to determine the wrongfulness of an action based primarily on the harm as a hit on welfare (as Nozick does), this does not exclude the possibility that right violations can be specified without reliance on non-moral measures. If the wrongfulness of the act is defined in moral terms, and not relying on the concept of harm either in terms of causation or in terms of costs incurred, it could be the case that we are capable of arriving at the final judgment as to whose entitlements should be protected, even in cases in which the conclusion is difficult to reach. Fried's point is rather that by looking at the causation and costs incurred alone, we cannot reach a definite answer. I will elaborate on the fatal problems that Nozick's theory encounters once it commits itself to such an understanding of wrongful action.

²⁰ Infringement of a right, as opposed to violation, basically means that we committed a lesser transgression, one that can be rectified or compensated. Joel Feinberg offers the famous example of a person breaking into another person's cabin in order to shelter himself from a life-threatening blizzard. (Feinberg 1978) While it might be true that the person was justified in doing so, this does not change the fact that he did trespass onto someone's property. According to this view, the content of the right remains unchanged by the circumstances – the right to private property of the cabin owner is not affected by the circumstances of the trespass. The circumstances influence only whether the behavior that opposed a right (justifiably) infringes or (wrongfully) violates the right. (Oberdiek 2004,

seems ludicrously stringent to say that transgressions are never permissible, unless we get a permission for the transgression in advance. This is not only paralyzing, but also factually impossible – accidents and non-intentional transgressions of other people's boundaries by relatively innocuous actions happen all the time. Sticking to such a position would make it virtually impossible to live our lives.

2.1.3 Attenuation of rights: “no transgression without compensation”

This is the reason²¹ why Nozick makes the strategic move of rights attenuation (Mack 1981). The complete prohibition on rights infringement is too stringent – instead, there are rights

326) For example, if the person broke into the cabin simply because they liked it and wanted to spend some time in it, without any extenuating circumstance involved, it would count as a violation of a property right. This so-called “moral space conception of rights” (Oberdiek 2004) is not of a purely libertarian pedigree; Nozick shares it with Judith Jarvis Thomson and Joel Feinberg, for example. However, libertarians see this moral space as ultimately inviolable – for example, in the case of the breaking and entering the cabin, the owner would have to be compensated even if the trespasser would act out of a good reason. Also, this compensation would not simply correspond to the value of damaged goods; Nozick says explicitly that in cases in which agent knowingly crosses someone else's boundary, but negotiation on purchasing such a right prior to infringement was impossible (the hiker could not contact the cabin owner in order to ask him whether he can, and at what price, use his cabin during the blizzard), the person whose right was infringed upon should be paid a fair price, which will usually be “more than what would be required to simply leave the victim as well off as he or she was before the violation (place the victim on the same indifference curve)” (Von Magnus 1983, 123). Nozick thinks that simply paying the owner the same amount as he would have gotten had the usage of the cabin been negotiated prior to the event is not sufficient, as the cost of both individual experience of fear of such trespasses occurring on regular basis, plus the cost of a general fear in society that sanctioning such regular crossings would provoke, need to be calculated into the fair price (ASU, 71-73). Many non-libertarians would agree that people should not necessarily be penalized for a justifiable, or at least excusable, use of someone else's property. If I take a hair from your head in order to save my life, most of us would think that the seriousness of the reason for making an infringement might not require any compensation at all, except maybe in the form of an apology and explanation. This would entail that I am allowed to wantonly pluck people's hair for no good reason; but unlike Nozick, the wrongness of the action would not be measured in terms of net losses or costs imposed on you, either by a loss of a hair, or, more likely, by the stress and fear of knowing that someone might do that to you.

²¹ The move of rights attenuation is a polemically crucial step in the argument that Nozick builds against anarchists – how can a state, even the minimal one, arise without violating individual rights in the process? For, not only does such a state need to collect taxes in order to finance its operation, it also needs to gain the monopoly on the use of coercive force. The state can do this only by coercively suppressing other actors or entities engaged in the rights enforcement and protection, claim the anarchists. Nozick accepts this, but attempts to show how the dominant association (a future state) can achieve this suppression without, in fact, violating rights of its competitors in the process. In order to be able to claim this, Nozick must introduce the acceptability of rights attenuation. For the purposes of this analysis, it is not necessary to enter the details of the debate between Nozick and the anarchists. I will be focusing on the repercussions the strategic move of attenuation has for the rest of Nozick's theory.

infringements that could be permissible without obtaining previous consent, provided that a due compensation for the welfare lost is paid to the affected person. “Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been...” (ASU, 57). Having a right does not always mean that others are prohibited from treating us in certain ways; sometimes it only means that they are not allowed to infringe upon us without duly compensating us, and that we have a claim against them that their infringement does not leave our utility or welfare on net diminished (Mack 2018b).

This corresponds to our commonsense idea that not all forms of right violations and infringements are the same, and that for a normal functioning of society, different sorts of infringement are to be dealt with in a different manner. It is not the same whether I take your life or a strand of hair from your head; while I cannot possibly compensate you for the former, I might very well compensate you for the latter. Since we inevitably run into the way of each other’s trajectories, it seems necessary to find a way not to prohibit, that is to say criminally penalize, all sorts of boundary crossings. It might be sufficient to simply make some acts compensable. This distinction also invokes the legal distinction between entitlements protected by property rules and entitlements protected by liability rules (Mack 2018).²² A certain

²² This distinction is particularly well elucidated in the often-cited paper on the topic by G. Calabresi and A. D. Melamed (1972), mentioned by Nozick in a passing note as well. Besides property and liability rules, the authors also distinguish inalienable entitlements: if taken or destroyed, they are protected by the state that determines compensation and punishment for this transgression, but are not protected by property rights in the full sense because the way we are allowed to dispose of them is limited. For example, I have the right not to be conscripted to slavery or to have my kidney taken away, but I have no right to sell myself to slavery or sell my kidney. Of course, Nozick does not think that there is such a category – no one has the right to determine what I am allowed to do with my entitlements. Calabresi and Melamed think that society has the right to impose such limitations out of considerations of justice or equality. However, since they are discussing the case from a broadly utilitarian perspective, while they recognize that the notion of efficiency cannot capture all the reasons which we have for a certain policy (which could be and often are genuinely grounded in concerns of social justice), they point out that these considerations can still be simply viewed as yet another social preference. “...it is likely that a society often prefers an entitlement which even leads to mild inefficiencies or maldistribution of wealth ... because that entitlement tends to support other entitlements which are crucial in terms of efficiency or wealth distribution in the society at large and because the cost of convincing people that the situations are, in fact, different is not worth the gain which would be obtained...” (1104n32).

entitlement is protected by a property rule if others may not determine without my consent what is to be done with it, even if they would be willing to compensate me afterwards. The only way to legitimately obtain the entitlement is through voluntary consent of the entitled person. On the other hand, an entitlement is protected by a liability rule if others can unilaterally decide what is done with it, as long as the entitlement holder is duly compensated for the loss in utility.

This would seem to convert all property rights into *pro tanto* liability rules – provided that we can compensate, we can do whatever we want to do to someone without their consent. If this is so, asks Nozick, why would we ever forbid any kind of action, provided that the victim is compensated? The first reason is an obvious one – there are some boundary crossings, such as killing or maiming, that one can barely be compensated for. But there are additional reasons for not simply allowing the conversion of all rules into liability rules. First of all, if the cost of committing a violation or infringement is equal to the compensation, this would incentivize people to try to obtain whatever they want, because in the case they are caught, no additional costs but compensation would be imposed on them. This seems both unfair and as providing unwanted incentive for boundary transgression. The transgressor's costs need to be higher than potential gains from the violation, not only as a matter of retributive justice, but also because it seems that in the case people would simply have to pay the compensation price, there would be no incentive for anyone to even start negotiation – it would be always easier to ask for forgiveness after the transgression than to get permission. This would in turn have two effects: firstly, the victims would be unfairly robbed of an opportunity to get the market price instead of merely the compensation price²³ (which is always lower, as it uses the *indifference* point of the seller as a reference); secondly, it would induce *general* fear and insecurity in people, as they

²³ Assuming that transgressors even have enough resources to pay the compensation for certain acts.

would expect an invasion of their boundaries at any point. In addition, some of these boundary crossings, although compensable, are painful and scary, and should thus be generally prohibited. An example of such transgression would be non-lethal bodily harm, such as having one's arm broken.²⁴ Last, but not least, a system which allows boundary crossings as long as due compensation is paid would effectively embody the idea of using persons as means. In his argument for the separateness of persons and their special moral status Nozick subscribed to the Kantian idea that this is prohibited. Curiously, however, here he does not say that this would violate the status of persons, but that "knowing they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a *cost* to people;..." (ASU, 71). This already sets off the alarm bells, as it seems awkward to phrase the wrongness of interfering with the ability to lead a self-directing life, befitting a being with an elevated moral status, solely in terms of net losses in welfare. After all, wasn't the whole point of the experience machine example that there is more to human life than simply receiving utility? The aforementioned quote would imply that there is nothing especially problematic in treating people as means, as long as it would not produce losses in their welfare. It is not even clear that this would represent a loss in welfare for everyone; probably, there are some people who would enjoy the thrill. In order to make such estimates, Nozick must use, if not the maximizing logic of utilitarianism, at least the logic of the principle of average utility. It is not clear how this squares up with his previously

²⁴ Nozick muses over the idea that people feel "global fear" involved in this kind of acts due to "alterable features of the social environment" (ASU, 70). If people would grow up in more risky and stressful environments, being used to certain acts (such as unprovoked arm breaking), maybe they would not associate any particular sort of fear with such acts, as they would treat the possibility of these acts as part of the normal social background. If this is so, says Nozick, "we would not have a very deep explanation of why certain acts are prohibited (rather than allowed, provided that compensation is paid)". (ASU, 70) This is a curious way to look at the rationale behind the core side-constraints against unprovoked attack, especially by a professed adversary of utilitarianism. If the only issue of having one's boundaries crossed in this way would be getting used to it, there is no reason why people would not get used to the risky business of living in a utilitarian society either, especially if they could count on reaping great benefits from it at other moments in life. However, the importance of momentous sensations is not Nozick's professed way of looking at the importance of individual life, so it is not clear why he considers this option.

stated commitment to almost absolute deontological constraints; that issue will be tackled soon enough. At this point, Nozick still commits to the possibility of a nearly absolute property rule type protection, albeit for troublesome reasons.

2.1.4 Prohibition, compensation and risk

The last conclusions would seem to throw us back to all entitlements being protected by the property rule. But Nozick points out that this is not a satisfactory solution either, as the possibility of being penalized for everything would bring large amounts of risk and insecurity into people's lives. While considering that some might deem this unfair, he decides to leave it aside and to concentrate on how impractical the issue is. For Nozick, it seems obvious that acts that are permissible to perform, if a due compensation is paid, are those in which two conditions are upheld: prior negotiations would be impossible or very costly (accidental acts, unintentional acts, mistakes etc.); and the acts are not generally fear producing (ASU, 72).

However, the factor of risk complicates things further, as the totality of relatively innocent individual actions, which individually have a relatively low risk of causing harm, could in sum turn into a significant risk of harm. Yet it seems unfair to forbid someone to perform an action that does not, and would maybe never, result in any actual harm. Nozick expresses the worry that “a society which prohibited such uncovered actions would ill fit a picture of a free society as one embodying a presumption in favor of liberty, under which people permissibly could perform actions so long as they didn't harm others in specified ways” (ASU, 78). Here, for Nozick, the crucial distinction to make is the one between important activities performed by almost all (for example, driving a car), although some do them with more risk than others (for example, epileptic drivers), and activities which are not “generally done” (such as playing Russian roulette

with other people's heads). The second kind of action is generally forbidden, while the first one might be forbidden for some, such as the epileptic. However, in this case the individuals especially disadvantaged by the prohibition need to be compensated for the costs of mitigating this ban (e.g. by having taxi fares and chauffeurs paid). Yet, they cannot use this in order to bargain a higher compensation in exchange for their inaction; effectively, they are banned from prior negotiation of the market price for their boundary crossing. This makes Nozick a bit uncomfortable, and he admits that he has neither a measure for disadvantage, nor can he offer a consistent definition of a "generally done" activity; moreover, Nozick points out, if indeed an outrageous, dangerous action is the only way a person can have fun or earn living, then it perhaps merits compensation.

2.2 Weaknesses of the non-moralized conceptualization of sacrifice

The exposition of the previous passages is primarily important within the framework of *Anarchy, State and Utopia* as the stepping stone to Nozick's justification of the minimal state; he relatively quickly abandons the attenuation of rights view in favor of a more robust conception of rights as property claims in the second part of the book. Yet, the exposition is extremely illuminating for our present discussion, as it illustrates the weaknesses of a non-moralized conceptualization of sacrifice. Mack (2018) argues that one of Nozick's purposes in the discussion on risk and compensation is to point out that even if we start with a weaker, liability rule conception of rights, we will end up concluding that most rights will, due to an inability of compensation, end up being claims protected by property rules. Yet, this seems very different from saying, as Nozick did in the beginning, that rights are inviolable boundaries. Namely, after attenuation, some rights are inviolable (i.e. protected by property rule) only as a consequence of their nature –

the impossibility of compensation for the loss or of gaining prior consent. The liability rule sometimes yields firm constraints primarily due to an impossibility or difficulty of compensation, not because they protect anything that is *prima facie* morally more important than anything else, which a commitment to the inviolability of persons would suggest. While the compensation handles the loss in utility, it does not change the fact that the actions used persons as means, and this is something that Nozick emphatically rejected initially. As Mack (2018) puts it: “Nozick does not begin this work by declaring that there are things that may not be done to individuals *unless, of course, they are duly compensated.*” The attitude that Nozick expresses throughout his reasoning, which culminates in the Principle of Compensation, would seem to imply that what is wrong with using people as means, and violating their boundaries, can simply be subsumed under their diminishment in welfare or imposed losses in utility. This does not only mismatch with his prior expressed commitments, but also makes a poor fit with deontological views on value and the significance of morality having the form of constraints.

2.2.1 Is well-being a “master value”? Back to the Experience Machine

This construction complicates things. As we have seen, deontological theories have resources to postulate some actions as intrinsically unacceptable, or at least *prima facie* unacceptable. Therefore, the wrongness of an action does not depend solely²⁵ on the consequences of the action in terms of overall welfare. Deontological theories do not generally take people’s preference as given and equally worthy no matter what their content is. My preference for torturing people is not worthy of consideration in any potential calculus of moral rules. “The principles of right...

²⁵ Rawls points out that what characterizes deontological theories, as opposed to teleological ones, is not that they define the rightness of acts independently from their consequences, as this would simply be irrational. “All ethical doctrines worth our attention take consequences into account in judging rightness.” (TJ, 26)

put limits on which satisfactions have value.” (TJ, 27) Thus, certain ways of treating people, such as the ones prohibited by the non-aggression principle, should be seen as intrinsically wrong, and not seen as wrong insofar they cannot be compensated for. By introducing unrestricted preferences into consideration and counting right violations solely in terms of losses in welfare, Nozick not only undermines his own theory, but runs the risk to wreck the whole deontological framework.

Welfare, or wellbeing, represents “an input into moral thinking that is not already shaped by the moral assumptions” (Scanlon 1998, 109). It is thought to be essential, because it represents what an individual has a reason to want, when unfettered by any moral considerations, restrictions or obligations. It is, in a way, “pure preference”. Thus, it is often argued that the notion of wellbeing is crucial for taking individual interests into account, and subsequently, for justifying moral principles²⁶. From this perspective, the perspective obviously pursued by Nozick as well, “the strength of a person’s objection to a principle is properly measured by the cost that that principle would have for that person’s well-being, or by the level of well-being to which he or she would

²⁶ Not all theories of well-being share this feature: besides desire-based (people’s well-being consists in satisfaction of preferences or desires, the content of which reveals itself in people’s choices) and hedonistic, or pleasure-based theories (people’s well-being consists in pleasurable experiences), there are also objective list or substantive good theories of well-being, which claim that there are things that contribute to well-being independently of satisfying a desire or experience (Scanlon 1998; Crisp 2017). While the last group of theories does not perceive individual pleasure or preferences as fundamental, it shares with the former two groups the understanding that there is what Scanlon calls a “sphere of compensation”, within which we can measure trade-offs in our life with the same currency – “losses in well-being of one kind could be fully made up for by other gains in well-being, but not by considerations of other kinds” (Scanlon 1998, 127). So the fact that a moral obligation gives me good reasons to accept a loss in well-being does not change the fact that it still represents a distinct kind of loss. In the same time, trade-offs within the currency of well-being do not represent losses, because I am presumably trading off one aspect of my own well-being for another. Thus, well-being is seen as separate from other kinds of commitments. Of course, theories of justice often give comprehensive lists of things that are supposed to measure those aspects that society and institutions are responsible for providing to individuals; such are, for example, Rawls’s primary goods and Sen’s capability sets. However, unlike substantive good theories of well-being, they do not appeal to those things as important for well-being, abstractly conceived; those might be things we all have reasons to want, but not necessarily because they are important for our well-being on some sort of a global measure. At first glance, Nozick seems to support a desire-based account of well-being and to oppose the hedonistic one (which manifests most clearly in his Experience machine passage), which he sees as typically utilitarian; however, he casually slips into the experiential account now and then.

be reduced if it were accepted” (Scanlon 1998, 137) – irrespective of the content of the preferences which give rise to the person’s well-being. The complaint of a person with a weird predilection for playing Russian roulette with other people’s heads, the complaint of an epileptic driver and the complaint of the victims of their actions are not fundamentally different, because we have no way to assess the morality of actions that lead to their predicaments, besides observing their effects. Thus, this view sees well-being as a “master value” – things are valuable insofar they contribute to individual well-being, and it is possible to assess well-being by looking at the level of preference satisfaction. Ultimately, what matters is the gain in wellbeing, and not how this wellbeing was accomplished.

Scanlon finds this view to be deeply mistaken; when we think of what people are generally owed, and what are the ways in which they can be permissibly treated, we often invoke things that individuals have reason to want. Yet, we neither think that just about any preference deserves consideration or satisfaction; nor do we think that it is our duty to promote people’s wellbeing. When we think of our duties to others, we usually have in mind duties to benefit them in specific ways. It is a misunderstanding to think of well-being as separate from other values and considerations in morality – as mentioned earlier, deontologists think that the pursuit of the good should be limited by the right. Thus, it is no wonder that Nozick struggles with accommodating outrageous preferences, such as the one to play Russian roulette with others. As it was previously argued, a teleological understanding of value often fails to plausibly explain the ways in which we value important things in life, and hence cannot capture the intuitive wrongness of both having such preference and putting it on par with more innocuous ways of arriving at pleasure. The value of many goods that contribute to a person’s well-being goes beyond the good of success in achieving them – such as a valuable personal relationship.

Therefore, "...to the degree that the concept of well-being plays a role in the justification of moral principles, it does not serve as a starting point for justification that is itself without moral presuppositions." (Scanlon 1998:141) The very idea of deontological constraints and the kind of personhood and account of value that accompany it exclude such way of thinking of what is valuable and worth protection in an individual's life, and, subsequently, what kind of acts are impermissible.

In addition, this understanding of rights and wrongness casts doubts on the ability of Nozick's theory to prohibit "paternalistic aggression" (ASU, 34). If the purpose of rights is to primarily serve as a protection of individuals from experiencing net losses in welfare, it is not clear that people have a principled complaint against interferences that raise one's welfare. Of course, Nozick could reply that paternalistic interference would never make people better off, but that would beg the question. He would either have to acknowledge that the good of persons is comprised of something more than welfare or explain how people's welfare could be diminished without them experiencing an actual hit on welfare. Previously we have seen that Nozick supports the rather thin understanding of welfare as mainly being comprised of experiential states – in the way he discusses costs of interference primarily in terms of unpleasantness or some sort of nuisance. Let us remind ourselves: the problem of allowing potential compensation of all boundary crossings is that "knowing they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a *cost* to people;..." (ASU, 71). The problem with framing non-lethal physical harm in terms of liability rights, for Nozick, is the experience of fear. Therefore, it seems logical to conclude that an individuals' welfare would not be diminished by paternalistic intervention, as long as they are not aware of it. This goes against the conclusions

reached by the *Experience Machine*: how exactly are we supposed to conclude that something matters to us beyond experience? What remains of the deep significance of our choices?

2.2.2 Nozick: a crypto-utilitarian?

Nozick pays dearly for his attenuation of rights move, because the problem does not limit itself to simply betraying previously professed commitments of the theory; it also makes Nozick's entire argument from that point on unsound, as construing sacrifice in non-moral terms of well-being turns our attention towards the state of affairs as the primary object of interest. Thus, this turns the objection to balancing into a principle for judging the value of outcomes, "and it does not distinguish between bringing about an outcome and merely allowing the outcome to occur." (McKerlie 1988, 217) By adopting a teleological outlook on value and well-being, Nozick commits himself to the view that only states of affairs have value. If actions have any intrinsic value, they have it as components of states of affairs – "as things that occur, and that it is good (or bad) to have occur." (Scanlon 1998, 80) According to such a conception, it is not clear whether we could have reasons to do or not to do something independently from the goodness or the badness of a certain outcome.²⁷

This means that we cannot discriminate between doing and allowing, bringing something about and allowing it to happen. When arguing for strong deontological constraints, and the subsequent singular moral importance of negative rights, Nozick invokes this intuitive distinction, basing it on the Kantian notion that individuals ought to be treated as ends, and not merely as means (ASU, 30-31). In the domain of political philosophy, this means specifically not to use people in

²⁷ For deontologists, many reasons for or against an action do not involve the desirability of an outcome, but the (in)eligibility of various other reasons (Scanlon 1998, 84). On their own, outcomes are rarely justifiable independently of how they are achieved. Certain reasons and courses of action are normally deemed ineligible, no matter the results that could be achieved by following them.

certain specified ways, primarily by physically aggressing against them (ASU, 32). Generally speaking, these specific bans are supposed to be expressed in negative rights, and negative rights only. However, if he subscribes to the teleological view, it is no longer clear if Nozick's extension from moral form to moral content works – if we define rights in terms of hits on welfare, why would the source or type of action that caused the hit matter? The only thing that matters is the subsequent diminishment of welfare. This effectively makes the appeal to the intuitive plausibility of the non-aggression principle void – why would the line between justified and unjustified hits on welfare be drawn in such an arbitrary way? As long as something, whether action or inaction, brings me below the state of nature level, I would seem to have a legitimate claim for my state to be mitigated. It is no longer clear that there is any principled distinction between being killed by someone and being left to die. This means that we would have to expand the scope of objectionable actions well beyond those that violate negative rights. As McKerlie points out: “There is no obvious path from the objection to balancing to the conclusion that we should respect one person's freedom by sacrificing gains in welfare for others.” (McKerlie 1988, 210) Respecting negative rights of other people often imposes costs on us. It becomes unclear why hits in welfare through violation of a negative right should count for more than hits received in some other manner.

Nozick's strict commitment to negative rights entails that only harm we experience through violation of our negative rights counts as wrongful. This is because, presumably, there is something particularly wrong in directly interfering with people, as opposed to merely frustrating their aims indirectly as a third party or failing to provide them with something. Here Nozick relies heavily on our intuition that, generally speaking, it is worse to kill someone than to fail to save them. However, by adopting a non-moral measure of sacrifice in terms of losses in welfare,

Nozick loses an opportunity to appeal to the difference in kinds of actions that potentially bring about the same outcome, and thus loses any grounds for privileging negative rights over positive ones.²⁸ Nozick often argues how welfare hits of third parties, in many cases experienced as a consequence of someone else's voluntary transactions, do not count as legitimate complaints. Presumably, the justice is preserved as long as parties are entitled to their holdings, and as long as their transactions are voluntary (which means they are free of theft, coercion or fraud). Again, Nozick appeals to our intuitive understanding of what kind of transactions are deemed innocent and legitimate; the precise specifics being fixed by "conventional details".

However, these details are not as straightforward as they might seem, at least not within the framework that Nozick provides. Barbara Fried points out that these "merely 'conventional details' emerge from thousands of micro decisions about how to balance conflicting but *prima facie* legitimate interests..." (Fried 2011, 247), and thus represent different moralizations of legitimate sacrifices imposed on individuals. Nozick cannot simply help himself with such moralizations at will, because he committed himself to a completely different outlook altogether. Thus, the almost absolute negative rights that Nozick endorses seem unsupported, as it is fairly obvious that transactions of others sometimes make us worse off in terms of welfare. If we are competing for the same job and you get hired instead of me, obviously, I am at loss. Or to paraphrase Nozick's own example, if, after distribution of mates in a society, I remain without a

²⁸ One needs to be careful how one defines positive duties – those are not simply duties which require action as opposed to abstaining from action. There are derivative positive duties - the ones that are actually based on negative duties – which require from us to take some action in order to respect other person's negative rights (Long 1993). For example, I might be required to push the brake in order not to run you over with my car, or I might be required to take positive action in order to rectify a violation that I caused. True positive rights require that we act on behalf of the welfare of another person, without prior commitment or responsibility. "I have a positive right against you, then you have an enforceable obligation (not merely to refrain from interfering with my activities but) either to let yourself be used by me or to take some positive action on my behalf." (Long 1993, 170) Thus, unlike negative rights, positive rights include treating people as means, irrespective of whether they are justifiable or not - simply in virtue of requiring a kind of action that includes providing a service; as opposed to negative rights that mostly demand non-interference.

spouse, I experience diminishment in welfare, insofar one of my goals was to get married. Nozick cannot invoke the commonsense intuition that the choice of marital partners is voluntary, and that no individual or society owes individuals a guarantee of establishing certain kinds of personal relationships. The legitimacy of complaint becomes even more obvious in the case of the hire, as passing me up for a job might leave me jobless and penniless. In his critique of end-state and patterned principles, Nozick claims that we cannot tell much about the fairness of a situation just by looking at the states of affairs – and yet does precisely that in order to estimate how to compensate for rights violations. However, by conceptualizing sacrifice in terms of welfare hits, Nozick can no longer plausibly uphold such a view. The distinction between doing and allowing collapses; as Nagel asks: “How can there be a reason not to twist someone’s arm which is not equally a reason to prevent his arm from being twisted by someone else?” (Nagel 1986, 178) By extension, we could also ask what are the reasons we could have for refusing to help someone, no matter what is the source of their predicament – another person or forces of nature.

There is an incongruence between Nozick’s operationalization of welfare in terms of utility on the one hand, and rights as side-constraints, on the other. Rights as side-constraints represent a purely moralized construct, independent on actual effects on welfare. Nozick’s conception of preference satisfaction seems to be completely dislodged from his idea of the significance of negative rights; if preference satisfaction is what matters to us, then it would make sense to care about the means to achieve them, and it would make sense that sometimes the trumping or violation of negative rights is seen as necessary and desirable. Since it is not clear what exactly negative rights are supposed to protect, their special status becomes unjustifiable. Moreover, a libertarian insistence on especially stringent side-constraints seems particularly irrational: why

would a small right infringement, such as taking a single hair from my head, be more serious than a serious welfare hit caused by a third-party transaction, as in the hire example?

2.2.3 Implications for property rights

So, even the implementation of Nozickian negative, minimal rights will presumably make someone worse off than they would have been otherwise. Therefore, the system of minimal rights also constitutes the imposition of a conception of the social good on some and demands sacrifice on their behalf. This seems especially clear in the case of ownership rights, which often preclude certain courses of action, or exclude people from certain spaces or usage of certain goods, which can have a major influence on their welfare. Nozick's view on property rights is very rigid: people have (nearly) absolute²⁹ entitlement to what they own, in the same way they have an absolute entitlement to their persons, and the limits of such use cannot be limited for the sake of exercising some conception of social justice. No matter how bad things turn out to be for some individuals, and no matter how unequal the overall pattern of ownership on the level of the society turns out to be, the distribution of assets in society is deemed just as long as everyone is entitled to their holdings, and they are entitled as long as they acquired what they own through voluntary exchange. "The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition." (ASU, 238) When it comes to initial

²⁹ Presumably, the rights over external objects will be less stringent, in a sense that it is usually easier to compensate for their infringement. Libertarians generally share the idea that there is a difference in owning (or at least, how we get to own) external resources, and the property of our person, our mind and body – the so-called "asymmetry thesis" (Lippert-Rasmussen 2008,88). Nozick nominally subscribes to the thesis, as he offers an account (albeit a rudimentary one) of initial acquisition of external objects and its limits in the form of a weak proviso. In comparison, there is no account on how we come to own our person, and there is no limit to how we use it. However, Nozick's subscription to the welfarist view of sacrifice diminishes the importance of the distinction, making it seem unmotivated. Why would it be worse to break my arm than to burn down my house? In terms of welfare, the second loss might be more damaging and irreversible.

acquisition, there is no particular pattern of distribution either, but only a limitation in form of the Lockean proviso that instructs individuals that they need to leave “enough, and as good” for others (ASU, 174-182). Before even starting to discuss what exactly Nozick means by this formulation, it seems unlikely that many people would agree to the system of private property that potentially leaves them in a desolate position in terms of ownership. Worldly resources are limited, and it might as well be that by the time I am about to appropriate, there is nothing of worth left. On the other hand, it is not clear how one could enjoy the absolute entitlement over their property if one had to constantly adjust their holdings in order to satisfy the proviso.

Nozick has a prompt solution to this: people do not need to be compensated in resources themselves; it is sufficient that other people’s acquisitions do not leave us worse off in terms of welfare. And since “a rising tide lifts all boats” (Schmidtz 2011, 203), the institution of private property and the operation of market economy will on net benefit everyone, even if they were unable to appropriate; that is, better off compared to the baseline of the state of nature, in which everything can be enjoyed by everyone and we are incapable of excluding anyone from anything important to us. Such situation is worse for everyone, as under such condition, every project I embark on could be taken away from me within a second. Why would I bother to cultivate an orchard, when everyone else would be equally entitled to the fruits of my labor? Nozick thinks it is self-evident that the system of private property is generally beneficial for everyone.

Yet, there is the nagging suspicion that Nozick’s fix proceeds too quickly, unabashedly generalizing in the process. First of all, even if the vast majority of people would fare better under a system of property rights, it is plausible to presume that at least some would not. While we could argue that, on a very fundamental level, negative rights protecting our bodily integrity are crucial for living any sort of a conception of the good life, this is less obvious with private

property rights, and especially not with the kind defended by Nozick. Johnny Appleseed, for example, whose only preference in life is to be able to roam freely, planting apple trees, would not fare better under a system of private property imposing fences and restricting his movement. He could rightfully complain that he is getting nothing out the system, and that the kind of elusive compensation offered by Nozick simply does not interest him. Saying that one will be compensated by other effects of the system seems unfair, because it is unclear who was entitled to decide how people should be compensated in the first place. In any case, if such a decision is to be reached, it would seem more plausible to frame the compensation in the same currency in which the appropriation happened, than to invoke barely measurable positive effects, which might not even be positive for people with eccentric lifestyles.

But even if we dismiss people such as Johnny Appleseed as exceptional weirdos, it still remains unclear why people would accept un-owned commons as the baseline for comparison of all the possible arrangements of initial appropriation and subsequent ownership rights. There are many imaginable structures of property rights between that state and absolute private property rights, one of them being the one we presently live in. Nozick could say that within the framework of a utopia³⁰, alternative arrangements of any sort would be available. But why would this proposed structure have the privileged place of being the “natural” one? We do not need to invoke Johnny Appleseed and other odd fellows to imagine that many people would be better off under a different ownership system. Many people would fare better already with some sort of egalitarian division of worldly resources.³¹ A miserable proletarian would profit from a less absolutistic system of property rights, which would also make sure that at least a minimum level of resources

³⁰ In the third part of his book, Nozick argues that the proposed minimal state is desirable, as it can function as a framework within which numerous peaceful and voluntarily formed communities can coexist, while having inner structures and rules that embody the will of their inhabitants.

³¹ The core of left-libertarianism is precisely opposing to this view of unrestricted acquisition, and supporting instead egalitarian constraints on appropriation and use (van der Vossen 2019).

necessary for sustenance is guaranteed. Why would I agree to the institution of private property, if such an institution diminishes my prospects? If we are already forced to move from the baseline of no sacrifice, why would we move to the point that Nozick suggests and not somewhere else? It is not clear why Nozick assumes that some people would agree to only marginal gains.

In justifying this sort of a move, Nozick often uses a straightforward utilitarian reasoning. While discussing the issue of pollution, he even drops the concern for achieving a Pareto improvement, and simply says that society should permit “those polluting activities whose benefits are greater than their costs” (ASU, 79). Thus, he argues for the Kaldor-Hicks improvement (Fried 2011, 251n10), which is far less demanding, as it relies on a hypothetical compensation, potentially leaving some people worse off. As we have seen, arguing for a weak proviso and strong ownership rights, Nozick invokes *marginal* gains for an individual as justification. As Fried rightfully points out, such statements abound within Anarchy, State and Utopia, especially in Part I. Considering the whole framework, it is puzzling why Nozick thinks that individuals would not rather prefer negotiating for strict anti-pollution laws, or for a larger share of resources per person, for example.

I suspect it is the consequence of Nozick adopting, along with the welfarist perspective, the view of maximizing rationality, which is typical for the rational choice theory and assumes that people will always try to maximize their gains, no matter what other considerations are involved. So, essentially, the situation of initial acquisition mirrors the *Dictator* or *Ultimatum game*, in which two players are allotted a sum of money, but only one (Dictator, or Proposer) can offer which proportion of the sum of money he wants to distribute to the other. If the other person (Responder) refuses that offer, both are left with nothing. If the Responder accepts, they split the

sum in the way proposed by the Proposer. If both players are trying to maximize their gains, the Proposer would offer the smallest possible compensation, and, if rational, the Responder has to accept it, as he still gains more than if they were both left with nothing (Camerer and Thaler 1995). Real-life experiments have shown that people generally neither propose nor except such outrageous offers, but let's leave that aside. It still remains unclear why Nozick thinks that people (at least those co-existing at the same time) stand in such an asymmetrical position in the situation of initial acquisition. Why would some people behave like dictators, and others accept it, instead of trying to negotiate a better position? The only explanation is that Nozick thinks that, to some extent, might makes right, and the more powerful are capable of imposing their view of distribution, as long as they offer marginal gains to the powerless. This, however, takes us very far from the initial idea that each individual has a veto, which is grounded in his inviolability as a person, and leads us into some sort of Hobbesian state of nature. If interests of each were genuinely taken into account, and the only basis for making decisions about acceptable arrangements would be made with the reference to gains and losses in welfare, there would be plenty of people whose position would not be elevated by Nozick's arrangement, not even in the minimal sense, because there are plenty of people who have little use of non-interference. We could easily imagine a society in which people would on average profit more from an established positive duty to rescue than from the establishment of negative rights. For example, people with disabilities or those exposed to very risky surroundings would benefit more from establishment of even the most minimal duty to aid, compared to a system of absolute property rights. Under Nozick's proposal, they could only hope that the gains from the rising tide end up trickling down to them through voluntary acts of charity.

The problem is that Nozick essentially advocates for two mutually incompatible positions – that people’s property and rights, once acquired, should never be interfered with; and that people should be left with “enough and as good” in terms of welfare. So, despite the alleged usefulness of private property for everyone, Nozick acknowledges that there must be a certain limitation to the property right; however, he seems to be limiting it only to life necessities, such as water.

... Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Once it is known that someone’s ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) “his property.” (ASU, 180)

But he soon retracts this by saying that it is not the case that owners lose their rights; rather, their rights are “overridden to avoid some catastrophe” (ASU, 180). However, if this is indeed the case, then it is not clear why we would think that under normal conditions, voluntary exchanges somehow preserve justice independently of the circumstances. With respect to this, Cohen rightly asks: “But if unjust steps are indeed unnecessary to overturn justice, why should just steps suffice to preserve it?” (Cohen 1995, 44) It seems that in many cases, what we ordinarily think of as a violation of negative rights will to some extent depend on the context, and if we use diminishment in welfare as the basis to judge transgressions, they will depend entirely on it.

Furthermore, if rights can be overridden to avoid a catastrophe³², the question is by whose standards we are supposed to judge whether something constitutes a catastrophe or not. If we

³² This is not the only time Nozick talks about catastrophe – he also mentions the possibility of sacrificing a person for the good of the many, in order to avoid “catastrophic moral horror” (ASU, 29n*) His previous writing, and the way he sees compensation for things that we generally think of as impermissible, irrespective of their actual outcome (such as shooting a gun in a room full of people, and somehow miraculously missing each and every one), would seem to suggest that not only we are not to violate individuals for the sake of the pursuit of some overall social good – it would suggest that there is no principled way for us to know what constitutes such good, as people have so different ideas of it, and we should take them into account separately (as I will further explicate later, this sort of attitude of skepticism about value seems to lie at the root of libertarian proposals). For example, Taurek (1977)

have no principled way to determine when someone takes an unjustified hit in welfare, why would the lack of water count more as a horror to me than, say, the lack of some of your diamonds? Of course, one could say that having access to water is generally beneficial for the pursuit of *any* life plan, but this move is not available to Nozick, because he would deny that establishing a list of necessary things in such a way is even possible. Therefore, it is clear that Nozick operates with hidden assumptions in the background, for example that some things are crucial for a person's wellbeing, such as water, while others are presumably not.

2.3 Do negative rights as side-constraints still make sense?

To sum up, Nozick's account is insufficient for plausibly establishing rights as side-constraints. This is due to its combination of two irreconcilable approaches: a teleological, non-moralized understanding of value and individual wellbeing, and a moralized understanding of side-constraints as being rooted in the deeper fact of our personhood. If we exclude the moralizing assumptions that Nozick sneaks in, the objection to balancing, at least as long as it relies on a non-moralized measure of sacrifice, "cannot justify any specific side constraints" (McKerlie 1988, 217). If this is so, the floodgates have been opened wide, as we could potentially moralize the constraints on balancing in any way we see fit. Brink and McKerlie have both argued in a similar vein: since it is not anymore the case that there is something objective in the way we make comparisons between people, it is not clear that the way in which utilitarianism justifies sacrifice is any less plausible than any other proposed way.

thinks that when it comes to separateness of persons, it is not clear at all that saving more people rather than less constitutes a "social good". One would expect at least a similar position from Nozick, especially when the issue at stake is not whether to save many instead of one, but whether to *sacrifice* one in order to save many. If indeed there is "no social entity with a good that undergoes some sacrifice for its own good", it is not clear why we would endorse the justifiability of such sacrifice.

However, this is not necessarily so, as the respect for the separateness of persons limits the ways in which a sacrifice can be plausibly moralized. It is not a requirement that has been simply introduced at some point, only to be discarded once we progress to the next level of justification. As we have seen, the utilitarian view of sacrifice fits poorly with the conception of moral personhood that implicitly operates in the background of our intuitions. The existence of side-constraints protects this conception of the person and the value of human life, thus making side-constraints a plausible form of morality. The superficial persuasiveness of Nozick's exegesis largely stems from its ability to appeal to our most deeply held moral beliefs that there is indeed something to the special wrongness of interferences with people, a kind of wrongness that goes beyond setting back their interests. We also generally think that our reasons for actions are so intimately connected to us, that indeed there is a moral difference between killing and letting die, between twisting someone's arm and preventing someone from twisting that person's arm, even if this difference does not always need to constitute a justification for us not to take action.

The intuition that we have a *pro tanto* reason not to violate negative rights is widely shared among non-libertarians as well. Rawls says that "...to respect persons is to recognize that they possess an inviolability founded on justice that even the welfare of society as a whole cannot override... The lexical priorities of justice represent the value of persons that Kant says is beyond all price." (TJ, 513) In other words, a principle that protects basic rights and liberties has priority over a principle that distributes other sorts of benefits and opportunities: "Thus the persons in the original position are moved by a certain hierarchy of interests. They must first secure their highest-order interest and fundamental aims..., and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place." (TJ, 476) In the discussion of natural duties that exist outside of the

framework of the political system, which is the realm of his principles of justice, Rawls acknowledges negative duties as having a top priority. However, Rawls points out that this distinction, although an important one, is not fundamental in the sense that it gives clear cut distinction between the duties that we have (negative ones) and those that we do not have (positive ones); “the distinction is important only in connection with the priority problem, since it seems plausible to hold that, when the distinction is clear, negative duties have more weight than positive ones.” (TJ, 98) Considering the separateness of persons, a privileged position for negative rights against interference makes sense, although this does not necessarily mean that one has to commit himself to endorsing just them, as libertarians do. The restrictions for justified killing are harder to override than demands to rescue, for example.³³

Some think that such focus on physical invasion, as opposed to other sorts of indirect actions that can have identical consequences, is unfounded (Sunstein 2003; Fried 2005; Greene 2016). According to these authors, our intuitions do not point out to any special moral truths or valuable insights, but rather represent useful rules of thumb that cannot be generalized in a coherent manner. Barbara Fried argues that there is not “any intrinsic moral significance to physically invasive acts *per se*” (Fried 2005, 219), but that our judgments of their significance stem from their pervasiveness – such acts usually coincide with particularly damaging losses. Thus, we generalize such events into a moral rule, which then serves as a moral heuristic (Sunstein 2003), presumably applicable to a wide ride of similar cases. Yet, Sunstein warns, such rules of thumb can be consistently and correctly applied only to a limited number of cases, and therefore insisting on their wide application can have absurd results. Fried shares his opinion, but points out that in moral theory, it is possible to come up with principled distinctions if one

³³ Yet, it is true that in cases in which the sacrifice demanded is deemed to be so universally low, such as in the well-known case of the baby drowning in the pond, the omittance to provide aid intuitively comes very close in wrongness to violation of a negative right.

acknowledges that most cases require the use of judgement in order to arrive at the correct answer. Nozick's quick fix in terms of hits on welfare is unsatisfactory, but this does not mean that there are no other ways to plausibly moralize sacrifice. Besides that, the familiar distinction between positive and negative rights and duties does not rely on a simplistic distinction between action and inaction. It relies on the view that there are side-constraints, albeit these are neither absolute nor defined in terms of the experiences of only one side.

2.4 Should morality be minimal?

Not even all libertarians think that we can derive a complete set of rights by simply applying the non-aggression principle and counting losses in individual welfare. They think that there are other plausible explanations as to why rights need to be attenuated, and how initial appropriation and the subsequent usage of ownership might be restricted. Neither do all libertarians see self-ownership rights as derived principally from the distinction between using people as means and treating them as ends. For example, Eric Mack conceives them as grounded in the "separate, freestanding importance of each individual's life and well-being" (Mack 2009, 121). He proposes that firstly, we are to specify rights in a way that avoids "specifications that systematically morally preclude individuals from exercising their rights or from conducting their lives in ways that a specification of their rights is supposed to protect" (Mack 2011, 112); and secondly, he introduces the "self-ownership proviso", that puts limits to the owner's use of property when such use prevents others to interact with the world. Gauthier (1986) argues that individuals will self-limit their rational maximizing behavior in order to reap benefits from cooperating with others and avoid collectively harmful outcomes. This attitude of "constrained maximization" will result

in a relative harmonization of our moral commitments and self-interest. People will ultimately agree, and the world will not come to a halt.

However, all libertarians share the view that, insofar as we are entitled to the sort of independence protected by side-constraints, we have no “non-contractual enforceable obligations to anyone else...” (Cohen 1995, 240). As previously mentioned, this distinction does not hinge on the simple distinction between physical transgressions, or physical action or inaction, and it does not represent an obviously inconsistent position. Your enjoyment of appropriated natural resources and freedom from assault depend on me in ways neither I or anyone else can avoid; but many of the bad things that can happen to you might have absolutely no connection with neither my existence nor with the way I enjoy worldly resources. If I push you into the water and you start to drown, you would not be in that position if it wasn’t for me. But if you start drowning after having a stroke while swimming, that is a situation in which I had no share whatsoever, and you would drown even if I was not there and refused to rescue you. Of course, there is a whole range of accidents that can take place between those two situations, but the difference is clear enough to illustrate what is meant by providing a service. In the same way, for example, the fact of congenital disabilities of some people does not impose a duty on others to help them. As Cohen points out, “failing to help another person cannot be construed as interfering with his right to use himself as he wishes, and not being required to help others leaves everyone with more rights over their own powers than they would otherwise have.” (Cohen 1995, 215) Rawls explains the difference between positive and negative duties as follows: While positive duties are the ones which require from us to do something good for another person, negative duties just require us not to do something that is bad. There is a general asymmetry between providing additional benefit and causing a loss. So, without going into major details as to how exactly they

are delineated, the distinction between positive and negative duties and rights is clear and depends on the way in which our existences are, in an important way, separate.

2.5 Positive duties: weaker, but indispensable

Whether upholding such a rigid distinction as the one endorsed by libertarians is plausible, that is another matter. Ordinarily, we think that people have at least the duty of easy rescue, and that we have a duty to provide care for the disabled and infirm; most of us would consider the libertarian attitude towards providing aid, outside of the realm of moral and political philosophy, simply monstrous. In a sense, the libertarian insistence on almost absolute constraints and their refusal to a service provision might not be entirely unmotivated, although it is rarely properly spelled out. Actually, besides their professed commitment to non-moralized conceptions of sacrifice, libertarians also seem to share the background assumption that value pluralism commits us to some sort of agnosticism when it comes to the human good. Due to people holding different, often incompatible, conceptions of the good life, arrangements that will be considered as sufficiently advantageous for everyone will be minimalistic in nature. We all have, first and foremost, an interest in running our lives as we see fit, and thus non-interference is something that should be of paramount importance to us, more than what we could gain from other people's help. Therefore, it makes sense to aim at negative rights as the smallest common denominator between diverse people. Narveson, for example, claims that the "contractarian framework fundamentally hopes to generate moral principles for societies out of the non-moral values of individuals" (Narveson 2001, 180). He does not think that there are any natural rights; but even if there would be any, we would hardly agree to go much beyond their extent. Only minimal rights could be established without running afoul of the "predator's freedom 'enjoyed' in the amoral

condition” (Narveson 2001, 192). However, despite aiming at providing us with a non-moralized argument, such lines of reasoning do implicitly assume a lot about the human nature and wrongness. This is not necessarily an issue, but it is something that needs to be kept in mind. Adopting a moralized conception does not mean that we need to adopt an “anything goes” attitude. But it does mean that there should be a discussion about the foundations of the moralization, how much it corresponds to our judgments and how well it performs compared to competing accounts.

Even if libertarian proposals are not necessarily inconsistent in the way they deal with sacrifice and subsequently the way they define wrongness, their strict reliance on a distinction between positive and negative duties precludes some intuitively desirable claims, such as the one to be rescued from a great peril, when the required sacrifice is relatively small. The option of having a rather strong side-constraints protection, without having to give up completely the option of having a claim on others to weaken those constraints under dire circumstances, seems more in line with our intuition. It is possible to acknowledge that individuals have a particularly important special interest in being able to live according to their conception of the good, without committing ourselves to respecting just those side-constraints. While it would be unacceptable to require us to change our status and priorities for the sake of others whenever their prospects take a dive, we do not exist in a vacuum, and it is plausible that the existence and conditions of others also shape our condition to some extent. Side-constraints do not need to fill the entire space of morality. Thus, it is possible to offer a moralized account of permissible sacrifices which will be in congruence with the conception of a moral person. In a case in which sacrifices imposed on us are limited, it is unlikely that we, as moral agents, are supposed to remain indifferent to the plight of those around us and untouched by the changing circumstances of the world. What exactly

constitutes what kind of violation, and in what sort of a circumstance, that needs to be adjudicated and negotiated. Simple, straightforward solutions based on non-moral distinctions in types of actions do not suffice for establishing even a rudimentary framework. There is a place on a spectrum between us not being influenced at all by changes in the circumstances of others, and us being required to respond to every single of these changes.³⁴ People often experience losses by no one's fault in particular – but the matter of what constitutes “a fault” is something that needs to be discerned as well. Intuitively, our considerations on separateness will restrict the extent to which we are responsible for other people's losses, but they do not need to diminish it entirely. These considerations are also based on recognizing others as free and equal, and objects of our concern and respect. The question is precisely how to walk the thin line between showing proper respect for some, while in the same time showing concern for other's plight. Deontological theories in general have resources to explain the difference between losses that merit complaint on behalf of the afflicted, and those that do not merit a complaint, despite a comparable diminishment in welfare.

³⁴ For example, Scanlon points out that Rawls's choice of “primary goods” (rights and liberties, powers and opportunities, income and wealth, and the social bases of self-respect) represents a proposal of the “social division of responsibility” between political institutions and individuals. (Rawls 1982; Scanlon 1998)

CHAPTER 3: MORALIZING SACRIFICE, CONTRACTUALISM AND LIBERAL EGALITARIANISM

3.1 Moralizing sacrifice

As we have seen, there are two possible routes in reaching an answer as to how to allow for balancing claims of different individuals. Firstly, there is the idea that all balancing between individuals is prohibited, and thus, if we sometimes are to balance different claims (which is inevitable), then losses that some individuals undergo must be compensated. This compensation is to be measured in terms of non-moral criteria, such as utility. This is essentially Nozick's approach, and its problem is not only that it evokes typical objections to libertarianism, such as that it is incompatible with redistribution and even the weakest duty of mutual aid (as benefactors cannot possibly be left uncompensated); it also provides a poor fit with deontology, as it makes it impossible to interpret the violation of even the most basic non-aggression rights as being intrinsically important. Secondly, instead of combining the demand of separateness of persons (objection to balancing) with a non-moral criterion of sacrifice, we could pair it with a moralized account of when a loss constitutes a sacrifice: one that allows us to distinguish between justified and unjustified burdens that can be imposed on an individual. This way, individuals do not have to be compensated for every burden, only for those that are unjustifiable. Of course, the issue of what represents a justifiable burden, and on what grounds, is substantive, and it is the main point of contention between libertarians and (liberal) egalitarians in their interpretation of what respect for separateness of persons demands.

A convincing account of moralization should refer back to our reasons to think that respecting separateness of persons is important, as it should correspond to our considered moral judgments

as well. As we have seen, the problem with Nozick's non-moralized conception of sacrifice is precisely that it cannot capture all those instances of wrongdoing and right violations that do not entail major hits on welfare, and yet appear to us as clear right violations; and, the other way around, it cannot capture instances of legitimate hits of welfare that intuitively do not call for compensation (such as fair competition). Most libertarians do not take the route that Nozick does³⁵, but offer moralized accounts of sacrifice instead, which prove to be inadequate on different grounds.

Of course, the question when a loss is unjustified and when balancing is implausible is substantive. Brink (1993) thinks that accepting a moralized account of sacrifice opens the floodgates for almost any conception of sacrifice, including the utilitarian version. After all, utilitarianism also addresses when a loss counts as sacrifice (the loss is permissible if it results in a net gain in utility). However, as I have demonstrated, separateness of persons is not just a simple constraint that can be given any desired content. It is tied to a specific account of a moral person and to deontological constraints that embody this special status. Thus, teleological conceptions simply offer a fundamentally different understanding of a loss, one that is not inherently impermissible or inherently tied to particular individuals. As we have seen, deontological constraints are at their most obvious and clear terrain when it comes to blatant violations of individual rights (such as the ones protected by the non-aggression principle). But our moral space is much wider than this, and we interfere with each other to a much greater extent than these straightforward cases delineate. Therefore, while the major theories dedicated to deontological constraints, such as libertarianism and liberal egalitarianism, can agree on the

³⁵ As I have shown, he does not take it consistently either - he is using a non-moralized conception of sacrifice primarily in order to show how the minimal state can arise without any violation of anyone's rights; it does not figure so much in the rest of the argument of the book. Part II of *Anarchy, State and Utopia*, which essentially focuses on criticism of his perceived ideological rivals (utilitarianism and egalitarianism), mostly relies on run-of-the-mill libertarian moral interpretations of sacrifice.

special place and even primacy of the protection of negative rights, there remains a plethora of acts which include trade-offs between individuals on whose status they do not agree. The question is: How to offer a plausible moralization of sacrifice? As we have seen, deontology, as opposed to utilitarianism, does not allow for an individual and his interests to be simply outweighed and his considerations outvoted – in a relevant sense, a sacrifice imposed on individuals needs to be acceptable to each of them, requiring unanimous agreement over which losses are unacceptable.

3.1.1 Unanimity

I believe that this sort of requirement of unanimity is what motivates libertarians to argue for a minimal conception of moral requirements acceptable to each, as negative rights are part and parcel of any sensible conception of the good life. Assigning intrinsic significance to the burdens imposed by (at least) gross violations of negative rights seems uncontroversial enough. However, as we have seen, deontological theories take into account the fact that people value things for different reasons, and that burdens that sometimes seem unjustifiably imposed on them do not always include hits on welfare. The moralization offered by libertarians captures some of the distinction, as right violations do not make specific reference to losses in welfare, but rather delineate a bubble of inviolability which holds without reference to specific losses. Thus, libertarianism will think that either compensation or voluntary agreement is necessary whenever a right is infringed upon, even if the act itself and the loss were relatively innocuous, such as taking a hair from someone's head in order to save a life. From this perspective, since we are not morally required to impose a loss on ourselves, no matter how insignificant, we do not have any positive duties towards others. I am not required to sacrifice anything, no matter how

insignificant it might objectively seem, in order to save a life. Crossing a boundary, no matter how insignificant, is always worse than failing to provide a benefit, no matter how great. Therefore, there is no duty for us to save a drowning baby from a shallow pond, no matter how small effort it would require, and we are not wronging the baby by refusing to do so. While such a situation might be considered as universally morally abhorrent, libertarians would argue that even if such situations would seem regrettable, this cannot bring into question the primacy of negative rights. We can only hope that most people, most of the time, will decide to voluntarily curb their rights in such situations and help others.

3.1.2 How to assess burdens? Justifiable and unjustifiable losses

Now, while there are strong reasons to think that negative rights in general are weightier than positive ones, there is no reason for us to think that they must be the only duties we have. Maybe some of the general implausibility of right-wing Nozick style libertarianism could be curtailed by giving people some sort of an equal claim to natural resources, as proposed by left libertarianism. While this is certainly true, it still does not help us with the fact that such a minimal conception fails to respond to our considered moral judgments in many cases. Generally, we think that sometimes people are owed something beyond non-interference by others: In many cases, such as with people who are dependent on others for care, a share of natural resources without appropriate input by other people simply would not mean much. Besides that, it would seem that most of us would not want to forgo the option of having a duty of easy rescue, even if we are not generally dependent on others.

As Brink points out, “even if such libertarian theories do not flout any formal feature of SRC [sacrifice requires compensation], the moral interpretation of SRC may make such theories seem

very implausible” (Brink 1993, 259). If we are to engage in finding a moral interpretation of which losses are impermissible, we would judge a theory to be very unpersuasive that

a) does not find some very serious losses in welfare worth considering, just because they were not generated in a way it deems as the only problematic way to cause a loss to someone (direct right violation) and

b) finds very serious losses caused by refusal to impose a miniscule sacrifice on someone else’s behalf to be justifiable.

For there must be a way to make a distinction between justifiable and unjustifiable losses, and the aforementioned interpretation simply leaves out many intuitively relevant ways in which we can think that a person might have unfair burdens imposed on them. If we drop the commitment to a minimal conception, what are the other ways of reaching a conception acceptable to all, which will not ultimately violate the separateness of persons? We would prefer to find a point of mutual agreement that goes beyond minimal rights and is capable of accommodating at least some positive duties towards others. Unless we accept some additional, highly contentious assumptions about human nature, such as people being primarily rational maximizers³⁶ and using their leverage without any constraint, we are not obliged to agree with a libertarian way of moralizing sacrifice. As long as we think that people have the right to equal consideration within the moral framework, there is no reason to think that they would accept such moralization. We would think this only if we assumed that their different bargaining powers, which inevitably exist in reality, need to spill over into the moral realm indiscriminately³⁷. Assuming separateness of persons without accepting the equality of those moral persons is implausible and undermines the

³⁶ I hope I have already demonstrated, with the generous support of Scanlon’s argument, why such a view is ultimately incompatible with the deontological account of value, which lends support for separateness of persons as something to be cherished.

³⁷ Even if this would be correct, it is not clear that it would not be rational to bargain for some minimal duty to aid.

idea that we owe something to them in the first place. The moral basis of separateness of persons takes for granted that we are not moral just because it is in our interest to be moral; if we want others to recognize our claims, we need to offer the same to them. Within the realm of morality, we ought to recognize that others have claims which should be taken into consideration equally, no matter how exactly we think that burdens and benefits will end up being distributed. Libertarian moralization, while trying to treat people equally, simply leaves out some considerations that we would find necessary if we are to treat people truly as equals. We do have a special interest in our own life and conceptions of the good, and this is an important part of what respect for separateness of persons is trying to capture. However, allowing for a complete disregard of how other people fare does not embody the commitment of mutual recognition. We have a special interest in our own life, but we also owe it to others to recognize the objective importance of *their* lives.

What sort of a burden can we impose on the individual that is consistent with respecting him as a person? That is to say, what is the maximal burden we could impose on people, that is consistent with rather strong (albeit not absolute) deontological constraints, mandated by a concern for the separateness of persons? The moralized account of sacrifice tells us that only imposing unjustifiable burdens on others is impermissible. What if there are losses, contrary to what libertarians claim, that go beyond the pure respect for negative rights that we can still justifiably impose on others?

3.2 Liberal egalitarianism and separateness of persons

We might be tempted to think that, since the libertarian moralization is so obviously flawed, some form of its main contestant, (liberal) egalitarianism, must clearly be more plausible. These

theories usually combine commitment to individual rights and liberty with a substantive egalitarian principle. Of course, both the liberal and the egalitarian part are open to negotiation; but how exactly they are combined, usually does not matter much for the general classification. The family of theories is very inclusive, and it admits members which are situated at the far end of either a commitment to equality or to liberty. Usually, liberal egalitarian theories are not too concerned with addressing separateness of persons, or they address it only indirectly. There is a shared agreement that, once we have cleared the terrain of teleological theories, especially utilitarianism³⁸ as the main opponent, almost anything goes. Most of the disagreement which exists among liberal egalitarians is primarily about the precise formulation of a plausible egalitarian principle.³⁹

Since we all agree that a plausible theory should respect individual rights and liberties, we can move on to discuss the distributive side of the issue. Even attempts undertaken by left libertarians to address this challenge do not actually look deep into the issue of congruence between their strong commitment to self-ownership and their preferred distributive principle. They simply assume that those are values to be balanced, and the challenge is to find the appropriate way of balancing them out. This is often only an implicit commitment, and very few, such as G. A. Cohen, have grappled with this issue properly. Liberal egalitarianism has also largely reoriented

³⁸ As we will see, not all forms of utilitarianism are ruled out by the separateness of persons, although I do believe that ultimately, it is almost impossible to reconcile the two ideas. As I have already suggested, separateness of persons needs to be built into the theory in a substantial manner, and forms of utilitarianism which take individuals separately on a superficial level, such as average utilitarianism, do not satisfy this requirement. Average utilitarianism shows concern for individuals by seeking to maximize the average of utility across individuals; but it does not equal respect for them nor does it fully appreciate the pluralism of their conceptions of the good life. Thus, individuals would not be satisfied with the principle of average utility, because even if that principle conferred more of abstract units of utility on each of them, it would not take into account a wide variety of their conceptions of the good. People want to have secure means for themselves, but they do not wish for that in an abstraction of what their conceptions are. Utility in this respect does not mean much, because it does not have any sort of a concrete form.

³⁹ For some insights on this issue, I am indebted to the participants of the panel “Being a Liberal in 21st Century Political Philosophy”, organized as part of the summer school “Equality and Citizenship III” at the Department of Philosophy, University of Rijeka. I am especially grateful to my fellow speakers from Central European University, Viktor Ivanković, Miklos Istvan Zala and Man-Kong Li

towards incorporating issues of choice and responsibility, “the most powerful idea in the arsenal of the anti-egalitarian right” (Cohen 1989, 933).

However, I believe that if we want to take the fundamental motivations and assumptions of deontology seriously, the further choice of a distributive principle will have to be constrained by the respect for separateness of persons. It is a constraint that cuts all the way down to the principles; it is not a consideration one can abandon on the roadside once he has cleared the land of teleology. I think that many egalitarian conceptions do inherently violate separateness of persons, but only very few tackle this problem explicitly.

3.2.1 Rawls and separateness of persons

A notable exception among liberal egalitarians is John Rawls, who takes the commitment to separateness of persons as the bedrock of his theory (this is also due to Rawls’ attempt to offer a comprehensive theory). It is true that the Rawlsian theory of justice applies primarily to “basic social institutions, rather than to distributive choices, and perhaps it cannot be extended to other cases” (Nagel 1979, 109); Rawls himself acknowledges that justice as fairness is not a complete moral theory. However, he believes that “the contractarian idea can be extended to the choice of more or less an entire ethical system, that is, to a system including principles for all the virtues and not only for justice” (TJ, 15). Even with its limitations, Rawls’s theory covers, in one way or another, a huge section of what Scanlon calls the “what we owe to each other” part of morality. Not all moral principles might be situated within the framework of his principles of justice; but he does not remain entirely silent on their content, discussing natural duties of justice. Rawls’s ambition is to show that a distinctly egalitarian principle of justice cannot be merely balanced with considerations derived from the respect for separateness of persons, but it can be developed

as a natural extension of them. Thus, his first principle of justice, concerned with the protection of equal liberties, is not merely balanced with his second principle, concerned with the distribution of social and economic advantages. Quite the contrary, the principles are applied in lexical order precisely because of the way they relate to each other: “A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.” (TJ, 38) Therefore, liberty can neither be restricted for the sake of reaching further social efficiency, nor for the sake of achieving equality. Of course, this set of liberties is at the first glance less extensive than the one purportedly offered by libertarian rights; but this is because it takes into account other interests we might have and arranges them hierarchically. However, while “the acquisition of means that enable them [persons in original position] to advance their other desires and ends has a subordinate place” (TJ, 476), it still *has* a place, making it more plausible than the libertarian conception.

3.2.2 Rawls and contractualism

As I will show in the next section, however, Rawls does not directly argue for egalitarianism; rather, he argues for it via contractualism. He believes that people placed in an appropriate decision-making situation will end up deciding for an egalitarian distributive principle. The method used itself is not prejudiced in terms of an egalitarian result. The idea that the contractual method he proposes results in the incorporation of a distinctly egalitarian set of principles only when applied to a particular kind of institutional and social setting is especially prominent in Rawls’s later work. Thus, such a setting incorporates certain assumptions about the nature of a

democratic society and its citizens that might not have a universal application. Yet, many of the additional assumptions introduced by Rawls have wider implications, and have been often discussed in a more general form. Moreover, serious doubt has been cast on the reasons Rawls offers for confining his theory in this respect, and whether he can consistently hold those reasons. Hence, I do not think that there are serious obstacles for discussing Rawls's theory at least partly as an attempt to make egalitarianism congruent with the demand for separateness of persons. I believe that, ultimately, Rawls fails to show that his principles would be accepted even in the setting he proposes, as the mediating assumptions he uses to arrive to an egalitarian distributive principle are dubious and mutually inconsistent. Separateness of persons singles out contractualism, but contractualism, once all considerations are properly accounted for, results in a general distributive principle which falls significantly short of a demanding, distinctly egalitarian general distributive principle, thus singling out an intermediary position between libertarianism and liberal egalitarianism as the appropriate extension of the respect for separateness of persons.

3.3 How should egalitarians moralize sacrifice?

As we have already mentioned, philosophers like Derek Parfit tried to argue for a direct connection between separateness of persons and egalitarianism.⁴⁰ However, as we have seen, the demand for respecting separateness of persons goes beyond simply acknowledging “a merely formal notion of equal consideration”, which simply states that “comparable claims of each person deserve equal respect and should be given equal weight” (Scanlon 2003b, 202). It also hints at what comparable claims are, and judges some claims as being almost impossible to be outweighed, primarily the ones protected by intuitive deontological constraints. This is so

⁴⁰ “Since it is a deep truth that we live different lives, it is an ultimate moral aim that, in so far as we are equally deserving, the lives of each should go equally well.” (Parfit 1984, 330)

because moral persons are beings with different conceptions of the good life, cherishing and valuing different things for different reasons. Of course, the challenge is precisely to find an agreement between them on things that they find comparably valuable, and a fair way of resolving disputes in cases in which their claims cannot be satisfied simultaneously. While we seem to agree that, generally speaking, equal protection of individual rights is valuable on this ground independently of other considerations, we might still disagree how exactly these rights fit one another, and how they are to be balanced with intuitively important claims that go against them.

3.3.1 How to give equal consideration to people? Libertarianism, egalitarianism and utilitarianism

Thomas Nagel (1979, 111) points out that the main dispute between libertarianism and egalitarianism⁴¹ is precisely how people are to be given equal consideration – what kind of burdens imposed on people are consistent with treating them equally as moral persons? Both parts are important: People need to be treated equally, but, at the same time, we should not forget that they are moral persons who have special interest in their own lives and diverse conceptions of the good life. People do not only disagree on how benefits and burdens are to be distributed on self-interested grounds, in a sense that they would prefer a distribution that favors their own conception. They also genuinely disagree on what they think is a morally justifiable way of distributing such claims. Therefore, such theories try to offer their own explanation for what it is that needs to be of equal weight, and how these weights are to be combined (Nagel 1979, 112).

⁴¹ Nagel emphasizes that utilitarianism also gives equal consideration to people granting equal contribution of each person's interests into the sum of overall benefits. However, "It is not really a *majority of persons* that determines the result, but a majority of interests suitably weighted for intensity." (Nagel 1979, 112, emphasis added)

While the libertarian view, favoring rights, is primarily concerned with judging the quality of an action, regardless of its consequences, the egalitarian point of view is, according to Nagel, more concerned with outcomes and therefore closer to utilitarianism. He thinks that ultimately, both libertarianism and egalitarianism are concerned with protecting certain individual interests or needs, according to their urgency. They establish an order of priority among needs (presumably from the point of view of separateness of persons, what is necessary for living a conception of the good life), but egalitarianism, unlike libertarianism, gives preference to the most urgent ones. Libertarians define the realm of individual moral claims rather narrowly, only in terms of rights, primarily assessing the quality of actions over outcomes. They give each person symmetrical and equal claim, without assigning special priority to anyone's particular claims beyond that point. Thus, libertarians identify the most urgent need as freedom from interference by others. First and foremost, people have an interest in not being treated by others in a certain way; everything else is secondary. One could see what a libertarian line of argument could be here: since people's conceptions of the good life are so different, the priority should be to protect people's choices, no matter what sort of outcomes these choices might result in. The main concern is to give people large enough space to choose.⁴²

Egalitarians, on the other hand, define the realm of individual needs and interests in a more expansive way, and do not confine it just to the ways people may be treated. The outcomes of this treatment also matters. Besides having such a more expansive view of need, egalitarianism also does not give equal veto to everyone, in the way rights do. Rather, it "establishes an order of priority among needs and gives preference to the most urgent ..." (Nagel 1979, 117). So the most

⁴² This is also why libertarians subscribe to the Choice or Will Theory of Rights, instead to its rival, Interest Theory. While the first one considers the normative control of the right-holder over what others can do to him to be the primary function of right holding, the latter considers that the primary function of rights is to further the right-holder's interests (Wenar 2020).

urgent needs of those who end up doing the worst are to be satisfied before the interests of others. First, we aim to satisfy everyone's most basic claims, and then everyone's next most basic claim. However, since claims are not limited to negative rights, there will be more conflicts between individual claims, and it will be very difficult, if not impossible, to reach an arrangement acceptable to everyone. This is similar to the way a libertarian might object to such a solution: once we introduce claims based on outcomes judged independently from how they are generated, the conditions of reaching unanimity grow to a point where it is impossible to make sure that everyone's claims are satisfied and not violated.

Be that as it may, we simply must satisfy ourselves by coming as close as possible to unanimity, says Nagel. While not all claims will be perfectly acceptable for everyone, they will be treated with equal consideration, as we took into account the interests of each person, applied the same system of priorities of urgency to them and classified them accordingly. Those whose overall life prospects place them at the bottom of the system⁴³ have a more urgent claim than those with better life prospects, and we should thus first attend to them and their needs. It does not matter how these people ended up doing the worst off, be it through rights violation or in any other way; what counts is only that they ended up at the bottom.

Thus, Nagel thinks that we can derive a plausible egalitarian theory from separateness of persons, if we accept the egalitarian interpretation of what counts as a burden (some sort of a loss in welfare⁴⁴) and how to rank the burdens (by giving priority to those who are doing the worst). The

⁴³ It is unclear whether Nagel thinks that what is important is the benefit of those who are worst off in overall life prospects, or of those whose claims are the most urgent, as those two categories need not overlap. Later, he explains that he thinks overall lifespans are appropriate units for measure; however, this clashes with some of our ideas of what urgency might mean. We might think that a claim of an old person, who did really well over their lifetime, to be saved from drowning is very weighty and urgent, despite other people being there whose overall life prospects are worse, but who are not currently in similarly dire straits.

⁴⁴ Nagel acknowledges the difficulty of determining the standard of urgency: should we use a purely objective measure, or should subjective preferences also influence the ranking? However, no matter what sort of standard he

theory he proposes is in a relevant sense very similar to Rawls's; yet, Rawls does not seem to suggest that an egalitarian principle can be straightforwardly derived from the respect for separateness of persons.

It would seem that Nagel unwittingly talks about contractualism, rather than egalitarianism. As Nagel himself points out, he is essentially offering a method he deems appropriate for finding a correct way to determine justifiable burdens for individuals, but “the results will be very different depending on whether material advantages or individual liberty and self-realization are given priority” (Nagel 1979, 117). Yet, he insists on pairing the requirement of unanimity (i.e. acceptability to each) with the assessment of *outcomes*. He purports: “In defending an interpretation of moral equality in terms of unanimity applied in the assessment of outcomes, I am therefore denying that either utilitarianism or rights theories, or both, represent the whole truth about ethics.” (Nagel 1979, 122) However, if we recall the discussion of the difference between teleological and deontological views, it becomes clear that such a view, while maybe ending up in “a radically egalitarian policy of giving absolute priority to the worst off” (ibid.), would also violate separateness. By framing the unanimity condition purely in terms of outcomes, Nagel allows for potentially impermissible trade-offs from the point of view of deontology.

Of course, I am not claiming that this is the actual view on distributive justice that Nagel endorses.⁴⁵ But insofar he claims that the egalitarian principle can be consistently derived from separateness and equal consideration of persons, by phrasing terms solely in terms of outcomes, Nagel does not just introduce outcomes as an additional consideration in addition to rights. He

would eventually opt out, Nagel makes it clear enough that the main standard for judging would be assessment of outcomes.

⁴⁵ Moreover, he expressed skepticism that egalitarianism of this sort could be made into a plausible theory, albeit for different reasons – it would be insensitive for numbers, by always giving priority to the needs of the worst off, no matter how few, over the needs of the better off, no matter how many there are. A plausible “social morality” will show the influence of all three major theories: egalitarianism, the rights view (libertarianism) and utilitarianism (Nagel 1979, 118).

effectively precludes rights from playing any role in the way we usually think they should play a role. We sometimes think that our rights should be protected even if their violation would bring a great deal of benefit to someone else. Libertarianism offers an implausibly stringent conception of rights and does not recognize any other consideration besides them. Therefore, Nagel is right to criticize libertarians for their refusal to consider at least some burdens that outcomes put on people, those which are not the result of right violation. Many of his points capture the essence of criticism towards libertarianism rather well. First of all, by focusing solely on the ways people can be permissibly treated, libertarianism fails to acknowledge that we need more than just rights in order to live in a meaningful way according to our conception of the good life. We generally think that we need to have a valuable range of options in order to have a meaningful choice between different conceptions (Scanlon 1986), and simple protection of negative rights does not offer this. Second, libertarianism denies the option that, by combining different viewpoints, we can reach an agreement on justifiable burdens that goes beyond those imposed by rights infringement or violation. Yet, it seems that we have widely shared intuitions on some claims beyond that, as being justifiable and desirable from basically anyone's point of view, such as the duty of easy rescue. We also need to believe that some sort of reaching a common viewpoint on substantive issues is accessible, despite us having different conceptions of the good.

Of course, it is entirely plausible that we can derive a distinctly egalitarian view consistent with separateness of persons by using the contractual method, but certainly not by simply giving priority to the worst off in terms of outcomes. There is a large step from there to substantive egalitarianism. Some egalitarian principles, such as the one proposed by Nagel, are demanding to the point of making our rights void. What is the point of having material resources provided by others, if we are severely restricted in using them? Throughout history, people have protested not

only for access to lacking material resources; they have protested (and still do) against oppressions of different kinds, like the ones that put limits on the exercise of religion and other comprehensive modes of life. Any sensible theory should strive towards leaving such a space for individuals as well, one that is not limited by the demand of a distributive principle, no matter how correct that principle might seem. A more plausible egalitarian theory, such as Rawls's, acknowledges this and therefore gives primacy to equal liberties enjoyed by the people. Ultimately, Rawls does think that such sort of a comprehensive egalitarian principle is compatible with this requirement⁴⁶. However, he does not think that such a principle is determinable prior to these other considerations and commitments, and neither does he think that such principle is to be balanced with these considerations in any way. Rather, the principle is informed and constrained by those considerations, and it is ultimately reached by application of a correct method, rather than in an independent way. The method of arriving to the egalitarian principle proposed by Nagel, minus the implausible requirement to judge claims only in terms of outcomes, points us first and foremost towards contractualism, not towards just any sort of a conclusive egalitarian view.

⁴⁶ This is why Rawls purports that the proposed distributive principle is to govern the distribution of all primary goods except basic liberties. Rights are in important ways distinct kinds of needs from other, because they specifically protect the content of conceptions of the good, not just the means to arrive at them. Moreover, Rawls does not think that giving the absolute priority to the worst off applies to the choice of a distributive principle. While it is plausible to choose in such a manner the principle of equal liberties, this sort of a view becomes less plausible when it comes to the choice of the distributive principle. "Despite the formal resemblance between the difference principle as a principle of distributive justice and the maximin rule as a rule of thumb for decisions under uncertainty..., the reasoning for the difference principle does not rely on this rule." (Rawls 2001, 94-95) Maximin applies only up to the point of a certain suitably acceptable minimum; to insist on absolutely benefiting the worst of in such situations would seem irrational.

3.3.2 Impartial egalitarian concern?

In his later work, Nagel explicitly rejects the kind of impartiality offered by the contractualism favored by Rawls and Scanlon as insufficiently egalitarian in its assumptions and results. He believes that the “correct method of combination will include a built-in bias in favor of equality, over and above the equality of importance that everyone's life has in the initial set of values to be combined.” (Nagel 1991, 65) Therefore, in order to reach distributive principles that are as egalitarian as we intuitively think they should be, a “motive of impartial egalitarian concern — assumed as a component of reasonable human motivation” has to be added to the individual points of view that need to be considered. The standard contractualist view simply leaves too much space for inequality, Nagel claims, although it certainly eliminates “serious inequalities” (Nagel 1991, 70n19). In order to imagine how this impartial egalitarian concern might be worked out, Nagel suggests a thought experiment that would supplement the point of view of the utilitarian “impartial sympathetic observer”⁴⁷ to the perspectives of the litigants in a contractual setting: the impartial spectator chooses the principles he would choose if he knew that he will later split himself up into all the distinct individuals that society is comprised of. As this person cares about each of the individuals’ point of view equally, this would presumably add an extra layer of benevolence, which would push the selected principle towards more equality. Rawls considers this proposal and concludes that it would not ultimately add anything, as benevolence of the spectator is a second-order notion: it can only apply to the good that is already given, and when it comes to the plurality of persons, it is obvious that such good does not exist. On the contrary, different goods clash, and benevolence has no way of discriminating between them. For

⁴⁷ The impartial sympathetic observer takes a general point of view of no one in particular; his own interests are not at stake and he possesses all the information on each individual’s preferences. He is also capable of taking each individual point of view, until he reaches a final verdict that achieves the perfect balance of satisfactions and pains. Rawls represents this sort of a view in the background of utilitarian reasoning, in order to demonstrate how utilitarianism conflates all desires into one system of desires (TJ, 160-168).

the problem of justice to arise in the first place, people need to have separate interests which may conflict, and the only thing we can plausibly offer is a sort of impartiality that stems from the viewpoint of each individual, albeit placed in a position in which they can judge principles without bias or prejudice. “Therefore a love of mankind that wishes to preserve the distinction of persons, to recognize the separateness of life and experience, will use the two principles of justice to determine its aims when the many goods it cherishes are in opposition. This is simply to say that this love is guided by what individuals themselves would consent to in a fair initial situation which gives them equal representation as moral persons.” (TJ, 167) Therefore, the plausibility of principles of justice stems from the fact that they would be chosen in an appropriate, contractual setting, and this setting is plausible because it respects separateness of persons in a way that it takes each point of view into account. In order to show that those are indeed the principles that would be reached in this setting, we need to examine the process of their justification. Nagel, however, seems to think that the mere application of the contractual method will not result in a sufficiently egalitarian principle, because it will leave too much incongruity between the different personal standpoints.

Of course, Rawls thinks indeed that the reasoning in the original position, with appropriate assumptions, will ultimately result in an egalitarian principle, albeit not nearly one as strong as the one proposed by Nagel. Rather, the same decision-making principle Nagel uses, maximin, will be (though to a limited extent) plausibly applied in a contractual setting in order to help us settle the issue of what kind of principles of justice we will arrive to. First and foremost, contractualism is meant to supply us with a new way of moral thinking, one offering a plausible alternative to utilitarianism and perfectionism. So, we might accept the interpretation of the

contractual situation without accepting the set of principles which would be accepted in it, it is argued (TJ, 14).

3.4 What is contractualism?

What do we actually mean when we speak about contractualism? Contractualism purports that in the assessment of individual claims, we should first attend to those who are left worst off. As each individual claim deserves equal consideration, their losses seem harder to justify than those of the people who are better off. As Scanlon puts it: “Under contractualism, when we consider a principle our attention is naturally directed first to those who would do worst under it. This is because if anyone has reasonable grounds for objecting to the principle it is *likely* to be them.” (Scanlon 2003a, 145) Brink (1993) refers to this as the moral asymmetry of top-down and bottom-up sacrifices. The drowning baby’s loss of a life is more serious than the loss experienced by the person in a position to easily save it, and therefore the justification offered to the baby why nothing was done to save her life would be much more demanding than the justification to the rescuer as to why his pants had to get wet in the process. However, contractualism is not preoccupied with judgement of individual acts, but tries to find principles that would minimize the complaint of the worst off across different situations. Therefore, in order to show that we can complain about a principle, it needs to be the case that no one else would do worse under any alternative principle proposed. Therefore, we try to minimize the maximal complaint. Since there is a conflict of interest between individuals, there will be no solution that satisfies everyone’s claim. “But it is possible to assess each result from each point of view to try to find the one that is least unacceptable to the person to whom it is most unacceptable. This means that any other alternative will be more unacceptable to someone than this alternative is to anyone. The preferred

alternative is, in that sense the least unacceptable, considered from each person's point of view separately.” (Nagel 1979, 123) Even if not all claims are satisfied, individuals will have no grounds for complaint, as they would see that their claim was taken into consideration and defeated only because someone else would have fared even worse. This is why the final distribution of burdens and benefits is the one that should be acceptable to each. In this way, contractualism makes us combine our own point of view with that of others.

As we have seen, separateness of persons demands that we attach intrinsic significance to some kinds of burdens. Libertarianism attaches intrinsic significance only to the ways people are treated, refusing to assess outcomes, while Nagel’s kind of egalitarianism gave too much weight to them. Contractualism offers a distinct manner of moral reasoning that helps us to include outcomes without falling back to some sort of teleological theory. In order to show that I can reasonably reject a principle, I first need to show that the principle adversely affects me in some way. However, the negative impact is not sufficient to reasonably reject having a certain burden being imposed on me – I must also ask myself how other people are being affected by the principle. If every alternative principle imposes an even greater burden on someone else, then it is reasonable for me to withdraw my objection, as I realize that your reasons are weightier than mine. However, several explanations of the specific features of contractualism are necessary.

3.4.1 Non-aggregation

First of all, contractualism is essentially individualistic and does not allow for aggregating individual complaints. I cannot complain against a principle that protects against a serious loss of an individual just on the basis that rejecting it would confer smaller benefits on many people. In assessment of a principle, we must appeal to its implications only for ourselves and for other

single people (Parfit 2011, 193). Therefore, contractualism is expectedly an anti-aggregative view – generally, it does not allow for aggregation. Many critics found this to be implausible (Nagel 1979; Parfit, 1984; 2011; Brink 1993; McKerlie 1988), but from the perspective of separateness of persons, this is an advantage and does not represent an obstacle for the proceeding argument.

3.4.2 Grounds for rejection: Well-being and beyond

Secondly, it needs to be clarified what counts as the biggest complaint. Obviously, in the most standard sense, the principle of minimax in decision-making theory is simply to be applied, in a way that counts “any improvement in the situation of someone worse off as more urgent than any improvement in the situation of someone better off” (Nagel 1979, 125). Minimax has been often criticized for giving the absolute priority to the worst-off individual, regardless of the cost to the rest (Strasnick 1976; Brink 1993; McKerlie 1988). However, proponents of contractualism do not argue that it should be applied in such a strict manner; rather, the way we determine the minimax complaint (Parfit 1984; Brink 1993) will also depend on the way we moralize it. The minimax complaint does not say that the worst off have a veto; but that the biggest complaint has a veto. It will depend on the criterion of well-being that we apply, and other factors we might take into account. For example, being the worst off in a relative sense might not be sufficient – for example, Scanlon thinks that in assessing a person’s claim, we should take into account the size of her relative loss, her absolute level of well-being and her relative level of well-being. Nagel thinks that the right measure takes into account a person’s relative social position and the size of her loss.⁴⁸ Scanlon adds that the idea of priority of the worst off, in this relative sense, has more

⁴⁸ A theory that would count only the relative social position would apply pure minimax, while a theory that would take into account only the size of the relative loss would be a theory that would effectively have no egalitarian commitments, but would allow for bargaining - I could complain whenever I experience a relative loss, no matter

plausibility depending on whether the good we provide is directly relevant for the person and the issue in question. Sometimes, it would be unreasonable and unfair from the worst off to expect from the others to suffer great loss so that they would gain marginal benefit. For example, we do not think that a person who generally had a great life, enjoying health and wealth, should therefore be eligible to be sacrificed, so that another person, who had a much worse life, would get his organs. But we might think that transfer of wealth between them is morally justified in order to address the relative deprivation of the second person in terms of material wealth, albeit not in terms of bodily parts.

This brings us to the question of what sort of “criteria of wellbeing” (Scanlon 2003c, 70-84) contractualism uses in assessing individual claims. As we have seen, contractualism incorporates outcomes by acknowledging their importance for the burdens that befall individuals. Yet, contractualism, unlike Nagel’s egalitarianism explored earlier, does not take well-being as the ultimate reason for rejection – though it is important, many other personal reasons that go beyond an impact on well-being are allowed. I am not required, for example, to undergo a sacrifice each time someone else’s loss in well-being is greater than mine. For example, I could be asked to donate an organ each time someone needs it, or sustain significant bodily harm in order to rescue someone every time the others’ injuries would be greater than mine. While this sort of a sacrifice would be different in rationale than the one demanded from us by utilitarianism, it would still be too great. Contractualism requires that we apply a certain generality when assessing the reasons – the question is not simply “what are the implications of this principle for me at this moment?” but ‘what will the social world be like?’” (Kumar 1999, 296). The appropriate assessment of the rejectability of a principle must take into account the consequences of its acceptance in general,

how well or badly off it would leave me. The example of such a theory would be the one proposed by David Gauthier, which takes the state of nature as the baseline for making claims in relative losses (Brink 1993).

not merely in a particular case that we may be concerned with. For example, one could object to the aforementioned principle because it would seriously compromise a person's control over her life (Kumar 1999, 298).

Scanlon considers the option of adopting a kind of "welfarist contractualism". This would come close to Nagel's proposal, which defines the reasonableness of rejection of a principle solely in terms of the loss of well-being that an individual would experience if that principle were accepted, compared with losses that person and others would experience under alternative principles. However, Scanlon warns, it seems clear that "the justificatory force of a given increment of well-being in moral argument is not constant in all situations, but depends on other factors of a clearly moral character". (Scanlon 1998, 243) For example, we might think it matters, at least to some extent, how the decrease in well-being happened, not just that it happened. We generally think that there is a difference between killing someone and letting them die. This does not mean that the distinction is always clear cut and that it is always permissible to let someone die. Rather, the assessment will also depend on whether our actions "express an attitude of respect for others as persons" (Kumar 1999, 285). Therefore, refusing to provide help to a person in serious peril, when the costs are very small to us, would express a general attitude of disrespect. A principle allowing for such action would fail to reflect the attitude of mutual recognition that people generally owe to each other. Therefore, the main issue would not be just a loss in welfare or pain that a person would undergo, but the failure to treat a moral person in accordance with principles they could not reasonably reject. "Since human beings have reason to avoid pain, they could reasonably reject principles that allowed others to inflict pain on them without good reason, or to fail to relieve their pain when they could easily do so." (Scanlon 1998, 181)

3.4.3 Reasonable partiality

Contractualism also recognizes the importance of the fact that people have their own lives to live, and that sometimes we can show reasonable partiality towards our own interests or special relationships. Therefore, principles could reasonably be rejected on the ground that they leave no room for valuing other things that are important in our lives. This sort of objection could not be raised from a strictly self-interested position; rather, it would have to invoke general reasons we have in order to pursue things important to us. Since being capable of living according to our conception of the good life is one of the fundamental motivations for each of us, we could argue that we all have a shared interest in being able to pursue such goals, even if they would sometimes bring out a loss for someone or for the overall good. For example, we would think that I can reasonably reject to treat someone else's child with the same concern as my own, and that this stems from the general fact that people tend to care for special relationships they have with significant people in their life. These special relationships and interests are valuable because they are important to us; sometimes, this is a sufficient reason, as it takes into account that people value things in different ways and for different reasons.

Of course, the question is how to find a consensus on what legitimate expectations that individuals can press on each other are. In terms of defining what we owe to each other in every imaginable situation, this would amount to an almost impossible task. However, it is possible to delineate some kinds of general expectations, which would necessarily have to fall short of being applicable to all possible situations. For example, we generally think that people's moral duties extend beyond what they can be enforced to do, and yet think that it would be extreme to force them into doing everything they are supposed to do. While there are things that a parent is obliged to do for her child in order to be a good parent, this is usually defined much more

expansively than what a mere adequate parent might be required to do, and what might generally correspond to the public standard that we hold people to. People generally have an interest in having a rather wide range of their personal activities and choices free from other people's demands, and they have an interest in having means and opportunities to exercise these choices. Thus, we could imagine that people would frame their legitimate expectations on each other in terms of all-purpose means for achieving whatever their life goals are.

Rawls's concept of primary goods, although meant to be applied primarily to a specific theory of justice for social institutions of a democratic society, gives a general idea of what kind of consensus on goods we could achieve. As Rawls points out, such goods are derived from a thin theory of good, which does not presuppose specific goals and aims for individuals. "It is rational to want these goods whatever else is wanted, since they are in general necessary for the framing and the execution of a rational plan of life" (TJ, 380). It suffices to invoke some notion of reasonableness, or, in Rawls's case, "the evident criteria of rational choice", to explain why people would prefer them. He thinks that people in a contractual situation would take for granted that they wish to have "greater liberty and opportunity, and more extensive means for achieving their ends" (TJ, 380). In a way, defining such set of goods already urges us to combine our point of view with other people's point of view in order to arrive to what we can all find acceptable.

To sum up, contractualism uses an objective criterion of well-being, one that "provides a basis for appraisal of a person's level of well-being which is independent of that person's tastes and interests", but in the same time one that takes into account "individual variation in taste and interest" (Scanlon 2003c, 70). Thus, contractualism will attach great significance to providing conditions necessary for individuals to develop their preferences and follow their conceptions of the good life.

3.5 Rawls's contractualism: an assessment

After arguing, and hopefully demonstrating, why contractualism is a plausible way to moralize sacrifice consistent with the demand of separateness of persons, we arrive to the next task: answering whether an appropriate application of the contractual method inevitably pushes us towards adopting a substantive egalitarian principle, akin to the second principle of justice proposed by Rawls. When I speak about such egalitarian principle, I have in mind more than a principle which is solidly grounded in egalitarian concerns (because fundamentally, the demand of separateness is egalitarian in the most basic sense), but a principle with substantive egalitarian distributional implications.

Before proceeding to my argument which demonstrates that an egalitarian view which supports a substantive distributive principle of justice is not a view which is singled out by contractualism, I examine Rawls's theory of justice as the epitome of egalitarian contractual theory. Rawls straightforwardly takes the respect for separateness of persons as the crucial moral concern for an adoption of the contractualist method for resolving conflicts among individual claims. Separateness of persons plays a substantive part in his theory – both as the motivation for the basic difference between deontological and teleological views, and especially for shaping his first principle of equal liberties. Parties in the original position have an overwhelming concern in making sure that the widest range of options to choose between different conceptions of the good life are available to them.

Following Barry and Nagel, I identify two different kinds of arguments for the principles of justice in Rawls's work: the intuitive argument, offered in chapter 2 of *A Theory of Justice*, and the formal contractualist/contractarian argument that seeks to derive the two principles of justice from the original position, offered in Chapter 3 of the same book (Barry 1989, 213-215; Nagel

1979, 118). The first can be understood as Rawls offering an “informal contractualist idea of principles acceptable to all”, while the second one moves to the more formal idea of principles of justice being accepted as a rational choice of principles by mutually disinterested parties placed behind the veil of ignorance, and thus turn out to be “more precise and more capable of yielding definite results” (Scanlon 2003, 147). When it comes to the argument from the original position, I do not question Rawls’s premises so much, but I do find his conclusions for the choice of the second principle of justice, and especially the difference principle, to be surprisingly weak and inconclusive, when considered within the framework of the original position. The arguments that Rawls suggests as decisive for adopting the difference principle, as opposed to the principle of restricted utility and the social minimum that is associated with it, cannot be convincingly supported by the contracting parties.

The intuitive argument, however, which will be examined in the next chapter, is more problematic and requires a more extensive criticism. I will examine the main foundations of Rawls’s intuitive argument, and following Barry’s analysis, identify two ultimately incompatible conceptions of justice, which both play a crucial role in the argument: Justice as Impartiality and Justice as Mutual Advantage. Furthermore, I will elaborate what their implications are and how these implications conflict. As I will argue in the next chapter, keeping both conceptions obliges us to a morally implausible implication – the exclusion of the disabled from the framework of justice.

3.5.1 Justice as fairness

Famously, Rawls proposes a theory of justice for a liberal society, which is encapsulated in two principles:

1. First Principle (the principle of equal basic liberties): Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, a scheme which is compatible with the same scheme of liberties for all;
2. Second Principle: Social and economic inequalities are to satisfy two conditions:
 - a. Principle of fair equality of opportunity: They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;
 - b. Difference Principle: They are to be to the greatest benefit of the least-advantaged members of society. (Rawls 2001, 42-43)

3.5.2 The original position

According to Rawls, these principles would be chosen by persons who are representative members of different social groups, which differ in terms of social and economic holdings, in a special decision-making setting – the original position. The original position represents a kind of “thought experiment” (Rawls 2001, 17), which intends to emulate the moral point of view appropriate for thinking about principles of justice. It models, on one hand, fair conditions under which moral persons can reach an agreement on fair terms of social cooperation, and on the other, it imposes restrictions on the kinds of reasons that people can employ in support or against the proposed principles (Rawls 2001, 80). In the original position, parties are equally represented as moral persons, which means that they are not only capable of forming and pursuing their

conceptions of the good, but also of being reasonable and having a sense of justice. While people are rational in trying to secure for themselves as much of the multipurpose goods that everyone has a reason to want (primary goods), they are also reasonable enough to limit this pursuit by acknowledging that others have the same ambition; thus, people are reasonable when they do not seek to impose on others what would be unacceptable for themselves to accept (Rawls 2001, 191). Sense of justice refers to possessing reasonableness as an actual motivation; “a willingness, if not desire, to act in relation to others on terms that they also can publicly endorse” (Rawls 1993, 19).

3.5.2.1 Circumstances of justice and rationality of the parties

The problem of how to divide burdens and benefits of social cooperation arises due to the circumstances of justice. Because of the fact of moderate scarcity, there is simultaneously a sufficient amount of resources available, so that people are not in a desperate competition over them; yet, there is not enough for everyone to be satisfied. This is why there is both identity and conflict of interest between people; they are interested in cooperating, because this advances everyone’s position, but they are also not indifferent as to how the fruits of social cooperation will be divided among them, as each prefers a larger share (TJ, 109). There is a conflict of interest between people, because not only do they often want the same things, but they are also holding a wide range of often irreconcilable, though reasonable, comprehensive doctrines. Parties in the original position are also mutually disinterested – which does not mean that their comprehensive ends outside of the original position cannot overlap partly with the good of the others. However, they are not expected to be altruistic in devising principles, and they will prioritize their own goals and strive to do the best for themselves, without envy and comparing

themselves with others. The assumption of mutual disinterest is introduced in order to credibly emulate a genuine, deep plurality of individual ends, not to emulate some sort of a commitment to self-interested behavior that could be ascribed to human nature.

3.5.2.2 The veil of ignorance

There are two principal ways in which the sort of reasons individuals can offer are restricted in the original position: so-called formal constraints and constraints imposed by the veil of ignorance.

Rawls purports: “Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.” (TJ, 118) This is why he places parties behind the veil of ignorance: no one knows her place in society, class position, social status, natural endowments, race, gender and other features of her person. Furthermore, she is also ignorant of her conception of the good, character traits, or particularities of her society’s circumstances. She just knows that circumstances of justice obtain, and is aware of some more general facts about human societies, such as natural and psychological laws and generalizations, basic human behavioral propensities, etc.

The introduction of the veil of ignorance makes sure that the parties are impartial, an impartial person being one “capable of judging in accordance with these principles without bias or prejudice” (TJ, 165). Since people know nothing of their particular position, they have neither basis nor incentives to try and push principles that are partial towards their own advantage. In such a situation, parties do not bargain but rather reach a unanimous choice. In this way, each person is situated symmetrically to others and treated equally.

3.5.2.3 Formal constraints

Further, formal constraints on the concept of right exist, which are general constraints for ethical principles. First, principles should be suitably general; they should not use proper names of “rigged definite descriptions”, in order to keep impartiality. They should also be universal (they must hold for every moral person) and capable to determine priority among its principles; they should be key to resolving conflicting claims, making the theory complete. The principles should be public: generally, everyone should know about them, understand the reasoning behind them, their role and how they are applied. The final condition is finality: an agreement on these principles is conclusive, so we cannot try to devise them again just because we do not like them; once they are adopted, their conclusions “override considerations of prudence and self-interest” (TJ, 117).

One important feature of the principles of justice pointed out by Rawls is that “principles should be capable of generating their own support” (TJ, 119). Thus, although parties are aware of their sense of justice and count on it, they are also realistic about the demands that certain principles put in front of people. If they doubt that they will be able to uphold a principle because of the strains it puts on individual motivation and commitment (as discernable from general psychological features), they should not adopt the principle. Thus, parties will avoid adopting principles whose consequences they would find unacceptable, or with which they would be able to comply with only with great difficulty. These are the so-called “strains of commitment”.

3.5.2.4 Available conceptions

Parties in the original position are presented with a shortlist of traditional conceptions of justice and need to agree through pairwise comparison on the one they find to be most suitable. Among the competing conceptions, there are the two principles of justice, intuitionist theories, perfectionism, utilitarianism, and certain mixed conceptions which partly or completely substitute the second principle of justice with versions of the principle of average utility. Thus, the original position is merely a “selection device” (Rawls 2001, 83), as it does not try to deduce the principles of justice from the conditions of the original position, but rather argues that they would be selected as superior over the offered alternatives.

3.5.3 Restating the original position

After Rawls’ conception of the original position and his arguments for the principles within it have been subject to sustained criticism, Rawls amends and clarifies his arguments, especially the one arguing for an adoption of the difference principle in the original position. Originally, Rawls states that “...it is useful as a heuristic device to think of the two principles as the maximin solution to the problem of social justice. There is a relation between the two principles and the maximin rule for choice under uncertainty.” (TJ, 138) However, in his *Restatement*, Rawls points out that since the maximin choice rule and the difference principle share a superficial similarity (as they both seek to maximize the minimum position), he mistakenly conveyed that the difference principle is justified by the maximin rule (Rawls 2001, 94-95). The maximin rule plays almost no role in the justification of the difference principle, although it is very important for justifying the first principle of equal liberties.

Rawls has been criticized for several other aspects of the original position and the veil of ignorance; however, many of the intricacies in devising the theory are not crucial for an assessment of Rawls's generally sound contractualist reasoning. I believe that Rawls does not make fundamental mistakes in its construal from the point of view of contractualism. The veil of ignorance, for example, is a useful heuristic device to help us put ourselves in other people's position. It makes us think in a way that urges us not only to take other persons' perspective, but also to take it seriously. For example, the question is not whether the conservative maximin principle would *actually* be adopted by the parties in such position; the point is that it *should* be adopted, if we are to take our own interests and the interests of others seriously. Even without all the complexities of its structure, the original position and what it is supposed to convey is easily grasped: "The two principles", says Rawls, "are those a person would choose for the design of a society in which his enemy is to assign him his place." (TJ, 133) Rawls goes on to dismiss this remark, saying that the parties "should not reason from false premises" (ibid.). But the general point is made, and it explains what role the minimax complaint, broadly understood in contractualism, generally plays in the theory, although not being applicable as a decision-making rule for each and every aspect of the theory. In Rawls's words: "Focusing on the worst outcomes has the advantage of forcing us to consider what our fundamental interests really are when it comes to the design of the basic structure." (Rawls 2001, 99)

3.5.4 Two fundamental comparisons

In order to explain the reasoning behind the adoption of the two principles of justice in the original position, Rawls makes two fundamental comparisons between his own two principles taken as a whole, and the principle of average utility (representing the most attractive version of

utilitarianism). The comparisons are supposed to emphasize the advantage of Rawls's theory with respect to the distribution of rights and liberties on the one hand, and opportunities and material goods on the other. Compared to utilitarianism, in the former case the distribution will be more equal, in the latter more reciprocal. While a society organized by utilitarian tenets might end up expressing equality and reciprocity to some extent, it will do so only accidentally and indirectly. While the first comparison decisively argues for the adoption of the principles of justice as a whole, the second comparison, arguing for the adoption of the difference principle in particular, is less decisive, Rawls purports.

3.5.5 The first comparison

In the first comparison, Rawls' two principles of justice, taken as a whole, are compared with the principle of average of utility as the only principle of justice. The principle of average utility holds that "the institutions of the basic structure are to be arranged so as to maximize the average welfare of the members of society, beginning now and extending into the foreseeable future" (Rawls 2001, 96). In the first comparison, the maximin rule is pivotally applied: we are to select the worst option of each principle, and select the one that is the least bad among them. However, we need to show that conditions for a rational application of maximin apply in the original position, those conditions being: 1) we have no reliable basis for making an estimation of probabilities of various social outcomes; 2) one of the offered conceptions offers a highly satisfactory guaranteeable level; 3) all the other alternatives offer the worst outcomes that are significantly below the guaranteeable level.

If we apply the maximin rule, then we would rather select the two principles of justice than the principle of average utility, for obvious reasons – the principle of average utility would allow for

curtailment of liberty of some individuals if this would raise the level of average utility. We can easily imagine such a situation: for example, an intolerant majority would be greatly pleased by limiting religious practices of a minority. A society regulated by the two principles of justice offers a highly satisfactory guaranteeable level, because it secures basic rights and liberties for all, and this is of paramount importance for the parties in the original positions, as they are moral persons. We would not care much about the increased level of utility if this could potentially include the loss of freedom to live according to our conception of the good life. Parties in the original position would not risk losing something so precious, especially when the alternative principles can guarantee it. Considering this, the strains of commitment under the principle of average utility would be excessive, and we would not be able to guarantee that we would be able and willing to uphold it once the veil is removed – what if we are the ones whose liberty ends up being sacrificed? Rawls' two principles protect our basic interest in having our liberties preserved, and complement it with a suitable share of primary goods necessary to pursue our goals. This makes them a desirable contractualist solution, not only when compared to average utilitarianism, but also when compared to competing theories such as libertarianism, that offer no way to regulate the distribution of opportunities and material goods. The centrality of such interests also helps to explain the very conservative attitude that parties in the original position take with respect to risk and uncertainty – the decision-making they are involved in is not a regular one, but the one securing their core interests. The two principles of justice are further supported by considerations of the kind of political culture they create, not just by reference to individual gain; they espouse the “essential requirements for a stable constitutional regime” (Rawls 2001, 115). These conditions guarantee individuals that certain issues will not be subjected to capricious changes, as they might under an average utilitarian regime; most likely, the core of liberties will not be questioned, although they will be regulated. The regime justice as

fairness is more stable because it offers a clear and shared conception of public reason, offering more assurance. The removal of the most divisive issues and uncertainties further has a positive effect on promoting a spirit of cooperation among its citizens. Thus, all in all, the two principles of justice offer parties “a highly satisfactory social world”.

3.5.6 The second fundamental comparison

In the second fundamental comparison, the two principles, taken as a whole, are compared with a mixed conception, the “principle of restricted utility”. This conception preserves the principle of equal liberties and principle of fair equality of opportunity, but replaces the difference principle with the principle of average utility, combined with a social minimum. Thus, the pursuit of utility is “restricted” by liberties, equality of opportunity, and a fixed social minimum. The purpose of the second comparison is to give support to the difference principle in particular, as the first comparison simply showed that it is an adequate principle for securing a share of primary goods, but it did not decisively argue for its superiority to some other principle specifically governing the distribution of goods. Rawls sees the principle of restricted utility as the most formidable contender to the difference principle, as it guarantees equal liberties and opportunities and secures against the most serious losses in well-being. Thus, both the second and the third condition for an application of the maximin rule do not hold, as the worst options are eliminated – both the difference principle and the principle of restricted utility represent highly satisfactory options. Thus, which principle we will ultimately choose will depend on the strength of an independent argument, as the options are too close to each other for minimax to offer any discernable solution. Both alternatives include conceptions of citizen and society which are used in justice as fairness; thus, the only real difference lies in the appropriate distributive principle in

the narrow sense. Thus, in order to show that individuals would truly favor the difference principle, Rawls must show that the guaranteeable level offered by the difference principle is markedly and distinctly higher than the one offered by its rival, so that it is irrational for an individual to gamble for higher gains (Edmundson 2017, 97). This would seem to bring us back to maximin after all; however, if we leave this aside, Rawls's ambition is to show that both more and less advantaged people would choose the difference principle over the principle of restricted utility, and argues they would choose so on the grounds of publicity, reciprocity, and stability, the last one being particularly important, as we will see.

3.5.7 Grounds for opting for the difference principle: publicity, reciprocity, and stability

3.5.7.1 Publicity

The condition of publicity requires the parties to evaluate principles of justice in the light of the consequences – political, social, and psychological – of a public recognition of those principles by the citizens. For that purpose, citizens should not be deceived, hold false beliefs, or rely on ideology. Ideally, citizens have a full grasp not only of what principles demand, but also of how they are generated, what is the main reasoning behind them, and how they are justified. It is important to add that the principle should have an educational aspect – the difference principle also educates citizens into seeing and accepting each other as free and equal (Rawls 2001, 56). By educating citizens, the difference principle, and the whole framework of justice as fairness, generates further support for some of its other important aspects, and for the conception of justice as a whole. In particular, the support for the view on reciprocity, the next ground, is generated among the citizens in this way.

3.5.7.2 Reciprocity

Restricted utility does not include a commitment to reciprocity; it is, despite the restrictions accepted, still a maximizing aggregative principle. The idea of reciprocity Rawls has in mind is a specific one: it is defined by the benchmark of equality, which citizens accept because the original position situates them symmetrically; since they do not know their particular position or the distribution of native talents in society, they assume that initially, everyone has the same claim not only to liberties, but to primary goods as well. Thus, they explicitly agree to consider the distribution of native endowments as a common asset.

However, as they are rational and want to secure more of the goods for themselves, rather than less, they consider allowing departures from equality for the sake of efficiency, but only under the condition that everyone's situation is improved. Presumably, the principle of restricted utility also improves everyone's situation by allowing for inequalities; but it does so in an unrestricted and imprecise way, as a departure from equality is unlimited as long as the social minimum is provided. On the other hand, the difference principle blocks inequalities when they reach the point in which they stop benefitting the worst off. Thus, it is not sufficient that inequality simply does not harm or lower the prospects of the worst off; it needs to effectively benefit them. "The idea of reciprocity implicit in the difference principle selects a natural focal point between the claims of efficiency and equality." (Rawls 2001, 124) It determines a focal point in which inequalities are still raising the expectations of the worst off. Once the expectations stop rising, we are not allowed to move towards more inequality, even if it would be more efficient. "The difference principle represents an agreement... not to enter the conflict segment." (Rawls 2001, 124) If the better off would decide to move towards more inequality, even if this does not improve the situation of the worst off, they would violate reciprocity.

One of the virtues of the difference principle that Rawls is trying to demonstrate here is its simplicity and determinacy when compared to its competitor. The difference principle does not need to determine a minimum, which would presumably be a rather contentious task, as it relies on the assessment of some sort of objective needs. Rather, the difference principle is relative in nature, and does not assume that there is a need to determine a particular threshold, as the rise and fall in expectations between the groups are intrinsically connected. We need not to measure the benefits accruing to each representative person in society, but only the worst off, and maximize her expectations (Green 2013, 126). Of course, the difference principle also has an objective, not just a relative measure of interpersonal welfare, in the form of primary goods, which represent a reliable and publicly perceptible basis for comparison.

This virtue of determinacy and clarity of the difference principle is connected with both the previous desideratum of publicity (citizens, and especially the worst off, have a clear idea of how exactly the ideal of reciprocity is implemented by the principle), and the next desideratum of stability.

3.5.7.3 Stability

Under the condition of stability, the political conception of justice must generate its own support under reasonably favorable conditions (Rawls 2001, 125). The vast majority of citizens should perceive the conception as legitimate and should willingly comply with it; they do not wish to try to renegotiate the conditions of the social contract. Since the difference principle bars the better off from accruing even more benefits, it is most likely that they will be the ones trying to push towards the “conflict segment”, in which the worst off are not benefitting anymore. As we have seen, with restricted utility, this will regularly be the case. Here we see how the grounds of

publicity, reciprocity and stability mutually support and reinforce each other. Since a society governed by the principles of fairness is educating citizens on the grounds of the conception of justice, it is unlikely that the better off would even try to question the status quo: “They would see themselves as already benefited by their fortunate place in the distribution of native endowments, say, and benefited further by a basic structure (affirmed by the less advantaged) that offers them the opportunity to better their situation, provided that they do so in ways that improve the situation of others.” (Rawls 2001, 126) In turn, the acceptance and affirmation of the difference principle by the better off “conveys to the less advantaged their acceptance of an appropriate idea of reciprocity in the clearest possible way.” (Rawls 2001, 126)

A society governed by the principle of restricted utility would be an unstable one, as it involves greater “psychological strains that may lead to instability” (Rawls 2001, 127). Restricted utility asks some citizens (the worst off) to accept lower prospects for the sake of the good of the average citizen. Now, of course, the more advantaged are also asked to accept certain lower prospects for the sake of the worst off, even if their life prospects are rather high in absolute terms. Rawls thinks this still represents a smaller sacrifice on behalf of the better off than the one that restricted utility asks from the worst off. The better off will, due to being more likely to hold positions of authority and power, be tempted not to comply with the difference principle. Rawls thinks that this is an additional reason to limit the extent of inequality in the way the difference principle does and restricted utility fails to do. Moreover, warns Rawls, it may be that “the inequalities permitted by the difference principle are already too great for stability” (Rawls 2001, 127)”; however, they will be certainly more limited than under restricted utility, and this provides us with good reasons to opt for the difference principle.

3.5.8 The social minimum

Rawls examines the role of the social minimum itself and finds it problematic on several grounds. His most serious worry is that the strains of commitment imposed by the principle of restricted utility will be excessive. Due to its utilitarian pedigree and therefore its ultimate commitment to maximizing utility, a system applying the principle of restricted utility will pose a question like this: “With the principles of the equal liberties and of fair equality of opportunity already adopted, what is the lowest minimum necessary to assure that the strains of commitment are not excessive?” (Rawls 2001, 128) Basically, it will ask: “How low can we go before the least advantaged start defying the system?” Since it does not operate with the idea of reciprocity in the background, rooted in the idea of citizens as free and equal, it will treat the demands of the worst off as a nuisance: “Therefore its message, whether or not intended as such, is an invitation to the least-advantaged to view themselves as casualties, dependents, or mere beneficiaries rather than participants in a public world.” (Edmundson 2017, 103-104) The typical responses of the worst off to the exceeding strains of commitment will be either defiance of the system, or, even worse, complete withdrawal from the public life of a wider community. In this way, the value of community (Cohen 2009) is obstructed: people have such radically different everyday experiences that they cannot possibly see each other as equal and free, nor can they experience the reciprocity which should obtain between citizens of a political society as a system of fair cooperation. Rawls denies that this can be compensated or prevented by simply making sure that people are accorded a substantive minimum which would permit individuals to lead a decent human life. While the difference principle also specifies a social minimum, it does so in accord with the idea of reciprocity. People would rather see themselves as full members of society, even if the minimum guaranteed by the difference principle would not, or barely go, over the

provisions for satisfaction of essential human needs, than have perhaps a higher absolute minimum under the principle of restricted utility.

3.5.9 Do we have good reasons to opt for the difference principle?

Rawls concedes that the argument for justice as fairness over restricted utility is not as clear and decisive as the argument for the two principles of justice taken together, as presented in the first fundamental comparison. The former argument relies on elucidating certain desirable features of the political culture of a society governed by the difference principle, rather than on concentrating on “plain and evident considerations of greater public good” (Rawls 2001, 133).

While Rawls’s second comparison is, taken on their own, elaborate and compelling, it is not clear how its form and supporting arguments are meant to fit into the contractual device of the original position. Originally, the bulk of the Rawls’s argument hinged on his reliance on the maximin rule in deriving the difference principle. The idea was that individuals behind the veil of ignorance would not gamble with the prospects of the worst off, as their rule of thumb is to maximize the minimal outcome. As the difference principle, with its commitment to the maximization of the position of the worst off, offered a better option for them than any rival principle, it seemed rational to opt for it, even if this would mean less prosperity for the better off groups. Rawls was famously criticized for the application of the maximin decision making rule in circumstances of uncertainty, most famously by John Harsanyi (1975), who purported that this would suggest irrationally high levels of risk aversion by the parties. This is one of the reasons why Rawls is committed to separating the arguments for the adoption of the first principle of justice, in which maximin figures prominently, and those for the difference principle. The choice of the difference principle is no longer, at least principally, a matter of rational choice, but the decision making is

rather firmly grounded in a specific political conception of justice (Rawls 2001, 82n2). Rawls acknowledges the idea, defended by Jeremy Waldron (1986), that the social minimum offered by the principle of restricted utility does not need to be either absolutely unacceptable or impossible to devise in an intelligible and definite manner. Thus, since both justice as fairness and the rival mixed conception are capable of yielding a highly satisfying level of minimal provision, maximin does not apply. In order to argue for the attractiveness of the difference principle, we need additional arguments, which Rawls offers. However, these arguments depend heavily on the parties in the original position knowing the facts and adopting the reasoning as if they were already in a society which is governed by the ideals of Rawls's theory. In order to accept Rawls's line of reasoning, they already need to commit seriously to the idea of reciprocity, an idea that Rawls's theory is supposed to convince us to *ultimately* accept as the right one for a society in which free and equal people engage in social cooperation. In the initial phase of the original position, however, people should be far from having sufficient information for making such choices. At the outset, the attractiveness of the original position was to convince us that the difference principle is an attractive option even if we are not committed to any particular comprehensive understanding of society and the relationship among the citizens. The idea was that, since the choice of a principle of justice is a serious, one-time decision that will determine our entire life, we are justifiably extremely cautious and therefore trying to maximize our worst option. This was a more ambitious task, trying to appeal to the considerations of those who might not share Rawls's views on how arbitrariness of natural and social lotteries should best be tackled. Without this goal, the device of the original position seems somewhat redundant.

However, even if we accept this restated version of the original position, it is not clear that we are justified in completely abandoning the goals that were set out for the individuals. Consider the

choice of the principles: As a satisfying level of provision is guaranteed by both of the principles that individuals are considering, it seems implausible to say that people would not have good reasons to gamble and opt for the principle which would secure the higher absolute level of wealth in a society, and we have reasons to believe that the principle of restricted utility would lead to such a society. Since the provisions for the worst off are guaranteed not only by the social minimum, but, let us remind ourselves, also by the principle of fair equality of opportunity, it would seem unreasonable not to opt for a situation in which no one is doing worse than under the alternative proposal, and some are doing better. It would mean that we accept leveling down, which is thought to espouse the vice of envy, as we want others to do worse even if it will not improve our situation. I am not arguing that leveling down can never be desirable; only that at this point in the original position, its parties have no reason to willingly opt for it. Especially, since, although they do not possess the grounds for estimating probabilities, they do know that not everyone will be in the worst off group, so they have chances to secure a larger share without having to worry that they will be in a bad situation if they end up at the bottom of distribution. Why not accrue additional benefits that harm no one and at worst leave the worst off as well off as they are anyway? Since we are explicitly instructed in the settings of the original position that individuals are trying to do the best for themselves, this seem an odd choice. “The special assumption I make is that a rational individual does not suffer from envy. He is not ready to accept a loss for himself if only others have less as well.” (TJ, 124) In first stage of the original position, individuals lack knowledge and are not motivated by special psychologies, envy being one of them. Later on, the possibility of excusable envy arises, and Rawls thinks it is a suitable “reaction to the loss of self-respect in circumstances where it would be unreasonable to expect someone to feel differently...” (TJ, 468) As self-respect is one of the primary goods, this sort of complaint cannot be disregarded. Be that as it may, at this point in the argument, Rawls is explicit

about parties being self-interested and mutually disinterested – their priority is to secure the best level of advantage for themselves, without being concerned with a comparison with others.

A further problem that arises is that the reciprocity-centered interpretation of the difference principle (Wall 2012) is not committed to maximization, and does not instruct to maximize the position of the worst off. According to this interpretation, the difference principle simply sets out the conditions for justified inequality; meeting the condition that justified inequality requires an improvement of the position of the worst off does not require the prospects of the worst off to be maximized. In this situation, a society could still be quite poor in absolute terms, and it would still be considered just, because the relative positions would espouse the ideal of reciprocity. Waldron rightly asks if such low absolute levels of wealth would not also amplify strains of commitment, especially if people knew they could do better. This strikes us as implausible, “unless relative deprivation threatens social allegiance as much as abject deprivation (and Rawls's own remarks on the problem of envy suggest that he does not believe this)” (Waldron 1986, 31). It would rather seem that abject deprivation is a more serious challenge for stability, even if not the only one. And there is no guarantee that the level of minimal provision offered by the difference principle will be high, as people have no obligation to maximize, so the actual social output will depend primarily on the constellation of individual preferences, as Rawls himself notices: “The general level of wealth in a society, including the well-being of the least advantaged, depends on people’s decisions as to how to lead their lives.” (Rawls 2001, 64)

Since the difference principle, even under a maximizing interpretation, applies to the overall life prospects of a group representative, but does not safeguard against the possibility that at certain points all members of the group in question temporarily fall under the minimum, and some members even permanently fall below it, some philosophers have argued that the difference

principle should be supplemented by a guaranteed, non-comparative social minimum as a policy (Casal 2007, 323-324). Rawls himself opines that a high level of wealth is not necessary for living a good life, and it might actually impose a hindrance on living a good life in a society governed by his principles of justice (TJ, 257-258). However, as Wall cautions, unless we rely on some sort of a perfectionist explanation, it is not clear that once we have secured a sufficiently high minimum, the worst off themselves cannot complain that their position is worse than it needs to be under some alternative. It is not obvious that individuals would be committed to the view of justice as reciprocity at the expense of their gains, without already adopting it as a substantive moral view. People are committed to gains in primary goods primarily because they represent a shared basis of expectations. Material resources and wealth are among them. As the second part of the second principle of justice is supposed to specifically govern their distribution, it is not clear whether individuals would be willing, within the framework of the original position, to sacrifice their level of material wealth for the sake of other, comprehensive commitments, even if it would represent a gain in a different dimension.

3.5.10 The difference principle: a limitarian principle?

Ultimately, Rawls's grounds for accepting the difference principle instead of the principle of restricted utility are only convincing from the perspective of people who are already outside of the original position. What is intriguing is that the grounds of publicity and especially stability, have an argumentative force without relying on the grounds of reciprocity, or on the underlying commitment to consider all assets as held in common. They first and foremost give us a reason for limiting inequality based on the experiences of people who are already beyond the thick veil of ignorance. They could as well be used to convince a society which adopted the principle of

restricted utility to limit the range of permissible inequalities, once they consider the likely consequences of such inequalities on an individual and society after its members find themselves outside the original position. However, I conclude that the arguments presented by Rawls do not perform convincingly within the original position, and thus sit rather uneasily both within his conception of the original position and within his wider theory in general. The device of the original position was meant to provide a relatively independent, contractualist support for Rawls's principles of justice, but in its revamped version, it fails to do so.

CHAPTER 4: IS LUCK EGALITARIANISM COMPATIBLE WITH CONTRACTUALISM?

4.1 Rawls, moral arbitrariness and mutual advantage

In this chapter, I will examine whether contractualism can support the choice of a substantive egalitarian distributive principle. Many egalitarians believe that individuals have a *prima facie* moral claim to a certain distributive share of goods, and that this share of distributive goods is an equal one. This is why, for example, Rawls takes the benchmark of equality as his point of reference, and Dworkin takes a distribution in which everyone has an equal purchasing power for bidding for social resources as the initial point – no matter how endowed people are from the outset. Importantly, both philosophers include both internal and external assets into this benchmark of equality. If we are to move away from this benchmark of equal distribution, we need good reasons to justify such a move. I will argue that such kind of a distributive pattern in initial claims is unsupported from a contractualist perspective, and that, while contractualism certainly supports the view that individuals have some claim to resources as a matter of equal consideration, this claim does not and cannot take the shape of a specific egalitarian share prior to a consideration of the burdens and benefits it imposes. Contractualism can only support a claim for an adequate share of resources, which can be equal on occasion if the good in question demands it. Thus, even if contractualism supports egalitarianism, it does not support it via arguments that intentionally start out from the assumption of equality and then move away from it in its all-considered-principles; rather, it starts from some view of adequate share as fair share, and then considers additional reasons as to why we might still prefer moving towards a more egalitarian distribution of goods in society. There are instrumental reasons for moving towards

more equality, or at least less inequality, but these reasons are not grounded in individual distributive claims. Rather, they derive from further considerations about the impact of (large) inequalities on the individual's experience of her own worth and standing in society, and their impact on relations between people. While this sort of reasons might appear less potent to many orthodox egalitarians, as they seem to be relevantly context-dependent, they are very powerful because they correspond well with our usual experiences of the woes of very unequal societies.

In the first section, I examine the inherent dilemma in Rawls's intuitive argument for justice and conclude that his insistence on limiting the scope of justice to able-bodied and productive members of society is unsustainable, considering his professed core commitments. Moreover, it goes against our general moral beliefs and therefore has to be suspended. However, without principles of justice being constrained in such a way, many aspects of Rawls's proposed principles lose appeal, as they have implications which would be unacceptable to both able-bodied and disabled alike. In the second section, I explore whether Rawls's core luck egalitarian commitment to the neutralization of morally arbitrary inequalities has independent plausibility in delineating individual burdens and benefits, as defended in other (luck) egalitarian theories. I explore certain problems in the way luck egalitarianism determines individual claims, and conclude that their determination of claims either fails to relevantly correspond to our considered moral judgements, or, if they do, they do so only when considerably restricted in the light of more important considerations. When luck egalitarian proposals manage to meet our considerations, this is mostly in cases in which considerations of luck and responsibility play only marginal roles for determining individual claims; also, their distinctly luck egalitarian reference is overruled by other, more pertinent considerations. After exploring Dworkin's view in particular in the third section, I demonstrate that his view neither depends on his luck egalitarian

commitments, nor does it end up in a distinctly egalitarian view – as we have already concluded chapters ago, any plausible theory that would be adopted within a contractualist framework endorses individual distributive claims which are adequate for pursuing individual conceptions of a good life. This is something that equal consideration and mutual recognition between moral persons require – it does not rest on any sort of a claim of initial equal shares. Moreover, Dworkin’s hypothetical auction explicitly refers to the idea that individual claims cannot be made prior to an assessment in absolute terms of the burdens and benefits on others. In the final section of this last chapter, I argue that even if we do not have reasons to start from the assumption of equality, we might have good reasons to move towards equality. More egalitarian distributions have a certain impact on the individual and collective experience of life in society, as they have a bearing on how individuals see themselves and to what extent the relations between people are capable of displaying an appropriate attitude of equal concern and mutual recognition that individuals owe to each other. This also has a bearing on the way we see disagreement between distributive and relational egalitarians – it is about the appropriate place for the value of equality and egalitarianism within a theory of justice, rather than about the disagreement over what should be the appropriate focus of justice in general. Both distributive shares and relations are proper foci of justice, but only the latter are distinctly egalitarian. Individuals might not have a claim to a *prima facie* equal distributive share, but they do have a claim to live in a society which ensures that they treat each other as equals.

4.2 Rawls and disability

Rawls's principles of justice seem to be supported by two different conceptions of justice which ultimately rest on mutually opposing considerations: Justice as Impartiality and Justice as Mutual Advantage. Justice as Impartiality is strongly grounded in the assumption of moral arbitrariness, and as such refers to all natural and social inequalities, no matter whether they are generated within the framework of social cooperation or not. This step is polemically crucial for Rawls, because it establishes the benchmark of equality according to which we judge the subsequent distributions. It also frames the second principle of justice as an expressly egalitarian principle, which calls for the neutralization of the influence of social contingencies (fair equality of opportunity) and the application of differential awards that come from differential natural endowments in a way that benefits the worst off (difference principle). This stands in tension with the idea of justice as mutual advantage, which says that everyone must gain from inequality. This has prompted some to interpret the difference principle as a maximizing prioritarian principle of distributive justice. Rawls himself is quite ambiguous on this point and offers several different versions of the difference principle, which open space for interpretation (Wall 2012; Parfit 2000).

However, not only does such an interpretation clash with the rationale of the benchmark of equality and the explicit aims of fair equality of opportunity, it also goes against Rawls's explicit statements on the matter. As a matter of fact, Rawls thinks that the difference principle allows for suboptimal Pareto distributions in case they do not contribute to the worst off – even if they happen not to disadvantage them and if they could bring substantial gains to others. However, he argues that such situations should generally be rather rare, as there are certain empirical assumptions that should hold once the other principles are put into operation: chain-connection

and close-knitness⁴⁹. These conditions will make sure that expectations of each group, from the least to the most advantaged, do not function in a disjointed way –situations in which the prospects of any group can sharply turn down or up without influencing the prospects of the others will simply not occur. Rawls admits that these conditions might not hold, but purports that even in that case, “...those who are better off should not have a veto over the benefits available for the least favored. We are still to maximize the expectations of those most disadvantaged” (TJ, 70). Even in the case of the so-called leveling-down (a situation in which no one, including the worst off, is not better off in an absolute sense), we might say that everybody gains, because “(t)he worst off gain as much as they possibly can gain from inequality, so that they have no reasonable complaint; and the rest gain even more than the worst off, so they have no reasonable complaint” (Barry 1989, 233).⁵⁰

Now, we could say that in this interpretation, the two understandings of justice do not significantly collide. However, Rawls mentions the idea of justice as mutual advantage explicitly in his definition of society as the appropriate subject of application of his principles: “In justice as fairness society is interpreted as a cooperative venture for mutual advantage”. (TJ, 73-74) Rawls is adamant about this also in his Restatement: “Social cooperation, we assume, is always productive, and without cooperation there would be nothing produced and so nothing to

⁴⁹ The assumptions of close-knitness and chain-connection are meant to consolidate the expectations between groups. They rule out situations in which gains to one group do not at the same time impact the position of other groups; moreover, the expectations of the group move together – if we raise the expectations of the worst off group, we automatically also raise the expectations of all positions in between that and the best off group: “For example, if the greater expectations of entrepreneurs benefit the unskilled worker, they also benefit the semiskilled.” (TJ, 69-70)

⁵⁰ Now, one could complain that from the contractual point of view, people do have a valid complaint when a burden is imposed on them, although there is no comparable burden imposed on anyone else. Of course, this will also depend on the kind of burden – when it comes to exercising certain liberties, we do not think that it is a problem to limit certain freedoms for everyone. However, in that situation, we are doing it because by this limitation everyone is made better off in a very straightforward way.

distribute.” (Rawls 2001, 61) Rawls does not think that the distribution of native endowments⁵¹ should be considered as held in common simply in virtue of being undeserved by its holders; after all, libertarians such as Nozick also do not think that native endowments are deserved by the individuals who control them (ASU, 224). In the absence of a system of cooperation, there would be no particular assumption as to how the fruits of such endowments should be distributed – either equally or unequally. We do not owe an adherence to egalitarian principles of justice to people as such – the demand for a benchmark of equality kicks in only once we have engaged in cooperation. People, whether naturally well or poorly endowed, depend on others to be able to put their talents to use, and this creates a *prima facie* claim on equal share, due to differential rewards being the result of the morally arbitrary differences among persons. Thus, “the difference principle represents an agreement to regard the distribution of native endowments as a common asset and to share in the benefits of this distribution whatever it turns out to be”. (Rawls 2001, 75) We allow differential awards for people who are doing better within the basic structure, because we reward them “for training and educating their endowments, and for putting them to work so as to contribute to others' good as well as their own” (Rawls 2001, 75). Cooperative venture is thus presumably never a zero-sum game, and in this sense everyone has more than they would have on their own. Here Rawls explicitly points out that his conception of justice is the one of justice as reciprocity, which is a moral ideal “situated between impartiality, which is altruistic, on the one side and mutual advantage on the other” (Rawls 2001, 77).

Even if this apparently resolves the inner tension in the theory, it also explicitly excludes all those people who are not able to participate in the system of cooperation. That is to say, those

⁵¹ It is important to point out, as Rawls himself does, that it is the distribution of native talents that is to be considered as held in common, not the native talents themselves. Native talents are legitimately considered the ownership of people whom they are attached to, and this ownership is protected by the first principle of justice, thus guaranteeing “psychological and physical integrity of persons” (Rawls 2001, 75).

permanently disabled in a way that severely limits or inhibits their full participation are not included within the conception. It makes sense to say that those who do not participate do not have a right to equal share. The entitlement to equal share explicitly rests on the participation in the cooperative scheme, so moral arbitrariness together with cooperation jointly oblige us to the benchmark of equality and subsequent egalitarian principles. There is an even more concrete sense in which everyone is gaining by justice – no matter what, we can always count on the fact that everyone will somehow contribute to the common scheme, at least theoretically. This is why Rawls's scheme explicitly excludes people who are not productive. On its own, presumably, moral arbitrariness does not trigger the need for an equal benchmark. While we owe it to the people who are non-members of the cooperative scheme to treat them with equal consideration, they are excluded from a treatment according to the principles of justice.

Rawls acknowledges this difficulty and the need to provide an extension of justice as fairness to the cases of permanent disability, if possible (Rawls 2001, 176n59). However, for the time being, he concentrates on applying his theory on a democratic society “in which citizens conceive of themselves in a certain way. So let's add that all citizens are fully cooperating members of society over the course of a complete life. This means that everyone has sufficient intellectual powers to play a normal part in society, and no one suffers from unusual needs that are especially difficult to fulfill, for example, unusual and costly medical requirements...” (Rawls 1980, 545-546) Rawls cannot accept incorporating the disabled into his conception of justice because positive duties include zero sum relations, which are of a kind “in which whatever one party gains the other loses, so if justice mandates transfer from one to another, it cannot be mutually advantageous” (Barry 1989, 241). This, presumably, puts a strain of commitment on people, as parties cannot enter agreements that have either unacceptable consequences or to which they can adhere only

with great difficulty (TJ, 153). Parties must be able to uphold the agreement they reach “even should the worst possibilities prove to be the case” (TJ, 153). Since the claims of justice on behalf of the disabled can be very demanding, it could be the case that justice is non-reciprocal even in the weakest sense, at least with some people. Rawls, however, thinks that we can ask people to cooperate only if the terms of the scheme are reasonable. The more advantaged can consider themselves already compensated by the scheme only if they can count on the fact that others are also productive. Obviously, the difference principle will require from some people to do worse than under the presumed benchmark of equality, at last sometimes. But it will never ask from us to do worse than under the non-cooperative baseline, which the presence of non-productive people would potentially allow for. Compared to the non-cooperation baseline, we do not gain if we engage in relations with non-productive members. In a world of just two persons, there is a clear sense in which hypothetically, we can be at gain whenever we engage in cooperation with a productive person (even if the gain is marginal); while the existence of an unproductive person, towards which we have certain positive duties, can only accrue costs on us – it cannot even leave us at the level of gain of the non-cooperative baseline. While this scenario might strike us as unrealistic, Rawls needs to consider it as a counterfactual, as his proposed scenario – a world in which people have an option only between non-cooperation and cooperation with every member of society capable of cooperation (no matter how productive they actually are), on the basis of the equal share assumption – is similarly unrealistic.

One could respond that, unlike libertarian approaches, Rawls’s theory does not principally deny the existence of positive duties towards others; it just does not give them the status of principles of justice. Rawls explicitly discusses natural duties and affirms their existence, giving some examples: “(T)he duty of helping another when he is in need or jeopardy, provided that one can

do so without excessive risk or loss to oneself; the duty not to harm or injure another; and the duty not to cause unnecessary suffering.” (TJ, 98) Only the first duty mentioned is a positive duty in a full sense. One could point out that, in discussing natural duties, Rawls is primarily preoccupied with the duty of justice, the duty to “support and comply with just institutions that exist and apply to us” (TJ, 99). This is essentially pertinent to the issue of political obligation, not to the issue of what we owe to people with whom we do not and cannot cooperate. Moreover, in discussing the duty to aid, he refers primarily to the duty of *mutual* aid, which is supported by the reasoning that we stand to gain from its application on the long run, and is presumably less firm when applied to people from whom we cannot expect help. Yet, he does make a reference to a sort of society which would not uphold such a duty. Such a society would fail to show proper concern and respect for human beings in general and would therefore be a society no one would want to live in (TJ, 298). Thus, I will not discuss this further, and just assume that Rawls had in mind a genuine duty to aid to both the permanently dependent and the people in dire need.

Still, this results in two worries: First, it puts the genuine commitment to positive duties into question. Liberal egalitarians boast that, unlike libertarians, they can include positive duties into their conception of justice. Yet, it seems that simply paying lip service to the idea of positive duties and promising to accommodate them *somehow*, while excluding them from the theory of justice at the same time, fails to live up to that promise. Rawls might have envisaged his theory to apply only to a very particular case, but he is not offering a theory of justice limited to the workplace, or any other particular setting. A theory of justice applies to society, and societies normally include disability.

Even if we accept this unwarranted limitation of participants in society as subjects of the principles of justice, this leaves us with another worry. Namely, a contractual theory should be

concerned with weighing the burdens imposed on people by a particular principle. As we recall, contractualism is not meant to be applied to particular cases (although it can be very helpful in teasing out relevant considerations), but it is meant to be applied generally, in order to uncover appropriate principles of justice. Nevertheless, the burden of caring for the disabled cannot be considered a special case; it is a permanent feature of our societies. While the first principle of justice leaves considerable space for the pursuit of personal projects, the “project” of caring for the disabled is often costly and time-consuming. While general positive duties to the disabled might be fulfilled by some limited financial aid on behalf of the society, most of the care would be left to their immediate family, who also have their own obligations as cooperative members of the society. Our duty to contribute to the cooperative scheme might be severely curtailed by our caregiving responsibilities, which can be counted, within a theory of justice, as burdens on exercising liberty at best. It seems unfair that either provisions for the disabled or the alleviation of burdens of their caregivers should be left out of the realm of justice. A theory that puts considerable emphasis on moral arbitrariness of unchosen circumstances of birth cannot in good conscience take a competing consideration (mutual advantage) that goes against its core as a way to plausibly limit its scope. Leaving out the people who are left most vulnerable by the arbitrariness of natural and social lotteries undermines the very idea that such arbitrariness should represent a strong moral reason.

Even if we would find a way to incorporate these burdens, the inadequacy of the general theory in dealing with the issue still persists. One must say that the emphatic force of the statement of morally arbitrary inequalities loses much of its force once it excludes those who do not participate, as this represents yet another morally arbitrary fact. How is it the fault of the disabled that they are not capable, at least not equally, of participating in the cooperative scheme?

Ordinarily, we would tend to think of congenital disability as a paradigmatic case of arbitrary inequality. The two demands, moral arbitrariness of distribution of natural endowments on the one hand and social cooperation on the other hand, that were jointly meant to bring us to a principle of distributive justice, simply do not sit well together.

However, someone who is convinced by justice as impartiality could simply suggest that we ditch the mutual advantage conception and expand the principles to everyone. Why would we not simply say that the equal status of persons makes them *prima facie* equally deserving of nature's bounties, both the internal and the external kind? There is nothing that obliges us to accept Rawls's terms. Simply said: "Egalitarians generally believe that it is bad for some to be worse off than others through no fault or choice of their own." (Temkin 2003, 767) This does not mean that all inequalities are bad, but only the ones that one did not deserve – and none of us deserved our social and natural endowments. Thus, only inequalities generated by a person's choice are the ones that are not perceived as unfair. Ideally, only pure difference in effort is what should make a difference. Thus, for example, Rawls's fair equality of opportunity does not tell us how people will end up doing compared to one another, but rather that people with same natural talent and the same level of ambition (which is, presumably, an element of choice) should have equal chances for attaining the same position. Therefore, Rawls's theory itself, once it is expunged of the contractarian commitments, is generally committed to mitigating the effects of morally arbitrary inequalities. The two parts of the second principle of justice, fair equality of opportunity and the difference principle, directly tackle two major sources of inequality: social and natural contingencies, respectively (Clayton 2001; Miklosi 2010). I believe there are two reasons for this unequal treatment of different sources of inequality. First, unlike social inequalities, natural inequalities are more difficult to tackle directly. We cannot make sure that everyone has an equal

opportunity to become a successful athlete, as this is largely determined by natural predispositions that we are unable to significantly influence; however, what we can tackle to a greater extent is the equal access to means necessary for exercising one's talent, which are largely socially determined. Second, since such social inequalities are largely socially created, they are something we have both more influence over and more responsibility for. Even if we could benefit the worst off by allowing greater inequality in opportunities for gaining social positions, this would be harder to justify than differential effects of natural inequalities, which would to some extent, exist independently of the social system in place. Even if no social order of any kind would be in place, natural inequalities would presumably make more naturally endowed people reach the top of the hierarchy anyway; they would be more productive, thus increasing the social "pie" in many respects, even when mechanisms of transfer are not available. This increased productivity is not necessarily bad for society, as long as it is appropriately utilized for the benefit of all, and especially the worst off. Thus, we pursue the goal of a neutralization of the effects of the natural and social lottery, within the limits that were given to us by other values and constraints, such as liberty and efficiency.

We can continue building on this idea and see how this less restricted egalitarianism works within contractualism. While some have proposed to expand Rawls's theory from his initially constrained conception of a single, closed society to the global order, an expansion in the direction of an inclusion of non-productive people has proven to be more difficult (Brighouse 2001).

4.3 Do the principles of justice work without mutual advantage?

After we have ditched the assumption of mutual advantage and included persons with disabilities⁵², the application of Rawls's principles leads to certain problems. Before proceeding, however, it is necessary to clarify what we mean by "disability". Brighthouse defines it as "a chronic departure from normal human functioning, with its source in some medical or biological problem" (Brighthouse 2001, 539). For the purposes of his paper, the same author focuses on disabilities that are clearly naturally caused, such as certain genetic conditions. This way, he eschews the question of responsibility for the disability, which could influence the view on who should bear the costs. The above-mentioned definition seems to rely on the so-called medical model of disability, which primarily focuses on impairment in itself as the main source of limitations for the disabled, as opposed to focusing on social practices of exclusion as the source. There is no need to commit to any of these views here, as the most plausible models, as well as the definitions of international and governmental bodies, take both of the aspects into account. They understand disability as a "physical or mental characteristic labeled or perceived as an impairment or dysfunction" (Putnam 2019), thereby distinguishing it from other unchosen traits such as sex or race, which are often the subject of discrimination in society. Brighthouse also excludes from his consideration people who do not have a sufficient level of mental capacity to develop two moral powers: the capacity for a sense of justice and the capacity for a conception of the good. As I am interested in examining the implications of the revamped Rawlsian theory, stripped off its condition of cooperation, within a contractualist framework, it is not necessary to impose such limitations. Scanlon himself introduces the idea of trusteeship over humans who

⁵² Disabled need not, and often are not, unproductive members of society. However, they usually need more resources and accommodation to be able to get an appropriate education and to perform their work tasks. There are also disabilities that completely prevent people from participating in social production. While the disabled indeed represent such a diverse group, I here simply assume that disabled in general require extra resources, compared to the majority of others in society. Thus, satisfying the condition of moving them towards the benchmark of equality will, presumably, require significantly more resources.

themselves lack the capacity to hold judgement-sensitive attitudes. “The mere fact that a being is ‘of human born’ provides a strong reason for according it the same status as other humans.” (Scanlon 1998, 185) Trustees must reason in a counterfactual manner over what their beneficiaries would reasonably reject if they were able to reflect on an issue on their own. Therefore, contractualism is able to accommodate even people that lack “moral powers”.

The main issue with the introduction of the disabled into the contractual situation of Rawls’s theory is that the conditions of close-knitness and chain connection definitely cannot be presumed to hold anymore. Even if we have granted these assumptions as valid in the standard case, there they are limited to cooperating people within the “normal range”, who have much in common in terms of needs, expectations and positions they compete for. In such cases, situations in which expectations of the worst off stay the same, while those of better off rise, are not realistic, argues Rawls. The individuals who belong to the least advantaged group are not identifiable apart from, or independently of, their income and wealth: “Rather, the worst off under any scheme of cooperation are simply the individuals who are worst off under that particular scheme. They may not be those worst off in another.” (Rawls 2001, 59n26) This is obviously not the case with the severely disabled, who can expect to be among the worst off in any imaginable alternative distribution. Positions of the worst and better off, and all positions in between, are partly interchangeable in the standard case because the people in question are so similar.

Thus, it is no longer true that we cannot improve the position of the worst off while in the same time not improving the position of all the groups above, or vice versa. We could imagine plenty of things that could be provided to the severely disabled that are of no interest for the able-bodied. In such situation, once we try to maximize the prospects of the worst off, what might happen is that “the justice of large increases or decreases in the expectations of the more

advantaged may depend upon small changes in the prospects of those worst off” (TJ, 136). Therefore, it could be the case that great losses need to be imposed on the better off for the sake of the tiniest benefit to the worst off; and the opposite: it might be that large inequalities are justified by only marginal benefits to the worst off. Both outcomes strike us as implausible. It does not seem to be a sufficient justification to tell the disabled that they should be satisfied with whatever they get, even if their gains, especially since they already are in a particularly destitute situation already, are minimal. As we have seen, Rawls says that when such conditions do not obtain, the better off should still favor the maximization of the position of the worst off. However, it does not seem fair to impose a sort of dictatorship of the worst off on others either. As Brighthouse points out, “(a)nything less than maximization of her level of physical functioning will leave the continually disabled person with the complaint that she is being denied an available increment of functioning just for the sake of some level of material enjoyment of people who function better and enjoy more material well-being” (Brighthouse 2001, 555).

Even if we would bite the bullet and accept that the worst off deserve tremendous amounts of resources, there are reasons to think that such a solution would be equally unappealing to the disabled as well. There is an additional worry – leveling down, allowed by the difference principle, might contribute to lower absolute levels of provision for everyone, and the disabled would probably be the ones particularly harshly hit by this. The worst off are also rational and care about their absolute level of primary social goods. At some point, Rawls mentions that achievement of great wealth is not only unnecessary in a society – it might represent a positive hindrance to achieving the value of meaningful work with others (TJ, 257-258). Therefore, a just society might be relatively poor, as long as it provides reasonable circumstances so that citizens can develop their moral powers. However, unlike Rawls’s happy workers, many of the disabled

could not expect to be compensated by the value of meaningful work, and among them, those who could, would need considerable resources to be included in the job market. Here one could argue that, as disability is not only a matter of natural but also of social disadvantage, the principle of fair equality of opportunity, if appropriately adjusted, could serve as a guideline. However, the principle of fair equality of opportunity only says that those with the same level of talent and ambition should have the same prospects of success. Thus, the worst off person in terms of talents in a society will have no legitimate claim for attention being given to the development of his native talent, as the demands of the principle will be automatically fulfilled in his case – he would be doing as well as anyone else on his level. Since the principle makes no proper reference to the guaranteed absolute level, it will do little to provide benefits and alleviate burdens of the worst off, even if it is a distinctly egalitarian principle. While fair chances might be equal chances, we ordinarily think they should also be good chances.

Brighthouse considers several solutions for the problem, all of them making reference to replacing the benchmark of equality with that one of sufficiency, at least when it comes to principles specifically applying to the disabled. It could simply be the case that objective circumstances limit the application of a principle in the special case of the disabled – the disabled are owed an adequate or acceptable level of resources. This adequate level would function similarly to the principle of just savings for future generations, which places limits on how much can be put aside for the sake of future generations, or in this case, the disabled. While we owe it to future generations to save enough to maintain the institutions of a basic structure, we do not owe them as much as is demanded by the difference principle. In the same way, we would continue applying the difference principle to the able-bodied, and constrain the demands of the disabled by some reference to a sufficiency baseline. Brighthouse finds both solutions questionable, for obvious

reasons. They both make a fundamental difference between the disabled and the able-bodied which cannot be justified on any grounds (unlike the differential treatment of future generations), making us draw arbitrary distinctions between the two groups. Moreover, both solutions urge us to treat the demands of the disabled as the ones of the lesser concern, as compared to the demands of those who are simply untalented. As we have a tendency to see disability as the “paradigm example of unchosen disadvantage” (Putnam et al. 2019), this move seems unjustified. Why would those clearly more disadvantaged by nature receive less than people on whom the influence of natural abilities is far less obvious? Considerations of moral arbitrariness alone would urge us rather to think that the “issues raised by incapacity and disease are clear and central” (Barry 1989, 244), while the questions of talent distribution are much more obscure. Another point to consider in the assessment of burdens is certainly the need for revising the metric of justice, which tells us along which dimension people should be equal – resources, welfare or capabilities, for example. While this might not require the abandonment of social primary goods as a metric, this metric would certainly need to be expanded and supplemented by a richer understanding of human needs, one that goes beyond standard considerations. Devising a richer conception of primary goods might in itself be more demanding, as it will probably make reference to concrete provisions by others for people who are poor converters of resources into functionings.

If we take the moral arbitrariness of undeserved traits as morally authoritative, it simply makes no sense to make such a sharp cut in the continuum between disability and lack of talent, both being equally undeserved. It would rather make sense to apply the standard of adequate or sufficient provision to everyone, the disabled, abled and future generations alike. The plausibility

of the equality benchmark for an assessment of distributions is put into question, and we might consider replacing it altogether with a benchmark of some sort of sufficiency or adequacy.

It is thus difficult to see how Rawls's own position could be modified to appropriately accommodate a wider range of contract parties, without making distinctions which seem question-begging in their own terms. However, Rawls's theory is certainly not the only one which takes considerations of moral arbitrariness of natural and social inequalities as the starting point of its thinking. The rich body of work which stems from such considerations, often collectively designated as luck or responsibility-catering egalitarianism, offers a wide range of answers to the challenges presented above.

4.4 Luck, choice and equality

Rawls's views on moral arbitrariness inspired the large body of egalitarian theories commonly known as "luck egalitarianism" (Anderson 1999) or "responsibility-catering egalitarianism" (Blake and Risse 2008; Armitage 2005). Some of the most influential egalitarians subscribe to this view, which holds that people should not fare worse than others through no fault or choice of their own. Under such view, we should not strive for making people equally well off as a matter of outcome; some resulting inequalities are not problematic at all, as long as the process through which the state of affairs was produced is morally unproblematic. Such process is not problematic as long as inequalities are a product of choice, and choice is properly exercised when there is no undue influence of morally arbitrary factors: all the unchosen circumstances of our life, such as our natural abilities, or the social class in which we were born. Restated in contractualist terms, it follows, people have a valid complaint from the standpoint of equality when they have fewer options than others to pursue their conception of the good life due to factors that are beyond the

exercise of their responsible agency. In terms of distribution, such a view would hold that individuals have a *prima facie* claim to a certain share of some relevant goods, and that these shares are equal, whatever we think is the appropriate expression of such goods relevant for individuals – primary goods, resources, welfare or capabilities.

Egalitarianism has been often criticized by conservative and libertarian opponents for catering to the lazy and irresponsible. Why would a person who is reckless or idle get the same reward as the one who is prudent and industrious? However, by incorporating considerations of luck and responsibility, egalitarians do not need to commit to finding each and every inequality problematic. The goal of luck egalitarianism is not to ultimately establish equal distribution – just any distribution that is improperly influenced by luck is unfair. “Egalitarians... object to all and only those inequalities that do not appropriately affect choice.” (Cohen 2006, 439) Thus, fair equality and fair inequality are both possible, and the goal to be achieved is not equality, but neutralization of luck. Equality is just the default position and is guaranteed only *ex ante*. By incorporating considerations of luck and responsibility into a theory of distributive justice, luck egalitarians believe they offer the best explanation for our considered moral judgements, such as the one above, that people should be accountable for their responsible choices. “The argument for equal opportunity rather than straight equality is simply that it is morally fitting to hold individuals responsible for the foreseeable consequences of their voluntary choices.” (Arneson 1989, 88)

By extension, suffering bad luck is not always problematic: if the bad luck is the result of so-called option luck, which stems from “how deliberate and calculated gambles turn out—whether someone gains or losses through accepting an isolated risk he or she should have anticipated and might have declined” (Dworkin 2000, 73), then the resulting inequalities do not necessarily need

to be rectified from the point of view of justice (although they might for other reasons). On the other hand, inequalities that are the result of circumstances beyond our control should be rectified. This is what Dworkin refers to as brute luck: “a matter of how risks fall out that are not in that sense deliberate gambles.” (Dworkin 2000, 73) Luck egalitarians see this as the virtue of their approach, as it dodges conservative and libertarian criticism that the application of straight equality awards and incentivizes the lazy, while penalizing the hardworking and ambitious. As Cohen aptly notes: “Dworkin has, in effect, performed for egalitarianism the considerable service of incorporating within it the most powerful idea in the arsenal of the anti-egalitarian right: the idea of choice and responsibility.” (Cohen 1989, 933)

The luck neutralization agenda is apparent in the writings of notable egalitarians such as Rawls and Cohen: “Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors (i.e., natural talent, social position and chance) so arbitrary from a moral point of view.” (TJ, 63, insertion mine) And: “For anyone who thinks that initial advantage and inherent capacity are unjust distributors thinks so because he believes that they make a person’s fate depend too much on sheer luck.” (Cohen 1989, 932) Of course, the crucial question is: When is a distribution of such kind that it nullifies the effects of brute luck? A complete neutralization of brute luck is impossible, and the passages above suggest that egalitarians do not need to be committed to complete neutralization of the effects of luck, but simply argue that we should do as much as we can to mitigate the effects of the factors beyond individual control. Luck egalitarians disagree on how exactly this is to be achieved – while some are committed to the neutralization of brute bad luck, other believe that justice requires equality of initial prospects (Vallentyne 2002); however, the commitment of both

of these solutions is approximating a benchmark of equality in which the operating factor will be personal choice and effort, not morally arbitrary circumstances.

4.4.1 Contractualism and choice

From the contractualist point of view, in order to take a certain value in consideration, we need to show that someone cares about it – it cannot be merely relevant from the point of view of universe. The value of neutralizing luck could not be properly recognized if it was merely a consideration of appraising a certain state of affairs as bad, even if it is not bad for some particular person. Therefore, in order to figure out which aspects of brute luck individuals would want to neutralize, we have to consider in what way having a choice matters to them. This points us towards an answer as to when luck improperly influences distributions.

Presumably, distribution is excessively influenced by luck when we cannot hold individuals responsible for their choices, because the choice was not *genuine* – too many factors were outside of the person's control. We see a person's choice as being attributable to them only if it was made against a certain background which makes the person's choice relevantly independent of such factors. Generally, we do not think that people should simply bear with the consequences of their actions if their choice was very limited due to being seriously curtailed by natural or social factors. There are plenty of reasons that can curtail the span of our choice – everything that we ordinarily consider to be “bad luck”: congenital conditions, disease, accidents, the kind of family in which we were born, its socioeconomic status etc. As moral persons, capable of forming and revising their conceptions of the good, represent the main focus of contractualism, the possibility of a meaningful exercise of choice will be of paramount importance. This is why, as we have already concluded, any reasonable principle adopted in a contractual setting will necessarily

make a provision for these conditions. Therefore, in his argument from the original position, Rawls takes the comparison between the Difference Principle and the requirement of a guaranteed social minimum as the benchmark of the performance of the Difference principle – since *any* reasonable theory will offer some sort of a minimal guarantee, Rawls seeks to demonstrate that individuals in the original position have reasons to adopt a more egalitarian principle. Since we cannot enjoy our freedoms to any meaningful extent without certain means that will make sure we can implement our plans, any plausible contractual theory must bestow on individuals a claim to a distributive share of resources. This is why libertarianism represents an unattractive view – it leaves the conditions for individual choice, and subsequently individual life prospects, completely determined by morally arbitrary factors beyond anyone’s control.

Further, any plausible conception should take into account that some individuals need different amounts of goods and aid in order to meet this minimum, as they might be, for example, poor converters of inputs into things and states that represent a requisite for pursuing one’s goals. In order to offer them equal consideration, we would need to acknowledge their need for a higher amount of resources and aid. Since we have expanded the conception to include the disabled and other sorts of dependent persons, this is something that needs to be properly considered – not only because such people will often require more goods, but also because they will require active engagement of others in order to be able to live according to their conception of the good. This is why, as we have shown above, a plausible theory will assume that people have positive duties towards others. While we have a special interest and responsibility for our own project, we realize and appropriately acknowledge the objective importance of others doing the same.

Hence, in order to give equal consideration to individuals, any plausible theory would take these two factors into account. However, the question is whether contractualism calls for a distinctly

egalitarian distributions of relevant goods. That is to say, would such a division, and on what grounds, be accepted by the contracting parties? Thus, contrasting egalitarianism with libertarianism and other “unreasonable” theories by appealing to the general idea that it is bad that people suffer certain conditions they could and cannot do anything about, such as different forms of disability, is insufficient to establish the plausibility of egalitarianism. This is something that should arguably be the basis of any reasonable theory.

4.4.2 The benchmark of initial equality

Egalitarians do not simply hold that we should limit the influence of luck to some acceptable level, or make sure that people have adequate conditions for exercise of choice. They think that, ideally, such influences of luck should be completely neutralized, irrespective of the absolute level on which individuals are situated. If two individuals have both reached a high absolute level of opportunity, it is still unfair if one of them would have fewer opportunities through no fault of his own. Thus, egalitarians show an essential interest in how people are faring *relatively* to each other – this interest is not extirpated once individuals reach a certain adequate level.

Since choices are genuine only when uninfluenced by brute luck, *the benchmark of initial equality* is derived, which essentially represents pure individual choice, unencumbered by natural and social contingencies. This establishes equality as an ideal that plays an independent role – we need a justification when we deviate from equality, instead of offering reasons to move towards it. Thus, for luck egalitarianism, effects of brute luck represent an independent ground for complaint: “luck... is benefit and burden in disaccord with choice”. (Cohen 2006, 441)

Of course, there are several reasons why this benchmark becomes unattainable as soon as it is set: first of all, once people start exercising choice, we will move away from equality, as people will put disproportionate amounts of effort, have different levels of ambition, and some of their gambles will turn out for the better or for the worse. So even if it would be possible to control for morally arbitrary factors, we could assume that this would result in inequality over time. However, this sort of inequality would not be problematic.

4.4.3 Inseparability of endowments and effort

The other, more important, reason why the benchmark is merely hypothetical is the problem of separation of natural endowments and talents from effort and ambition. As Dworkin points out, this is not only a matter of possessing an adequate knowledge of people's personality and how much "native talent" the person possesses, as talents are "nurtured and developed, not discovered full-blown, and people choose which talents to develop..." (Dworkin 2000, 91). While there are certain physical and psychological predispositions which contribute to a talent, talents are both significantly shaped by the effort and the choice of an individual, and, very importantly, by the demand of society which often signals to us which talents we should develop. This in turn makes our talents feed back into the production of social assets. This is what Nozick has in mind when he says that endowments "come into the world already attached to people having entitlements over them" (ASU, 160). Just prior to this, Nozick notices how theories of distributive justice have a tendency to treat "production and distribution as two separate and independent issues." (ibid.) While Nozick is trying to make a thoroughly different point, his observation is apt. While being attached to resources does not mean that we are entitled to the full gain from them, as Nozick would suggest, it becomes a very important fact in assessing individual burdens, as the fact of

embodiment both ties talent to a person's choice and to a person's actual work. This in turn has a significant impact on shaping a person's burdens – it does not seem plausible any more that we should be compensated for our brute bad luck, independently of what others might have to sacrifice for that sake. One could ask whether it would be simply possible to allow those who are poor in internal resources, or powers, to catch up with others through transfers that would compensate them, up to the point in which they will be in an equal starting position with others (Dworkin 2000, 79). As in one of our aforementioned readings of the Difference Principle, this would require the transfer of basically all available resources to the handicapped, and in this case without any hope of reaching any point of compensation which would count as “equalization”; so there would be no upper limit to compensation. This would leave the able-bodied without any resources, which is plainly unacceptable.

But even if the able-bodied for whatever reasons required no resources, any plausible solution would need to take into account the issues of production in order to respond to the issues of distribution. This becomes even more pertinent when we take into account that caring for dependents involves not only an allocation of significant resources, but also actual care. Situations of dependency are those in which positive duties come to the fore the most. In such situations, the emphasis is not necessarily on the availability of resources, because the dependent in question might be relatively poor converter of resources into means of sustaining themselves, let alone having a decent life. Rather, the emphasis is on the care and actual work that a caregiver should provide for such a dependent. Since most of the times, members of the society do not have direct contact with those who they owe positive duties of care but with whom they are not personally related, we often have the tendency to think of provision of care only in monetary

terms. However, even these indirect inputs are produced by someone. This consideration invites us to reconsider the way we think about costs that one person's claim imposes on others.

The way in which a focus on distribution has the tendency to mask the burden of work involved in provision of goods and services of all sorts can be well illustrated by an example offered by Michael Otsuka (2003). He describes an artificial society consisting of only two persons, which have no resources available and are in danger of freezing to death unless clothed. The only available material for weaving any sort of a garment is what their own bodies can offer – their hair. Alas, only one of them is hirsute and capable of weaving, while the other one is bald and cannot provide himself with clothes. According to Otsuka, the hirsute would prefer if he could weave only one set of clothing for himself, but an imaginary third party, “the state”, imposes a 50 percent income tax on the hirsute, which means he needs to give half of everything he weaves to the bald. The hirsute has one option – not to weave at all, but this is not a viable option because he will freeze to death unless he weaves. Therefore, effectively, the hirsute would be forced to spend half of his time working for the sake of the bald. “There is a clear sense in which this tax forces the weaver to work for the sake of the non-weaver.” (Otsuka 2003, 18)

However, most of the time taxation does not force us to work under the threat of freezing to death. Most of us would think that the hirsute definitely has certain duties towards the bald, despite him having to onerously work and use his own body parts as material. However, what is unclear in such a case is whether, after weaving a sufficient amount of clothing items for the bald, the hirsute can continue weaving in order to expand his wardrobe beyond necessity. Otsuka thinks that in this case the objection to further taxation might be justifiable, especially if the tax effectively demands from the hirsute to provide a wardrobe as good as his own to the bald. However, Otsuka thinks that, once worldly resources come into play, intuitions might

significantly change. He tries to explore the connection between self-ownership and the libertarian claim that distributive taxation is on par with forced labor, and this is why the weaver uses his own hair. However, even if we flout this wildly fantastic assumption, the weaver's labor is still a considerable burden to consider when determining reasonable claims of the parties. Refusing to provide a sufficient aid to the bald would also constitute an unreasonable move on behalf of the hirsute. Presumably, both sides have a desire to justify themselves to each other and are mutually respectful of their burdens, therefore pressing reasonable claims. Therefore, the bald might consider pressing an egalitarian distributive principle on the hirsute as unreasonable, as the hirsute has his own life to live. A focus on distribution sometimes masks this. As Elizabeth Anderson puts it: "Justice demands that the claims that people are entitled to make on others should be sensitive not only to the benefits expected on the part of the claimants but to the burdens these claims place on others." (Anderson 1999, 294)

Scanlon addresses the issue of entitlements directly, and rejects the view that presupposes that the framework of entitlements does not exist. We cannot examine the implications of the principles by focusing only "on macro issues of just institutional design, because this will explain how particular entitlements are generated..." (Brink 1993, 253). Instead, argues Scanlon, "how a person is doing in terms of measures of welfare is not a sufficient consideration – in order to understand what a principle entails, we need to presuppose the framework of entitlements." (Scanlon 1998, 213) This does not mean that we need to acknowledge entitlements in the sense that libertarians do – there is no such entitlement that would create the so-called "threshold of reasonable rejection" (Scanlon 1998, 216) – there is no cost so great that it would automatically generate a case for rejection, irrespective of what other people's complaints are. For example, we could not accept a principle saying that we can do whatever we need to in order to avoid death.

Yet, we need to keep some entitlements fixed when assessing the principle. There is no complaint, not even of the worst off, which can simply dismiss other complaints just because no one else is doing worse than them. Thus, in the example of the hirsute and bald, we cannot simply dismiss the hirsute's complaint because a) his hirsuteness is undeserved and b) the bald is doing worse than him. We need to take into account the fact that the hirsute produces for both, and this is a burden on him. A rejection to give this fact a proper consideration on behalf of the bald would mean that she does not recognize the hirsute as more than a repository of his natural endowments. While each person's place in the hierarchy of distributional rewards neither results from a sheer matter of effort nor from sheer talent, distributions do not come into being out of thin air either.

4.4.4 Problems with benchmark of equality

Therefore, it would seem that the luck egalitarian assumption of initial distribution already presupposes how relevant burdens and benefits should be distributed equally, prior to an assessment of individual burdens and benefits in any meaningful way. The ideal starting point of luck egalitarianism consists in noumenal selves which exercise pure effort. This could raise the worry that luck egalitarianism uses the notion of "bare persons" in devising principles, assuming that contractual parties have an interest in claiming an equal share prior to having interests of moral persons, who decide on how goods should be distributed in the light of their own burdens and benefits, as well as those of others. From the perspective of contractualism, prior to looking at burdens and benefits, there is no ground for any particular distributive pattern of claims besides that "individuals are owed their fair share". In contractualism, it is impossible to come to "correct" distributive patterns prior to assessing individual burdens and benefits. Therefore, we

might talk about equal shares as the ones that are owed to individuals when we treat them *as equals*, but this is different from the initial egalitarian claim, which needs to be revised in light of the latest considerations.

4.5 What are fair circumstances of genuine choice?

If we leave aside the potential problematic genesis of the benchmark of equality and focus on the idea that the goal of luck neutralization might be reached only imperfectly, there are further reasons why contracting parties might find egalitarian principles which seek to neutralize luck unappealing. Namely, such principles refer only to relative levels of advantage; but we have no idea what kind of options would be accorded to us by following the luck neutralization aim. As luck neutralization can support both fair equalities and fair inequalities, such distribution could end up leaving us with rather bad options, with no absolute level of advantage guaranteed. Having equal opportunities might not mean much if these opportunities are not good or severely limited. So, if a distribution stemming from the aim of luck neutralization would result in bad options, why would we have a reason to accept it? Why would we care about luck neutralization? The problem is that there is a certain equivocation in what constitutes circumstances in which the options are good enough to be considered conducive for personal responsibility. For example, people might care about a distribution offering them a higher level of absolute opportunity for exercising choice, rather than making sure that these options are relevantly immune to luck. It is not clear that, as Cohen claims, “effects of genuine choice contrast with brute luck” (Cohen 1989, 931) or at least, that this is the only relevant thing that genuine choice contrasts with. Therefore, some (in)equalities might be acceptable, even if they cannot be traced back to individual responsibility. For example, we might think that people have a genuine choice when they have a

valuable set of options and are under no duress. This is the issue that Serena Olsaretti raises with regard to the libertarian principle of self-ownership: in order to figure as a plausible principle which actually coheres with our intuitions, it would have to make a reference to the notion of “voluntariness or freedom as a quality of our choices” (Olsaretti 2013, 48), and not merely rely on an intuitive understanding that cannot take us far beyond the non-aggression principle. Olsaretti defines an action or a choice as “non-voluntary, or forced... if and only if it is done because there is no acceptable alternative to it, where the standard of acceptability is an objective one” (Olsaretti 2004, 119).

Thus, in order to be plausible, an acceptable principle should refer to some guaranteed absolute level of opportunities for good choice, not only to a relative one. On its own, a luck egalitarian principle cannot guarantee it, as making sure that the effects of luck are neutralized and securing the conditions for good choice do not need to overlap, but might even conflict. In fact, one of the main objections that critics of luck egalitarianism mount against it is the fact that the principle alone has several implausible implications: abandoning victims who caused their own accidents through negligence and recklessness, or letting people who squander their share of goods live in squalor and utter dependence on charity of others, or even abandoning the prudent who simply end up doing poorly through foreseen but extremely unlikely circumstances, which she thus failed to properly insure against (Anderson 1999). While it is true that sometimes only equal opportunities are good opportunities, as in the case of certain positional goods, this is most of the time not the case. Considering possible adverse consequences of luck egalitarian assumptions, it is not clear that considerations of luck and responsibility play a great role in determining fair shares that individuals should be accorded. Through workings of bad option luck, people might end up in a situation in which their further ability to exercise choice is severely curtailed in the

name of justice, and this would seem unacceptable to us, as people should be able to both pursue and revise their conceptions of the good. In this respect, the goal of luck neutralization seems disrespectful towards personhood.

4.6 Dworkin's equality of resources and his hypothetical insurance

When it comes to the issue of separation of talent and effort and the individuals burdens and benefits associated with the production of goods, it would seem that one of the most plausible versions of luck egalitarianism, the one by Ronald Dworkin, responds to it in a plausible manner. Dworkin, while being committed to the idea that the distribution of resources should be endowment insensitive and ambition sensitive, recognizes that some sort of a market is a necessary part of a plausible theory of equality of resources. Here, it is not so important whether a market can function in this way, or whether markets are justified in general – what matters is what the market in itself represents as a mechanism in Dworkin's theory. The market expresses the value that resources assigned to individuals have for others, which is an important consideration in devising any distribution. Individuals cannot simply press claims based on their individual tastes and preferences without taking into account what sort of burdens their claim imposes on others.

There are infinite ways in which we could equally divide initial resources, but they are all arbitrary, as they are not sensitive to people's choices. Thus, a market in which each individual would participate in equal standing (by having the same purchasing power) needs to be recreated in which people would bid for various bundles of resources until no one would prefer someone else's bundle over another one's, thus making the distribution envy-free. In this way, the auction is fair, because people have initially equal prospects, and because the prices reflect the

opportunity costs of other people. This is an important point, because it reflects how people cannot simply press claims against others without reflecting on the price of the goods in question for those other people. As Dworkin says: “The auction proposes what the envy test in fact assumes, that the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others.” (Dworkin 2000, 70) Thus, although starting from the benchmark of equality, Dworkin’s proposal is sensitive to burdens of other people when fixing the individual claims on a share of resources.

However, as individuals have different internal resources, or powers, this solution could not stand on its own. It has to be supplemented by a hypothetical insurance market in which individuals would insure against brute luck, first and foremost against disability, and then also against the possibility of ending up with a lowly marketable talent. Thus, the question is what level of coverage for these two eventualities people would buy, considering they have equal resources at hand, and no knowledge of what exactly their condition will be – everyone has an equal antecedent risk of ending up disabled or untalented, and knows the distribution of disabilities in society. The question is, then, what portion of resources an average person would be willing to spend on insurance against such eventualities. Since in reality, there is no equal prior division of resources, individuals would pay premiums from their expected future earnings, which they have no way of predicting. Under these conditions, everyone would presumably buy the same level of coverage.

In this way, the disabled will have more resources at their disposal than the others, “but the extent of their extra resources will be fixed by the market decisions that people would supposedly have made if circumstances had been more equal than they are” (Dworkin 2000, 78) In this way, even the insurance against brute bad luck is sensitive to other people’s preferences and does not

require from us to limitlessly dump resources on the disabled. While it might be true that some people will still end up doing badly through no fault of their own, perhaps by experiencing an accident that no one would prudently choose to insure against, the insurance would still be of worth overall, because the resources not invested to insure against each and every possibility would leave the person with more resources to pursue their ends and consequently have more choice.

While people would buy a decent coverage for disability, they would opt for a relatively modest level of insurance against the poorly marketable talents and, effectively, underemployment. From the procedural point of view, it would be imprudent to buy a high level of coverage, because the high level of coverage would require an exorbitantly high premium, too, for returns for few people. The people who end up having marketable talents would end up working very hard in order to gain very little, just to cover the premium. This would leave them little resources or leisure for pursuing their choice. While this in practice would mean that the envy test will not be perfectly satisfied, since some of those who are doing worse than others through no fault of their own will remain undercompensated, we need to acknowledge that once we take into account the constraints in distribution of internal endowments, the goal of endowment insensitivity and ambition sensitivity pull in opposite directions (Dworkin 2000, 89). While we might be committed to endowment insensitivity, we are also committed to ambition and choice sensitivity – they are parts of the same ideal. It would be wrong to err on the side of endowment insensitivity, because this would leave the option that we have introduced unjust equality.

An unfavorably talented individual could still press the objection against this relatively low level of coverage: how could it be fair that this coverage is so modest, when there are people earning very high sums, such as movie stars? If he had the requisite talent, the individual could say, he

would be as willing to work hard as the movie star. Dworkin here reminds the individual of the need to balance endowment insensitivity and ambition sensitivity. Moreover, he asks the individual to ask himself if he would support a large scale redistribution of market incentives if he properly considered its effects. Namely, meddling with the movie stars' rewards will also influence others, "including those who for one reason or another, including their preferences for work, leisure, and consumption, will have less" (Dworkin 2000, 105). For example, the film industry would not flourish as much, and as a consequence, people might get a product subpar to the one they were initially expecting; or some people might not find jobs in film industry, which might employ many of the moderately to low talented people who are perfectly happy with their job (Van der Veen 2002, 64). Dworkin basically invokes other people's burdens and benefits, which we should consider before pressing our claim. He adds that if there is a different, better arrangement possible, then the complaining individual should offer "some argument in favor of the change he recommends which is independent of his own relative position" (Dworkin 2000, 106). This might strike us as odd of a response, because from the point of view of *justice*, the untalented individual is pressing a valid claim based on his relative position: not only is there a possibility that he is faring worse than others through no fault of his own, but there was never even a serious attempt to mitigate the effects of his brute luck to a considerable extent. Thus, the individual could reply that, considering that we are committed to endowment insensitivity, large differential awards should not be allowed, as long as there is a reasonable option to increase the level of minimal insurance for those doing poorly on the job market. This is especially the case since the actual losses on behalf of the others, who are not movie stars, might be insignificant compared to the losses on the untalented. Why would those doing better not adjust their preferences, in the light of the gravity of his complaint? If this is truly an egalitarian view, it should be concerned with the complaint of the one who is among the worst off according to its

own standards. It would seem that by invoking considerations of the “wholesale effects of any scheme of distribution and redistribution” (Dworkin 2000, 108), Dworkin has more in mind than simply the considerations of burdens of other individuals, which, in contractualism, should not add up. If we reject the idea that the sum of small complaints of everyone else is what is behind the rejection of the claims of an unfavorably talented individual, then it must be the case that Dworkin is invoking considerations of incentives and efficiency, and thus makes an appeal to individual prudence in choosing a higher absolute level of advantage over a relatively more equal but lower level in absolute terms. In this way, egalitarian considerations of luck and choice would play only a marginal role in determining the final share of resources that an individual is entitled to. If considerations of luck and choice play such a role, they play it in a more general, not distinctly egalitarian way: having adequate circumstances for choice is what is owed to individuals. But there is no meaningful reference to what people are owed to in virtue of faring worse than others through no choice of their own.

4.7 Plurality of value and principle of stakes

Luck egalitarians would reply that, while this might indeed be so, luck egalitarianism does not need to commit itself to recognizing neutralization of luck as its only value. Reasonable egalitarianism gives space to consideration of other values, too. Thus, for example, egalitarians do not need to demand that the talented be left in complete squalor once the disabled and untalented are compensated for their bad luck, because they recognize the objective importance of their lives, too. Furthermore, they can recognize considerations of efficiency, which might sometimes limit the extent of the luck neutralization goal in order to increase an absolute set of options for everyone. Therefore, to use Scanlon’s distinction (Scanlon 1998, 248), we do not

need to hold people substantively responsible every time we find them attributively responsible: “substantive responsibility concerns liabilities and benefits for which individuals can be held to account, whereas attributive responsibility involves identifying some feature of persons that represent the grounds of those ascriptions of substantive responsibility.” (Elford 2018, 1206)

What we end up holding people substantively responsible for will depend on our all-things-considered view, and in this view, the considerations of luck can be overridden by other types of considerations. Thus, while luck egalitarianism directs us to look at the individual choice in ascribing attributive responsibility, what consequences these individuals should bear is a separate question which does not need to be informed solely by considerations of attributive responsibility. The principle of stakes, which tells us which costs of individual actions we could ask people to bear, is informed by other values as well (Stemplowska 2009; Olsaretti 2009; Dekker 2009; Arneson 1999). We cannot really make sense of what people should be responsible for prior to considering the burdens and benefits pressed by other values and considerations in the given context. Thus, we might have overriding reasons to provide help for reckless drivers getting heavily injured, because the absolute level of costs that individuals would otherwise be asked to bear seems implausibly excessive. One of the promising candidates for a principle of stakes that Olsaretti proposes is the consequentialist approach to stakes, in which the consequences of people’s choices should coincide with the promotion of some independently desirable outcome, like the maximization of equal opportunity for advantage (Olsaretti 2009, 183). Or in Dworkin’s case, it could be said that the principle of stakes is established by the result of a procedure in which an average, representative individual behind the Dworkinian “veil of ignorance” would choose to insure against different eventualities. It is to be expected that such an individual would take into account his absolute, non-comparative levels of advantage, not just relative ones. The worst off are also reasonable and want to do better for themselves in certain

situations, irrespective of the issues of envy. Whatever would transpire from such a procedure could be considered fair. For example, if an individual would choose to insure against the consequences of reckless driving, that would be justifiable.

According to Cohen, such all-considered solutions are not fair – they are merely legitimate, in the sense that nobody has the right to complain about the outcome (Cohen 2011, 133). Of course, this reveals that Cohen ultimately endorses a telic egalitarian view: one that considers unfairness to be bad in itself, even when it is not bad for anyone in particular. Since we are considering the plausibility of luck egalitarian principles within a contractualist framework, such appeals to impersonal values are not appropriate. Thus, we can support the view of Olsaretti and others who consider such principles not only to be legitimate, but fair, as they help flesh out, not constrain, demands of responsibility. Of course, Cohen's ultimate view on the matter might not be all that different, because he, as a pluralist, acknowledges the importance of other values and balancing equality with them. However, he would insist that inequalities that would be allowed to persist on grounds of those other values are not, in a relevant sense, fair.

4.8 Is Dworkin a (luck) egalitarian?

The upshot is that luck egalitarianism does not have to subscribe to counterintuitive conclusions. It is easy to see how Dworkin's view responds to concerns about luck egalitarianism which were raised earlier: it takes burdens and benefits of people and their interplay seriously and recognizes the higher demands of the disabled, without thereby sliding into the slavery of the talented. However, it would seem that many of the most attractive features of Dworkin's solution could be reached without any proper reference to luck and choice. For example, the hypothetical insurance can proceed without any reference to the initial auction which assumes an equal initial

distribution of resources. Of course, the hypothetical equal purchasing power is also present at the point in which a representative individual decides on buying the premiums; but in doing so, the individual already presupposes unequal future earnings. Here, the equal purchasing power is merely represented as an assumption that an individual, given that she does not know which place she is actually going to end up occupying, is to accord *equal consideration* to each option.⁵³ Arneson notes similarly that “(w)hat is clear is that people purchasing hypothetical insurance against the possibility of starting out in life with very little wealth will care about improving their opportunities overall and not at all about attaining equality of initial shares per se” (Arneson 2018, 55). So, “the equality-of-resources kernel in fair insurance becomes vanishingly small” (ibid.). But if we can reach legitimate conditions for choice without invoking luck – moreover, considerations of luck and responsibility would be even inimical to choice by lowering the absolute level – how exactly does luck figure, and how much does it figure in determining the actual stakes?

Therefore, it would seem that luck egalitarianism is at its most persuasive when it responds to and competes with two views – the libertarian and conservative views, which oppose redistribution in general, and to those that demand straight equality. Compared to those two extremes, luck egalitarianism seems like a reasonable option. However, it is not clear that it is invested with

⁵³ Dworkin himself, in his answer to Samuel Scheffler (Dworkin 2003, 191), denies that he is a luck egalitarian, because he does not support the core idea that “inequalities deriving from unchosen features of people’s circumstances are unjust”, although he does think that overall, luck should have less of a role in determining how wealth is distributed, compared to now. Rather, his ambition is to argue for making such circumstances “equal under some appropriate version of the envy test”, which requires “that people be made equal, so far as this is possible, in their opportunity to insure or provide against bad luck before it has occurred, or, if that is not possible, that people be awarded the compensation it is likely they would have insured to have if they had had that opportunity”. The proposed solution does not represent merely a compromise with equality of resources, but it is what equality requires. However, as Scheffler (2003a, 199-200) replies, there is plenty of textual evidence that suggests that this claim of Dworkin’s is exaggerated, as, while his ultimate solution represents a refinement of luck egalitarian starting premises, it does start from the idea that his theory “aims to make people’s impersonal resources sensitive to their choices but insensitive to their circumstances” (Dworkin 2000, 323); “government should strive to ensure that any differences in the degree to which people are not equally capable of realizing . . . ‘complex’ achievements should be attributable to differences in their choices and personality and the choices and personality of other people, not to differences in the personal and impersonal resources they command.” (Dworkin 2000, 303)

independent plausibility. Most of its intuitive appeal can be better explained by the overlap with other concerns, such as the mitigation of effects of disability on individual lives and the upkeeping of conditions for individuals to exercise meaningful choice. Insofar the view is plausible, it is plausible in virtue of its distinctly non-luck egalitarian elements. Thus, it is plausible up to the point where it demands the adequacy of individual shares – but once we are past that milepost, or in the cases we do not hit it, it often starts having counterintuitive implications, or makes, at best, the difference in tie-breaking cases. Thus, if considerations of luck have some bite, this bite is neither distinctly egalitarian, nor of paramount importance.

4.9 How important is luck?

Right now, we cover all sorts of health-related costs for people, no matter how responsible they are for them. For example, we cover the treatment for reckless drivers and smokers who develop cancer, despite their attributive responsibility often being relatively clear. Here, a luck egalitarian such as Dworkin could raise the complaint that, while this might be factually our current practice, it is clearly an unfair one – we cannot seriously think that there is a real value in activities such as smoking and reckless driving that could possibly justify not simply removing them from people's set of options. This might indeed be true, but there are plenty of other activities that are not considered morally problematic, and yet we could hold people responsible for them – at least as much as we could do so for smoking and reckless driving. For example, we could think of activities like giving birth of children with congenital disabilities despite knowing about the risk, or undertaking dangerous expeditions, such as climbing Mt. Everest. In the first case, we could reply that children with disabilities should obviously be provided for, as they are separate persons; however, it is not clear that the mother could have any plausible claim for a

compensation of her care-giving costs in her own right (unless they are strictly tied to the welfare of the child). In the second case, it is as of recently⁵⁴ the case that people need to prove, through display of their medical history and a confirmation from a doctor, that they are indeed physically fit to undertake the expedition; plus they need to provide a proof of an accident insurance policy, which covers the cost of rescue and immediate treatment. However, in case of an accident, individuals coming from countries with decent national health insurance systems will have most of the subsequent costs covered. Those costs are likely to be even higher than the pure costs of a search and rescue mission, and might include lifelong provisions. This strikes us the right thing to do, although the ascent to Mt. Everest is absolutely inessential for satisfying anyone's needs. This is so, I suspect, because while climbing a mountain is not crucial, people's health is seen as a core interest. For the same reason, we might not put any limits to providing medical aid to a reckless driver, yet find it fitting to increase his car insurance premium, even if the car is essential for him because he lives in a part of the country with a poor public transport system. In that case, the appropriate general answer would not be to decrease the premiums, but to invest into providing the public good of public transport, which is in its nature having multiple purpose and does not compensate anyone in particular. If we sometimes seek to limit the level of compensation, this would not be on grounds of thinking that it is appropriate to hold people responsible for the consequences of their actions, but because certain levels of compensation might negatively influence people's incentives for engaging in certain risky activities. This can have the effect of externalizing parts of the costs, as in the case of the mandatory Mt. Everest search and rescue insurance; but it can also be done by establishing a medical expert commission, which will assess the medical histories of applicants in order to issue permits. Thus, we might still find it fitting to

⁵⁴ More info on: <https://www.nationthailand.com/travel/30379484>

internalize a significant portion of the cost, instead of imposing a ban or completely transferring the costs on individuals.

We generally seek to protect certain crucial areas of interest in human life directly, especially those that are important for any sort of a life plan (health, for example). While this outlook might share more similarities with the capabilities approach, there is no need to enter into a debate about the currency of justice at this point – maybe some version of equality of resources is plausible, or ultimately, demands of both approaches are not that different after all. However, even if we think we should retain resources as a plausible currency, considerations of luck will play a limited role. The provisions for citizens, collected through taxation, will seek to protect certain crucial aspects of human life necessary for the continuous exercise of meaningful choice, and they will likely be more extensive than the ones guaranteed by the application of an insurance scheme that is distinctly luck egalitarian in nature, as the latter scheme would have to recognize that considerations of responsibility could not be so easily extinguished by other values as the matter of justice. Thus, despite not being distinctly egalitarian, the shares demanded by such a scheme could be, in sum, more generous. The safety net provided should not let anyone down, even the imprudent.

Let us compare the burdens of the person with the largest complaint, for example the aforementioned reckless driver after a serious accident in which he was nearly fatally injured and left disabled, under the luck egalitarian principle and under my proposal. It would seem that he could complain that the luck egalitarian principle treats him unduly harsh for the sake of considerations of luck. He might have been reckless, but the burdens he is expected to shoulder are simply unreasonably high, and no one else is as burdened as he is, even if they are expected to collectively bear the expenses of his treatment. Therefore, he could point out that a principle

which avoids burdening him or anyone else in his situation so harshly, while asking for a not even comparable sacrifice by others, is available and should be implemented, as it minimizes the maximal complaint. On the other hand, he could not claim that increasing his car insurance premium represents the highest complaint, as the costs on others and on him are comparable, while the costs of his health and the cost that helping him imposes on others, are not. While we might owe him to cover the costs of his treatment as a matter of equal concern and respect, we are not expected to subsidy his nonessential interest in reckless driving.

In such a view, the priority of tackling disability, as the major influence on limiting the options for people's exercise of meaningful choice in many cases, does not stem from its unchosen nature. "Compensation" for disability should not be on par with the compensation for lack of talent, even if it would be possible to separate the latter from effort. It would still seem to us that the centrality of claims of disability derives from its objective effect, that is to say from hindering people to function in many areas of life we consider important; it is a secondary consideration that it is a product of luck. The problem for luck egalitarianism is that this moves us away from the aim of luck neutralization, towards the goal of mitigating objectively bad circumstances which make people particularly badly off in an absolute way in areas of life we perceive as crucial – and probably extracts its plausibility from this insight. If it is the case that, sometimes, we are mitigating the effects of brute bad luck, then it is badness that prompted us into doing this, not luck per se.

With such a scheme in place, considerations of luck mitigation would play a tie-breaking role at best. For example, in case we would have insufficient funds to help everyone and would thus have to choose between helping someone who recklessly caused his own misfortune, and someone else who experienced bad luck, assuming they both ended up equally badly off, we

might decide to help the victim of the brute bad luck. However, considering the general nature of principles and the scheme, it is unlikely that such cases would play a significant part in our moral thinking. While considerations of attributive responsibility might have a great importance in certain areas of life, like in criminal justice, they play only a marginal role in establishing substantive responsibility when it comes to the determination of distributive shares that individuals are owed. In that realm, such considerations mostly strike us as harsh and moralistic (Scheffler 2015, 41-42; Scheffler 2003b; Anderson 1999).

Thus, I conclude that there is a foundation in our intuition that does not have anything to do with luck egalitarian considerations when properly unraveled. If we consider that unjust equalities are bad as well, and if considerations of choice do not support the idea that the circumstances of choice need to be equalized, as long as they are suitable, it is not clear anymore to what extent considerations of luck and equality overlap, even if they figure independently in our weighing of burdens and benefits. If we care about equality, we care about it for reasons beyond considerations of luck and responsibility, and for reasons that do not derive their importance from distributive concerns, but from relational ones. This does not mean to deny the significance of the fact that individuals have a prior claim to a certain distributive share, a claim that is important in itself – it only means denying that such claim is a claim to an *equal* share, even an *a priori* one.

4.10 Why is inequality bad?

Despite not having an egalitarian claim to distributive shares, contracting parties might still have reasons for moving towards more equal distributions, or at least, towards less unequal ones. In his essay “Diversity of objections to inequality”, Scanlon explores the heterogeneous grounds we have for valuing equality, each of which, he concludes, does not decisively overlap with the

demands for substantive equality, or equality of distributive shares (no matter the currency). However, it is possible that such reasons, taken together, lead us to adopting “substantively egalitarian consequences” (Scanlon 2003b, 202). Thus, there are *instrumental* reasons for moving towards more equality, or at least towards less inequality. Scanlon identifies five such reasons for the elimination or reduction of inequalities: 1) humanitarian concern (relief of suffering and severe deprivation); 2) prevention of humiliating and stigmatizing differences in status; 3) prevention of domination; 4) preservation of the equality of starting places in order to secure fairness of certain processes; 5) implementation of procedural fairness, which sometimes might require that institutions deliver goods to individuals equally (Scanlon 2003b, 207). Some of these reasons obviously overlap with and can be satisfied by the reference to an adequate, not equal provision. For example, the humanitarian concern is clearly such a reason. However, the reasons 4) and 5) are only contingently egalitarian. Whether fair opportunity will require opportunities to be equal will depend on whether just equal opportunities are the ones which do not undermine the fairness of the process, and this is not always the case. It might also be contingent on a particular setting – for example, we might think that differential influence of wealth should be limited when it comes to preserving the fairness of a political process. How egalitarian the reason 5) will be depends on the acceptance of the idea that individuals have *prima facie* equal claims on shares of a social product, due to the cooperative nature of a common enterprise. Here, Scanlon explicitly has Rawls’s theory in mind. This leaves us with reasons 2) and 3). Surprisingly, Scanlon does not consider the prevention of some people having an unacceptable degree of control over others as a consideration that is ultimately grounded in egalitarian reasoning, despite considering the influence on a political process in which such domination could result. Those in control of vastly greater resources can both influence the laws that will be passed, and influence the production of goods in a society. I believe that this sort of consideration is genuinely egalitarian in nature,

although it is one that is not grounded in demands of equality of distributive shares; rather, it is, as Martin O'Neill puts it, "non-intrinsically egalitarian": it favors more equal, or rather, less unequal distributions, because they are conducive to creating conditions under which people can treat each other as equals (O'Neill 2013, 440-441). The second consideration, expressing concern over stigmatizing or humiliating differences in status which could be generated by vast inequalities, is similar in this respect. Here, the emphasis is on how an individual sees himself in relation to others. Despite the main source of such experiential evils being discrimination by institutions, which blatantly treat some unequally (for example, based on race or ethnicity), vast material inequalities can also be the source. In situations like these, it is possible that the worst off live such inherently different lives to others who are better off, that they cannot help but feel humiliated by the difference. As a result, they cannot participate in many meaningful forms of socialization in their society, and thus experience social exclusion.

Such considerations overlap with our common views on what makes inequalities bad. As we have seen, at least two of them cannot be mitigated by merely invoking a standard of adequacy. Of course, it could be the case that such effects hinge of certain contingencies; it could be true that they seem so burdensome because no currently existing society exemplifies even a commitment to providing conditions for good choice to all of its citizens. It could be the case that even such a scheme, implemented seriously, would on its own, without particularly aiming towards equality, require such a considerable distribution that the currently present effects of vast inequalities would be mitigated.

To what extent we should limit acceptable income inequalities would partly depend on how easy it is to convert income into status inequality (Anderson 1999, 326). It is possible that such feat would require us to limit the influence of monetary disparities in certain areas of particular

interest, such as health, education and politics. Be that as it may, we currently have good reasons to believe that vast inequalities have effects that are detrimental for the ability of people to treat each other as equals, and we have sufficient reasons to move towards a more egalitarian, or at least, less unequal, distribution of wealth. Such a support of equality might appear insufficient to many egalitarians, but in fact it better coheres with the reasons that people have for being concerned with relative, not just absolute levels of their material goods.

CONCLUSION

In this dissertation, I embarked on the exploration of the fundamental moral commitment that is shared by all deontological theories – the respect for separateness of persons. While this commitment is often stated, it is thoroughly underexplored, as the relatively small number of works which engage directly with the deeper meaning of the concept demonstrates. There is a shared belief that utilitarianism is incompatible with this value, but it is rarely demonstrated in what way exactly. I explore the question what it means for a theory to uphold the separateness of persons, and conclude that all teleological theories are vulnerable to this charge. This is, however, due to them starting from a fundamentally different idea of what represents an appropriate subject of moral concern – for them, it is not moral persons, but person-stages. Thus, our commitment to separateness of persons fundamentally depends on whether we accept that unified moral persons are the appropriate, essential starting point of a moral theory. Insofar they are, as deontological theories assume, we have good reason to reject teleology. This leads us to the next question, which is whether the separateness of persons as a standard can be used to argue for a specific deontological theory. I have argued that separateness of persons represents a standard which cuts all the way down to the principles and policies, and it is not simply a milestone that needs to be reached only to be forgotten afterwards. Therefore, we need to see how the major competitors in the area of distributive justice, libertarianism and egalitarianism, perform in terms of respect for separateness of persons.

Although, curiously enough, both major libertarian and liberal egalitarian thinkers, Nozick and Rawls, take separateness of persons as the starting point of their theories, they end up with very different conclusions as to what this commitment actually entails. They disagree in the ways they explore the issue and conceptualize the permissible trade-offs between individual gains and

losses. Therefore, the distributive implications of their theories turn out to be fundamentally different. While Nozick ostensibly uses a non-moralized measure of sacrifice, he thereby abandons his professed commitment to deontology and separateness of persons, which ultimately leaves his approach vulnerable to internal inconsistency – it is not possible to show that violations of negative rights represent a particular kind of wrong, which is a result that hardly seems acceptable even for a non-libertarian deontological theory. In exploring this issue, I analyze Nozick’s move of rights attenuation, which is usually not discussed in this context, but rather in the context of the formation of a minimal state. However, I find this part most instructive for understanding Nozick’s conceptualization of individual burdens and gains, even if he seems not to refer to it explicitly in the later parts of his main work *Anarchy, State, and Utopia*. After revealing the inconsistencies in Nozick’s account, I conclude that as deontologists, libertarians should adopt a moralized version of sacrifice – sacrifice requires justification. However, I also conclude that the rigid way they conceptualize sacrifice, in which negative rights are the only morally relevant consideration which cannot be justifiably overridden without compensation or without consent, even if the losses for the right-holder are minimal, represents an undesirable and unconvincing way of moralizing sacrifice, which can be reasonably rejected. Presumably, every plausible moral theory needs to leave space for at least some minimal positive duties, such as the duties to dependents or the duty of easy rescue.

After rejecting libertarianism, we might be tempted to simply embrace some form of liberal egalitarianism, which will certainly, if not allow, then at least not oppose, positive duties. However, it is necessary to explore whether some of those theories also violate the respect for separateness or yield intuitively implausible results. Before embarking further, it is necessary to find a plausible way to moralize sacrifice – one that will be acceptable to each. One of such moral

frameworks is contractualism. Contractualism starts out with the idea of moral asymmetry – since we treat people with equal concern and respect, it is natural to attend first to the maximal complaint and try to minimize it. A principle is justified, i.e. cannot be reasonably rejected, if under any other proposed principle, someone else would fare even worse than the person with the greatest complaint. Since contractualism represents a general method, an account of moral reasoning, it is not incipiently committed to any particular distributive principle. It remains to be examined whether contractualism will automatically result in a decisively egalitarian distributive principle or not. Therefore, the most elaborated liberal egalitarian application of contractualism is examined – Rawls’s Justice as Fairness. After exploring the two different kinds of arguments that Rawls offers, I conclude that they either offer only a weak support for an egalitarian principle, or they ultimately rely on conflicting premises in reaching an egalitarian conclusion. Moreover, such premises limit our duties to the permanently disabled, which is clearly undesirable.

Finally, after Rawls’s theory is expunged from its problematic features, the remaining luck egalitarian idea is examined within the contractualist framework. There are several issues identified with the application of such a view from the contractualist perspective, although it is conceded that there might be applications of the view which could potentially deal with those objections. After demonstrating that Rawls’s theory cannot be modified in a satisfactory manner in order to include the disabled into the spectrum of people to whom we owe duties of justice, I explore how a general luck egalitarian principle performs within the contractualist framework. I conclude that luck egalitarian theories, insofar as they are attractive, mostly draw their plausibility from the aspects of the theory which are not strictly luck egalitarian, but represent a generally prudent choice in a contractual situation. Their derivation does not rely on the baseline of equality that (luck) egalitarian theories take as their starting point. Subsequently, while

individuals have a strong claim to their distributive fair share, this fair share is not a specifically egalitarian, but rather a sufficient or adequate one.

Still, there is space for a convincing push towards egalitarianism within contractualism: instrumental arguments for a more egalitarian society are persuasive and respond directly to the personal interest that individuals could have in organizing society according to more egalitarian principles, or at least for limiting the extent of inequality. These kinds of arguments represent a weaker form of egalitarian arguments, because, instead of arguing for equality as a starting point, deviations from which need to be justified, they argue for moving towards equality. This might not ultimately represent a significant difference on the level of application and practical policy-making, but it represents a significant difference on the level of the argument. Thus, while contractualism rejects libertarianism, it does not make as strong of a case for egalitarian distributive principle as egalitarians might have hoped for.

Thus, my thesis makes several contributions to the contemporary debate. First, it closely examines the precise way in which utilitarianism (and teleological theories in general), according to the old accusation, violates the separateness of persons, and vindicates the significance of separateness of persons as a comprehensive standard within moral theory. Second, it shows the explicit connection between this standard and different conceptualizations of sacrifice, which has been often overlooked in the literature. Third, it explores how these conceptualizations are integrated into competing distributive theories, illuminating the connection between them and specific commitments of respective theories. Finally, it explores how a more robust egalitarian principle fits within the contractualist framework, which is something that has been hinted at by Scanlon but never explicitly undertaken.

In conclusion, there is still remaining work to be done in developing both a distributive metric and principle which would represent a close fit with contractualism, the broad framework for which I have sketched in this thesis. A more “local” application of such a theory on particular areas of interest could lead us to new insights, refocusing the perspective on people who have been historically under- or misrepresented by contractualist theories, such as dependents and the discriminated.

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