The Value of Equality

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I hereby declare that the work presented in this thesis is my own and the work of other persons is appropriately acknowledged.

Signed:

Abstract

This thesis undertakes to explain the appeal of the ideal of equality and the role of the intrinsic value of equality therein. Following John Rawls, it ultimately argues that justice requires the equal distribution of fundamental resources and privileges, and that equality may only be deviated from to the extent that these deviations better the lot of the worst-off. Thus justice requires equality. However, I argue that Rawls's difference principle (DP) is a way of respecting what is politically pragmatic without ensuring true justice. A proper conclusion of Rawls's reasoning in support of the difference principle would permit inequalities only to the extent that they reflect unequal burdens, as suggested by G. A. Cohen. Despite this egalitarian conclusion, however, I argue that Rawls need not rely on the intrinsic value of equality.

To this end, I begin by examining the value of equality as it appears in egalitarian theories of distributive justice, noting the difficulty in proving that equality is of underived or intrinsic worth. I then scrutinize two challenges to Rawls's DP which, however opposed in direction, share the assumption that the DP relies on the intrinsic value of equality. Both challenges reveal weaknesses in Rawls's principle as it is typically formulated, leading us to doubt its very appeal – let alone its ability to prove the value of equality.

On a proper reading of Rawls, however, what politically matters about equality doesn't presuppose that equality itself is a value. Thus we can see Rawls's difference principle as intending to do justice to what is owed to each citizen, without having to be axiologically creative in the way that Cohen is. Conversely, arguments for the difference principle go beyond the

mere sufficiency Frankfurt allows for. So, again, Rawls better reflects the political attraction of equality than Frankfurt's appeal to sufficiency can recognize.

In closing, therefore, I argue that an alternative reading of Rawls's argument for the DP offers a compelling explanation for the appeal of the ideal of equality, an explanation that warrants a more egalitarian conclusion than Rawls himself concedes. Thus, justice requires equality, but not necessarily because equality is intrinsically valuable.

For Ava

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Acknowledgements

Introduction

My task in this dissertation is to examine two questions through a Rawlsian lens: does justice require equality, and, if so, why? For the egalitarian, justice demands the equal distribution of certain resources. She promotes an ideal of equality, and designs theories of distributive justice that are supposed to bring us closer to this ideal social order. Yet, determining why the ideal of equality is attractive, whether it is because it reflects an intrinsically valuable value of equality (hereafter IE), or because it reflects other non-intrinsically egalitarian values, proves difficult. It is common, on the one hand, to suppose that there is something especially important about the value of equality that distinguishes egalitarianism from other ideals of human coexistence, such as humanism or feminism. Yet, on the other hand, at least as common is the view that non-egalitarian values can explain the egalitarian promotion of equality, and that appealing to an intrinsic value of equality is dangerous and misguided.

After accepting the appeal of the ideal of equality, in an effort to shed light on the above controversy, and to support a thoroughly egalitarian theory of distributive justice, this thesis will examine what is arguably the best developed and most attractive principle of egalitarian distribution, Rawls's Difference Principle (hereafter DP). This principle, it will argue, does not uphold IE – despite the fact that many read Rawls to advocate it. As the best principle of egalitarian distributive justice that we have, therefore, perhaps this should mean that IE is a redundant value; perhaps Rawls's theory manages to capture what is appealing about the ideal of equality without requiring that equality is intrinsically valuable.

After examining the common reading of Rawls' DP, and showing how it fails both to uphold IE, and to capture what is appealing about the ideal of equality, I will highlight an alternative reading of the DP which, I suggest, can capture what is appealing about the ideal of equality. While this reading redeems Rawls's defence of egalitarian distributions, I will argue that he fails to accept the implications of his reasoning by not clarifying that the DP must be interpreted strictly, meaning that justice requires greater equality that he concedes – though the less strict (lax) DP may nonetheless be the closest principle of justice that we can hope to implement successfully, given human history and psychology.

This conclusion, in parallel with the likes of G. A. Cohen, will accommodate the stronger egalitarian intuitions I will allude to in the first chapter, but will not rely on an intrinsic value of equality. It thus offers a Rawlsian explanation for the appeal of the ideal of equality, one with a more egalitarian conclusion than Rawls draws, without appealing to the intrinsic value of equality. Thus, justice shall require equality, but not necessarily because equality is intrinsically valuable.

Chapter 1

The Puzzle

I - INTRODUCTION

To set the scene for Rawls, I will dedicate this first chapter to an examination of what exactly is meant by the value of equality, to an exploration of the reasons we might have for considering it valuable, and to an examination of whether these reasons can explain the appeal of the ideal of equality without relying on an intrinsic value of equality. In so doing, I will attempt to show that, while there are good, non-intrinsically egalitarian reasons to adopt the ideal of equality, attempts to disprove the intrinsic value of equality, puzzlingly, remain unsatisfactory.

II - WHAT DO WE MEAN BY THE VALUE OF EQUALITY?

Most basically, 'equality', 'equal' and 'equally' signify a qualitative relationship. To use Gosepath's definition, they denote "correspondence between a group of different objects, persons, processes or circumstances that have the same qualities in at least one respect, but not all respects, i.e., regarding one specific feature, with differences in other features."[1] This is to distinguish equality from identicality and similarity, the former signifying equality in all respects including space and time, and the latter signifying likeness in one or many respects, but not necessarily equality in any respect. This identification of equality as an "incomplete predicate" therefore leads us to ask: in what respect or respects might equality be desirable?[2] Different people have answered this question in different ways, making the concept as

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[1] Gosepath, 2008, Section 1.
[2] Ibid.

used in moral and political philosophy difficult to represent and evaluate. As Dworkin writes, "People who praise it or disparage it disagree about what they are praising or disparaging".[3]

To evaluate the value of equality, therefore, we must turn to the question of currency: with equality of what is the value of equality concerned? At its most elementary level, the consensus points away from the conventional metrics of goods and access to services and towards the realm of social relations. As Scheffler writes, "Equality, as it is more commonly understood, is not, in the first instance, a distributive ideal, and its aim is not to compensate for misfortune. It is, instead, a moral ideal governing the relations in which people stand to one another."[4] He later adds: "I have argued that equality is most compelling when it is understood as a social and political ideal that includes but goes beyond the proposition that all people have equal moral worth. It is this ideal that we invoke when we say that our society should be organized as a society of equals."[5] To value equality in this most basic sense, therefore, is to believe that each person, by virtue of her very humanity, is entitled to be treated as somebody of equal human value to everybody else, regardless of her social background or natural abilities. In other words, because each person is equally human and therefore of equal moral worth, she should be treated with the respect that this status demands – a point from which certain institutional structures and distributive practices follow, though one that does not necessarily require the equal distributions of resources.

Gosepath traces this idea back to Aristotle's *Nicomachean Ethics*, writing: "When two persons have equal status in at least one normatively relevant

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3 Dworkin, 2000, p. 2.
4 Scheffler, 2003, p. 21.
[5] Ibid, p. 33.

respect, they must be treated equally with regard to this respect. This is the generally accepted *formal* equality principle that Aristotle formulated in reference to Plato: 'treat like cases as like'."[6] Before approaching the question of what kind of treatment each human being is equally entitled to in virtue of this understanding of value of equality, therefore, it is worth looking briefly at what aspects of common humanity might inform proper egalitarian treatment, i.e. which equal features of our humanity entitle us to certain kinds of equal treatment?

Bernard Williams provides us with an excellent platform from which to answer this question by investigating the implications of common humanity in his essay, *The Idea of Equality*. Beginning from the "apparent platitude" that we are all human, he searches for undisputed commonalities that each human being is morally entitled to have respected – respect being the overriding acknowledgement of a given commonality, such that no reason allows it to be ignored.[7] The first commonalities he identifies are "the capacity to feel pain", physical and in thought, "and the capacity to feel affection for others".[8] These are no trivial truths, as critics of arguments from common humanity might argue, "For it is certain that there are political and social arrangements that systematically neglect these characteristics in the case of some groups of men, while being fully aware of them in the case of others."[9] In so far as the social programmes we promote

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[6] Gosepath, referencing Aristotle's *Nicomachean Ethics*, V.3. 1131 a10-b15 and his *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23 in Gosepath, 2008, Section 2.1.
[7] Williams, 1962, p. 114.
[8] Ibid, p. 112.
[9] Ibid. In these cases, Williams continues, common humanity is generally acknowledged and unequal treatment justified by appeal to extra reasons that override the moral claim of the person discriminated against. A racist person, for example, might appeal to the inferior degree of certain human capacities that a given race has to justify discriminating against them, such as "insensitivity to treatment, brute stupidity, ineducable irresponsibility" (p. 113). However, this kind of rationalisation, Williams argues, is morally unacceptable since, apart from the falseness of the reasons offered, it ignores the indisputable commonality that everyone feels pain, which is to overlook a moral concern (p. 114).

seek to rectify these 'neglects' by attending more equally to the humanity of all people and groups, therefore, the notion of common humanity can play a central role in our reasoning supporting these programmes.

Of course, merely recognising someone's capacities for pain and affection leaves us a long way off the ideal of a society "organized as a society of equals", to which Scheffler appeals. Indeed, a great deal of unequal treatment, such as inequality of status, opportunity, wealth and welfare is compatible with recognising only these features of common humanity. For this reason, Williams further fleshes out common humanity to include certain desires, particularly the desire for self-respect. Distinguishing it from the "culturally-limited, bourgeois value", he characterises this notion as the "human desire to be identified with what one is doing, to be able to realise purposes of one's own, and not to be the instrument of another's will unless one has willingly accepted such a role".[10] The desire for self-respect so-construed is fundamental to what it is to be human and, accepting that everyone is entitled to her humanity unless her self-respect-establishing projects themselves disrespect the same humanity in others,[11] each human being has a *moral* claim to realise this aspect of herself. Acknowledging people's equal claim to self-respect so construed, therefore, has a crucial role to play in any morally sound social and political ideal; and it is central to the egalitarian ideal of equality. To this ideal, it adds the specification that to treat someone with equal moral value (in that she is equally entitled to her humanity) is to allow her an equal chance at achieving the self-respect fundamental to her humanity.[12]

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[10] Williams, 1962, p. 114.

[11] I make this qualification despite the fact that it seems contradictory that a person could make a claim based on common humanity which demands that another person be deprived of such a claim.

[12] This feature of common humanity will be of particular relevance to the defence of Rawls's egalitarianism, as we shall see in Chapter Three. As he writes, "self-respect and a

Equal moral worth, to the degree described thus far, is relatively uncontroversial – though consensus on a more exact account of individual rights to pursue private projects proves far more difficult. Moreover, Williams' list of morally significant features of humanity, as he admits, is undoubtedly incomplete, and completing it, if such a task is possible, is beyond the scope of this thesis and, indeed, philosophy alone.[13] As such, the implications of common humanity that we are in a position to draw are perhaps rather limited. Furthermore, we have left unexamined the possibility that there exist commonalities that are morally irrelevant, ones that we have no moral claim to realise, and this is an issue that I must here bracket. Nonetheless, Williams does show that there is more to the notion of equal moral worth than the 'apparent platitude' that we are all human. In addition to assuming the equal moral worth of each human being (perhaps leaving aside the problem cases of foetuses), we can also identify at least some legitimate claims to equal treatment that these individuals can make by virtue of their humanity alone. There is, therefore, a value for the treatment of people as equals and, as Gosepath notes, "any political theory abandoning this notion of equality will not be found plausible today."[14]

The controversy begins when determining *how* to treat people as moral equals; or, in the Williams vocabulary, how to give people an equal chance at achieving the self-respect fundamental to their humanity. This is a concern for private moral deliberation, in which individuals must identify justifiable codes of conduct towards others in their personal lives, and for

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sure sense of one's own worth is perhaps the most important primary good. And this suggestion has been used in the argument for the two principles of justice" which, for him, demand equality (Rawls, 1999, p. 348). See Chapter Three, §IV.
[13] "This is a very inadequate and in some ways rather empty specification of a human desire; to a better specification, both philosophical reflection and the evidences of psychology and anthropology would be relevant." (Williams, 1962, p. 114.)
[14] Gosepath, 2008, Section 2.3.

public deliberation, in which people must decide how to organise and regulate their social institutions in a manner that reflects this value, i.e. in a manner that does not allow social institutions to ignore the important, respect-worthy human features of some individuals or groups. Practically all contemporary political theories, be they utilitarian, prioritarian, or egalitarian, purport to best apply this value of equality (i.e. construed as a value for 'treating as morally equal') – though different theories may weight it more heavily against other political values, such as utility. What, therefore, distinguishes egalitarianism from all the other social and political theories that claim to uphold this value of treatment as moral equals?

The answer common to all versions of egalitarianism is that they all demand that some currency of equality, some type of good or goods, should be equally distributed among all members of the community – side-constraining values, such as need and desert, aside.[15] In other words, egalitarians maintain that the equal distribution of certain goods is, in some way, valuable.[16]

Before trying to determine the modality and soundness of this specifically egalitarian value of equality (hereafter 'the value of equality'), I will make more explicit the difficulties with which such a pursuit is faced by briefly reflecting on the point raised by Williams, the importance of recognising and treating people as equally human. On the face of it, as mentioned above, this objective need not render equality valuable in itself. It might only

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[15] As Scanlon puts it, "Genuinely egalitarian objections to inequality are *comparative*…They are also *unspecific* in not being concerned with the absolute levels of… benefits [that individuals enjoy]." (Scanlon, 2009, p. 4.)

[16] This kind of 'substantive egalitarianism' (equality of some kind of resource or opportunity) need not be a moral implication of the common humanity described by Williams; however, in many instances substantive equality will seem to be instrumentally required by the respect for common humanity. In such cases, there need be no intrinsic value for equal distributions, a fact that could render the value of equality redundant.

render equal distributions of some currency valuable to the extent that they advance the more fundamental objective of ensuring that everyone is reasonably satisfied that her humanity is respected, that she has adequate "respect-standing", to use Wolff's terminology.[17] While this may seem to follow from the reasons I will soon discuss, there is a common intuition that inegalitarian distributions which do not reflect unequal valuing of individuals as human beings remain, at least in one way, bad.

Take the case of Laila, a multi-billionaire who earned her money fairly according to the rules of her economic environment and whose business disrespects the humanity of no one, exploits no one, whose employees are well-treated by generally accepted standards, and who herself interacts with others as an exceedingly respectful, well-intentioned and generous individual. She is, perhaps, a great inventor whose revolutionary work improves the lives of the least well off, and only the buzz of earning such vast wealth can motivate her to be of such benefit to people. Moreover, the economic order according to which she secured this wealth is one that was designed to secure maximum benefit for the least well-off members of society and is therefore supposed not to be unjust by disrespecting anyone's humanity.[18] In other words, the economic order to which Laila's business conforms, the 'superstructure' or 'basic structure' of society, is supposed to be designed in a manner that nurtures the self-respect of all its members by trying to maximise the level of benefit of its most disadvantaged members. Despite the fact that Laila's unequal wealth is not apparently related to the improper attention to anyone's humanity and does not affect anyone's respect-standing, for many, the intuition remains that it is somehow unfair

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[17] 'Respect-standing' is Wolff's term for the degree of respect people have for each other. "If I am treated with contempt this will lead me to believe that I have low respect-standing; if treated decently I will believe that my respect standing is high." (Wolff, 1998, p. 107.)
[18] This is the kind of economic order will be outlined in more detail in the following chapters' discussion of Rawls's Difference Principle.

that she is able to have so much more than others. Even if everyone appreciates and respects Laila, the wealth disparity systemically permitted between her and her contemporaries nonetheless strikes many as a moral defect of the state of affairs in question, and one that a proper theory of distributive justice should not allow.

Larry Temkin is one philosopher who would argue this way. There is, he advocates, something important about equality beyond its attributable relation to respect-standing or wellbeing. "Even if there is no one for whom it is good" – i.e. even if an equal distribution of Laila's money wouldn't actually benefit anyone's wellbeing or respect-standing, least of all Laila's – Temkin argues, equality remains valuable in itself.[19] Conflicting values, such as certain freedoms for example, may prevent the redistribution of Laila's wealth; however should other values trump that of equality, there is at least one way the re-distribution of Laila's wealth would be better than the prevailing unequal distribution. Temkin goes as far as to argue that there is a sense in which 'levelling down'[20] is better than the alternative in which everyone is better off, though less equal.[21]

Bearing in mind Temkin's rejection of levelling down, and the common intuition of unfairness illustrated by the case of Laila, I shall return to the examination of equality as a value, and, based on this examination, end the chapter by asking if the reasons explored sufficiently explain the appeal of equality without positing a value of equality, as does Temkin.

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[19] Temkin, 1998, pp. 154-5.
[20] Levelling down denotes the distribution that achieves equality by taking from those with more to achieve a more equal distribution, particularly when it is no longer possible to better the lot of the worst off.
[21] Temkin, 1998, p. 1545.

To begin, therefore, I shall briefly introduce some common egalitarian metrics (or currencies), and, in Section III, continue by examining the reasons we might value distributive equality according to any of these currencies. This exercise will ready us for the final task of the chapter: to determine whether equality can be reasonably established, either as a value of "inherent or underived moral value",[22] as doubted by Frankfurt, or something of mere instrumental value, as queried by Temkin above, given the considerations discussed in Section III.

Among the most commonly proposed metrics of equality are resources, welfare, opportunities for welfare or advantage, and freedoms or capabilities. Supporters of the popularly touted metric of opportunity, for example, think it best because "it holds individuals responsible for their decisions and actions", but considers circumstances beyond their control, such as "race, sex, and skin-color" irrelevant to distribution.[23] Resourcist egalitarians like Rawls and Dworkin, on the contrary, think their metric superior, as, in addition to the exclusion of morally arbitrary factors, such as race and sex, from distributive decisions, it also forbids inequalities that result from natural inequalities, such as intelligence and innate aptitudes or disabilities.[24] Resourcists therefore typically support equality of income and wealth (income being a flow, wealth a stock) in the belief that it will allow people the resources to enjoy their purchases to the same extent and the freedom to do with their income what they please, regardless of whether they are exceptionally intelligent, male, handicapped, well-bodied, and so on.[25]

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[22] Frankfurt, 1999, p. 146.
[23] Gosepath, 2008, Section 3.5.
[24] Ibid.
[25] Arneson, 2009, Section 3.3.

III - WHY MIGHT WE UPHOLD THE VALUE OF EQUALITY?

While vast amounts could be said in favour of and against these various versions of egalitarianism, it is first important to clarify the reasoning behind their popularity. Why, we must ask, might we value any kind of distributive equality? As Scanlon highlights, there are a number of reasons and not all are egalitarian. (In other words, not all of these reasons are primarily concerned with distributive equality; rather distributive equality according to some metric is a means to other ends). The first reason he highlights is the humanitarian value for basic wellbeing, which seeks to decrease or abolish human suffering. Distributive equality helps to realise this by redirecting resources from those who do not need them to those who do.[26] While preventing suffering is certainly a component of the original, humanitarian value of equality by acknowledging every human being's capacity to suffer, it is not, as Scanlon, among others, points out, an egalitarian reason; i.e. it is not primarily concerned with the fact that some have more resources or opportunities than others. Rather, it is concerned with meeting the needs of individuals. In so far as the value of equality is motivated by the aim of decreasing suffering, therefore, it is only instrumentally valuable.

The second reason offered by Scanlon, the value of good social status or a sense of self-worth, harks back to Williams and looks slightly more egalitarian. "One consequence of extreme inequality in income and wealth", Scanlon writes, "can be that it forces the poor to live in a way that is reasonably seen as humiliating."[27] Unlike the suffering abhorred by the first reason, this second reason is clearly relational; it is concerned with how people fare relative to each other and, as such, might account for the

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[26] Scanlon, 2009, p. 11.
[27] Ibid, p. 5.

inherent value of equality. Economic and political inequalities allow attitudes of superiority to be cultivated by setting a standard of lifestyle beyond the means of many and this stratified culture can cause the suffering of humiliation. We might therefore value equality because we think it wrong for people to be made to feel inferior to others – just as we think it wrong to hold attitudes of superiority, such as racism, "even when they are not expressed in or taken to justify economic advantage or special social privilege".[28] As a relational reason, it could contribute to a case for the independent, "underived" value of equality. However, more work must be done before such a step can be taken.

For one, although redistributing economic and political resources to eradicate what could be called 'status anxiety' is to value some kind of relation of equality among people, it is not to value distributive equality for its own sake. Material equality (or equality of any of the above-listed metrics) is only the instrument for eradicating the stratification of status or respect-standing. This raises two further complications: the first being that material inequalities do not necessarily even produce inequalities of status, and the second being that unequal status is not always negatively experienced or "suffered". On the latter point, Williams notes that the dominant culture might be such that people see the world as necessarily stratified according to race, religion, ethnic group, sex, and so on – certain groups being more entitled to status and power than others. People might therefore plan goals and identities in accordance with this worldview. As such, it is possible that people born into a social class of lower status, without the means to have superior, or even average status, could be, to a certain degree, content with how they are treated by political institutions and their superiors. As Williams writes, "it is precisely a mark of extreme

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[28] Scanlon, 2003, p. 204.

exploitation or degradation that those who suffer it do *not* see themselves differently from the way they are seen by the exploiters."[29]

This fact of adaptive preference might steer us away from valuing equality at all, or at least inspire us only to uphold it where there is a proven connection between material wealth and 'status anxiety'. However, it seems highly counter-intuitive in today's Western moral culture to accept this kind of adaptation as morally permissible. It strikes many of us as inadequate to accept unequal status, particularly in the most extreme cases of exploitation, even when those at the lower end of the social status spectrum have no apparent urge to raise their own social status. To understand this apparent contradiction, Williams' analysis of common humanity can again provide insight. In addition to the claim to self-respect that each individual is equally able to derive from her equal moral worth, she should also have the claim not to be encouraged to be under-ambitious in her respect-establishing projects. In light of the cultural conditioning of the exploited, Williams thus suggests that not only need we attend to everyone's claims to self-respect by trying to see the world through her eyes, understanding her motivations, her circumstances and her goals, but we must also abstain from suppressing or destroying her consciousness of her respectability in order to create or perpetuate a stratified class consciousness.[30] Material equality may be the best way to achieve this. The link, however, remains unclear.

Perhaps, then, an investigation of the former, related problem will help us to clarify the role of status concerns in the egalitarian valuing of equality. As mentioned above, in addition to cases in which people accept inferior social status without any kind of explicit coercion, it seems that there could also be

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[29] Williams, 1962, pp. 117-8.
[30] Ibid.

cases in which material inequalities do not map on to inequalities in status in the morally relevant sense. In other words, it is quite conceivable that a stratified society could function, and maintain itself without compulsion, without anyone feeling less valued as a human being. This is to mark a potential distinction between the notion of respect-standing and social status, since one may feel sufficiently respected as a human (at least according to one's understanding of one's humanity) while knowingly occupying a lower social status than others. As Williams writes, "In such a society, each man would indeed have a very conspicuous title which related him to the social structure; but it might be that most people were aware of the human beings behind the titles, and found each other for the most part content, or even proud, to have the titles that they had."[31] In this scenario, everyone would be able to clearly detach people's socialised titles and values, such as their social-status-giving ability to invent machinery, or their adequate cleaning skills, from their moral value. In such a culture, human equality and political equality would indeed be unrelated, and concern for status-anxiety would thus be irrelevant to the evaluation of egalitarianism. Theoretically possible though it may be, however, it seems that Williams is justified in his suggestion that the true acknowledgement of equal moral worth must spark the end of a stable hierarchy. The recognition that one's social role, be it as cleaner or engineer, "is itself in some part the product of social arrangements"[32] would, without some kind of compulsory Huxleyan conditioning,[33] surely end any sense of satisfaction with the existing hierarchy. As Williams writes, "what keeps stable hierarchies together is the idea of necessity, that it is somehow foreordained or inevitable that there

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[31] Ibid, p. 119.

[32] To initiate this kind of conditioning, as Williams highlights, one would need to be no longer "immersed in the system" and begin "to think in terms of compulsion, the deliberate *prevention* of the growth of consciousness, which is a poisonous element absent from the original ideal". (Williams, 1962, p. 120.)

[33] Aldous Huxley's *Brave New World* offers a thought experiment demonstrative of the repugnance of this approach.

should be these orders".[34] It therefore seems that greater material equality – be it measured according to opportunity, resources, or another such metric – goes hand in hand with greater equality of moral status. This result could therefore point towards a morally necessary "built-in bias towards equality",[35] though the need to appeal further to an intrinsic value of equality is not necessarily implied. Before taking a position on the modality of the value of equality, however, there are other reasons in its favour that remain to be evaluated.

Yet another reason for valuing equality can be derived from a value for self-determination. Inequality can give some unacceptable control over the lives of others, forcing those with less resources and opportunities to accept worse trade terms, for example. As Scanlon writes, "Those who have vastly greater resources than anyone else not only enjoy greater leisure and higher levels of consumption but also can often determine what gets produced, what kinds of employment are offered, what the environment of a town or state is like", and so on.[36] Moreover, resources also translate into political power, as is apparent from election campaigns worldwide. The objection to material inequalities on the basis of power differentials is thus justified and can, it seems, be derived from our original value of equality. If each person, by virtue of her humanity, is entitled to self-respect in the sense sketched by Williams above, her equal right to make a life plan, and to pursue a freely chosen identity, demands that she should start on an equal footing as everyone else where possible. Again, however, this is not to value the equal distribution of resources or opportunities in themselves; rather, equality is valued because it prevents the economic and status imbalances that lead to

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[34] Ibid, p. 119.
[35] Parfit, 1995, p. 106. This result, Parfit calls 'non-relational egalitarianism' in an effort to distinguish it from intrinsic egalitarianism, which holds that the relational egalitarian value of equality is valuable in itself.
[36] Scanlon, 2003, p. 205.

the domination of some over others. In this regard, equality again seems to be instrumentally valuable. Perhaps, however, an examination of appeals to fairness might yet sway the argument in favour of an underived value of equality.

Fairness is perhaps the most common justification for the underived value of equality. This concern subdivides into two slightly different categories, concern for procedural fairness, and the more egalitarian concern for what Scanlon calls 'fairness of procedural outcome'. The former of the two, the concern for procedural fairness, might look a lot like the previous argument for equality, i.e. the importance of fair opportunity to determine one's life path; however, it warrants independent statement because it covers further cases in which unfair processes do not yield power imbalances. In such cases, people with morally arbitrary advantages, such as greater capital to invest, finer education, or a more secure developmental environment are unfairly more likely to benefit from a given distributive procedure than those without such advantages. This is clearly unfair even if it does not render the disadvantaged less able to determine their life path than they otherwise would have been. Distributive procedures are thus unfair if they discriminate against certain members of a group who are otherwise of equal innate talent, ambition and dedication, and we might therefore value the reduction of certain inequalities, as Scanlon suggests, because "this is necessary to preserve the fairness of both economic and political institutions."[37]   Indeed, many egalitarians would also count natural inequalities of talent or ability as factors to be included in the calculation of fair procedure, so that those who are naturally more able to advance in economic, political and perhaps social life are not allowed to benefit more

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[37] Scanlon, 2009, p. 7.

than others due to the morally arbitrary advantages they possess.[38] To the extent that we are motivated by the value of procedural fairness, again, equality appears to be merely instrumentally valuable. Indeed, fair procedures can yield very unequal results. (A simple example is that of the lottery winner.)

The value of fair procedural outcome, however, is a more egalitarian reason than the value of procedural fairness, and as such, it might explain the special, underived value of equality to which so many appeal. To those, like Temkin, who advocate fair procedural outcome, distributive equality is not only a means; it is also an end. While this reason can, in certain value systems overlap with the above opportunity conception of fairness, (depending on the degree to which one believes that people are responsible for their successes and failures,) it deserves separate statement so that the arguments specific to it can be properly examined. Equality of procedural outcome can go beyond the value of fair chances before an institution or within a procedure, since fair chances can still yield unequal results. Take the example of two farmers, both of whom invest the same amount of resources in sewing the same crop, in the same type of land and both aware of the best weather forecasts which predict the same weather on both farms. One gets extremely lucky, her investment yielding an unpredictably massive profit, and the other, equally unpredictably, makes a loss, due to the weather, or other unpredicted events outside of her control.

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[38] Cohen is one advocate of this more comprehensive principle of procedural fairness. He calls this view 'socialist equality of opportunity' and claims that, when it prevails, "differences of outcome reflect nothing but difference of taste and choice, not differences in natural and social capacities and powers." (Cohen, 2009, p. 18). Chapter 3, §IV of this thesis will outline Rawls's formulation of a similar take on how to treat people of varying abilities and talents.

There are at least two different ways of stating an objection to this kind of 'undeserved' unfairness of outcome. The most far-reaching version of the two is that put forth by Cohen. He writes, "an unequal distribution whose inequality cannot be vindicated by some choice or fault or desert on the part of (some of) the relevant affected agents is unfair, and therefore, *pro tanto*, unjust, and… nothing can remove that particular injustice."[39] For Cohen, fairness demands equality regardless of whether or not there are institutions to enforce it and regardless of whether or not those who received less in the distribution could be said to need any more than they received. (Therefore, even if the unlucky farmer would not go hungry or find herself no longer able to enjoy the standard of living deemed to be decent by her community, her unequal receipt of resources relative to the other farmer would be both unfair and unjust). If Cohen's invocation of the reason of fair outcomes is sound, it would thus appear that the sense in which equality is itself valuable has been discovered, since only in a state of equality can justice prevail.

Yet, Cohen's equation of bad luck and injustice in this case is highly controversial. Many think that inequalities brought about by sheer luck, ones that occur after those who deserve more get more, and those who need more get more, are perfectly acceptable. And it is hard to substantiate a disagreement with them. Is it really inherently bad if Matt plays and wins the lotto and I don't, even if his win does not change the nature of our friendship, does not allow him unfair control over the lives of others, nor permit him an elevated social status? Put this way, harping on about equality seems irrelevant. For this reason, Scanlon's account of the value of fair procedural outcome might be more appealing, though it does not bode well for the independence of the value of equality.

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[39] Cohen, 2008, p. 7.

While Scanlon maintains that unlucky outcomes should be of concern, they are only relevant when they result in unacceptable and rectifiable levels of welfare, power differentials, or the other above-discussed ills that can be redressed by equality. He therefore denies the unfairness of distributions of 'non-contractual' benefits, noting that: "It does not seem that in general we are under even a 'prima face' duty to promote the equal welfare of all".[40] Cohen would agree to the extent that individuals should be allowed to pursue their own private interests. As he writes, "we are not nothing but slaves to social justice",[41] and, "Each person has a right to pursue her own self-interest to some reasonable extent".[42] The difference between both thinkers lies in the boundaries they set between this right to pursue private interests, unbound by concerns for maintaining equality, and the value of fair outcome. Fairness, for Scanlon, is only an issue when there is a duty-bound person or some institution (or perhaps some tacit agreement according to which various parties agree to cooperate for mutual benefit) from which to claim recompense for one's unequal profit or burden. When no such contractual obligation exists, however, there is no room for the value of fairness and, consequentially, the value of equality. He writes: "If each member of a group has the same claim that some individual or institutional agent provide [her] with a certain benefit, and if that agent is obligated to respond to all of these claims, then that agent must, absent special justification, provide each member of the group with the same level of benefit."[43]

Scanlon upholds the contractualist formulation of this reason in support of equality to account for the cases in which the benefit distributor is not duty-

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[40] Scanlon, 2003, p. 206.ee
[41] Cohen, 2008, p. 10.
[42] Ibid, p. 119 (footnote 8).
[43] Scanlon, 2009, p. 8.

bound to distribute a benefit equally. He gives the example of a group of people all of who have an equal claim on my help, but who I am not obliged to help equally. When faced with five different charitable appeals for the same pot of resources, for example, I am under no obligation to give to them equally, or give to them at all, though, to use the contractualist terminology, they all have equal claim on my funds.[44] The question that remains to be answered, therefore, is whether Scanlon is justified in limiting the pursuit of equality to instances in which we are contractually obliged to pursue it and the other non-egalitarian reasons discussed above, or whether Cohen is on to something when he extends the obligation to pursue equality beyond the reach of institutional and contractual obligations?[45]

An example might tip the balance in favour of one position or the other. Consider a farming community whose crop is destroyed by unpredictable and unprecedented flooding caused by climate change.[46] This community might claim that they should be given some kind of compensation for their lost income and the drop in standards of welfare that will result, since they worked just as hard for it as those in the unaffected highlands across an international boarder, and since only brute luck caused their work to bare less fruit. Presuming something like the existing nation-state context, we shall presume that the two territories have no political or economic ties, yet they are aware of each others' existence and predicaments, and share a similar material culture (therefore their standards of wellbeing are roughly equal and one community will be less well-off by their own standards than the other). For clarity's sake, we will also presume away all other sources of aid and imagine that both communities have enough to survive. In this context, we must then ask: do the highlanders have an obligation to

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[44] Scanlon, 2009, p.8.
[45] See his discussion of "the moral relationship" in Scanlon, 2008, pp. 139-52.
[46] We will assume away the role of human actions in climate change.

distribute some of their extra wealth to the unfortunate lowlanders? It seems that Scanlon would answer 'no', and many would agree. According to Scanlon's reasoning, the wealthier community have no duty in fairness to the lowlanders and, since the latter community will not suffer in a manner that would raise humanitarian concerns, there would be no non-egalitarian obligations to share with them. Cohen, however, might still advocate an obligation in fairness on the grounds that, once the highlanders' reasonable private pursuits are allowed for, they are morally obliged to share with the lowlanders – although they are clearly not legally obliged.

Upon this formulation, Scanlon's position of a more limited and contractual scope might be the most appealing, since it demands less extreme selflessness on the part of law-abiding citizens and still allows for needs to be met. If we uphold Scanlon's reasoning on this point, we are left without any conclusive argument to support the independent value of equality, since all the reasons for our valuing equality appear to have independent moral force.[47] This point might be further supported by the well-known 'levelling-down argument'. If equality is itself valuable, the egalitarian is forced to admit that, when comparing two populations of the same size, the state of affairs in which everyone is equally miserable is in some respect better than one in which only half of the people are this miserable, and the other half live blissful lives. For this reason, Scanlon concludes that equality "may have the status of one appealing social ideal among others, but that it lacks the particular moral urgency which the idea of equality seems to have in ordinary political argument".[48]

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[47] Scanlon, 2003, p. 208.
[48] Ibid.

IV - CONCLUSION

While many people will stop at this point and declare attempts to rescue equality tried and misguided, Scanlon's conclusion is not decisive. For one, Cohen has not been definitely dismissed for considering it a concern for distributive justice that lowlanders benefit less from the same amount of effort as highlanders. If one accepts that formal equality requires us to treat as equals and treatment as equals is our moral obligation regardless of nationality but according to one's concept of the good life, the fact that both groups in the above example share the same concepts of the good life might indeed require the wealthier group to share with the less-well-off. This may be because, in keeping with our Laila intuition, even when a good, respectable standard of living is secured for all, where people share a common culture, it could just be contrary to the spirit of common humanity to allow some people the means to enjoy the good life more than others when neither group has earned this right any more than the other.[49] As such, even if concern for personal freedoms and other values prohibits international law from enforcing the equalisation of income in situations like this, there may be a duty in fairness for highlanders to share their good fortune. While this would be a strong moral line to take, perhaps it is a consequence of the moral intuition raised by the Laila example. At this point, however, because this kind of intuition is by no means universal and authoritative, we are unable to conclude whether there is a duty in fairness

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[49] In keeping with this position, as Temkin notes, the levelling down objection is weakened when one acknowledges that other values might hamper levelling down distributions so that when equality requires levelling down, conflicting values, such as meeting needs and promoting wellbeing, outweigh equality. Therefore, using his oft-cited example of blinding the sighted, Temkin clarifies that while he believes there to be a sense in which blinding those who can see when the blind cannot be cured is good, other values make this a bad policy. (Temkin, 1998, pp. 154-5.) Just as retributive justice can be good even when it is good for no one, concludes Temkin, equality might be good (of intrinsic moral value), despite the fact that realising it might, in theory, benefit no one, as would presumably be the case in our Laila example. (Ibid, pp. 149-55.)

to share in this case and, resultantly, we are unable to deduce whether it implies an intrinsic value of equality at this point.

In so concluding, I uphold the appeal of the ideal of equality, but remain unable to capture certainly why equality is appealing using the non-egalitarian reasons explored above. Likewise, I have thus far been unable to definitively show that there is an intrinsic value of equality. At this point, therefore, a puzzle remains to be solved: what exactly is appealing about the ideal of equality if for reasons other than the non-egalitarian reasons we have explored above and if not that it realises IE?

In Chapter Three, I will develop a possible solution to this stalemate by suggesting that followers of Cohen are here moved by respect for the demands of some kind of tacit social cooperation, more profound than that outlined in Scanlon, but not necessarily by the value of equality. According to this line of thought, perhaps supporters of Cohen in the above case are motivated in their egalitarian convictions by respect for the social cooperation that emerges in economically and politically related communities, although this is not the case in our example. Cohen's point would certainly seem weaker if both communities were extremely culturally distinct – think of a self-sufficient, happy and un-interfered-with Amazonian tribe versus the population of London's Primrose Hill. In this case, there seems to be no duty to transfer resources from the affluent Londoners to those in the Amazon, since those in the Amazon are, if uninterfered with, presumably content with their lot and feel in no way disrespected or lacking for their unequal wealth. Perhaps, therefore, Cohen's appeal to the value of equality will remain compatible with Scanlon's conclusion in this case, but Scanlon's contractual argument will extend more liberally to interdependent people.

Chapter 2

An Egalitarian Principle of Distributive Justice

I - INTRODUCTION

Having concluded the first chapter with uncertainty about the role of the value of equality in egalitarian theory, this chapter will attempt to shed light on the puzzle by examining what is arguably the best available formulation of an egalitarian principle, namely Rawls's Difference Principle (DP), as it relates to the value of equality. In so examining, it hopes to reveal whether Rawls's egalitarian principle can capture what is so appealing about the ideal of equality in a manner satisfies those of Cohen's persuasion who think that there is more to the ideal of equality than the instrumental reasons explored in the previous chapter, and in a manner that determines the modality of the value of equality.

The chapter will begin by examining the common interpretation of and justification for the DP, and test its soundness as a means of realising distributive justice according to the ideal of equality. This common reading supposes that Rawls recognises the intrinsic value of equality (IE), meaning that if the reading is sound and Rawls's argument for the DP convincing, this argument might offer a solution to our puzzle. However, the strength and opposing messages of the criticisms to be discussed when testing the soundness of the standard reading make such a neat outcome unlikely. On the one hand, Frankfurt will criticise Rawls for unnecessarily appealing to the value of equality and, on the other hand, Cohen will criticise Rawls for insufficient dedication to the value of equality. The common reading of Rawls's DP, I shall thus argue, seems to raise legitimate concerns about the place for the value of equality in theories of distributive justice and, once

again, fails to provide a determinate solution to our puzzle due to the contrary intuitions supporting both critics. This conclusion shall pave the way for the final chapter, where I will attempt to offer a better account of Rawls's argument for the DP, which is subject to neither criticism, and which, I argue, can satisfy the IE intuition raised by Cohen and Temkin (e.g. the Laila example) in Chapter One.

In order to highlight the puzzle, I shall here only briefly outline Rawls's principle as it is commonly justified, present the related criticisms, and signal the implications for the ideal of equality and the intrinsic value of equality. Against this backdrop, the following chapter will proceed to further examine Rawls's reasoning for the DP in order to show how the standard reading comes about, and to show that it fails to represent Rawls's view as a whole.

Rawls's DP demands, as a matter of justice, that social and economic inequalities only be permitted when they are "to the greatest benefit of the least advantaged members of society".[1] This principle forms the final part of an inter-dependent set of principles which constitute Rawls's theory of distributive justice. According to this theory, a just system for distributing "the things citizens need as free and equal persons living a complete life", what he defines as "primary goods",[2] is one in which (i) certain basic rights and liberties, such as freedom of thought, conscience and association and the right to bodily and psychological integrity, are respected in all people, (iia) fair equality of opportunity (beyond mere meritocracy) prevails, and (iib) the DP regulates the inequalities that can be produced by iia. Thus, even in cases where some people, due to their natural aptitudes for economic

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[1] Rawls, 2001, p. 43.
[2] Ibid, p. 58. Primary goods will receive more attention in the following chapter, §II.

productivity or their superior education, are seen to contribute more to the social product than others, according to Rawls's theory, they remain entitled to the same cut of the total product as everyone else. That the DP demands equal distributions except to better the lot of the worst off may thus strike us as non-instrumentally egalitarian. As such, after elaborating slightly on the standard reading of the DP and the reasons we might have for adopting it, I shall spend the majority of this chapter and the next asking to what extent and in what way it is an egalitarian principle. I shall, in other words, ask whether the DP's concern with the least well off is an egalitarian concern that people should fare as well as others, as suggested by Cohen,[3] a humanitarian concern that people should fare well and above a given standard of sufficiency, as suggested by the likes of Frankfurt,[4] or by a combination of both. In so doing, I will also ask whether the DP is able to capture the appeal of the ideal of equality in a way that satisfies those who share the intuition that Laila's wealth is unfairly won.

It is worth emphasising, by way of introduction, the conception of justice to which the DP is supposed to contribute. Justice, for Rawls, requires fairness, where fairness is construed as the respecting of entitlements.[5] Moreover, the principles of justice sought by Rawls are those that can be practised by well-ordered societies. He writes that "we cannot, in general, assess a conception of justice by its distributive role alone, however useful this role may be in identifying the concept of justice… We must take into account its wider connections… other things equal, one conception of

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[3] Of course, Cohen is also concerned with absolute levels of wellbeing.
[4] Frankfurt, 1999, p. 146.
[5] Definitions of fairness vary from "treating people equally (Compact Oxford) and "free from bias, dishonesty, or injustice" (Dictionary.com), to "the quality of treating people equally or in a way that is right or reasonable" (Cambridge Online Dictionary). The first and third of these definitions seem to incorporate the notion of formal equality, while the second looks more ambiguous and may only appeal to the notion of earned entitlement, as outlined above.

justice is preferable to another when its broader consequences are more desirable."[6] Rawls thus attempts to discover principles of justice which yield this kind of attractive outcome by designing a thought experiment that creates conditions of fairness in the belief that such an experiment will reveal what justice as fairness requires in 'real world' conditions. In the imaginary "original position" (hereafter the OP), as we shall see below, all gender, racial and other biases are abstracted away, leaving people to decide what justice requires from behind a "veil of ignorance".[7] The principles of justice, or the social contract, Rawls comes up with by appeal to his thought experiment are sensitive to two kinds of entitlements, those derived from formal equality, or common humanity (outlined in chapter one), and the entitlements to the fruits of social cooperation. As such, goods which have been commonly created must, absent any conflicting reason, be equally shared as a matter of fairness and, therefore, justice. This leaves ambiguous the question of the limits to which the DP might apply and thus the role of the value of equality therein, particularly since it is difficult to abstract private effort from social circumstance. To this difficulty, however, I shall return in Chapter Three.

For the purposes of this chapter, apart for some brief introductory remarks, I will take points i and iia of the introduction (i.e. Rawls's first principle of justice and the first part of his second principle of justice) to be sufficiently substantiated by Chapter One's discussion of reasons in their favour, leaving me to focus attention on the DP itself. To begin, it should be noted that both principles, the DP included, apply to what Rawls calls the 'basic structure' of society, to the political framework of institutions and laws within which we as individuals and groups operate and cooperate. Therefore while the

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[6] Rawls, 1971, p. 6. This will be an important point to note when examining Cohen's critique of the DP.

[7] See *A Theory of Justice*, §4.

DP governs 'public morality', according to Rawls, it should not be presumed to govern private morality. For example, once an inequality is legally permissible within a Rawlsian political framework, the individual is not further obliged by justice to apply the difference principle and direct her unequal benefit at the 'less advantaged'.[8] In this light, the DP might appear rather less committed to the value of equality than first expected. I shall thus return to the question of whether or not this distinction accurately reflects Rawls's position, and whether it is acceptable when discussing G.A. Cohen's critique of Rawls below and in the presentation of an alternative reading of Rawls in the following chapter.

Bearing in mind Rawls's focus on basic structure, and his understanding of justice as fairness, I now turn to the reasoning behind the DP. Why should our basic structure adopt the DP after managing to respect the common humanity of everyone and after realising fair equality of opportunity? Rawls himself admits that there is nothing inherently wrong with nature's unequal distribution of talents and aptitudes. He writes: "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts." If this is so, then, why should we attend to such differences as a matter of justice by applying the DP? In response, Rawls continues, "What is just or unjust is the way that institutions deal with these [natural] facts."[9] If, as this paper presupposes, our concern is to discover fair rules of social cooperation that benefit everybody in virtue of their humanity and their membership of the cooperative community, not in virtue of any given skill-set, Rawls's point here seems plausible. Why should the market be regulated in a

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[8] One might here recall Scanlon's example from the previous chapter of those with an equal claim on one's help, but who one is not obligated to help equally. See pp. 23-4 of Chapter One.
[9] Rawls, 1971, p. 102. A more developed commentary on the significance of Rawls's characterisation of natural talents will be offered in §IV of the third chapter.

manner that favours some over others because their skills, due to economic necessity, are worth more on this market? Just as it is morally arbitrary that nature distributes skills and talents as it does, it might be considered morally arbitrary, given our understanding of formal equality, to allow certain combinations of skill favour in the distributive system.

Moreover, Rawls' concern that justice be maintained over lifetimes and across generations will also demand that those with economically productive talents be forbidden from profiting excessively, since this profit would allow a gradual increase in inequality of opportunity. As demonstrated in chapter one, increased income can lead to increased political power and social status, results that give us reason to prohibit the rise of inequalities.

Rawls's famous 'Original Position Argument' for the DP, however, does not primarily appeal to these reasons, since it happens at a deeper level of abstraction. To understand what would be required by justice as fairness in the basic structure, Rawls requests that we imaginatively adopt the 'original position' (OP). Here all parties are "symmetrically placed" so as to have a fair say in choosing the principles of justice upon which everyone can agree. As Rawls explains, "In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range". As Rawls puts it, those in the original position charged with discovering fair principles of justice are behind a "veil of ignorance".[10] This veil of ignorance ensures that those we imagine to design a just basic structure cannot abuse their position by choosing a structure that

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[10] Rawls, 2001, p. 15.

will benefit them at an unfair cost to others. From this position, Rawls supposes, the conditions necessary to ensure fair negotiations, which favour no individual or group, but rather count every individual equally in virtue of their common membership of a given political community, are fulfilled.[11] He thus reasons that if every member of a society could be represented in this OP the principles of cooperation upon which everyone could agree would be just. This argument, it is often supposed, can reveal the best principles of justice by reasoning from the conditions in which, it supposes, we discover principles of justice. According to the common reading of Rawls, this approach ensures that the DP is chosen of egotistical rational necessity. However, as I will argue here and in Chapter Three, this interpretation doesn't stand up to scrutiny.

Supposing that the OP soundly constructs fair circumstances in which principles of justice could be established leads us onto the common reading of Rawls's justification for the DP. This reading attributes the justifiability of the DP to rational choice in the fair decision-making conditions of the original position. In these circumstances where Rawls supposes that just decisions are made, people would inevitably choose the 'maximin' DP as a principle of justice. Maximin principles, as Freeman puts it, direct us to "play it as safe as possible by choosing the alternative whose worst outcome leaves us better off than the worst outcome of all other alternatives."[12]

If this accurately represents Rawls's reasoning supporting the DP, there remains some uncertainty regarding its implications for the value of equality. On the one hand, there may be no role for the value of equality,

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[11] Ibid. p. 17. Moreover, "By situating parties symmetrically, the original position respects the basic precept of formal equality, or Sidgwick's principle of equity: those similar in all relevant respects are to be treated similarly. With this precept satisfied, the original position is fair." (p. 87)
[12] Freeman, 2009, §6.1.

since the equalities demanded by the DP can be explained by appeal to the promotion of self-interest (or the interests of the group one represents) in the OP. On this account, just principles are those which we would rationally choose under the conditions specified by Rawls, and maximin is how we would choose; therefore the DP represents nothing but self-interested rational choice making it, at best, an instrumentally egalitarian principle. On this account, it should be emphasised, the DP's concern for the worst-off is not primarily a product of concern for relative levels of wellbeing; it just so happens that promoting one's own interests in the fair conditions of the OP means adopting the DP.

On the other hand, however, Rawls could be thought to take this OP decision as morally instructive, meaning that the principles decided upon there are indicative of moral truths and that these principles should be internalised and appreciated as just by everyone. In this light, maximin is not merely a self-interested rational choice, but rather an indication of what justice should value: equality.[13]

Given that Rawls proclaims his OP argument to yield rationally inevitable principles of justice,[14] it is commonly assumed that he is engaged in the second activity: namely, using his OP thought experiment to identify values underlying the principles of justice. The critics I shall discuss later in the chapter both adopt this standard reading, taking Rawls to justify the DP because the OP argument reveals the existence of a value of equality.

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[13] It is indicative of what counts as just because the veil of ignorance makes it the case that all who adopt its principles consider the interests of everyone equally to the best of their ability as members of just one 'type' represented in the OP, since they could end up being any of these people.

[14] Certainly, in *A Theory of Justice*, he sets up the argument so that the decisions made in the OP could not have rationally been otherwise. He writes: "It is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice." (1999, pp. 15-6)

Two questions emerge at this point: firstly, is this justification of the DP the accurate and only one offered by Rawls and, secondly, would the DP even be the rational, and thus morally important, choice in fair bargaining conditions? The former question will be the subject of the following chapter, meaning that, for now, I shall move directly to the latter question. Accepting Rawls's justification of the OP as the proper state in which principles of justice are selected, we must first ask what constitutes a rational choice within the OP. Rational choices, as Rawls describes them, are choices that are consistent with the decision-maker's interests. "Parties are rational", he writes, "in that they can rank their final ends consistently; they deliberate guided by such principles as: to adopt the most effective means to one's ends; to select the alternative most likely to advance those ends; to schedule activities so that, ceteris paribus, more rather than less of those ends can be fulfilled."[15] Rational choice is here distinguished from reasonable choice. While self-interested activity is rational regardless of the justifiability of one's actions to others, reasonable choice must be justifiable to others. This means that a reasonable choice might accept an outcome that is not beneficial, because it understands this choice to be the morally correct, fair one – that which is justifiable to others. The reasonable person can thus weigh up and act upon the reasons for and against a given choice in virtue of commonly accepted principles of fair cooperation. The reasonable person plays by these principles of fair cooperation and expects others to reciprocate; whereas the rational person need not respect the rules of fair play and might instead unreasonably advance her own agenda. Thus, writes Rawls, "Common sense views the reasonable but not, in general, the rational as a moral idea involving moral sensibility."[16]

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[15] Rawls, 2001, p. 87. This understanding of the rational is, according to Rawls, much like that employed in economics.
[16] Ibid, pp. 6-7.

If rational choice is self-interested, one might press, then how could it inform principles of justice? The answer, according to Rawls, is that the original position ensures the justice of all decisions agreed upon there, so that all choices made therein are essentially reasonable.[17] He writes: "The reasonable conditions imposed on the parties in the original position constrain them in reaching a rational agreement on principles of justice as they try to achieve the good of those they represent. In each case the reasonable has priority over the rational and subordinates it absolutely."[18] Indeed, this much seems clear from what we have accepted of the OP.

If we grant Rawls's claim that rational choice, or the pursuit of self-interested ends can properly inform principles of justice given OP conditions, therefore, we must now ask whether rationality requires us to employ the maximin DP in the OP, as this reading of Rawls suggests it would. Would decision-makers in the OP choose to regulate their basic structure with the DP or would it be more reasonable and thus justifiable for them to take a little more risk, producing something more like average utilitarianism than the egalitarianism (or prioritarianism) that could be said to result from the DP? The intuitions of many will immediately uphold the DP; after all, if unaware of our future identity, our sex, nationality, religion and so on, we would surely consider ourselves rationally obliged, for our own sake and the sake of those we represent, to choose the principle that would make us least likely to endure suffering and discrimination as a member of any of these categories. Otherwise put, if the OP allows no

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[17] I should here note the OP exercise is designed to be performed once, not when confronted with every moral dilemma. The OP is an ideal circumstance in which we weigh up all reasons for a given choice properly. In reality, of course, this would be an unreasonable method of making every day decisions – we'd spend all our time calculating. A policy more like average utilitarianism given the immediately available evidence is practically necessary in everyday decision-making.

[18] Rawls, 2001, pp. 81-2.

knowledge of probabilities, of our likelihood of ending up as a given type of person, we would be irrational to risk a lower level of wellbeing than we had to in the hope of benefiting from a more utilitarian outcome (i.e. one in which there was more inequality leaving some worse-off than they might be under an egalitarian distribution, but more wellbeing overall).

There have been a great many responses to Rawls on this subject; however, for the purposes of this discussion I shall limit myself to an examination of just two such respondents. As mentioned above, both Frankfurt and Cohen question Rawls's construal of the DP, but do so for opposing reasons – Frankfurt because Rawls over-values equality, and Cohen because Rawls under-values it. I shall thus use both critics as compelling representatives of the debate surrounding the standard interpretation of the DP, Frankfurt representing the equality sceptics,[19] and Cohen representing the intrinsic egalitarians, in an effort to determine whether Rawls's argument for the DP, according to the standard reading, can capture the appeal of the egalitarian ideal, and prove or disprove the existence of the value of equality.

II - FRANKFURT'S SCEPTICISM

For Frankfurt, the DP is neither the rational choice, nor a moral imperative. On the latter point, he writes: "With respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*. If everyone had enough, it would be of no moral consequence whether some had more than others."[20] Elsewhere he writes, "There is no necessary connection between being at the bottom of society and being poor in the

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[19] Joseph Raz, for example, makes an equally compelling case against the value of equality without directing it against Rawls as explicitly as Frankfurt (see Chapter 9 of Raz, 1986, *The Morality of Freedom*).
[20] Frankfurt, 1988, pp. 134-5.

sense in which poverty is a serious and morally objectionable barrier to a good life."[21] Frankfurt thus concludes that relational concerns are morally irrelevant, and that morality is primarily concerned with people faring well according to a fixed, non-comparative standard of sufficiency. As such, the value of equality that he believes Rawls to be promoting by citing the DP as a principle of justice is misplaced.

To demonstrate his point, he uses Nagel's example of the good parents' dilemma. In it, a family have the choice between moving to a suburb or a city. In the suburb one of their children – an average, happy, healthy child – would flourish, while the other child who suffers from a painful handicap would continue to live with the same burden. In the city, on the other hand, the disabled child would have access to more medical services and thus enjoy a marginally better level of wellbeing, but this move would deprive the healthy child of a much greater benefit by all accounts. Frankfurt and Nagel agree that the good parents should move to the city, despite the fact that the disabled child will only gain a little and the healthy child could have gained much more relative to the handicapped child by a move to the suburbs. However, while Nagel thinks this case demonstrates the moral force of the DP in its unconditional concern for the worst-off child, Frankfurt claims that its compatibility with the difference principle is merely coincidental. He writes: "The fact that it is preferable to help the handicapped child is not due, as Nagel asserts, to the fact that this child is worse off than the other. It is due to the fact that this child and not the other suffers a painful handicap."[22] As Parfit writes of the same case, these parents should also move to the city if, other things being equal, they only

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[21] Frankfurt, 1990, p. 147.
[22] Frankfurt, 1988, pp. 151.

had a handicapped child – a point that suggests the primary concern in this case is not the reduction of inequality, but the meeting of needs.[23]

Frankfurt takes this case to illustrate his more general point that concern for the worst-off in society highlighted by the DP is most essentially explained by concern for need and that, moreover, the appeal to interpersonal comparisons is potentially dangerous. "Concern for economic equality", he writes "tends to divert a person's attention away from endeavouring to discover – within his experience of himself and of his life – what he really cares about and what will actually satisfy him, although this is the most basic and the most decisive task upon which an intelligent selection of economic goods depends."[24] Although the DP is not subject to the levelling down argument, it might nonetheless insist upon equalising for no good reason when needs have been met.

There are a number of ways to resist Frankfurt on this point. We could hold fast to our reading of Rawls and maintain that the DP is rational, and/or we could reject the moral irrelevance of comparative accounts of need. Many impulsively resist Frankfurt with the latter objection, which stresses that there is no uncomparatively established scale of sufficiency. Even if everyone has enough in the sense that they are educated, healthy, fed and clothed, some suppose, inequality is plainly a moral concern. What we consider necessary for a sufficiently good life, they highlight, is socially mediated: think of the school child who feels he needs branded trainers rather than any pair of functional trainers, for example. How could we outline a standard of sufficiency that is unconcerned with interpersonal comparisons if, it seems, what we think sufficient for a happy, fulfilling life

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[23] Parfit, 1995, pp. 107-8
[24] Frankfurt, 1988, p. 136.

is often the product of interpersonal comparisons? The fact that what counts as a good standard of living changes over time and from culture to culture should be a testimony to that, according to these critics.   Yet, as discussed in the first chapter of this thesis, a closer example of our reasons for objecting to Frankfurt in cases such as these points away from the egalitarian or non-instrumental value of equality.   Take the case of the branded trainers.   Why do we lament the predicament of the child with boring trainers? Because he is made to feel excluded. This case maps onto Scanlon's argument for the role of status concerns in arguments for equality discussed in Chapter 1. Although needs broadly construed to include social needs might be sensitive to interpersonal comparisons, therefore, they are not necessarily met by equality.   Moreover, as Frankfurt worried above, concern for equalising could distract us from what really is morally important, which, in this case, is the child's ability to fit in with his peers. Thus, the concern of distributive justice should not mean getting every 10 year old in England into this season's Nikes, but enabling each person to pursue his or her conception of the good, whether this means matching one's football team, or leading an unmaterialistic life in a self-sufficient monastery.

Importantly, Frankfurt allows that the DP might often be the best way to meet needs. However, once Rawls's other principles of justice are met (i and iia above), and once Frankfurt's conception of sufficiency (however ill-defined) has been achieved by all, it seems difficult to argue further for the DP on the grounds of morally imperative or rational choice. This point can be illustrated by interpersonal comparisons above and below the level of sufficiency. While the DP is the obvious choice in cases like the Nagel one above in which one party is clearly in need, it is less obviously the rational

choice in cases where both parties have a happy and fulfilling life (Frankfurt compares the 'well to do' and the rich).[25]

This point brings our focus back to the former line of resistance to Frankfurt, that of rational choice. Even if needs up to the generous standard of sufficiency described by Frankfurt are met and equality is not essentially required by morality, those in the original position might nonetheless choose according to maximin reasoning. If this is so, perhaps equality considered in abstraction is not the primary moral concern, but fairness shall require it nonetheless. Given the comparison between the rich and the well-to-do just mentioned, however, the appeal of the DP is questionable. Forgetting for a moment the veil of ignorance that affects decisions in the OP, we should ask whether we would normally consider it important to maximise the prospects of the worst off group if that group enjoyed a full range of rights, liberties and fair opportunities, and was very satisfied with its lot and lifestyle? Many people would consider efforts to promote equality at this point wasted energy. Consider the example of the parent-child relationship: parents are expected to provide for their children and are considered good parents when they succeed in meeting their children's needs, in securing them a happy upbringing, and in empowering them to make good lives for themselves. Once this much has been achieved, do we really care if they could have done more? Should the child feel hard done by that there are other children who got more out of their parents, despite the fact that these children all enjoy the same rights, liberties and opportunities? Otherwise put, are parents morally obliged to constantly try to improve upon their children's circumstances? Or rather, once parents have provided well for their children, ensured that all their needs are met, and, indeed some of their whims too, is it reasonable to expect no more of them and to permit them to

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[25] Ibid, pp. 146-7.

be content with the job they have done? If we think that they are perfectly rational and morally justified in the latter contention, it is strange that we should expect more from our political institutions (or our basic structure) by demanding the DP even after the good level of sufficiency has been achieved. Surely parents' responsibilities to care for their children are at least as demanding – if not more demanding – than those of the state to its citizens. Likewise, can we really expect the rational choice of those in the OP to be more cautious on the part of those they represent than that of a good parent? In this regard, Frankfurt's argument against the moral imperativeness of the DP seems to retain its force.

Therefore, once rights, liberties, fair opportunities and a good quality of life have been realised, it seems that average utilitarianism is often more rationally appealing than the DP – even from within the OP.[26] Likewise, if in the OP one can be faced with a choice between two outcomes, one with slightly more inequality, but a lot more utility, another with less inequality where the worst off are marginally better off than the worst off group in the former outcome, and both of which guarantee us very good lives, would we not take the risk? This is the point at which options on different scales seem to produce different results; what becomes clear, however, is that we are not always rationally inclined towards the DP.

Adopting Parfit's system for comparing outcomes is useful to test this point. He imagines that we can attribute utility ratings to different outcomes, and that the differences in ratings represent 'all things considered' differences in the utility level or wellbeing of the people these ratings represent (in other

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[26] For further discussion of the relative merits of the DP and average utilitarianism see Chapter 3, §V.

words, it accounts for diminishing marginal utility,[27] where the same goods make a bigger difference to the utility level of worse-off people). If we consider 100 to be Frankfurt's level of sufficiency for a good life and must choose between a policy that will leave 90% of the population at level 105 and the remainder at 101, and one that will leave everyone at level 102, it seems that people might, choosing rationally, be inclined to choose inequality (given the fact that all the other objections to inequality are not applicable). Yet, if a smaller number of the population will benefit from this inequality, or if the gap in utility ranking is bigger, people are more likely to side with equality – even if we presume that total utility is greater in the less equal outcome. Think of the choice between 40% of the population at level 10,000 (if such a ranking is possible) and the remainder at level 101, against everyone at level 102. In this case, I imagine that many people would think equality preferable, despite the supposed lower average utility.

For his part, Rawls insists that the rare circumstances of the OP require the highly risk-averse DP choice given the gravity of the decisions at stake in a way that day-to-day rationality does not. The DP is designed to regulate *only* OP decisions that determine the organisation of the basic structure – not decisions that govern the day-to-day activities of moral agents. Siding with Rawls, Freeman therefore argues that: "It is not being risk averse, but rather entirely rational, to be unwilling to gamble, in the face of no information whatsoever about probabilities, with the liberties, opportunities and resources needed to pursue one's most cherished ends and commitments, all for the sake of gaining the marginally greater income and wealth that may be available in a society governed by the principle of

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[27] "The fact that the marginal utilities of certain goods do indeed tend to diminish is not a principle of reason. It is a psychological generalisation…" (Frankfurt, 1988, p. 139).

utility."[28]   Despite this ideal decision-making circumstance of the OP, however, because the prior principles of justice secure rights, liberties and opportunities, there does not seem to be anything to prevent those in the OP agreeing on criteria of sufficiency and combining these with a principle of average utility. Likewise, it is still unclear, given the mixed intuitions about the outcomes considered using Parfit's test, whether or not maximin reasoning must be adopted, and it thus appears that the standard reading of Rawls cannot definitively justify the DP. This is to say that, if Rawls's argument for egalitarian distribution is based in rational choice alone, on what would be the most rational choice for the individual and those she represents, it does not seem that those in OP conditions would undoubtedly choose the egalitarian DP if a restricted average utilitarian principle would guarantee them a good minimum standard of living and increase their odds of wellbeing with very little risk of tiny loss (in the region of one point of Parfit's scale, for example).   In this light, it seems that Frankfurt's scepticism of the value of equality is not so radical after all. Nonetheless, while the DP and the value of equality it is proposed to uphold have not thus far been conclusively justified, nor have they been conclusively rejected.

III - COHEN'S SCEPTICISM

The second criticism that emerges based on the standard reading of the DP is that offered by G. A. Cohen. Cohen differs immediately to Frankfurt in that he takes the reasoning supporting the choice of the DP in the OP to be sound and indicative of the value of equality. He thus understands Rawls to be correctly asserting that the maximin choice is the fairest, and therefore that which those in the OP should choose as a matter of justice and internalise as an ideal by which to live.

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[28] Freeman, 2007, p. 178.

This conviction leads Cohen to a different criticism to that of Frankfurt. For Cohen, if we allow that maximin is rational in the OP, Rawls's account of the DP is insufficiently egalitarian, since it applies only to the basic structure of society. By only requiring the principles of justice to apply to the basic structure, to laws and institutions, Rawls considers all actions that do not break the law to be just – even if they lack in moral virtue. Specifically, he allows those who have the ability to better the lot of the worst-off to profit from their skills through incentive payments since, given the rights and liberties secured by the prior principles of justice, they cannot be forced to work more productively to benefit the worst-off without economic incentive. As such, after using the OP to establish what justice requires, Rawls allows that these findings are not implemented completely and he considers this outcome just.[29] Rather than do the work that they could do to benefit the worst-off for a normal salary, and rather than allow more resources to go to the worst-off, the talented, like Chapter One's Laila, are legally permitted to profit from their lucky position in society within the remit of justice.[30] As such, Cohen suggests that Rawls's citizens are in breach of the principles they attest to accept as the proper principles of justice if they do not promote equality. He writes, "In a culture of justice shaped by the difference principle, talented people would not expect (what they usually have the power to obtain) the high salaries whose level reflects high demand for their talent (as opposed to the special needs or special burdens of their jobs)."[31] The DP as an internalised moral principle would

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[29] Cohen does, in fact, acknowledge evidence in favour of an alternative reading of Rawls which rejects incentives by 'strictly' interpreting the DP. However, in the end, Cohen takes Rawls to allow for incentives erroneously. He writes, "by endorsing incentives, Rawls treats inequalities whose necessity is relative to the intentions of talented people as acceptable to the difference principle: he proceeds as though he affirms the [difference] principle in its lax interpretation." (2008, p. 69)

[30] "The worst-off benefit from incentive inequality in particular only because the better-off would, in effect, go on strike if unequalising incentives were withdrawn." (Cohen, 2008, p. 33)

[31] Ibid, p. 73.

not, therefore, produce the inequalities it is usually thought to produce (and cannot, as such, justify incentive payments);[32] rather, it should only permit unequal shares of resources to the extent that this is an equalising measure, compensating for disabilities, or heavy, difficult workloads. Thus, while Cohen admits that something like the market economy we presently have may indeed be the closest we can get to justice practically, he does not allow that its permission of incentive payments qualifies as just. Justice, for Cohen, requires equality. Rawls's mistake, therefore, is that he "cannot recognise that if something is unfair, then it's to that extent unjust: the identification of the best-all-things-considered rules of regulation with principles of justice excludes that recognition."[33]

Of course, Rawls does not intend to promote liberal economic incentives in his theory of justice. As Scheffler advocates, Rawls is not arguing that incentives should be allowed or needed, but is rather claiming that no one principle can regulate both the institutions of the basic structure and the conduct of individuals.[34] True though this may be, when we consider that we are trying to determine whether the standard formulation of the DP captures the appeal of the ideal of equality, Cohen's point seems compelling. While Rawls might be warranted in confining the obligations of the DP to the basic structure and allowing people to be self-interested in their private decisions – since, as Cohen concedes, "we are not nothing but slaves to social justice"[35] – it is a further step to call this arrangement just. It seems hypocritical to assert that the principles determined by the OP thought experiment reveal the demands of justice, and then to ignore these demands when given the opportunity to do so without risk of retribution.

[32] Ibid.
[33] Ibid, pp. 7-8.
[34] Scheffler, 2006, pp. 18-9. Scheffler's point will better support the alternative reading of the DP to be presented in the following chapter.
[35] Cohen, 2008, p. 10.

Moreover, Rawls also suggests that justice is a 'trumping value', one that must be lexically prior to all other virtues of a political structure.[36] Therefore, if, as Cohen suggests, it transpires that the political system ends up seeing utility prioritised, Rawls seems to have unknowingly contradicted himself.

Cohen agrees that equality, supposing it is intrinsically valuable, is not the only value of political import. Perhaps, therefore, some of these other political values might also be relevant in determining the requirements of distributive justice, and perhaps distributive justice cannot merely be equated with equality. As such, while Cohen is justified in highlighting the room for hypocrisy allowed by Rawls's principles for just social cooperation, it is less clear that Rawls has erred in the decision to confine the DP to the laws and institutions of the basic structure of society in his characterisation of justice. Arneson, referring to Mill, draws on a useful distinction between two conceptions of justice at play here. The first is what he calls the "narrow conception", which essentially equates justice with fairness and, hence, equality. The second "broad conception", however, considers justice to be "an all-things considered and hence paramount moral evaluation of social matters".[37] Taking this latter characterisation of justice to be the subject of our theoretical inquiry, then, means that the system of distributive justice we end up with may not correspond to the narrow ideal, because other values will bear on the distribution we pursue as a matter of

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[36] Rawls, 1971, p. 3.

[37] "Mill more or less asserts that in a narrow sense of the term *justice*, it might be counterposed to anything that smacks of utility-maximizing, but there is also a broad sense of the term, perhaps more common, according to which it is an all-things considered and hence paramount moral evaluation of social matters. It is illegitimate to slide between the narrow and broad senses to convey the impression that obviously justice broadly conceived has nothing to do with utility. On the contrary, says Mill, even those who take equality to be the essence of the ideal of justice, end up adjusting the ideal so that inequalities that are expedient are not deemed unjust, nor are equalities that are inexpedient deemed to be just." (Arneson, 2008, p. 6)

justice. Here, the fact that one of the political values relative to justice is not entirely realised need not indicate that the result is unjust since other values might have outweighed the incompletely realised value – in this case equality.

Rawls, as mentioned above, is aware of these distinct areas of inquiry and, ultimately, he makes it clear that he is engaged in the latter pursuit: his interest is in discovering a practicable principle of distributive justice which, although perhaps not the most ideal principle we could conceive of, will be the most likely to produce justice in society. He writes, principles of justice should be "easy to understand and simple to apply. The gain in compliance and willing acceptance by citizens more than makes up for the rough and ready nature of the guiding framework that results and its neglect of certain distinctions and differences. In effect, the parties agree to rule out certain facts as irrelevant in questions of justice concerning the basic structure, even though they recognise that in regard to other cases it may be appropriate to appeal to them." This is considered just because it "increases the capacity of the conception to fulfil its social role"[38] Cohen's interest, on the other hand, is less consequentialist. The principles of justice he seeks are fair through-and-through and do not compromise their ambitions for the sake of other values, such as utility.[39] Scanlon characterises this difference as an interest in political justice on the part of Rawls, and an interest in egalitarian justice on the part of Cohen.[40]

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[38] Rawls, 1980, p. 347.
[39] "On Rawls's understanding, unlike Cohen's, there is no conceptual bar on grounding what he terms 'first principles of justice' in a plurality of values." (Williams, 2008, p. 489) He writes, "other things being equal, one conception of justice is preferable to another when its broader consequences are more desirable." (Rawls, 1971, p. 6)
[40] Scanlon, 2006, pp. 86-7. Williams makes a similar point in his 2008 essay, *Justice, Incentives and Constructivism*. He writes that "although Rawls and Cohen both use the same terminology, we should not be very surprised if they understand the idea of a fundamental principle of justice, or phrase 'first principles of justice', quite differently". (2008, p. 488)

It strikes me that both pursuits are important in their own right. For the purposes of this dissertation, however, I shall abstain from inquiring after the relative importance of each subject.[41] Since my aim is to understand what is appealing about the ideal of equality and to determine the modality of the value of equality, I will proceed to examine Rawls's DP from the perspective of the narrow conception. At this point, that means questioning whether Cohen's criticism of the standard reading holds if we consider the narrow conception of justice to be our subject of inquiry. We must thus ask: if Rawls justifies the DP with the OP argument alone, and if the principles chosen by rational self-interest are supposed to show what are the most just principles of distribution, is Rawls exposed to the incentives argument and, if so, does this indicate the need for an "egalitarian ethos"[42] and the existence of IE?

This brings us back to the question of basic structure. If we are looking to discover what would be the most ideally just way to distribute benefits, must we restrict the domain of our principles of justice to the basic structure with the affect that these principles need not guide non-institutional, non-constitutional individual decisions? On this point, Cohen asserts that "no defensible account of what the basic structure is allows Rawls to insist that the principles that apply to it do not apply to the choices within it",[43] and that, therefore, he is mistaken to permit incentive payments as just. To substantiate this claim, Cohen highlights the frequent ambiguity in Rawls's writing regarding the constitution of the basic structure – whether it includes

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[41] Further discussion of this topic as it relates to the Cohen-Rawls debate appears in Arneson, 2008; Scheffler, 2006; and Williams, 2008.
[42] This ethos, Cohen suggests, is required to ensure the justice of Rawls's theory. Cohen, 2008.
[43] Cohen, 2008, pp. 118.

only legally coercive institutions, or both legally coercive and non-legally coercive institutions.[44]

The central point of controversy is with what Cohen deems to be "noncoercive institutions" – particularly the "monogamous family"[45] – which Rawls often includes in characterisations of the basic structure. While, indeed, families are regulated by many laws, such as those pertaining to marriage, adoption, providing properly for children, protection from domestic violence, etc, Cohen claims that these coercive rules do not do all the work in structuring and regulating the family, and that the justice of the family as an institution thus partially depends on choices made by individual family members and the conventions they trigger. He writes, "The coercive structure, let us provisionally accept, arises independently of people's quotidian choices: it is formed by those specialized choices that legislate the law of the land. But the noncoercive structure of the family has the character it does only because of the choices that its members routinely make."[46] Over time, these routine decisions create norms that others feel obliged to follow – consciously or subconsciously. As a result, codes of conduct, standard divisions of labour and power, emerge voluntarily and independently of legal coercion, according to Cohen.[47] Moreover, the law cannot, in light of its interest in allowing for freedom of lifestyle choice, religion and so on, dictate how families structure themselves beyond its prohibition of certain kinds of behaviour. Thus, argues Cohen, "By virtue of circumstances that are relevantly independent of coercive rules, some people have much more power than others to determine what happens

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[44] See Cohen, 2008, Chapter 3, § 5, pp. 132-40.
[45] Rawls, 1971, p. 7.
[46] Cohen, 2008, p. 135.
[47] Ibid, pp. 135-6. Elsewhere, he writes, "institutions belong to the basic structure whose structuring can depend far less on law than on convention, usage, and expectation: a signal example is the family". (Cohen, 1997, p. 19.)

within those rules".[48] As such, any theory of justice that includes the family structure within its domain must regulate the decisions that structure the family, in addition to those that regulate it.[49]

One way to avoid this problem with the standard reading of the DP is to exclude the family from the basic structure and characterise the subject of justice to be fully coercive.[50] If this were so, at least Rawls would not be contradicting himself – although the force of the incentives argument is not obviously lessened as a result. Rightly, it strikes me, Cohen rules this response out as a possibility. Family cannot be unarbitrarily excluded from the basic structure, given Rawls's characterisation of this structure as "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation".[51] Moreover, "the basic structure is the primary subject of justice because its effects are so profound and present from the start [or from birth as Cohen qualifies]".[52] Given that the resources and structure of one's family is so central to one's life prospects, as discussed in Chapter One, Cohen's point here seems intact.

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[48] Cohen, 2008, p. 138. One example he gives is the choice to send one's son rather than one's daughter to university in a patriarchical society. Regardless of whether one believes in equality of opportunity, convention might make it such that an egalitarian choice is far more economically strenuous than a conventional one. (p. 136, incl. fn. 48)

[49] "Structure and choice remain distinguishable, but not from the point of view of applicability to them of the principles of justice." (Ibid, p. 135)

[50] Cohen admits the possibility that Rawls would include only coercive elements of the institution of family in his account of the basic structure, but ultimately concludes against this interpretation. See Cohen, 2008, pp. 133-4, footnote. 40. In it, for example, he writes: "Section 5 of Rawls's *The Idea of Public Reason Revisited* offers an exceedingly interesting account of the family as a component of the basic structure. It does not, however, expressly address the question whether it is only in virtue of the coercive rules that govern it that the family belongs to that structure: but I think that it tends, on the whole, to answer that question in the negative." (Cohen, 2008, p. 134, footnote. 40)

[51] Rawls, 1971, p. 7.

[52] Ibid. Cohen's qualification appears in Cohen, 2008, p. 136, fn. 45, where he refers to the same Rawls text on pp. 82 and 96.

A different line of resistance, suggested by Scheffler's is to claim that the coercive elements of the family can succeed in justly regulating it; therefore, at least in the case of the family, the DP would suffice in securing just distribution. He writes, "If family law were thoroughly egalitarian, and if norms of gender equality pervaded other areas of the law that have served to enforce gender differences, it is far from obvious to me that the egregious sexist patterns that Cohen sites could indeed survive and flourish."[53] While this point might have more force than Cohen allows, however, I fail to see how such laws might, without paternalism, prevent unfair use of power entirely. If, given the standard reading, all basic structure institutions thoroughly adopt the DP and unfair practices are impossible within the family, the argument remains that, justified by the standard OP argument alone, the DP permits incentive-seeking behaviour.

One final Rawlsian response I shall consider here is that of contextual compensation. Perhaps Rawls can defend his invocation of the DP on the grounds that the other features of the system of social cooperation would prevent the DP from enabling this unfair outcome. Perhaps he can argue, for example, that when the principles of justice revealed by the OP are properly implemented, the decision-making circumstances and mindset of the talented are such that they will not choose to abuse their advantage, as Cohen suggests that they might. Rawls certainly argues that applying his principles properly will greatly alter the culture of society for the better. The basic structure, he writes, "shapes the wants and aspirations that its citizens come to have. It determines in part the sort of persons they want to be as well as the sort of persons they are. Thus an economic system is not only an institutional device for satisfying wants and needs but a way of

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[53] Scheffler, 2006, p. 39.

creating and fashioning wants in the future."[54] This point leads Joshua Cohen to conclude that Rawls's "alternative strategy is to argue in effect that the objectionable incentive inequalities will not arise and therefore do not command separate treatment in an account of justice".[55] Scheffler seems to be arguing in the same spirit when he writes: "Despite the fact that the principles of justice for the basic structure are framed so as to apply to institutions and do not constitute principles for the general regulation of individual conduct, … Rawls takes them to have an important bearing on both individuals' responsibilities and on their motives."[56] True though this may be, however, the fact is that incentive payments remain theoretically possible within this structure, unless we suppose that incentive-seeking psychology would be eradicated by properly-implemented principles of justice. However, to the extent that the standard reading does not make provision for this egalitarian ethos, it seems that Cohen is quite justified in his criticism. Rawls has not, on this interpretation, succeeded in showing that the DP, without an egalitarian ethos, is wholly just, and, as such, has failed to capture the appeal of the ideal of equality. As Cohen concludes, "I would now say that although, with certain qualifications, I indeed accept the [liberal] difference principle, I do not accept it *as a principle of justice*, but rather as a principle of intelligent policy."[57]

IV - CONCLUSION

Having granted Rawls's reasoning supporting the fairness of the OP and having adopted the standard reading of the implications of the OP argument – that it fairly allows self-interest to select principles of distributive justice, and that these principles indicate the value of DP equality – we are once

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[54] Rawls, 1999, p. 229. Likewise, just institutions "are to foster the virtue of justice and discourage desires and aspirations incompatible with it". (p. 231)
[55] Cohen, J. 2001, p. 372.
[56] Scheffler, 2006, pp. 3-4.
[57] Cohen, 2008, p. 30, footnote 7.

again left in a puzzling position. On the one hand, as discussed in relation to Frankfurt, there does not seem to be an onus on us to choose the DP in cases where needs have been met, suggesting that the value of equality may not, as Cohen supposes, be of intrinsic importance. This conclusion was in itself, however, indecisive. On the other hand, if we adopt the reasoning for the DP offered by the standard reading and embraced by Cohen, we find ourselves pressed to define justice in narrow terms and to expect the internalisation of the value of equality in all members of the community who proclaim to uphold the principles of justice in a way that Rawls's theory does not accommodate.

Of course, Frankfurt and Cohen are not in direct dispute with one another on this point, so their opposing criticisms do not interact as we might like. Frankfurt questions the reasoning behind the standard reading; whereas, Cohen criticises the implications of the standard reading. Moreover, there is an abundance of other noteworthy responses to the standard reading that I cannot here mention. Within this limited scope, however, the conclusion to be drawn is again one of indecision regarding the soundness of Rawls's egalitarian principle and regarding the role of the value of equality, and, indeed, a question, should one share Frankfurt's view, as to whether the ideal of equality is worth pursuing at all.

In the final chapter, I shall attempt to harness both Frankfurt's and Cohen's criticisms to shape a negative, a positive and a speculative conclusion. Frankfurt's scepticism of OP reasoning and the resulting appeal to the value of equality will inform the negative conclusion that the OP thought experiment does not conclusively justify the DP, while Cohen's scepticism of the justice of this standard reading will inform the positive conclusion that Rawls does not characterise DP justice merely as the ability to pursue

self-interest fairly, as feared by Cohen. Rather, as I will endeavour to show, Rawls can offer a different argument in favour of the DP. This alternative justification is founded in a normative conception of social cooperation, one that combines the concern for meeting needs with a concern for fair treatment. On this account, the DP, construed so as to prohibit incentive payments, will be justified as the proper way to treat members of the one system of social cooperation as equals. In so justifying, Rawls will not appeal to the value of equality by insisting upon the fairness of the DP; rather, it just happens that treating people as equals within a system of social cooperation is to treat them in a way that is compatible with equality. Hence the speculative conclusion that equality need not be intrinsically valuable since, while justice will require equality, this conclusion can be reached without appeal to the intrinsic value of equality.

Chapter 3

An Alternative Justification for Egalitarian Distribution

I - INTRODUCTION

In the last chapter we saw how problematic a DP-employing theory of justice seems if we presume that Rawls explains it by appeal to the value of equality. On Frankfurt's account, the value of equality is otiose, not obviously the rational OP choice, and even dangerous (along with the equal distributions it demands); on the Cohen account, it is insufficiently attended to, meaning that the DP permits the unjust exploitation of the worst-off. Both critics, I previously suggested, raise legitimate concerns about Rawls's characterisation of the DP as a principle of justice – despite the fact that they both ultimately accept that DP-compatible distributions are justifiable for different reasons. Frankfurt's assertion that we are under no moral obligation to pursue equality once a generous array of material and social needs have been met is well illustrated by the case of the good parent from the previous chapter. For him, the DP is a just way to meet needs, but not a limitless principle of justice; once needs have been met, justice does not require equality. On the other hand, Cohen shows that the DP, as he interprets it, can seem insufficiently fair by encouraging the talented to use their talents for private gain rather than using them to benefit the less fortunate. In this light, it seems that justice demands even more equality than the DP allows – even if other considerations ultimately dictate that the DP should be employed over whatever principle would ensure more equality.

What, then, are we to make of Rawls's theory of justice if it can be attacked with such contrary criticisms, and what do we make of the value of equality employed therein? Attending firstly to the former question, we must ask how Rawls would respond to both critics and defend his specific formulation of the DP as part of a theory of justice. To do so, we must ask if the justification for the DP employed by Frankfurt and Cohen is correct in the first place. If Rawls does not ultimately justify the DP as a requirement of justice because equality is the rational choice in the OP, then perhaps Frankfurt's objection to the DP can be resisted, Cohen's acceptance of the DP strengthened and his scepticism of the Rawlsian formulation thereof weakened.

Rawls suggests two ways in which one might argue for the DP (and, indeed, the prior principles of justice sketched in the previous chapter). The first is to test intuited principles of justice within a system of social organisation and see how well they perform in producing morally acceptable social policy.[1] While a useful and valid means of supporting a particular principle or set of principles of justice, this first method does not itself offer any decisive, deductive justification for the DP; rather it shows that the DP is a part of the best theory of justice we have thus far considered.

The second method, however, promises more decisive arguments and is thus the section of Rawls argument attended to by those who want to understand why the DP might be justified. This second method of justifying the DP, to paraphrase Rawls, tries to 'find arguments in favour of the principles of justice that are decisive from the standpoint of the original position'.[2] Within this category of DP justification, then, falls the argument from rational

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[1] Rawls, 1999, p. 132.
[2] Ibid.

inevitability referenced in the previous chapter. This argues that people in the OP would, choosing rationally, choose as their principle of distributive justice one that will maximise their 'worst case scenario' share of the primary goods available. The question we must now ask is: why does Rawls suggest that this OP choice is the rational and thus justified choice? Is it because the OP is a way of fairly realising self-interested values? Or is it because the OP is a reasonable way to track political values more generally, such as fulfilling needs, realising fairness and respect?[3] Only the first interpretation of Rawls falls prey to the criticisms of Frankfurt and Cohen.[4]

There are indeed many points in Rawls's work where he may seem to attribute the DP to maximin rational choice – particularly in *A Theory of Justice*.[5] However, I will argue that there is still more evidence to suggest that this is not his primary justification for it. In my presentation of his argument, I will thus claim that, when taking sections of his text in isolation, Rawls frequently presents the rational inevitability of the DP neutrally between the first option above (the standard reading), and the second option – a reading that is founded in normative conception of the good life and, thus, of justice. Tipping the balance in favour of the alternative reading and away from the standard reading, however, is the fact that Rawls never explicitly argues that the DP is just because it is rationally inevitable in the sense in which rational

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[3] Scanlon suggests a variant 'contractualist' justification for the DP: Rather than suggesting that the individual in the OP can properly chose principles of justice out of self-interest, he suggests that principles are sounds when they cannot be reasonably rejected: "I would claim … that the plausibility of Rawls's arguments favouring his two principles over the principle of average utility is preserved, and in some cases enhanced, when they are interpreted as instances of the first form of contractualist argument." (Scanlon, 1982, p. 240) This contractualist justification will be relevant to the alternative justification for the DP I will outline below.

[4] See note 29 of the previous chapter.

[5] Indeed, he openly acknowledges the proximity of his arguments to maximin: "The arguments I shall adduce fit under the heuristic schema suggested by the reasons for following the maximin rule" (Rawls, 1999, p. 153).

behaviour is considered to be the pursuit of self-interest on behalf of oneself or those one represents in the OP.[6] In light of this, and noting an alternative justification Rawls offers for the DP, I will conclude that both Cohen and Frankfurt found their criticisms of Rawls on a flawed interpretation. Considering Rawls's writings more generally, he does not suppose that the difference principle is justified by rational, self-interested choice. I shall, however, suggest that Cohen's egalitarian argument can add clarity to Rawls's often ambiguous position. Cohen highlights the respects in which some of Rawls's conclusions can seem insufficiently egalitarian given his arguments – particularly with regard to productivity incentives.

I will thus conclude that Rawls's argument for the DP only succeeds as a principle of justice and a means of capturing the appeal of the ideal of equality if it is interpreted in Cohen's strict sense and justified more broadly by the alternative reading to be outlined below. This is to draw a negative, a positive, and a speculative conclusion. .Firstly, negatively, and despite frequent suggestions to the contrary in Rawls's work,[7] while the OP thought experiment might be a clarifying exercise in discovering what values are of political importance, it does not conclusively justify the DP, as suggested by the scepticisms thereof explored in the previous chapter. However secondly, and positively, Rawls offers an appealing and plausible justification for the DP based on what fairness to citizens requires in a well-ordered society. This justification, unlike the former one, is able to capture the appeal of the ideal of equality, so long as it only permits unequal distributions to the extent that they act as equalising measures, compensating those who are disabled, and those who do particularly burdensome work. Thus, finally, the speculative

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[6] "…it may be thought that justice as fairness is itself an egoistic theory…Now this is a misconception" (Rawls, 1999, p. 127-8).
[7] Such as the passage highlighted by note 2 above.

conclusion: this alternative justification does not need to suppose that equality is intrinsically valuable. As such, we are lead to support the equality-ensuring strict DP, but to remain agnostic as to the modality of the value of equality.

II - REASONING TO THE STANDARD READING:

Before elaborating upon Rawls's OP argument and the extent to which it may or may not be an argument for the rational necessity of the DP, it is worth recapitulating and elaborating upon the background assumptions that shape it. The previous chapter highlighted Rawls's starting supposition of equal entitlement to certain rights and liberties in virtue of common humanity, and his focus on securing principles of justice to regulate the basic structure of society in a way that respects this common humanity. What follows will therefore expand upon this account of Rawls's framework in an effort to highlight features that inspire the alternative reading gestured at above.

The difference principle, as a principle of justice, aspires to facilitate individuals' pursuit of the good life within a mutually beneficial, fair system of social cooperation. The concept of the good to which Rawls's common humanity-respecting theory appeals, then, maintains that the good is essentially the realisation of each individual's rational desires in a manner that is consistent with the reasonable desires and ambitions of others. As Rawls summarises, "a person's good is determined by what is for him the most rational long-term plan of life given reasonably favourable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan. To put it briefly, the good is the satisfaction of rational desire."[8]

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[8] Rawls, 1999, pp. 79-80. While, indeed, fulfilling certain rational desires might not bring happiness due to psychological disposition or bad luck, Rawls's interest is in the political, not the personal, so to speak; rather than attempt to secure the happiness of each individual relative to their personal psychology, the object of his theorising is a theory that guarantees

This means that in the OP, all parties, since they are imagined to behave rationally, will attempt to ensure that their rational desires are fulfilled.[9]

The rational desires to be satisfied as part of Rawls's theory are not, however, merely egoistic;[10] they are guided by each individual's conception of the good, by "their primary values" and ideas about "the best kind of life to live", as Freeman puts it.[11] In Justice as Fairness, Rawls elaborates this view of the people imagine to be in the OP. "The parties, as representatives of free and equal citizens, act as trustees or guardians. Thus, in agreeing to principles of justice, they must secure the fundamental interests of those they represent. This does not mean that the parties area self-interested, much less selfish, as these words are normal."[12] It is thus misleading, writes Freeman, "to say (as many do) that the parties to Rawls's social contract are egoists, or are purely self-interested"[13] – a point that will be of importance in rejecting Frankfurt and Cohen's reading of Rawls below.

Rawls thus begins the OP argument for the DP with an assumption that everyone, at least when blinded by the veil of ignorance in the OP, desires what he identifies as "primary goods" – regardless of the diversity of their life

good life-enabling, fair institutions. Again, Rawls's focus is the basic structure. See Rawls's distinction between political and comprehensive liberalism (2001, §47).

[9] This rough characterisation renders Rawls a proponent of the standard account of the good life employed by Aristotle, Kant and Sidgwick, among others, as he highlights (Rawls, 1999, pp. 79-80).

[10] Although those in the OP are "disinterested" in that they do not know their social or family situation, and thus have no particular interest in promoting the good of others, they nonetheless do not agree to principles with a psychology devoid of a sense of justice. As Rawls writes, "The parties [in the OP] are presumed to be capable of a sense of justice and this fact is public knowledge among them… They are rational in that they will not enter into agreements they know they cannot keep, or can only do so with great difficulty." (Rawls, 1999, pp. 125-6)

[11] Freeman, 2007, p. 148.

[12] Rawls, 2001, pp. 84-5.

[13] Ibid, p. 149.

plans.[14] These goods are requisite both for fulfilling the rational desires of individuals and achieving their conception of the good life, and for cultivating the kind of social relations that we think important: i.e. relations between equal and free citizens with fully developed moral powers.[15] On the first role of primary goods, Rawls writes:

> Now primary goods…are things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be.[16]

This is to say that there are goods that the person who, after emerging from the OP,   will go on to become a fasting monk and the person who will go on to become a Wall Street millionaire will both want if blinded by the veil of ignorance. It is also to imply that these goods are desired maximally rather than to a degree of sufficiency – a point to be taken up by Frankfurt and discussed in Section V below.[17]

Primary goods, at least from the perspective of the OP include "all social values – liberty and opportunity, income and wealth, and the social bases of self-respect", in addition to natural goods, such as "health, vigour, intelligence

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[14] In reality, we might not value certain primary goods due to the life plan that we have formulated; yet these goods are considered universally desirable from the perspective of the OP.

[15] Rawls, 2001, p. 57.

[16] Rawls, 1999, p. 79.

[17] "Other things equal, they prefer a wider to a narrower liberty and opportunity, and a greater rather than a lesser share of wealth and income." (Rawls, 1999, p. 348)

and imagination", according to Rawls.[18] Listing the goods people would choose to maximise for themselves in the OP lends itself to the standard interpretation of Rawls, since the implication is that they are desired of 'inward-looking' or egoistic self-interest alone. It can thus appear that, in light of the universal desirability of primary goods, an assumption that primary goods are desired out of egocentric self-interest, and the equal, 'veil of ignorance' positioning of people in the OP, Rawls allows the egoistic desires of individuals to dictate what justice requires. If egocentric desires are all that determine the just, then, the DP is subject to the criticisms of Frankfurt in particular.[19] This is not, however, Rawls's precise conclusion. Parties in the OP choose with self-interest in that they seek to ensure that the basic social structure allows them the best possible life, and to the extent that they seek to discover principles that will guarantee social stability. Egoism alone, therefore, might not choose the DP; however, a wider brand of self-interest that is concerned with stability more likely will.

Primary goods are also desirable from within the OP, according to Rawls – as per their second function listed above – because they are required to position people as free, equal and morally responsible citizens. Primary goods are thus not merely desirable for their utility in achieving egoistic ends; they are requisite in achieving fair equality of opportunity, and in developing sound moral character – both requirements for social stability. The former claim can be inferred from the discussion of equality of opportunity in the first chapter; without certain resources and freedoms, people are not in a position to

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[18] Ibid, p. 54. Also see further discussion of primary goods in Rawls 2001, pp. 57-61.
"…note that it is not self-respect as an attitude toward oneself but the social bases of self-respect that count as primary good." (Rawls, 2001, p. 60)
[19] Of course, as noted by Freeman in the previous chapter, Frankfurt's argument need not be conclusive. (Freeman, 2007, p. 178) Given that my argument does not depend on a given reading of this argument, I shall here abstain from drawing one.

develop their skills and talents or to pursue the kind of lifestyle that they might legitimately desire. (Moreover, without *equal* shares of some such resources, as highlighted by Chapter One, some are given unfair advantage to benefit.) Secondly, and as a result of the fair positioning function of primary goods, primary goods further enable all citizens to cultivate a sound conception of the good, and a sense of justice – both moral powers that are required to ensure social stability, and both DP justifications to be explored in the fourth section.[20]

Primary goods are thus universally, self-interestedly desirable, according to Rawls, both for egoistic reasons and, as per the above paragraph, for social reasons. From this premise, Rawls reasons that his egalitarian principles of justice are inevitable. He writes: "Since it is not reasonable for him to expect more than an equal share in the division of social primary goods, and since it is not rational for him to agree to less, the sensible thing is to acknowledge as the first step a principle of justice requiring an equal distribution. Indeed, this principle is so obvious given the symmetry of the parties that it would occur to everyone immediately."[21] Yet, since other values are of communal importance, such as "economic efficiency" and "the requirements of organisation and technology", we permit some inequalities according to the DP. Otherwise put, "if there are inequalities in income and wealth, and differences in authority and degrees of responsibility, that work to make everyone better off in comparison with the benchmark of equality, why not permit them?"[22] Despite the 'rationally inevitable' maximin-compatible

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[20] "…equal political liberty is not solely a means. These freedoms strengthen men's sense of their own worth, enlarge their intellectual and moral sensibilities and lay the basis for a sense of duty and obligation upon which the stability of just institutions depends." (Rawls, 1999, p. 206)
[21] Ibid, p. 130.
[22] Ibid, pp. 130-1.

conclusion, however, as I have gestured at above, the self-interest that motivates this conclusion need not support the standard reading.

III - REJECTING THE STANDARD VIEW

If we step back from the more suggestive passages in *A Theory of Justice* that are ambiguous between the 'egoistically derived' standard reading and the alternative I will develop below,[23] we must note that neither of the two methods of arguing for the principles of justice mentioned in the introduction to this chapter are explicitly presented as proofs. Rawls never says that his argument from OP self-interest conclusively shows the principles it produces to be *the* principles of justice.[24]

Moreover, as Frankfurt's scepticism in the last chapter revealed, self-interest does not necessarily yield maximin choices. Indeed, highlights Rawls, "calling the difference principle the maximin criterion might wrongly suggest that the main argument for this principle from the OP derives from an assumption of very high risk aversion…but extreme attitudes are not postulated." Likewise, "there are many considerations in favour of the DP in which aversion to risk plays no role at all".[25] These other considerations will be the subject of the following section.

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[23] That quoted in the preceding paragraph is often taken as indicative of a standard, maximin-derived reading, for example.

[24] "To argue from a given list [the menu of popular principles of justice offered to those in the OP] cannot, of course, establish what is the most appropriate conception of political justice among all possible alternatives, the best conception, as it were. It may, however, suffice for our first and minimum objective: namely, to find a conception of political justice that can specify an appropriate moral basis of democratic institutions and can hold its own against the known existing alternatives." Rawls, 2001, p. 83.

[25] Rawls, 1999, 72-3.

It has also been noted that maximin demands that there be just one rational 'best result for the worst-off group', and Rawls's admission of a plurality of conceptions of the good does not accommodate this. As mentioned in the previous chapter in response to Frankfurt, the conditions of the OP allow insufficient knowledge for people to engage in maximin reasoning in the strict sense; there they are not choosing between likely outcomes in the sense in which the outcome they select will yield a particular kind of lifestyle. Rather, they choose principles that affect the kinds of lifestyle preference that can be realised within the remit of justice.[26] This choice does not dictate how society should be ordered once justice is achieved and it does not favour or deem worst one kind of conception of the good over others.[27] As Freeman writes, "Ultimately, the maximin rule of choice cannot be used to justify the difference principle… For when justice as fairness is compared with 'mixed conceptions' of economic justice that provide for basic liberties and a social minimum, the conditions for applying maximin are not fully satisfied."[28]

IV - THE ALTERNATIVE JUSTIFICATION

The alternative justification for the difference principle that, I argue, is the best way to interpret Rawls's theory, founds its concern for equitable

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[26] To quote Rawls, "Economics may wish to refer to the difference principle as the maximin criterion, but I have carefully avoided this name for several reasons. The maximin criterion is generally understood as a rule for choice under great uncertainty (§ 26), whereas the difference principle is a principle of justice. It is undesirable to use the same name for two things that are so distinct." (Ibid, pp. 72-3)

[27] As Rawls notes, even to employ the argument from the OP is to employ "some notion of goodness" (Ibid, p. 348). However, this does not make the argument from the OP circular, nor insufficiently neutral because "…the concept of goodness has been used only in a rather thin sense." (Ibid, p. 347) By employing only a thin notion of the good, which corresponds to the political liberalism rather than the comprehensive liberalism mentioned above (see footnote 8), Rawls ensures that uncontroversial moral values, such as meeting needs and fairness, are protected without further determining the kind of social organisation that might evolve from the OP. As mentioned in note 9 above, this conception of the good is relatively uncontroversial.

[28] Freeman, 2007, 188.

distribution according to the DP not only in rational choice – self-interested or otherwise – but in an ideal of political fairness.[29] Its founding conception of society is one of co-dependent cooperators, what Rawls calls "the well-ordered society".[30] Everyone in this fair and mutually beneficial kind of society is considered to be equal[31] – just as he supposes they are in the OP argument discussed above. However, in addition, *everyone* in the well-ordered society is supposed to play a positive and necessary role in the process of cooperation. This communal activity of cooperation yields what Rawls refers to as "the fruits of social cooperation", a set of benefits that are entirely contingent on the cooperation of everyone in society.[32] The conception of society underlying Rawls's theory of justice thus considers the diversity of skill sets and interests within society to be common assets that are necessary to achieve the production of goods enabled by social cooperation. All members of society, therefore, have a claim to their fair share of these benefits, on Rawls's account of social cooperation. In addition to this alternative take on what constitutes social cooperation is an argument for political fairness which links the concept of communal reciprocity and social inclusion to social stability. With this conception of society in mind and a concern for its stable maintenance, Rawls, I will argue, offers an alternative justification for the DP, one that succeeds where the argument from self-interest alone falls. While, as Cohen in particular highlights, Rawls's

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[29] Rawls' method for deciding upon the principles of justice presupposes a value, but this presupposition does not render his method circular, since the presupposition is minimal, his method remains generative of further stipulations for the organisation of a just society, and varying conceptions of the good remain compatible with the presupposed value.

[30] Rawls, 1999, §69, pp. 397-405. "Now justice as fairness is framed to accord with this idea of society" (p. 397).

[31] In the sense referred to in chapter one in discussion of Williams and common humanity.

[32] They are at least contingent on the cooperation of the vast majority of people in society and non-cooperators are a threat to these benefits. Ideally everyone would cooperate and more resources would be directed towards benefiting individuals rather than controlling non-cooperators.

arguments are unfortunately ambiguous between a strict and a lax interpretation of the DP, the alternative reading aligns well with the strict principle. The result is a defence of a strictly egalitarian DP that, although supposed to reinforce the findings of the OP argument, in fact, need not appeal to this argument to succeed in convincing. This alternative justification of the DP adds to the commitment to meeting needs addressed by the standard reading, a commitment to the value of fair distribution of the fruits of social cooperation in any given political community. In so doing, I argue, it is able to capture the appeal of the ideal of equality. Yet, this interpretation does not, or so I will argue, depend on the intrinsic value of equality.

To make this case, I shall outline the above-mentioned founding conception of society in more detail by emphasising its role in Rawls's theory, and by examining features that bear on his understanding of the requirements of justice, and thus on his reasoning supporting the DP. Without such a conception, we cannot specify the terms of the OP in the first place.[33] As Rawls writes in his 1974 *Reply to Alexander and Musgrave*, "The aim of a theory of justice is to clarify and to organise our considered judgements about the justice and injustice of social forms. Thus, any account of these judgements, when fully presented, expresses an underlying conception of human society, that is, a conception of the person, of the relations between persons, and of the general structure and ends of social cooperation."[34] We must thus examine the features of the conception of human society employed by Rawls and hitherto unmentioned, both in order to decide if it is sound and

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[33] The need to suppose a conception of a well-ordered society relates again to notes 27 and 29 above: even the OP requires that its inhabitants have a thin conception of the good and a sense of justice (to be further explicated below) to orientate their decisions.

[34] Rawls, 1974, p. 232. See full discussion of well-ordered society pp. 232-6.

sufficiently 'thin', and to determine its affects on the resulting 'alternative' defence of the DP.

As mentioned above, Rawls characterises the well-ordered society as a universal system of cooperation that should be organised to be fair and mutually beneficial to all members of this cooperation. He calls this feature of the well-ordered society 'reciprocity', and, in presupposing its fundamentality to the well-ordered society, his theory of justice must ensure it – save for a situation in which so-ensuring entails the sacrifice of a greater value. To decide how to mutually benefit contributors fairly, then, Rawls must first characterise the way in which people contribute and then evaluate what kind of entitlements result from these contributions. Here Rawls strays from many common characterisations of cooperative contribution by claiming that everyone in society is a necessary and equal contributor – regardless of skill-level or -set. "In justice as fairness", writes Rawls, "men agree to share one another's fate. In designing institutions they undertake to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit."[35]   He defends this characterisation by noting that the benefits of social cooperation are only attainable in virtue of the diversity of the innate talents and interests of its members. As such, while the well-ordered society will aspire to value people equally, it should not thereby aspire to homogenise natural abilities.[36] Rather – and this is the crucial step – it should regard these diverse abilities as a collective asset, the products of which everyone has an equal claim to.

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[35] Rawls, 1971, p. 101.
[36] "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts." (Ibid, p. 102)

This leads to an alternative justification for the DP: rather than proposing it because it best promotes self-interest in a morally acceptable manner, Rawls suggests it because it facilitates reciprocity according to the ideal of a well-ordered society.[37] As he elaborates, "No one deserves his greater natural capacity nor merits a more favourable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate."[38] In other words, since it is irrational to attempt to eliminate these natural advantages in others because they benefit the worse-off (and, moreover, such eliminations would likely harm the worst-off), and since the well-ordered society should exhibit reciprocity, Rawls suggests that the DP is justified.[39] This egalitarian principle respects common humanity, regards the diversity of talents as a communal asset, and distributes the fruits of this asset in a manner that is fair and compatible with his conception of the well-ordered society. Baring this point in mind, it becomes more plausible to attribute to Rawls a stricter DP, one that, due to this understanding of reciprocity, does not permit genuine inequalities via the DP. However, to this interpretative point I will return after a greater exposition of the alternative reading.

In resistance to Rawls, critics can argue that this conception of the well-ordered society (and resulting justification of the DP) unfairly ignores differential effort in productive activities. Rawls, they will argue, is essentially claiming that those who, out of laziness, have no desire to contribute should receive the same share as those who work extremely hard

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[37] "A further point is that the difference principle expresses a conception of reciprocity. It is a principle of mutual benefit." (Rawls, 1999, p. 88)
[38] Rawls, 1971, p. 102.
[39] Rawls, 1971 & 1999, p. 92.

for their share. This criticism, however, is misdirected to the extent that it only partially accepts the notion of common ownership of the diversity of talents. To criticise in this way is to pick and choose which different skills and traits are relevant to the conception of a well-ordered system of social cooperation and which are to be the responsibility of the individual. It is to argue, for example, that the young adult who has suffered from insufficient encouragement and education through no fault of her own is not entitled to the same benefits as her well educated and nurtured peer on account of her lack of motivation to contribute; however her lack of motivation is likely due (at least partially) to her social disadvantage which is, in turn, partially due to the existing lack of reciprocity in society.

Of course, many people will not accept the decision to view the diversity of skills and talents as a collective resource to which everyone, out of fairness, has equal claim. They will claim that cases exist in which people who are equally positioned will contribute in differing degrees and should thus be entitled to differential shares. With what moral conception we should frame the ideal of the well-ordered society is, of course, an extremely complex question and one this paper cannot attempt to answer definitively. Moreover, the result may ultimately come down to personal inclination. One might legitimately claim, for instance, that each individual should be regarded as entitled to the fruits of her talents (to the extent that these resources are causally detractable from the infrastructure of cooperative benefit provided by the agent's place in society) so that if she has an innate resource that yields greater returns in cooperative negotiations, there is no reason in fairness for her greater benefit to be redistributed.[40] The question of unequal abilities and dispositions resulting from differing family and social conditions is a difficult

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[40] See Rawls, 1999, §75.

one for Rawls. As gestured at in the previous chapter, as long as the institution of the family exists, there will never be perfect equality of opportunity, a concession Rawls himself makes. However he does not share the critics view. His vision of a just society is one in which everybody has opportunities to realise their abilities in an activity in which they can realise their talents - whatever these may be, and all receive a fair share of all the fruits of social cooperation. Rawls considers that when all have thus access to meaningful work, the problem of the lazy, those without an inclination to work, becomes marginal. Thus Rawls would contrast inclination to work in his property-owning democracy, and in the current economy in which the conditions in which many *do* work that blunts their imagination and talents. In addition, toleration of different conceptions of the good bars Rawls from considering that the way of life of those devoted to non-productive work is less worthy of respect than those who do work productively.[41] It is a moot point whether these Rawlsian lines of reasoning can fully meet the criticisms, but the idea of reciprocity (in the sense of cooperation which fairly benefits everyone) envisaged in this context is a great deal more plausible than the critics assume. In what follows, therefore, I will retain Rawls's view of reciprocity in a well-ordered society. In this society everyone should be supposed to contribute what she can with a view to benefiting from reciprocity and, in the spirit of common humanity, no one should be blamed for having the innate resources that she has.[42] As such, the well-ordered society, despite people's differing abilities and interests, should regard everyone's contribution and claim to benefit to be equal given that the advantages of

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[41] See Rawls's debate with Philippe Van Parijs (1991) on whether surfers should be fed.

[42] As Cohen writes, "The further back one goes, temporally and causally, in the construction of the feasible set, the more one encounters open possibilities that were closed by human choice, and the harder it is to identify inequalities that do not harm the badly off." (Cohen, *Rescuing Justice and Equality*, p. 33)

cooperation are so great, and the causal relation of contribution to benefit practically indecipherable.

One final feature of this characterisation of social cooperation and the resulting justification for the DP I will emphasise is that it still refers only to the basic structure of society. This means that it will not dictate the details of all distributions and will not render those who expend greater effort than others equally rewarded in all circumstances. It merely demands that, at an institutional level, those with a lesser capacity for productivity – whether for natural or social reasons – are not treated with special favour or disfavour by institutions. Rawls therefore suggests that if everyone is formally equal, contributes what she can, and is not responsible for having this skill or that strength, then an equal distribution of basic structural "primary goods" appears to be the most justified, and the DP, Rawls suggests, is the best way to collectively benefit from the skills available to society.[43] Thus far, however, the deductive exercise of the OP argument does not do a great deal in bringing about this conclusion. Moreover, no intrinsic value of equality is derived or expressed. The equality required by reciprocity is merely a means of respecting the entitlements of common humanity and, as discussed in the first chapter, this alone does not require equality to be intrinsically valuable.

The second, related feature of this well-ordered society with implications for an alternative justification of the DP is that it should be stable; it should persist without the coercion of certain groups, and in a relatively constant

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[43] Once again, I here bracket the possibility of incentive payments highlighted by Cohen which might be thought be some to be justified by the DP. I will take up this point below, ultimately concluding that the strictly egalitarian interpretation best follows the alternative reading of Rawls's DP.

form.[44] (Stability requires the consistency of institutional practice and laws, for example). To be stable in these respects, it must operate according to principles of justice that its members freely accept:[45]

> Now a well-ordered society is also regulated by its public conception of justice. This fact implies that its members have a strong and normally effective desire to act as the principles of justice require. Since a well-ordered society endures over time, its conception of justice is presumably stable: that is, when institutions are just (as defined by this conception), those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them.[46]

Rawls thus indexes social stability to justice; the more just citizens think their social institutions, the more stable the society will be. If people do not believe that the institutions and laws of society treat them fairly, they will be less inclined to cooperate, meaning that ultimately the system will not be stable.

This feature of the well-ordered society has knock-on affects for Rawls's justification of the DP. To achieve stability via a public conception of justice, the principles of justice must operate in accordance with "the strains of commitment" by demanding of people no more than they can reasonably commit, and they must conform to people's "sense of justice" to secure this commitment. Here Rawls posits a conception of standard human psychology

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[44] "It is evident that stability is a desirable feature of moral conceptions. Other things equal, the persons in the original position will adopt the more stable scheme of principles." (Rawls, 1999, p. 398)

[45]   We have here assumed the freedom and equality of individuals and have therefore ruled out forms of social organisation that might be stable, but where cooperators do not freely accept their role in the system. The coordination of slave or prisoner labour, therefore, does not qualify as *social cooperation*.

[46] Rawls, 1999, p. 398.

which, if justified, supports the alternative reading of the DP.[47] The rational dimension of this standard psychology was discussed briefly in the previous chapter. However, the elaborated alternative reading of the DP supposes a slightly more developed account of human psychology. This, in turn, complements the notion of a 'well-ordered society' since, as we will see, the next feature of the well-ordered society is that it nurtures this psychology.

The first additional feature of Rawls's account of standard psychology – specifically of rationality – not appealed to by the standard reading is that it prohibits people from entering into "agreements they know they cannot keep, or can only do so with great difficulty", according to the strains of commitment.[48] Taken together with Rawls's concept of the "sense of justice" to be discussed below, this is to specify that those accepting the principles of justice must not only be able to live with but also *endorse* the principles of justice to which they agree.

The notion of a social contract is noteworthy in understanding the strains of commitment. Rawls has already appealed to the idea of a contract made between hypothetical agents in the OP, a fictional situation that artificially constructs fair bargaining conditions and in which people design a contract in the form of principles of justice to which they and those they represent must conform. This new appeal to strains of commitment, however, evokes a separate social contract, one that should govern the well-ordered society, and that thus shapes the kind of contract that can be designed in the OP.[49] This

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[47] See note 34 above.

[48] Rawls, 1999, p. 126. He later adds: "However attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it." (p. 398)

[49] "Now the reason for invoking the concept of a contract in the original position lies in its correspondence with the features of a well-ordered society." (Rawls, 1974, p. 250)

social contract depends not only on the fair positioning of OP negotiators, but also on the psychology of the parties to the contract as this psychology would be in the well-ordered society and unblinded by a veil of ignorance. In this regard, psychological strains of commitment will impact upon what kind of contract people can agree to within or outside the OP.[50] "Thus", writes Rawls, "consider any two conceptions: if, given some possible circumstances, the first would permit, or require, social positions that one could not accept, whereas the second results in arrangements that everyone can honour in all circumstances, then the second must be agreed to".[51] Rawls ultimately wants to argue that his principles of justice fulfil the stability criterion for principles governing the well-ordered society in a way that alternative principles do not. I will compare one such alternative in the following section in an effort to determine whether Rawls is indeed correct in concluding that his principles of justice are easier to commit to. For the purposes of this section, however, suffice to emphasise Rawls's reasoning from the supposition of the stability feature of the well-ordered society to the DP. To do so, his account of standard psychology requires further development.

This brings us to the second feature of 'standard psychology' mentioned above, Rawls's concept of the 'sense of justice'. Rawls is not always clear about what he means by the sense of justice.[52] On the one hand, he claims that it is a desire to act in accordance with moral judgements, or to make the justice system match our moral inclinations.[53] On the other hand, and more

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[50] Viewed in terms of the strains of commitment, Rawls's well-ordered society contract is very similar to that of Scanlon, as presented in note 3 above.

[51] Rawls, 1974, p. 250.

[52] Indeed, unclarity is somewhat unavoidable given the complex nature of moral deliberation. As Rawls puts it, "Clearly this moral capacity is extraordinarily complex. To see this it suffices to note the potentially infinite number and variety of judgements that we are prepared to make." (Rawls, 1999, 41)

[53] Rawls, 1971, p. 46; 1999, p. 41.

frequently, the sense of justice is presented as one consideration of many in favour of one principle of justice over another. Read in this way, Rawls takes the sense of justice to be a moral motivation dictating that we do what justice requires, and competing with other motivations, such as altruism, self-interest, and so on.[54] It is in this latter sense that Rawls appeals to the sense of justice in defence of the DP. The stable society, he claims, requires that its citizens have a sense of justice intuitively informing their cooperative behaviour, and counterbalancing other moral and self-interested motivations.[55] Rawls goes to some effort to explain this sense of justice in more detail, its development and its inclinations.[56] For the purposes of substantiating an alternative reading of the DP, however, we need only accept that in the stable, well-ordered society something like a sense of justice that people act in accordance with is cultivated.[57] This, Rawls supposes, will incline them towards fair actions (where fairness is understood as the respecting of cooperative reciprocity), which perpetuate the stability of the system. This is an additional feature of Rawls's theory is worth mentioning in response to Cohen's charge of incentive permitting. In Rawls's 'property-owning democracy', characterised by meaningful work for all, and in which citizens have a sense of justice, a

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[54] Altruistic and benevolent actions will not, for example, always be just. See Freeman's discussion of this dual presentation of the sense of justice in Freeman, 2007, p. 249. Indeed, this distinction between benevolence and justice is already present in Hume. In his *Treatise on Human Nature* and his *Second Enquiry* Hume notes that benevolent actions are not always compatible with the requirements of justice.

[55] This society should thus aspire to safeguard and nurture this sense of justice. As Rawls writes, "the parties [in the OP] regard themselves as having a higher-order interest in how their other interests, even fundamental ones, are regulated and shaped by social institutions". (Rawls, 1974 B, "p. 228) Nurturing the sense of justice could be considered a third feature of the well-ordered society, or a sub-feature of its stability.

[56] "Just as persons gradually formulate rational plans of life that answer to their deeper interests, so they come to know the derivation of moral precepts and ideals from the principles that they would accept in an initial situation of equality. […] The connection between these standards and human aspirations is now comprehended, and persons understand their sense of justice as an extension of their natural attachments, and as a way of caring about the collective good." (Rawls, 1999, p. 434)

[57] This harks back to note 54 of the previous chapter.

sense of reciprocity is encouraged. This leads citizens to want to comply with fair terms of cooperation. This is further encouraged by the widespread ownership and control of means of production which characterises a property-owning democracy.

To support this understanding of social cooperation as informed by the sense of justice, Rawls highlights our inability to politically regulate all dimensions of life, meaning that a sense of justice is actively required in our society as well as in the well-ordered society.[58] Against this Rawlsian suggestion, there might remain uncertainly about the need to appeal to a sense of justice in characterising the stabile society. Perhaps people need only be bound by some agreement and fear of punishment to secure social stability. However, given that we have supposed that reciprocity should be a political value, and that all members of society should be free and equal, the sense of justice seems reasonably hypothesised as the embodiment of the values of the well-ordered society, a point that will be of relevance to Cohen's egalitarian ethos argument and the resulting endorsement of a strict interpretation of the DP.

This leads us to the final feature of the well-ordered society to be highlighted in defence of an alternative reading of the DP. The well-ordered society, according to Rawls, enables the warranted self-respect of all members of society.[59] This feature again relates to the value of reciprocity, in that it is, in

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[58] "…there are no legal sanctions in the ordinary sense for many sorts of unconstitutional actions by parliaments and chief executives, and the political forces they represent. The leading political actors are guided therefore in part by what they regard as morally permissible; and since no system of constitutional checks and balances succeeds in setting up an invisible hand that can be relied upon to guide the process to a just outcome, a public sense of justice is to some degree necessary." (Ibid, pp. 431-2)

[59] This is not to assume psychological homogeneity, but rather to identify some general features of psychological wellbeing that the well-ordered society should protect and nurture. It is also to exclude 'unwarranted' self-respect, i.e. the product of psychological manipulation.

the standard psychology, the subjective manifestation of a recognisably mutually beneficial social order. Thus, in addition to demonstrating reciprocity, being stable, (and nurturing individuals' sense of justice,) the well-ordered society should allow all its members to feel included in the system of social cooperation, and should nurture a sense of self-respect. As Rawls writes, "self-respect and a sure sense of one's own worth is perhaps the most important primary good. And this suggestion has been used in the argument for the two principles of justice."[60] When principles that do not satisfy the sense of justice or the value of communal reciprocity prevail, he writes, "…we become sullen and resentful… and …we grow distant from political society and retreat into our social world. We feel left out; and, withdrawn and cynical, we cannot affirm the principles of justice in our thought and conduct over a complete life."[61] In other words, the lack of reciprocity realised by the social order communicates the message that those who benefit less (allowing those with more to benefit further still) are not equally valued and should not be included to the same degree as others with skills that the social system rewards more highly. This point appeals to a dense psychology that, once more, we cannot hope to explore in sufficient detail here. We can reasonably suppose, however, that the appeal to 'self-respect' as a primary good, is sound, and we can further suppose that the connection between the ideal of communal reciprocity outlined above, and the sense of self-respect are interdependent in the sense suggested by this paragraph. If self-respect is reasonably contingent on feeling that one's social system is designed to benefit one, and benefit one as an equally important contributor this cooperative, Rawls concludes, the DP is a justified principle of justice. Moreover, he claims that it is superior to principles that pay no

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[60] Rawls, 1999, 348.
[61] Rawls, 2001, 128.

heed to inequality once a set level of sufficiency has been ensured, since ignoring inequalities that do not benefit the worst-off (and are therefore not conducive to the conception of society as organised to benefit everyone equally) sends the message of 'being left behind by society' Rawls refers to above.

On this note, Frankfurt might again chime in, claiming that people read nothing into the disparities in assets and entitlements beyond a generous level of sufficiency. Once everyone has enough to flourish happily they have no interest in how others fare relative to them, and any inequalities that do exist between them and others are certainly irrelevant to their sense of self-respect. As demonstrated by the previous chapter, different thought experiments reveal different intuitions in this regard, some apparently corroborating Frankfurt's view (such as the good parent example), and others corroborating a more egalitarian view (such as the well-off compared with the mega-rich using Parfit's metric examples). In response, the scope of Rawls's theory should again be highlighted. His theory refers to the basic structure of society and not to specific distributions above and beyond the remit of social institutions and laws. Perhaps people would not care if others have more than them in certain circumstances, as long as they feel that they have a good amount and that they are equally valued by society. However, the cooperative infrastructure of society must demonstrate reciprocity, unless some alternative interest is found to override this value. If reciprocity is not achieved by the basic structure of society, the unfairness of this distribution is likely to spark the disengagement of low self-respect.

The alternative reading of Rawls, therefore, takes these interrelated features of the well-ordered society to comprise Rawls's understanding of what any just

system of social cooperation will require, and to imply the justice of the DP. People in the well-ordered society with a well-developed sense of justice view each other as formally equal, view everyone's skills as necessary to produce the fruits of social cooperation, understand no one to be responsible for their natural endowments, and think all individuals entitled to a sense of self-respect. Given this conception of the individual and of the objectives of social cooperation, therefore, people aspiring to live in a well-ordered society should believe that reciprocity is most fairly realised and self-respect best guaranteed by an equal distribution combined with the (incentive inequality-prohibiting) DP. This is to affirm the positive conclusion introduced in Section I without appeal to the value of equality *per se*, and without a deductive argument from the OP – a point I shall return to by way of conclusion. The alternative reading of Rawls instead justifies the DP as a direct consequence of the view of what constitutes proper social cooperation in a well-ordered society. Furthermore, despite the elusiveness of the value of equality on this account, Rawls's view of the well-ordered society offers an explanation of the appeal of the ideal of equality in a way that the standard reading alone does not.

Having sketched Rawls's alternative justifications for the DP, we must now return to face Cohen's critique of the previous chapter. In offering an explanation of the well-ordered society, we must once again ask, has Rawls ruled out the possibility of incentive payments that are contrary to the ideal of equality? Otherwise put, given that the objective of the DP is not primarily to achieve the best deal for each self-interested group negotiating within the OP, but instead to respect common humanity and common ownership of the diversity of citizens' talents and interests, can we avoid the incentives argument? By highlighting these assumptions in Rawls's work, it becomes far less clear that incentive payments would be sought if Rawls's presuppositions

were adopted and his principles applied. It certainly seems unlikely, given such egalitarian moral presuppositions, that Rawls would want to permit incentive payments within the remit of justice. On the contrary, it seems more likely that Rawls imagines himself to propose a strictly egalitarian version of the DP. In so doing, he would respect the equal entitlement of all community members to the fruits of social cooperation. Supporting this view, Cohen writes:

> When true to itself, Rawlsian justice condemns such incentives, and that no society whose members are themselves unambivalently committed to the difference principle need use special incentives to motivate talented producers... save within the terms of the personal prerogative[62]

This is to endorse a strict interpretation of the DP. Such an interpretation, according to Cohen, does not only regulate the laws and institutions of society, but also the choices of individuals. It restricts them in their private pursuits to the affect that they cannot seek incentives that conflict with the ideal of the well-ordered society. "In such a society", writes Cohen, "the difference principle affects the motivation of citizens in economic life. It controls their expectations about remuneration, that is, what they will regard as acceptable pay for the posts they are invited to fill".[63] This strict interpretation, claims Cohen, avoids the incentive argument. Nonetheless,

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[62] Cohen, 2009, p. 68 incl. nt. 37.
[63] Cohen, 1991, p. 312. The passage later continues: "much of what Rawls says commits him to such an understanding of the difference principle, even though his approval of incentives embodies a rejection of that understanding, since approving of incentives means accepting the difference principle in its lax form, and in that form it can be satisfied in a society where it has no direct influence on economic motivation."

Cohen does not take Rawls to advocate this version, and he therefore considers Rawls to have left himself open to the incentives critique.

To escape Cohen's criticism, therefore, Rawls must either be shown to except that a strict interpretation of the DP entails the egalitarian ethos, or to prove that coercive institutions alone can enforce the strict DP. On the former point, there does not seem to be any change in the remit of the DP on the alternative reading. While Rawls claims that a sense of justice is fostered by a well-ordered society, and while this sense of justice, in turn, helps to perpetuate the well-ordered nature of society, the DP is still only considered to regulate the institutions of the basic structure. In allowing private decisions, such as those referred to by Cohen in relation to the family and productive activity, to fall outside the remit of the DP, Rawls's theory fails to guarantee the ideal of distributive justice that he outlines in his characterisation of the well-ordered society – despite the fact that everyone's sense of justice happen to discourage them from seeking incentives. On the latter point, Scheffler defends Rawls by claiming that it does not follow from Cohen's identification of the ambiguity in Rawls's characterisation of the DP that "a government could not implement the strict principle by itself".[64] This is to say that Cohen's basic structure objection does not hold and that coercive institutions alone can succeed in preventing incentive inequalities. In the previous chapter, I dismissed this claim, by conceding Cohen's point that individual decisions can affect the justice of basic structure institutions – particularly in relation to the family.

At this point, the three conclusions mentioned in the introduction to the chapter have been drawn – if somewhat provisionally. As per the previous section, if we adopt a standard reading of the DP and only appeal to the OP

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[64] Scheffler, 2006, pp. 24-5.

argument, we are not rationally compelled to choose even a lax version of the DP over a restricted principle of average utilitarianism. This explanation fails to capture the appeal of the idea of equality and, therefore, fails to indicate whether the value of equality is of intrinsic worth. This section, on the contrary, offers a Rawlsian way to explain the appeal of the ideal of equality. This explanation, I suggest, can justify objections to Laila's wealth, and can justify appeal to a strict DP. However, it also reveals that while Rawls offers compelling reasons for the DP, he fails to follow though on this reasoning by not considering how individual economic choices should properly be informed by the principles of justice.[65] To rectify this omission, it thus seems that an egalitarian ethos must be adopted to ensure that justice only the strict DP is practised.

V - COMPARISONS WITH OTHER CONCEPTIONS OF JUSTICE

Having outlined Rawls's conception of the well-ordered society and its implications for the DP, I will use this section to reinforce its appeal by comparing it with the most plausible alternative principles of justice, particularly the principle of average utilitarianism.[66] In so doing, I will suggest that Rawls's alternative justification for the DP (hereafter presumed to mean the strict DP) reigns superior to this and other related alternatives when justified using the alternative reading sketched in Section IV above.

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[65] Scheffler gives Rawls the benefit of the doubt regarding this omission. See Scheffler, 2006, particularly p.20.
[66] Following Rawls, I shall not attempt an exhaustive account the alternative conceptions of justice that might prove superior to that offered by Rawls. As he writes: "I do not wish to overemphasise this criterion: a deeper investigation covering more pair-wise comparisons may show that some other conception of justice is more reasonable." (Rawls, 1974 B, p. 231)

The most plausible principles of justice in competition with the DP are components of "mixed conceptions of justice".[67] This is to say that, like the DP, they are used in combination with the first principle of justice (ensuring an extensive range of rights and liberties to all) and with the first part of the second principle of justice (ensuring fair equality of opportunity). This means that many of the inadequacies of unrestricted utilitarianism to be sketched below and remedied by Rawls's theory are also remedied by these alternatives. For many, including Frankfurt and Harsanyi, this will cast doubt on the superiority of the DP above these alternative principles. In this section, I shall therefore examine what many take to be the most challenging alternative conception of justice, a mixed average utilitarian conception, before concluding the chapter in support of the DP.

Utilitarianism, to use Harsanyi's brief definition, makes "maximisation of social utility the basic criterion of morality".[68] A consequence of this position is that it regards people from an impersonal perspective, as mere locuses of utility. It is thus unimportant to the utilitarian in whom utility is located.[69] As Sen and Williams write, "In judging an action there is no need to know who is

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[67] See Rawls, 1971 & 1999, §49.

[68] Harsanyi, 1982, p. 40. Sen and Williams embellish this definition by characterising utilitarianism as an intersection between two types of theory: "One is a theory of the correct way to assess or assign value to states of affairs, and it claims that the correct bias of assessment is welfare, satisfaction, or people getting what they prefer [welfarism]….The other component is a theory of correct action, which claims that actions are to be chosen on the basis of the states of affairs which are their consequences [consequentialism]… Utilitarianism, in its central forms, recommends a choice of actions on the basis of consequences, and an assessment of consequences in terms of welfare" (Sen and Williams, 1982, pp. 3-4). Some would reject their appeal to consequentialism, claiming that utility need not only be measured in terms of outcomes since certain actions can bring utility regardless of their results and certain people might therefore choose to measure the social utility produced in actions rather than outcomes. However, Sen' and Williams's definition is widely endorsed, and therefore the version I will consider.

[69] Sen and Williams, p. 1. Or, as they later put it, "Persons do not count as individuals in this [utilitarian view of the human] any more than individual petrol tanks do in the analysis of the national consumption". (p. 4)

doing what to whom so long as the impact of these actions – direct and indirect – on the personal sum of utilities is known."[70] This leads us to the widespread objection to utilitarianism: if all that is morally significant is the utility that results from actions, and not the content of actions, unconstrained utilitarianism is compatible with any number of abominable distributive policies, such as the routine murdering of healthy people in order to save a great many more ill people, or the funding of a 'feel safe in your neighbourhood campaign' instead of a small number of procedures that will make the lives of a few bed-ridden people normal again. As Wolff puts it, "No consequence is so bad that it cannot, in principle, be outweighed by a large aggregation of smaller goods".[71] Therefore, despite its professed concern for the equal importance of individuals – no one's achieving of utility is more important than another's – utilitarianism as a moral theory cannot account for the values of individual autonomy or integrity beyond their weight as units in a utility calculation. As Rawls puts it, utilitarianism "does not take seriously the distinction between persons",[72] and this is surely a fatal defect for any moral theory.   Even if we instead aspire to average utilitarianism, meaning that we try to maximise the average utility level of each person in society, though slightly more individual-sensitive, our theory remains subject to the above criticisms; the worst-off might still be sacrificed to the benefit of the better-off as long as this betters average utility.[73]

This leads us to the 'mixed' reformulation of utilitarianism which brings it in line with the conception of common humanity and the implications thereof

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[70] Ibid, p. 5.
[71] Wolff, 2006, p. 1.
[72] Rawls, 1971, pp. 27 & 187.
[73] As Rawls puts it, "…while the principle of average utility may sometimes lead to a social order securing these [basic equal] liberties, there is no reason why it will do so in general" (1974 B, p. 228).

asserted in Chapter One. By constraining the principle of average utility with Rawls's prior principles, instead of always choosing the policy that betters the lot of the worst-off according to the DP, we might aspire to maximise the average utility level per capita of society as a whole. In so doing, we avoid the waste to which many believe the DP prone; i.e. we do not sacrifice massive gains in utility for very little benefit to the worst-off. Likewise, many would consider a principle of average utilitarian distribution, in this mixed context, far more rational a choice in the OP than the DP. As highlighted in relation to Frankfurt in the previous chapter, if the principles of justice were selected by rational choice alone, many people would be more inclined to risk a marginally lower level of utility if there were good odds they would be well rewarded for their risk.[74] Moreover, the principle of average utility also prohibits distributions that allow the overwhelming majority to fare badly so that a tiny minority can fare exceptionally well, as does the principle of maximum utility. Given these benefits, we must thus ask, why does Rawls think his principle of distributive justice superior?

As an aside, before continuing the dispute over which principle of distributive justice best accompanies the prior principles, it might occur to one that there is no need to have a principle of distributive justice in this position at all. If the distinction between people and their protection from the 'abominable policies' mentioned above is recognised in their entitlement to rights, liberties and opportunities, who cares how extra resources get distributed? In response, we should recall the discussion of fairness of procedural outcome highlighted in Chapter One: even when these prior principles are satisfied, brute bad luck can arbitrarily quell some people's chances of benefit. As such, if we believe

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[74] For a discussion of the prevalence of the widespread tendency towards this kind of utilitarian policy see Wolff's "Making the World Safe for Utilitarianism" (2006, pp. 1-22).

that the well-ordered society, as a system of mutually beneficial social cooperation, should protect its members from the affects of brute bad luck, we need a principle according to which social institutions are accountable to their members even after the former principles have been successfully practised. There will thus be a minimum requirement upon the well-ordered society to employ a principle of distributive justice that secures a decent level of sufficiency where possible. The DP is a means of achieving this end but, as Frankfurt highlights, this does not justify its use once the level of sufficiency has been reached by all. With this in mind, I shall return to the comparison of principles in order to better establish the DP as superior to average utilitarianism and, indeed, sufficiency.

Rawls explores a number of non-decisive reasons that, he suggests, favour the DP over the constrained principle of average utilitarianism. Firstly, referring back to the original OP argument, because the choices made in the OP affect the very structure of people's lives, and thus the quality of their lives as a whole, they are inclined to be extremely risk-averse.[75] While in specific instances risk-taking in the interests of maximising average utility makes sense because the negative risk is temporarily limited or very small relative to the benefits hoped for, OP decisions will affect the entire of one's life irrevocably, so it would be unwise to take risks one did not have to if one had no idea what the odds of benefiting from these risks were. Rawls also suggests that, in this regard, the DP is superior to a principle of sufficiency. Because those in the OP know not what their preferences will be, they will seek to maximise their potential share of primary goods rather than merely settle for a sufficient package – however substantial it may be. Not everyone will agree with Rawls on this account. Frankfurt, in keeping with his previous

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[75] See p. 43 of Chapter 2.

criticisms of the standard reading, accuses Rawls of verging on fetishistic consequentialism, since the latter seems to demand that primary goods be maximised regardless of the individual's private goals or desires. He likens this policy to that of a person who pursues money for its own sake, noting that "Rawls considers it rational for a person to want as much of them [primary goods] as possible".[76] However, this argument only follows if one ignores the demands of fairness and the concept of the well-ordered society discussion in Section IV's exposition of the alternative justification for the DP. While Frankfurt may be warranted in questioning the rationality of the choices Rawls suggests that those in the OP would make, he fails to consider what choices people aspiring towards a well-ordered society would make. In this regard, Rawls's preference for the DP over the average utilitarianism and sufficientarianism seems plausible.

Rawls also suggests that the DP is favourable to a utilitarian principle, because it is easier to apply. This is so, he argues, because we are more likely to be able to identify the means to better the lot of the worst-off group in society than to know how to maximise utility.[77] Likewise, restricted utilitarianism and sufficientarianism lack a means of establishing the level of sufficiency that should be guaranteed to all; whereas the DP need only identify the means of bettering the lot of the worst-off group in society to be practised effectively. This, combined with the likelihood of risk-aversion and the supposition, mentioned in Section IV, that it is psychologically easier to commit to the DP than a constrained principle of average utility, since it is both less risk-averse and because it is more conducive to the ideal of

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[76] Frankfurt, 1988, 157.
[77] "Once the least favoured group is identified, it may be relatively easy to determine which policies are to their advantage. By comparison it is much more difficult to know what maximises average utility." (Rawls, 1974 B, p. 229)

reciprocity towards which we properly aspire, leads Rawls to favour the DP.[78]
As he concludes, "I have noted several reasons that support the maximin
criterion: very considerable normal risk-aversion (given the special features of
the original position), less demanding information requirements, greater
suitability as a public principle, and weaker strains of commitment. Yet no
one of them is clearly decisive by itself."[79] This brings us to back to our
negative conclusion first highlighted in Chapter Two, Section II: alone, the
OP argument cannot justify the DP.

What definitively justifies the DP, suggests Rawls, is the normative
conception of the well-ordered society as 'a collective of cooperators
organised to mutually benefit one another' sketched above.[80] The principle of
distributive justice that best treats people fairly and in a manner conducive to
their status as free and equally important members of this social cooperative is
the DP. While a constrained principle of average utility will likely satisfy the
less-advantaged to the extent that it meets their needs and does not provoke in
them the violent anger of injustice, it will not grant them the self-respect and
sense of social inclusion described in Section IV. Eliminating causes for
unrest is not the only goal of the well-ordered society and while both the
constrained principle of average utility and the DP are likely to succeed in this
task, only the latter is sure to produce policies that every member of the social
cooperative can claim to benefit from. This is to distinguish the choice
between two kinds of welfare state, one that meets needs and another that

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[78] "Looking first at the situation of the less advantaged, the utility principle asks them to view
the greater advantages of others who have more as a sufficient reason for having still lower
prospects of life than otherwise they could be allowed. This is an extreme demand
psychologically; by contrast, the maximin criterion assures the less favoured that inequalities
work to their advantage." (Rawls, 1974 B, p. 230)
[79] Rawls, 1974 B, p. 230.
[80] "I want to suggest that the aspirations of free and equal personality point directly to the
maximin principle." (Rawls, 1974 B, p. 230)

treats each member of society fairly. Since restricted average utility cannot guarantee that it will treat people fairly, since it cannot guarantee to benefit everyone, and since it is likely, at times, to unfairly benefit the better-off instead of the worse-off, Rawls concludes that the DP would be chosen over the principle of average utility in the OP.

VI - CONCLUSION

In this chapter, I have suggested that Rawls's DP can be read in a way that does not depend on the self-interested desires of OP inhabitants, but instead on a normative conception of the well-ordered society. This view understands the objective of this well-ordered society to be cooperation for mutual benefit, it considers all of its members to be equally important to the production of these benefits and it thus considers distributive justice to demand the equal distribution of resources. This is admittedly a position that cannot be substantiated by further reasoning; either one accepts the view that we should consider the diversity of skills and talents within society to be a common resource, the fruits of which everyone has an equal claim over, or one does not. However, Rawls's view seems both plausible and attractive, given the notion of common humanity outlined in Chapter One, and the moral arbitrariness of the natural diversity of talents.

This leads to the three conclusions highlighted in the introduction. The negative conclusion, highlighted in Chapter Two and Section V above, claims that the OP argument cannot conclusively justify the DP given the dispute over what the rational choice in the OP would be (and, indeed, given the dispute over the valence of decisions made in so hypothetical a situation, and so lacking in self-knowledge). However, positively, Rawls offers an alternative justification for his egalitarian principle. This, he suggests, is

conclusive to the extent that if one adopts his normative conception of social cooperation, and one considers only the alternative conceptions of justice that he does, the DP will be the required choice of distributive principle. Rawls emphasises this point, as I highlighted in the previous section, by demonstrating the strengths of his principle over what is commonly considered to be the most challenging competitor. Unlike average utilitarianism (and sufficientarianism), the DP ensures distributive policy that recognises everyone as an equally important member of and contributor to the system of social cooperation by ensuring that every distribution benefits everyone. In this way, everyone can reasonably feel respected and, therefore, included – a fact that nurtures the sense of self-respect in all members of the society.

Having acknowledged the appeal of this view, and having claimed that it can capture the appeal of the ideal of equality, however, there remains an inconsistency in Rawls's work. While his strong presuppositions of moral equality and collective ownership of the fruits of social cooperation seem to require that just DP inequalities can only be compensatory, he seems to allow room within his theory of justice for incentive payments that conflict with the ideal of the well-ordered society towards which his theory aspires. This is so, because he restricts the domain of the principles of justice to the basic structure, excluding individual choices from its jurisdiction. Following through on his reasoning for characterising the well-ordered society as he does, I therefore argue, should instead lead Rawls either to call an incentive-permitted DP pragmatic rather than wholly just, and/or to appeal to an egalitarian ethos to compensate for the limited scope of the DP, as does Cohen.

On this account of distributive justice, therefore, justice requires equality because of the kind of mutually beneficial social order we value. Rawls writes: "Thus at first sight the distribution of natural assets and unequal life-expectations threatens the relations between free and equal moral persons. But provided the maximin criterion is satisfied, these relations may be preserved: inequalities are to everyone's advantage and those able to gain from their good fortune do so in ways agreeable to those less favoured."[81] While Rawls goes on to claim that "Meeting this burden of proof reflects the value of equality",[82] this move is not, in fact, necessary. This leads to the final, speculative conclusion. As Section IV above demonstrated, Rawls's alternative justification makes no appeal to the value of equality *per se*. Rather, equality happens to be the best way to treat people as we believe they should be treated in the well-ordered society.

In summary, an alternative reading of Rawls can account for the appeal of the *ideal* of equality in the sense, evoked by Scheffler, of a society "organized as a society of equals",[83] without appealing to the *value* of equality. This conclusion is similar to that of Scanlon referenced in the first chapter, but instead of reasoning from a normative account of the moral agent (has having a claim) within a social contract, Rawls reasons from a normative conception of social cooperation. In both versions, therefore, while justice requires equality, the value of equality seems to remain theoretically unnecessary.

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[81] Rawls, 1974, "Some Reasons for the Maximin Criterion", 231.
[82] Ibid.
[83] Scheffler, "What is Egalitarianism?", p. 33.

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