

Balancing Choice and Circumstance



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<http://www.billfrymire.com/>, Kamloops, British Columbia, Canada. October 28, 2009

Fair Shares and Just Access in Liberal Justice

By: Matthew Murray
Cardiff University
Politics Department
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Ph.D. Dissertation 2010

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Abstract

This dissertation assesses how liberal theories of justice balance the ideas of choice and circumstance and why these explanations fall short. This dissertation will show how we can progress naturally from libertarian intuitions about moral agency through to a developed liberal account of justice. I will work through the theories of Robert Nozick, John Rawls, Ronald Dworkin and Philippe Van Parijs. By assessing these theories, I will argue that liberal justice can balance the concern for individual choice and circumstance appropriately but that this requires specific developments of the liberal position. I will argue these developments are an understanding of fair shares in the prefaced but necessary market present in liberal theories in order to honor individual choices. This argument will lead us to endorse a specific conception of taxation based upon resources rather than end-results. The second development I argue for is the implementation of the Principle of Just Access to respect the moral agency of the handicapped. I will show that liberal theories have utilized a concern for individual circumstance, which is not detailed enough. This has caused them to under-represent the valid moral agency of the handicapped. I will argue that in order to honor the choices of the handicapped properly, an account of liberal justice must prioritize compensation through a Principle of Just Access. The dissertation will conclude by asserting the potential validity of some of Van Parijs' institutional claims. I will show that although Van Parijs presents an incomplete liberal argument, we can defend many of his positions, particularly his arguments for universal basic income and resource rents, through a properly developed account of liberal justice. I present this account and show why a conception of fair shares within the market and the Principle of Just Access make this account unique and necessary.

Acknowledgements

A thesis dissertation is much like the creation of a sculpture. In order for the project to come to fruition, there must be a great deal of support for the sculptor. My wife and family have encouraged me at every turn to pursue the production of this dissertation. For their support, comfort and sacrifice I am truly thankful and forever indebted. For my friends and contemporaries, Camilla, Sarah, Gavin, Claire, and Mike, your help, advice and distractions that helped me finish this project without succumbing to mental and physical fatigue that has accompanied this process, I extend to you my deepest gratitude. To Mike, I am particularly indebted for his advice, encouragement and willingness to listen to my liberal prattle. My sincere thanks to Mr. Bill Frymire who generously agreed to allow me to use his image "Justice for All" on the cover of this text. I feel it encapsulates the clear impartiality device present in liberal justice, yet how blurred the weighting and balancing of issues can be as we attempt to go about our judgments and actions in a fair and impartial way.

With the support for the labor provided, the sculptor undertakes his training. For me, I am deeply thankful for the many professors I have been fortunate enough to have met and been tutored by while at Cardiff University and Wheaton College. I am grateful for the support of Dr. Boroviak, Dr. Trevino and Dr. Weiskamp who have lent their support throughout my academic career and are aiding in my preparation for the American academic environment. I am especially grateful to Dr. Dworetz who saw in me what few did and whose persistence and encouragement ultimately fueled this journey. Cardiff opened its doors to me when so many others were unwilling to extend the help I needed to make my goals a reality. When things have not been their brightest, the school has always acted on my behalf without hesitation. To Dr. Roberts, Dr. Haddock, Dr. Sutch and Dr. Boucher I am particularly indebted in this regard. I would also like to thank Dr. Cole, Dr. Widerquist, Dr. Steiner, Dr. Van Parijs, Dr. Garrard and Dr. Pateman for their assistance, advice and attention over the past 4 years. You have all made me the scholar I am today and I am sincerely grateful.

The sculptor then is handed the task at hand, to create a product of merit. Words cannot begin to express the ways in which Dr. Roberts and Dr. Haddock have helped in bringing this document into existence. When it was little more than a lump of unmolded ideas, they could see the potential. When it was a roughly chiseled outline, they highlighted what needed to be more distinctively articulated. When it was a complete but unpolished visage, they were able to show me where to shine and work to make this document worthy of submission. At every turn, they were there with encouragement, a critical eye and a vision for moving the project forward. They always delivered their ideas and concerns with consideration, professionalism and a smile. This work truly would not have happened without you, gentlemen and I feel honored to have had you as my guides through this process. I hope to do you proud should I be fortunate enough to have a chance to be a career academic.

**Balancing Choice and Circumstance
Fair Shares and Just Access in Liberal Justice**

<u>Table of Contents -</u>	<u>Page</u>
Introduction	1
Chapter 1 - Nozick, Justice and the State	12
1.1 Rights, Entitlement, Patterns and the Minimal State	14
1.2 Critiques of the Entitlement Theory	34
1.3 Conclusion	51
Chapter 2 – Rawls, Circumstance and the Welfare State	54
2.1 Rawls and A Theory of Justice	57
2.2 Institutionalizing Distributive Justice: The Difference Principle in Detail	68
2.3 Moving from the Welfare State to a Property Owning Democracy	83
2.4 Conclusion	90
Chapter 3 - Dworkin, Talents and Ambition Sensitivity	94
3.1 Dworkin’s Critique of Rawls	97
3.2 Talents, Handicaps and Distributive Justice	115
3.3 Conclusion	142
Chapter 4 - Van Parijs and Real Freedom	146
4.1 ‘Real Freedom for All’ and the Unconditional Basic Income State	149
4.2 Ambition Sensitivity, Choices and Amending Property Rights	176
4.3 Endowment Insensitivity, Circumstance and Instituting ‘Undominated Diversity’	195
4.4 Welfare, Contributory Negligence and Equality	211
4.5 Conclusion	226
Conclusion – Developing Liberal Justice	230
Bibliography	243

Introduction

This year marked the 20th Anniversary of the Americans with Disabilities Act in the United States.¹ This was an anniversary touted through a memorable televised Presidential Public Service Announcement campaign prior to the mid-term elections of 2010. This act is the high water mark for civil rights for the handicapped and disabled within the United States. It has been challenged, amended and clarified over the last 20 years but the legislation still represents the recognition that handicapped and disabled individuals in society required greater protections in order to enjoy equally valued social privileges than had been recognized previously. This makes the handicapped and disabled one of the last groups in American society to receive recognition as a systematically under-represented group in need of greater civil rights protection. The ADA represents a move toward the kind of equality that our liberal societies strive for. The goal of the ADA is to afford individuals with handicaps and disabilities rights to access and enjoy the benefits of our interwoven society. It is intended to ensure that society does the best it can in providing social equality to handicapped individuals in a reciprocal and fair way.

However, the last 20 years have pushed and pulled the ADA in many different directions. There have been numerous court cases and amendments to the legislation that have both eroded and strengthened parts of the document.² Issues with a decline in employment numbers for those with disabilities and with professional enforcement mechanisms³ are well documented and expose the troubling ineffectual nature of the ADA. Other critics suggest that the ADA may actually compensate some who do not deserve compensation because of the vague or in some cases arbitrary classifications of handicaps. Treatment of the same handicaps can also vary greatly from State to State due

¹ See - <http://www.ada.gov/> The Americans with Disabilities Act website, maintained by the Department of Justice.

² See Footnote 1 and Stapleton, David C & Burkhauser, Richard V.; *The Decline in Employment of People with Disabilities: A Policy Puzzle* ; (W.E. Upjohn Institute; Kalamazoo, MI; 2003)

³ Vierling, Lewis E.; "Proving Disability Remains Difficult"; *The Case Manager* - January 2004 (Vol. 15, Issue 1, Pages 25-29)

to particular state mechanisms and classifications. Though refinement is to be expected with a new piece of legislation, the ADA represents the most basic protections a State which values equality can provide, in this case access to society. It is an emancipatory law much like historical legislation addressing gender, racial, and ethnic minorities. However, unlike these minorities, the handicapped and disabled have no heterogeneity and as a result, no historical collective social grouping or collective culture. They will continue to face inequalities that require positive actions by government in perpetuity. They cannot be made equal simply through the removal of barriers and are a difficult group to define from the outset. This leads to a confused hodgepodge of laws that have been ineffectual in addressing both sides of the problem adequately. Though this is best seen through the movements of the legislation to patch together an approach to disabled people, the existence of these needed movements orchestrates a much deeper issue. There is a clear obligation for assistance but without a clear and comprehensive picture of what this obligation is, approaches to it are going to be inappropriate in some manner.

Our ideas of what the fair treatment of these individuals ought to be is based on a conception of what a fair and reciprocal concern for distributions of goods, social and natural/physical, require of our systems of justice within a State. We are charged with deciding what people are fairly owed given their unchosen circumstances and their ability to make choices that lead to unequal outcomes. Without an account of what our duties to access are given our unequal physical dispositions, our laws will continue to meander in a troubling and ineffective way.

Accounts of liberal justice have attempted to show how to treat this issue within an account of distributive justice. These accounts show the effect physical endowments have on social outcomes. They explain how we ought to address them within principles of justice. They attempt to show us how we can be obligated to one another in specific ways and what these obligations mean for our treatment of one another given our unequal physical characteristics, shared physical environment and the value of philosophic equality. These theories themselves offer us very different accounts of what our obligations and institutions ought to be. These theories illustrate the push and pull

between our elements of distributive justice. The value of moral agency, choices and the limited role of government on one side and the redistributive and outcome based social equality arguments on the other. The latter of these, particularly Rawlsian Liberalism, has clearly influence the move in policies we can see through the ADA in the United States and other policies elsewhere.

The reason we have these conflicted accounts arising in our political processes is that our very basic accounts of how to balance these issues and attribute for them fairly is incomplete. This implies the solution will have to come from a development in our philosophic approach. In this dissertation, I will explore what this commitment ought to be, what developments of our liberal thought are necessary to reconcile these ideas and what institutions they ought to endorse. I will show how we ought to balance our considerations of individual choices and their validity with our legitimate concern for the unchosen physical circumstances that befall individuals in our society. I will show that in order to provide for the handicapped and disabled coherently, we must develop the idea of handicap comprehensively. I will show how this leads us to develop a Principle of Just Access in order to account for discrepancies in physical condition appropriately.

I will show that this is needed to attribute for the valid moral agency (the ability of individuals to make choices and accept consequences) of most of the individuals our account of justice would attribute as handicapped or disabled. I will show how this can be done and how it does not undermine particular aspects of market devices, which are associated with classical liberal approaches to justice and equality. By asserting what a fair market must do, particularly in terms of fair shares, I will show what is needed in order to provide a system of choice sensitivity and the individual freedom that comes from use of a market device. By working through liberal accounts of justice, I will show how important the idea of a market that formalizes choices can be. I will explore the underlying commitment to fair shares and why this must be taken seriously. I will also show how a proper consideration of disability leads us to a greater development in our principles of conditional redistribution and the institutions that can live up to these commitments.

To do this the dissertation will begin with an inspection of the argument for libertarian justice presented by Robert Nozick. Nozick represents the classical liberal/libertarian approach. Though Nozick is not the sole standard bearer for the libertarian argument, his argument is important as it is posed as a direct critique of the work of John Rawls and Political Liberalism. Nozick is also valuable as his argument shows how choices can have legitimate outcomes if individuals are presumed to have equal moral agency.

Nozick's argument is a defense of the power of choices and consequences that result from our natural rights and individual moral agency. It proves an important starting point in asserting the power and problems of a solely rights-based equal agency argument. I will show that Nozick fails to account for inequalities in natural endowments that have a direct effect on moral agency. I will also show that within his argument there are presuppositions that require market systems to provide fair shares of resources in order for individual agency to be equally valuable over time.

Rawlsian Liberalism asks us to move away from this approach to justice and I will show how this can come about more naturally than it seems from a classical liberal approach. However, in analyzing the libertarian approach of Nozick, I will show how we can still defend the kind of market device Nozick advocates for. In fact, I will argue we require such a device if people do have agency and can make choices which are equally valuable.

By working through Nozick's position, we can conclude that if individuals have agency that we must protect, the market device will serve a subordinate but needed role in preserving this agency. I will do this by presenting the critique of Nozick offered by the analytical Marxism of G.A. Cohen. Cohen works as a rigorous counterpoint to Nozick to show the strengths and weaknesses of Nozick's position. It is in examining these positions that we see the need for a different approach, which splits the difference between stark rights protection and collective universalism. I will outline the importance

of fair shares within a market device. I will show how this can be obtained through a secular proviso, the Fair Shares Proviso. I will also highlight the distinct problem of natural endowment issues within a Nozickean account and show how the balance between choice and circumstance needs refinements that Nozick does not give even if a market device can be defended as requisite if appropriately conceived and qualified.

This moves us toward the liberal account of John Rawls. Rawls uses a hypothetical approach to consider justice and produces, over the course of several books, articles and lectures, an account of justice, which has been a benchmark in contemporary political philosophy. Rawls is important because his theory explores how we can introduce and balance claims of circumstances/natural endowment and choices/moral agency, within an account of distributive justice. Rawls asks us to utilize a hypothetical thought device from which we can create fair principles of justice. He does this through the original position and the veil of ignorance, which are utilized to create the appropriate impartiality needed to create principles that are fair for absolutely everyone. For Rawls, this leads to principles of justice that equally value liberty through ensured opportunities and a maximin redistribution of social primary goods.

However, Rawls has his own issues that his many critics have raised over the almost 40 years since the initial publication of *A Theory of Justice*. For the purposes of this text, I will focus upon the distributive aspects of Rawls theory. The predominant assumption concerning maximin redistributive obligation is based upon the argument that the least well off are assumed to be naturally deficient or handicapped in some meaningful way. Because of this, the results of the choices individuals make are on some level always unchosen as they are the result of unchosen circumstances and could befall us all. This leads Rawls into a level of redistribution (maximin) and account of why we act this way that does not allow choices to mean what they ought to mean. This is because Rawls does not take seriously the legitimate moral agency those with deficiencies in natural endowment have or that equally endowed individuals may make decisions that lead to disproportionate disparities in condition. This leads to maximin redistributions that are not choice sensitive to an appropriate level and as such, do not

balance our considerations of handicap/natural endowment with the importance of individual choices.

Even if the outcomes and operations of the difference principle are troubling, Rawls gives us an account of justice that provides a device for coming to principles of justice and an account of these principles that intends to balance them against each other. Nevertheless, a further development is needed, which is why we move onto the work of Ronald Dworkin and Philippe Van Parijs. These two authors work in unique ways to develop the thought project of Rawls into an appropriately sensitive account of justice and the principles and institutions, which follow from this account.

I will establish our need to develop Rawls thought. However, this development is extremely important theoretically and institutionally as it further stipulates how we appropriately balance choices and natural circumstances that cause the problems with Rawls thought. Dworkin and Van Parijs treat these problems in different ways each of which I will argue adds something to our consideration of the problems at hand. These theories both form arguments as to what level of compensation and access are commensurate with our obligation to address unchosen natural circumstances. They also argue how we are to ensure people have fair shares that allow them to formalize choices equally. They form accounts of what is needed theoretically in developing liberalism and in the institutions it would support in accomplishing the needed development of Rawls.

The dissertation will first address the account of Ronald Dworkin. Dworkin will be addressed first because his theory develops Rawls account in a needed way due to our concerns of balancing choices and circumstances within an account of distributive justice. However, I will show that Dworkin does not work his position all the way through and ultimately settles, uncomfortably on an outcomes similar to Rawls. I will show that Dworkin gives us needed theoretical developments of Rawls that allow us to deal with choices and the redistributive constraint of reciprocity in a fair account of distributive justice. Dworkin argues for the use of an auction scheme to make distributions of goods choice sensitive. He further stipulates that we should institute a collective insurance

scheme to ensure that distributions/outcomes are endowment insensitive. These are undertaken through a modified veil of ignorance that allows in knowledge of talents but not their value (individually or socially). This allows distributions to be fair as no one could rationally envy the distributions of others. If they have a legitimate argument for an unfair distribution, Dworkin allows the auction to be re-run in order to ensure that distributions become legitimate. As a result, Dworkin develops Rawls to deal with choices better but rules out accessibility accounts because he argues they end up like Rawls maximin/difference principle account. Dworkin also does not work through choice legitimacy into institutions beyond this point because he ultimately argues these are indiscernible in ideal terms.

Philippe Van Parijs, who will be the focus of the following chapter, develops institutions that fulfill our considerations about the market, choices and freedom. Van Parijs wants us to be concerned with the real opportunities people have because these formalize the freedoms, liberties and choices available to citizens. He also sees the need to develop Rawls given the arguments Rawls largely presents in developing his own work in light of criticisms posed toward *A Theory of Justice*. However, Van Parijs rejects large parts of Dworkin's theory and places a rather troubling account of Rawlsian justice as an alternative development. This development largely undermines his desired institutional practices. Van Parijs does not develop Rawls in a way that supports his own institutions. We are left to resolve the intuitions motivating his systems or alternatively to accept his development of Rawls and undermine these systems. I will show how his systems can be endorsed by a proper development of our arguments about balancing choice and circumstance and how this will drive our theory closer to Dworkin.

The need I will assert for the theoretical development I will pose in terms of disability commitments can be seen most starkly through the problems in the arguments of Dworkin and Van Parijs in attempting to tackle compensation. Dworkin and Van Parijs develop this part of Rawls project in different ways. Dworkin rules out accessibility principles due to the assumption that these have to result in maximin reasoning. Van Parijs also offers an alternative account of addressing natural inequalities

to that of Rawls through his use of undominated diversity. Unlike insurance, this system works as a form of inverse envy in that individuals are compensated based upon no one rationally wanting a given lack of endowment. This position has some rather serious conceptual problems such as lone objectors and the belief that if the position is seriously considered, it has to end up at Dworkin's account. I will show how Dworkin's use of insurance makes more sense.

However, both of these accounts are insufficient in the same way. They only work out an account of handicaps/disability in part and as a result are insufficient because they do not treat handicaps appropriately. I will argue that handicaps only remove opportunities rather than impugn the validity of the choices that are made our commitments have to respect these choices and outcomes. Complete handicap (total incapacity) is only one kind of natural endowment problem we need to consider when discussing compensation. This is only a small part of the people we would classify as handicapped and disabled. These individuals are largely capable of making choices, having expensive tastes, and having talents, which they would, even in ideal circumstances, desire. I argue this description better describes most people we need to consider and constitutes most handicapped people in question.

As a result, their ability to make equally valuable yet constrained choices is an aspect of their moral agency we ought to work to protect. On one hand, their ability to make choices and be well off does not remove their right to compensation. On the other hand, compensation does not, if left unstipulated, provide a reciprocally appropriate account of their access to bundles or choices. I argue we need another layer of refinement to make our liberal theories work given these considerations. Developments of liberalism take us far in getting to an argument as to why we are obligated to act based upon inequalities in natural endowment. Nevertheless, our consideration as to how we act best to protect the moral agency of the handicapped, while only obligating social redistribution to an appropriate level, requires greater articulation. This is the problem the ADA and other policies have stumbled across in that the arguments pulling them in

either direction do so because our intuitions about what handicaps mean tug in different directions.

We are compelled to reciprocal compensation but for handicapped and disabled individuals to have their moral agency honored (those who are able to make choices) the compensation must act first to make opportunities available so that these choices can be made and count (in terms of consequences) equally. It is only after exhausting the first option due to cost that we would begin to work through the idea of monetary compensation. This would be apparent through the modified veil and so it must be present in our post-veil institutions/principles of justice. Liberal accounts lack this crucial development, and without it, society is left with a confused obligation to act in ways that may not actually honor choices equally or provide opportunities appropriately which is reflected in the policies we see today.

This is why we need the Principle of Just Access. The principle simply stated is an obligation to provide Y and Z to do A if Y and Z are equal to or less than the insurance amount. It is only when Y and Z exceed the amount of insurance that we move onto priority B, which is monetary compensation. This prioritizes the insurance payment based upon our consideration of valuing choices equally in light of unequal distributions of natural endowments. The idea of compensation may be assumed to provide accessibility. However, compensation can only do this if it is stipulated in an ordinal fashion based upon the choices/agency we are acting to protect in a conception of justice. We must act to value these choices and their consequences first to the degree this is possible. This only happens through the institutionalization of a principle that puts these values first. Such a principle will have profound consequences on how we conceive our institutions and policies. It does the best we can do to reciprocally provide the choices that really matter to people. It does so in a way that makes it a principled account which can be reflected in policies, political structures and can avoid forms of compensation that do not work to assure accessibility due to their medium (like cash)

It is only after this added development that a theoretical argument can properly support the freedom/choice institutions that Van Parijs argues for. These institutions formalize what comes out of our Fair Shares commitments. The work in developing Rawls leads us to endorse Dworkin given the specific development I pose. However, at this point we return to the market and its role in formalizing the choices of individuals, including handicapped/disabled individuals. Van Parijs gives us a unique system of political economy that formalizes the commitments that we uncovered when initially inspecting the market device.

This is where our working through Nozick's position of agency and its consequences does work in coming to structures like Van Parijs'. Our need for fair shares, as asserted by the Fair Shares Proviso, drives us towards Van Parijs systematic suggestions, but only after we have asserted the optimal amount of agency and compensation through our principles of justice/redistribution. This allows us to respect choices and outcomes while addressing inequalities in natural endowment that were out of balance in the institutions of justice we have inspected.

However, to do so, and to balance the issues of choice and circumstance appropriately, we need to add the requisite ideas of the Principle of Just Access and utilize the Fair Shares Proviso in our accounts of liberal justice. Concerns about how we balance the issues of choice and circumstance lead us toward a Rawlsian account of justice which attempts to balance the issues rather than ignore handicaps. Problems with the balance of these issues present in Rawls cause us to develop the position and move toward Dworkin. In working Dworkin through and understanding the complexities of handicap better, we are led to a further development of Dworkin's position in the Principle of Just Access. Once this is accomplished, we have a fair and reciprocal system that takes the moral agency and the consequences of this moral agency seriously for the handicapped and disabled. We then can then legitimize the market device as it formalizes these choices when we cash out how we need to do things systematically. The market serves a vital role in providing a device through which moral actors can make equally valued choices in respect to everyone's equal standing in the process. However,

to do so, the market must adhere to the Fair Shares Proviso, as this is a presupposition of justice in transfer through a market device. The Fair Shares Proviso drives us towards a system like Van Parijs' that utilizes a market and formulates a way in which people can be endowed with equal initial capital. These represent added layers in liberal thought, which have implications for how we approach institutions, principles and policies in a just society. They are needed in order for our account of choices and circumstances to take these commitments seriously and treat them comprehensively for all individuals in society.

Chapter 1 - Nozick, Choices and Procedure

Introduction

Van Parijs will argue that an Unconditional Basic Income (UBI) system fulfills the commitment of “Real Freedom”⁴ he adopts in developing liberal justice. A UBI does this by utilizing an “impure” capitalist system. Van Parijs will argue that his position is friendly to the rights, freedom and liberty aspects of justice that are the cornerstones of the libertarian argument. To understand this claim we must discuss the moral justifications behind a libertarian state as our starting point. Our understanding of these ideas and commitments will be important in ascertaining a precise commitment to justice that treats our choices and circumstances appropriately. It will be Van Parijs’ claim, that the “real libertarian”⁵ approach is the perspective that a coherent libertarian ought to adopt. He argues it undertakes actions of distributive justice first before allowing the procedural claims of the choice driven market. An account of what we will refer to as a “pure” capitalist system of justice is presented by Robert Nozick in his text *Anarchy, State and Utopia*. It is through the inspection of libertarian justice that we will be first introduced to the benefits, problems and inconsistencies of libertarian claims. I will show through a consideration of libertarian justice how this account leads naturally to the liberal accounts of justice to come and why these subordinates the claims of the market as they do.

These arguments and subsequent critiques will be one of the key elements in analyzing the two aspects I believe drive a greater development of liberal justice, choices and circumstances. Libertarianism boils down to an argument about how government

⁴ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, (Clarendon Press, Oxford, 1995), p. 21

⁵ IBID, p. 5

should operate if we can assert a robust level of moral agency to individuals. I will show libertarianism does not do enough to ensure moral agency through the legitimate actions of the state before legitimizing the actions of the market. We will assess what the libertarian argument needs to do in order to say something about our distribution of external resources through the market. The market is the apparatus through which we enact our choices about external resources. It will be my claim that libertarianism has something powerful to say about how we conceive a market that honors the choices individuals make. To do this, we move naturally to accepting redistributive measures and to accept what I call a Fair Shares Proviso. The Fair Shares Proviso works to provide a fair market given the needs associated with just acquisition and entitlement after equally valued moral agency is attained. It is with these needed developments of the claims of libertarianism that we can defend the market and private property from various critiques. These developments will give us important ideas that we need to retain when considering the fair operation of a market device. I will show how this is a subordinate but important claim about the role of the market in honoring our choices within a conception of justice. The subordination and qualification of the market results from the distinct weaknesses the libertarian account has as a complete account of justice. I will show that libertarianism needs to address internal endowments and the resource needs associated with moral agency to legitimize the actions of the market. Because of this, the libertarian argument does not take seriously enough the consideration of individual circumstances.

1.1 – Rights, Entitlement, Patterns and the Minimal State

Nozick starts his project by addressing the primacy of individual rights and how these rights can be legitimately secured through the State. Nozick wishes to take seriously the concern for individual rights postulated by anarchical moral arguments and counteract the more invasive forms of the state presented by welfare liberalism, socialism and utilitarianism. In particular, Nozick is focused on the conception of justice and the role of redistribution in John Rawls seminal work, *A Theory of Justice*.⁶ He accomplishes this by asserting that rights are of primary importance and form important constraints on the state. These constraints limit the scope of state action but do not prohibit the state from being a just institution in all conceivable circumstances as anarchical theory claims. This fundamental commitment to rights is clear in the opening of the Preface, “Individuals have rights and there are things no person or group may do to them (without violating their rights).”⁷

It is Nozick’s distinct account of natural rights that leads him to interpret the role of the state as merely a “night watchman”⁸. For Nozick, these rights are naturally present in all individuals no matter their physical disposition. The state can coercively prevent actions that violate these rights by actors against each other. The rights to life, health, liberty and possessions⁹ do not imply a positive obligation on the part of individual actors aside from the minimal security apparatus of the state. As such, the obligations individuals hold in providing justice are negative in nature.

A negative obligation to the security of life seems intuitively straightforward. Individuals can be restrained from killing each other. As Nozick puts it, “my property rights in my knife allow me to leave it where I will, but not in your chest.”¹⁰ The liberty to act in any way is natural but the license to act in certain ways is not. This highlights

⁶ Rawls, John: *A Theory of Justice*, (Cambridge: Harvard University Press, 1971) p. 17

⁷ Nozick, Robert: *Anarchy, State and Utopia*, p. IX

⁸ IBID, p. 25

⁹ IBID, p. 10

¹⁰ IBID, p. 171

Nozick's ongoing relationship to Locke, as it is a similar line of reasoning to what Locke provides in his *Two Treatises of Government*.¹¹ Though Nozick is not saying we are obligated by natural law, rather some other somewhat vague conception of obligation to autonomous rights. As unarticulated as this commitment is, the idea appears to work well in Locke's general context. The latter obligations of health, liberty and possessions eventually make the unique topography of Nozick's theory. A negative obligation to a right to health implies that individuals cannot harm each other's health and can be refrained from doing so by the state, but there is no legitimate obligation to ensure the health of others beyond this. This is an idea we will return to in discussing property rights later in this chapter, but it is important here to understand the negative obligation at work. Understood in this context, individuals are permitted to do whatever does not violate the rights of other formally equal individuals. The actions of the state can only be to prevent or correct injustices caused by violations of these formal rights and nothing more.

Nozick offers us a critique of why a Rawlsian position violates these individual rights. In Rawls' particular case, Nozick takes issue with the reasoning behind the "original position" argument. Rawls uses the "original position" as a hypothetical equal bargaining point that compels actors to make decisions about principles of justice under a "veil of ignorance".¹² Rawls argues that in such a position actors would agree to ensure egalitarian distributions and policies of subsequent redistribution in creating social institutions given their inability to ascertain where in the social order they would fall.

Nozick argues that Rawls theory violates the legitimate exercise of individual liberty granted by natural rights. This is because Rawls redistributes from the outcomes that result from the legitimate exercise of individual liberty. Nozick argues the actions taken by the Rawlsian State are motivated by end principles. These end principles in turn are used to undermine procedure. In doing so, the rights of individuals, particularly to property, are not protected appropriately. The result is Rawls is enforcing a pattern of

¹¹ See - Locke, John; *Two Treatises of Government and a Letter Concerning Toleration*, Second Treatise, Chapters 2 & 3, Sections 4-20. Nozick borrows many conceptions from Locke and this is one of them.

¹² IBID, p. 19

distribution rather than allowing just procedures to result in just outcomes. The patterned principles Nozick argues Rawls invokes do not allow individuals to do what they ought to be able to do freely through the exercise of their rights. This is because the patterned principles dictate a pattern of distribution that the liberty of individuals would inevitably disturb. As a result, the state must work to preserve the pattern, rather than secure natural individual rights and liberties.

To illustrate how the exercise of liberty disrupts patterns, Nozick offers the example of Wilt Chamberlain being given a quarter from every ticket sold at home games to watch him play basketball.¹³ Because the individuals purchasing the tickets consented to giving a quarter to Wilt to watch him play, the fact that he ends up with a disproportionate amount of money does not mean his comparative wealth is illegitimate. The procedure that yielded the material inequality was just as it was the result of individual choices. Attempts to redistribute Wilt's quarters would violate the legitimate claim he has to this income. Such an arrangement would violate Wilt's legitimate property rights. Nozick believes that patterned states (states that redistribute resources between individuals) cannot avoid violating the legitimate operation of individual liberty. Patterned states cannot provide justice respective of individual rights because they do not uphold the natural right to property these individuals hold.

Nozick argues that for property rights to be upheld we need a conception of justice that is historical and unpatterned.¹⁴ Our concern becomes creating just procedures that honor the legitimate distributions that result from the exercise of people's rights. If occurring through just procedures, the resulting distributions of wealth will be just no matter how lop-sided. Nozick argues that the objects in the world today arrived through individual labor. Entitlement to these objects transferred, in ideal terms, justly through procedure over time.

¹³ IBID, pp. 160-164

¹⁴ Nozick, Robert: *Anarchy, State and Utopia*, p. 157

In order to secure individuals rights, Nozick emphasizes the need for an entitlement theory. Nozick argues an entitlement theory works in the historical and unpatterned way necessary to secure individual rights. The exercise of these rights creates the material inequalities of the world. This part of Nozick's argument becomes particularly important in assessing liberal arguments, which will allow material distributions to be determined by a market device. Given Van Parijs' freedom-based approach, it is important to engage with what aspects of our choices are secured through market transactions and how these claims are routed to the idea of individual autonomy. Inequalities will occur in market practices, so it is important to understand why these inequalities can be legitimate.

In order to defend extensive property rights and unequal material distributions, Nozick has to define the parameters of what constitutes property, a just entitlement, and why individuals are at liberty to act as they wish with them. Nozick states the operation of an entitlement theory in three parts,¹⁵

- ' 1. How things not previously possessed by anyone may be *acquired*;
 2. How possession may be *transferred* from one person to another;
- and
3. What must be done to *rectify* injustices arising from violations of (1) and (2),¹⁶

Nozick argues that objects that are unowned can be legitimately acquired privately. Upon their just acquisition, they become property when an individual uses their labor to improve, sustain or utilize the resource. As individuals own their labor, their use of this labor with the resource creates a legitimate property right. This is a position that mirrors that of Locke and creates a way in which acquisition can be legitimized and yield naturally derived property rights.

¹⁵Nozick, Robert: *Anarchy, State and Utopia*, pp. 174-183. Please refer to footnote 4 for more information.

¹⁶ IBID, p. 151

Locke and Nozick are careful not to allow the idea of acquisition to stretch too far. To illustrate how thorny the issues of acquisition are when examined, Nozick explores the actions required to claim an entitlement. Nozick works through the acquisition of Mars, actions of fence making and aerial reconnaissance as examples of actions that cause us to question what kinds of labor count and what sorts of entitlements follow from this labor.¹⁷ Nozick explains how Locke uses the Lockean Proviso to avoid such problems by prefacing and limiting acquisitions. Locke states the proviso ensures third parties are not left worse off from an acquisition. They must be left with as much or as good of common resources.

Locke's proviso is categorized by Nozick as strict, in that it works to ensure individuals are not made fundamentally worse off from an acquisition, "...first, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could."¹⁸ Nozick argues that this kind of proviso is in fact too strict if interpreted as follows,

'Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z's situation. So Y's appropriation is not allowed under Locke's proviso. Therefore the next to last person X to appropriate left Y in a worse position, for X's act ended permissible appropriation. Therefore X's appropriation wasn't permissible. But then the appropriator two from last, W, ended permissible appropriation and so, since it worsened X's position, W's appropriation wasn't permissible. And so on back to the first person A to appropriate a permanent property right.'¹⁹

Nozick argues the potentially strict interpretation of the Lockean proviso is problematic as it could completely negate private acquisition. Individuals could continue to demand compensation for their diminished opportunity sets. Nozick argues instead for

¹⁷ IBID, p. 174

¹⁸ IBID, p. 176

¹⁹ IBID, p. 176

a different and weaker proviso henceforth referred to as the Nozickean Proviso. The Nozickean Proviso is stated as “enough and as good.”²⁰ Nozick argues this interpretation is necessary in order to avoid the paradox created by a strict interpretation of the Lockean Proviso. Nozick argues his weaker proviso in examining the previous example would,

‘...exclude the second way, though not the first. With the weaker requirement, we cannot zip back so quickly from Z to A, as in the above argument; for though person Z can no longer appropriate, there may remain some for him to use as before. In this case Y's appropriation would not violate the weaker Lockean condition. (With less remaining that people are at liberty to use, users might face more inconvenience, crowding, and so on; in that way the situation of others might be worsened, unless appropriation stopped far short of such a point.) It is arguable that no one legitimately can complain if the weaker provision is satisfied.’²¹

The respective provisos are doing a great deal of work in legitimizing the theories of Locke and Nozick. This is because the role these provisos play in legitimizing the market is immense. The provisos determine what can be appropriated, transferred and what requires compensatory action. For Nozick, the Nozickean Proviso is not a comprehensive attempt to fix Locke's theory of acquisition as much as it is a vehicle to show how a theory of transfer can be constructed and grounded. Nozick's proviso is intended to show that a “... process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened.”²² The Nozickean proviso ensures that individuals have access to “enough or as good” of the original resources. This in turn legitimizes the property rights that follow and removes the problem he sees Locke's strict proviso. Nozick wants to allow complete resource acquisitions that he feels Locke will not allow.

²⁰ IBID, p. 176

²¹ IBID, p. 176

²² IBID, p. 178

This is where Nozick begins to go awry. Locke's proviso and theory of acquisition more broadly may have problems because Locke's proviso is coupled theological/natural law obligations.²³ These discuss individual's obligations to each other outside of the State structure and explain why certain actions of charity will happen within this context. These acts of charity work to ensure compensation to those with discrepancies in natural endowment (amongst other things) and work to affirm their diminished but important moral agency. Locke's use of these obligations underlines the need for compensation for natural inequalities if moral agency is going to be equally valued. Libertarianism needs it to be equally valued because if choices are not philosophically equal, the market will not yield just outcomes given the rights projected on individuals. The liberal theorists who follow will work to formalize this commitment through the state. Locke and Nozick deal with the issue of natural endowments outside of the State realm. However, this does not mean they intend to ignore them or that they do not realize the role these unchosen circumstances have in conditional outcomes. They simply treat them as happening in an arbitrary way, which is unfortunate, but something we should not be systematically concerned with when considering the State and justice. Rights are projected onto individuals regardless of their physical constituency. This is the State's duty and any others must be realized by individuals. The assumption is that these obligations are to be met. However, because this requires some robust account of individual obligation, Nozick needs to assert it and does not. As a result, it appears to be a state matter in considering individual equality and the value of their moral agency, which opens the door nicely for a liberal account of justice.

This use of a strict account of formal rights has a clear effect, particularly in terms of property, on the conception of the state that Nozick has. As we move through the text, I will show that natural endowments are a factor that a conception of distributive justice will need to address if we are to balance the claims of choice and circumstance appropriately. For now, it is important simply to look at the external/natural resource aspects of the provisos and leave this large potential issue to the side. It is important

²³ Locke, John; *Two Treatises of Government and a Letter Concerning Toleration*, Second Treatise, Chapters 2 & 3, Sections 4-20

instead embrace this argument as simply speaking to resource distribution and the operation of the market after our concerns about justice and circumstance are met. The market is how we act out choices. If individual moral agency can be equally valued (which I will show it can through a properly developed account) private property and a market device follow from such a claim. This is because individuals have a relationship with the tactile world that is inescapable and grants them these claims and the ability to make choices in an account of justice. Conceptions of the market therefore must be mindful of this relationship and honor these choices appropriately. There is clearly work that needs to be done to legitimize the market going forward but I will show this can be done. How the market works to make our choices realized and count (for better or worse) is important to retain if we are to have our choices matter in a fair way. On this view, we can talk about the proviso within this specific frame of reference, what makes a market just and how this leads to outcomes that are disproportionate but legitimate. This is because we 1. assert the areas that are of concern in such an account and 2. work to address them through a liberal account of justice in subsequent chapters. What we are left with is the remaining market, constrained but still doing work for our conception of individual agency due to the importance of being able to make choices fairly.

On these terms alone, Nozick makes a jump that is a bridge too far in stating the problems with Locke's proviso. It is true that "as much or as good as" does cause vast re-visitations of acquisitions over time. Party after party revisits the conditions previous acquisitions left them in and in turn demands compensation and rectification of injustices in acquisition. However, the prospect of this aspect of Locke's proviso does not negate potentially legitimate ownership, as acquisition is still possible. It rather says something about the extent of resource acquisition.

Nozick argues that Locke's proviso negates the project of property rights. This is not true. It does negate the possibility of a complete property right in all of a given resource. Nevertheless, this is far from every conceivable property right. What Locke's proviso does do is limit the amount of a resource that can be legitimately held from an initially unowned resource. The implication here is very different. It opens up the door

for compensation and re-visitation of acquisition as Nozick fears it will. As we will see, Nozick backs into this position as well. However, it does not place every acquisition under scrutiny or subject to a compensatory claim. It only applies to those acquisitions that were disproportionate given every individual has an equal claim to their share of the resources given to man, by nature or god, in common. Nozick writes,

“It is important to specify this particular mode of worsening the situation of others, for the proviso does not encompass other modes. It does not include the worsening due to more limited opportunities to appropriate (the first way above, corresponding to the more stringent condition), and it does not include how I "worsen a seller's position if I appropriate materials to make some of what he is selling, and then enter into competition with him. Someone whose appropriation otherwise would violate the proviso still may appropriate provided he compensates the others so that their situation is not thereby worsened; unless he does compensate the others, his appropriation will violate the proviso of the principle justice in acquisition and will be an illegitimate one.”²⁴

Nozick's amendment of the Lockean proviso into the Nozickean proviso allows a total property right to all of an originally unowned resource. However, Nozick uses the amendment to accomplish something he argues is vital in considering justice in transfer, which is removing potentially endless objections and claims for compensation in initial acquisition. Nozick argues that the weaker nature of his proviso specifies more correctly and precisely the kinds of worsening that should count in our accounts of acquisition and restitution.

Nozick provides a tangible example of how a proviso like the Nozickean Proviso ought to constrain acquisition through labor. Nozick uses the idea of dumping a can of tomato juice into the sea to illustrate how this action does not constitute the ownership of the entire sea.²⁵ Nozick does this by arguing that the action of acquisition cannot harm

²⁴ Nozick, Robert: *Anarchy, State and Utopia*, p. 178

²⁵ IBID, p. 175

the ability of others to have enough or as good of that same resource. The complete ownership of the sea that dumping the juice into it could allow would worsen the condition of all other individuals as they would be unable to utilize “enough or as good” of this resource. Still, Nozick argues that if the rights of others are not harmed or their share of enough or as good made worse by an acquisition, the acquisition of the unowned object is legitimate.

The result for Nozick is there are property rights that are legitimate and must be protected by the state and that these are more expansive than Locke allows. Therefore, we need to take Nozick’s example to the next level of abstraction. Imagine an individual added a can of tomato juice to a bucket of seawater to create some kind of tomato brine or “delicacy”. This acquisition would be legitimate as the share of the resource used, the seawater, would not harm anyone else’s rights to enough or as good of the common resource. Others would be able to acquire a bucket of seawater after the acquisition in question, thus the acquisition left “enough or as good” for others. This legitimate acquisition gives a property right to the individual who made the tomato brine and thus we need an entitlement theory to ensure this right is secured. As a result, the goods or services bartered from exchange of the tomato brine to the fool or connoisseur willing to exchange for it, would also be legitimate entitlements of the seller and so on.

Nozick is concerned that any mode of worsening is subject to the actions of the Lockean proviso but this again is not what a proviso (as a thought idea) has to do. A proviso like Locke’s, that enforces a baseline standard of as much or as good, has only to compensate those who have their appropriation condition worsened from an initial non-appropriation standpoint. To place this idea into our bucket example, the Lockean proviso equally adjudicates the just acquisition of the seawater based upon the ability of everyone else to do the same. It is only if this level of reciprocal acquisition is violated that a condition of worsening is entered. Locke’s proviso does not prevent this kind of proportionate acquisition. Instead, it constrains it based upon reciprocal proportionality. It uses a different measure of legitimization than Nozick.

To put it bluntly, Locke and Nozick differ as to at what point the size of your bucket matters. Nozick's proviso is permissive of a far larger bucket. Nozick's proviso also proportionally constrains acquisition but only if there is not "enough" or "as good" left. Thus, his proviso is considerably more permissive because the threshold of worsening is harder to reach. On the other hand, Locke's proviso wants your bucket of seawater to be an equal size to everyone else's. The taking of a bucket of seawater is only a concern for the Nozickean proviso if it prevents everyone else who wants to from doing the same rather than projecting onto them a share regardless of whether they chose to acquire it like Locke does. Therefore, the worsening caused by acquisition is not as comprehensive as Nozick or later Cohen will argue. The conditions of worsening that count are constrained to these circumstances and against the benchmark of the resources available prior to acquisitions having taken place.

This requires using Locke's language for the proviso while removing much of the context in which Locke proposed it, as Locke would place other clauses upon acquisition and the obligations of individuals to each other. However, given Nozick's project of exploring the plausibility of something Locke-like, I argue we can take this liberty in considering a proviso. I will henceforth call this a Fair Shares Proviso as I will ask you to consider just the resource distribution principle posed by Locke, as much or as good, without the clauses Locke would place on individuals even prior to such a proviso. We will effectively place these clauses on our consideration of justice, but it will be my argument that liberal justice does a far better job of doing this, properly developed, than Locke's natural law account. This means the Fair Shares Proviso stands alone, as what is required to make a market, however developed or constrained, work justly over time.

To put this into Nozick's Z and Y example, we come to a different conclusion. Z and Y divide the land under the constraint of a Fair Shares Proviso, as we have just described it. X shows up and claims that his condition is worsened by the appropriation of the land and demands compensation. What a Fair Shares Proviso does here is give X a claim that Nozick does not want X to have (with the exception of some specific circumstances discussed later in this chapter). The scale of this issue is not nearly as big

as Nozick argues it might be if strictly interpreted. All a Fair Shares Proviso asks us to do is compensate X with a share of the resource or in lieu of that being possible, compensate him/her proportionately for its unavailability should a share be unrecoverable. Z and Y still have a property right, just one that is conditional and proportional to the equal acquisition rights of others. Z and Y are entitled to their share, however large or small, and what results from this share. The other forms of worsening that Nozick fears, simply do not count given the Fair Shares Proviso parameters we have stated. The claim of a Fair Shares Proviso does not dictate that property rights are undermined by a conditional standard of worsening.

A proviso, as an idea, is essentially a trump that operates before the actions of the market can be legitimized. It works in tandem with our concerns and provisions for moral agency in ensuring the actions of the market are legitimate. It subordinates the market and each of the following theorists, including Van Parijs will do much the same only in ways that are more robust. Nevertheless, it will be vital in assessing whether these accounts act properly given what this chapter will assert is needed prior to the just operation of a market. This consideration is not intended to ensure individuals are not materially worse off for an acquisition, in fact, they can be. Z or Y might do quite well with even their adjusted share given the presence of X and eventually W which may mean they are more materially affluent. A proviso is intended instead to protect the ability of others, with equally projected rights and agency, to acquire or use their fair share of resources. This requires that some acquisitions are off the table due to the claims we will make about justice in the coming chapters and that all others are constrained by proportional share. It is important to note here that I will eventually include in this account resources that are not naturally occurring but rather provided through social cooperation but we do not need to have this argument here. All that is important here is why the language of our Fair Shares Proviso is superior to that of Nozick regardless of what we will eventually place in its privy upon reconstituting it. It is intended to prevent or, in lieu of that being possible, compensate individuals with equally valued rights and agency for being disadvantaged initially in what they can acquire.

We move more naturally than Nozick admits to a liberal position even if the claims of a just market remain important. This is best seen by continuing to work through Nozick's position and will bolster Van Parijs' claim that a coherent libertarian ought to be a supporter of his left-libertarian approach. Nozick notes it is important to forbid the total acquisition by some of resources fundamentally needed for the basic natural rights of others even in cases where these resources were initially acquired justly. Nozick states,

'A theory of appropriation incorporating this Lockean proviso will handle correctly the cases (objections to the theory lacking the proviso) where someone appropriates the total supply of something necessary for life.... A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. Some reflection of the proviso about appropriation constrains later actions. If my appropriating all of a certain substance violates the Lockean proviso, then so does my appropriating some and purchasing all the rest from others who obtained it without otherwise violating the Lockean proviso. If the proviso excludes someone's appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.)'²⁶

This is a potentially massive caveat beyond the constraints of the Nozickean proviso. Nozick argues that this sort of caveat to his proviso is required by our consideration of justice. Although Nozick does not express it as such, it is an admission that resources are needed to ensure the moral agency of individuals so that their rights, on some basic level are equally valued. Nozick needs this caveat because his changing of the proviso has opened the door to total resource ownership. He runs the risk of individuals acquiring some of the initial resources that are necessary to ensure the kind of moral agency he projects on individuals. Nozick now needs to take some items off the table in terms of acquisition. However, Nozick is quick to assert this caveat, "(almost) never will come into effect; the more someone acquires of a scarce substance which

²⁶ Nozick, Robert: *Anarchy, State and Utopia*, pp. 178-179

others want, the higher the price of the rest will go, and the more difficult it will become for him to acquire it all.”²⁷ Nozick argues that the very small amount of resources that might fall under such a caveat will be the extreme exception. Even in the case of their existence, very rarely will a situation arise in which state action is needed to enact the caveat, as the market is likely to prevent a singular monopoly on such a resource. This is essentially the role of “enough” in Nozick’s proviso. “Enough or as good” only requires that the state ensure access to an acquirable amount of the resource needed to ensure the formal rights of others are not harmed.

Necessity for particular resources may change in certain circumstances; hence, these kinds of entitlements can warrant state intervention but this does not follow from the Nozickean Proviso itself. The proviso does not derive from the right to life even though it appears to be part of formalizing individual moral agency. As Nozick states, “... a right to life is not a right to whatever one needs to live; other people may have rights over these other things. ... At most, a right to life would be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else’s rights.”²⁸ Nozick is simply using the proviso as a way to ensure access to resources that occur naturally and exist without labor rather than those that come forth from labor. The latter are not the resources that Nozick wishes to give people access to but the former are.

As an example of how Nozick conceives his scheme of acquisition and property rights to work, he uses the acquisition of a state’s only water source as an example.²⁹ He argues that such acquisition is a violation of the entitlement theory. Items whose possession would fundamentally violate the rights and moral agency of others are not legitimate forms of property. However, this example is quite limited because it is contingent upon the resources available initially and not the eventual lack of such resources. By Nozick’s account, although state action may be warranted in the case of the only initial water source, it is not the same if it became the only water source later on.

²⁷ IBID, p. 179

²⁸ IBID, p. 179 (See asterisk footnote)

²⁹ IBID, p. 179

If the water source was initially abundant, for instance, everyone could acquire one, the water sources could come to be legitimately owned. If over time, one water source of these became the only water source, Nozick argues the stewardship of this resource gives the owner a legitimate title claim over the water source. This is because the owner ensured the longevity of the water source. The needs of others who squandered their water sources are not a relevant consideration in redistributing the water source and relinquishing the owner's title. Given these explicit conditions, if the water source is to be used the owner has to be compensated or otherwise consent, even though Nozick is willing to concede there is likely to be an individual moral duty that the owner ought to adhere to without state intervention.

This distinction is made even clearer when we inspect Nozick's argument about obligation in relation to labored goods, which result from acquired resources. Nozick believes that legitimate acquisition and labor give individuals title over the produced product. Nozick articulates the importance individual labor plays in defining an entitlement in spite of its potential social or individual utility. As Nozick writes, "[t]he fact that someone owns the total supply of something necessary for others to stay alive does *not* entail that his (or anyone's) appropriation of anything left some people (immediately or later) in a situation worse than the baseline one."³⁰ To articulate this further Nozick continues, "[a] medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms does not worsen the situation of others by depriving them of whatever he has appropriated."³¹ It is Nozick's point that the researcher and the diseased had the same opportunity to acquire the resources for the creation of the substance. The researcher's labor has made the substance. Although the substance could save the diseased person's life, the diseased person could have (given the proper talent and labor) made the substance themselves given they had equal access to the initial resources needed to create the substance. If the researcher did not make such a substance through his/her self-owned labor, the diseased

³⁰ Nozick, Robert: *Anarchy, State and Utopia*, p. 181

³¹ IBID, p. 181

would still not have the medicine to use. As a result, the diseased was not made worse off by the acquisition compared to the baseline/pre-acquisition condition.

There is no consideration of discrepancies in the natural attributes possessed by supposedly equal moral agents in a society by the state. There is also no concern that individuals may need things, originally acquired by others, in order to ensure their moral agency and that this cannot be a concern left to individual charity. As Hillel Steiner notes, not all individuals have the same ability to acquire resources, as time progresses, yet these individuals are still required to abide by the property rights granted to the preceding individuals.³² These critiques show there are developments in conceiving justice that have to take place before we can legitimize the market at all. It is the needs of individual moral agency, which will drive the deeper and more expansive commitments to justice and resource distribution seen in the liberal authors to follow. This is because liberalism takes seriously the claim that individuals need to have the resources required to maintain their moral agency and the choices they make through it equally and fairly. We then move naturally from libertarianism to liberalism because libertarian justice requires moral agency. Market equality may be the access to resources available but there is more to the story. The requirements of moral agency that are needed to say these individuals can participate in the market equally are far more robust. The inequalities of the distributions that follow from a libertarian account of distributive justice require that the individuals in question be placed in the same initial conditions. Natural internal distributions, circumstances, and the resources required by everyone to sustain themselves given their right to a fair share are plainly relevant to legitimizing a market and property rights. These must be addressed for an account of justice to be coherent.

Unbundling the proviso reveals a far more complicated set of commitments than Nozick's theory appears to have. This, however, does not remove the value of inspecting Nozick's thought and what he has to say about market claims in respect to how liberal justice treats them. Nozick places this market argument against Rawlsian liberalism, which is why it is so important. Our changes and considerations of Nozick cause us to

³² See - Steiner, Hillel: 'A Libertarian Quandary' in *Ethics*, (Vol. 90, No. 2; January 1980), p. 257

move naturally toward a liberal account of justice. Nozick shows us how autonomy and choices cause us to question the paternal market practices advocated by Rawls and the developments made from this position by Dworkin and Van Parijs.

The Wilt Chamberlain example brings up a key aspect of how individuals earn entitlements through their labor and talents. We are not all clones of Wilt Chamberlain, so we must consider if his talents are a legitimate factor in gaining entitlements. This issue will be explored in more detail later in this text as it will become central in the development I ask us to make in the liberal argument. However, the overarching point is important in assessing Nozick's argument against Rawls. Nozick argues that talents are arbitrarily endowed to human beings and incontrovertibly self-possessed by these human beings. As a result, their exercise is wholly a matter of consensual individual choice because they are controlled completely by individuals. The possession of a talent may be arbitrary and uneven but the choice to use what you have been endowed with is the same for everyone.

As a result, Nozick argues this aspect of human agency can yield legitimate inequalities. The exercise of talents is a matter of individual liberty. Taking individual autonomy and the choices we make as individuals seriously requires that these factors, which are or could be present in everyone, are allowed to determine discrepancies in material outcome. If redistribution were to dictate the reward for labor, the state would be "enslaving the talented"³³ to provide for other equal individuals in society. For Nozick, taxation of this type is unjust because the state is asserting ownership over the labor used to produce what is taxed. These things would not exist without the use of labor and as such, the taxation of them places an obligation on the producer that is paternal and unjust. If individuals own themselves and own their labor then, Nozick argues, they surely own the product that comes from these attributes. As we have discussed, redistribution through taxation is going to be necessary if we are to fulfill our pre-conditions to a market device. Nevertheless, Nozick does allude to a position about

³³ Nozick, Robert: *Anarchy, State and Utopia*, p. 152

our labor and how it is realized that it will be important to reference as we continue through our development of liberalism and how we conceive our systems of taxation.

Nozick is opposed to the kind of paternalism he perceives in redistributive states. Nozick believes these states deny individuals the freedom to make choices and undertake actions that their natural rights afford them. Nozick argues that it is not that individuals cannot enter into all sorts of voluntary constraints and behaviors. In fact, Nozick argues this is not only plausible but also likely. However, he urges it cannot be the role of the state to ascribe what these voluntary actions and associations are. Nozick argues that “using or threatening force for the benefit of the person against whom it is wielded”³⁴ is a clear violation of individual rights. Such a system ascribes or coerces the choices of individuals that they should be free to make as individual moral agents.

Nozick argues that a full libertarian constraint “will prohibit sacrificing one person to benefit another.”³⁵ Nozick argues that paternalistic structures may appeal on some intuitive levels but that these structures ultimately violate the separate and inviolable rights of individuals. Nozick argues, “one must focus upon the fact that there are distinct individuals, each with his own life to lead”³⁶ Nozick’s objection to paternalism runs throughout his critique of Rawls. Nozick’s argument boils down to the point that people ought to be free to make their own choices about their lives in keeping with their natural individual rights.

In Rawls’ later writing, he clarifies the original position to the point it is perhaps better thought of as an abstract point from which to discern principles of justice.³⁷ This conception eventually concedes a role for the market but no a priori claims to it (see Chapter 2). The removal of the specifications placed upon original position device and/or the veil of ignorance for a different construction of impartiality can still yield Nozick’s

³⁴ IBID, p. 34

³⁵ IBID, p. 34

³⁶ IBID, p. 34

³⁷ See - Rawls, John: *Political Liberalism*, (New York: Columbia University Press, 1995), p. 28 and Rawls, John: *Justice as Fairness: A Restatement*, (Cambridge: Belknap Press, 2001), Part 1, Section 10, pp. 29-31

general rights primacy objection. Nozick perceives this important objection to his argument for an entitlement theory. He writes,

'It might be objected to our argument that Rawls' procedure is designed to establish all facts about justice; there is no independent notion of entitlement, not provided by his theory, to stand on in criticizing his theory. But we do not need any particular developed historical-entitlement theory as a basis from which to criticize Rawls' construction. If any such fundamental historical-entitlement view is correct, then Rawls' theory is not.'³⁸

Nozick argues here that an entitlement theory precludes a system of justice as Rawls posits it. Our discussion of the proviso and lingering consideration of natural endowments calls this conclusion into question. However, Nozick's criticisms, properly qualified and reconstituted, raise a potential area of concern Rawlsian conceptions of justice. The paternalism that we have said Nozick must let into a theory of distributive justice is still limited and comes prior to market claims. Once the groundwork is laid for the market, Nozick's points about liberty and distribution still hold power. Nozick does not take into account properly what is required to get people to this baseline condition, the starting line if you will, but if we can do this, Nozick is telling us something about the market. This is because our considerations of justice prior to the market ought not to subvert the claims we can make upon reaching the market stage if we take the role of the market in formalizing our choices seriously. Our market account needs the Fair Shares Proviso to work but with this needed development, we must consider how we describe and operate the market very carefully going forward. All of our liberal authors will claim to do just this, but it will be my contention that Rawls, Van Parijs and to a degree even Dworkin do not take the validity of parts of this procedural/market argument and the choice sensitivity it represents seriously enough.

³⁸ Nozick, Robert: *Anarchy, State and Utopia*, p. 202

Nozick's objection to patterning raises interesting considerations in addressing Rawls' theory of justice. Nozick is arguing that this form of paternalism is incongruent to protecting individual rights and freedom. To understand the importance of our Fair Shares Proviso, the role it has to play in our market, and the implications of this upon the liberal conceptions to follow, we must explore critiques of Nozick. Nozick uses procedure to show that disproportionate outcomes are legitimate. We need to take our Fair Shares Proviso and see if it can stand up to criticism of the market and private property. This criticism will come from G.A. Cohen in the next section and his strong argument that patterns uphold, rather than subvert, individual liberty. If our developed and qualified libertarian claims can stand this scrutiny, they will place constraints on the development of the liberal argument even if we have established the legitimacy of qualifying the market as liberalism does.

1.2 Critiques of an Entitlement Theory

In the several decades since Nozick first published his libertarian objection to the redistributive liberalism of Rawls, it has sparked many insightful critiques. We have so far embraced Nozick on his own terms and highlighted some of the issues his perspective raises and some necessary amendments it clearly requires. Though Nozick has many conceptual issues, his insights about the just operation of a market device retain power against certain kinds of redistribution. These claims are subordinate but important in asserting the power choices ought to have in a fair society. G.A. Cohen realizes the power of Nozick's argument and attempts to counteract it systematically. Van Parijs will ultimately be sympathetic to some of Cohen's arguments about resource justice and will argue that his model is one that should be attractive to liberal socialists such as Cohen. Van Parijs' argues we should follow a liberal path located between the positions of classical libertarians like Nozick and liberal socialists like Cohen. However, Cohen's argument has some conceptual problems, which come to light when we frame it against our Fair Shares Proviso. It will be through our qualified market and Fair Shares Proviso that we will see the importance of private ownership and a market in affirming moral agency and the choices that come with it.

G. A. Cohen attempts to lodge a comprehensive argument against Nozick. This critique, which spans several different articles and books,³⁹ is motivated by a profound concern over the power of Nozick's argument. Cohen argues, contrary to the position of Nozick, that patterned theories preserve individual liberty rather than violate it.⁴⁰ Nozick's account of justice argues for an entitlement theory in order to protect individual rights. The outcome of the resulting distribution is dictated by procedure and frequently lop-sided. The talented, having a natural advantage in the application of labor, can and frequently do become more affluent than other individuals even under our stricter Fair

³⁹ See Footnote 40

⁴⁰ Cohen, G.A.; 'Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty' in *Erkenntnis* (Volume 11, Number 1, January 1977), pp. 5 – 23. See also Cohen, G.A.; *Self-Ownership, Freedom and Equality*, (Cambridge: Cambridge University Press, 1995), pp. 29-37

Shares Proviso. Nozick illustrates through the Wilt Chamberlain example how this is acceptable and justified. Cohen asks us to examine Wilt's wealth not wholly as the result of procedure but for the power his disproportionate wealth affords him over other equal individuals in society.

Wilt has earned money for his skills as a basketball player but this money affords him liberties other individuals do not have. Cohen urges that if individuals are subject to the power this money affords Wilt over them, they are unequal to him in society in a troubling way. This inequality is beyond material as it implies a political and social power that threatens the equality between political equals. The disproportionate distribution of wealth accrued by a minority in society, such as Wilt, has direct effect on the conditional equality of everyone else. Cohen's concern grows deeper when we inspect the results of the transactions that created Wilt's wealth. These arrangements of economic liberties that benefit Wilt are visited upon individuals who did not enter into the transactions directly. Cohen argues that individuals who did not pay to see Wilt are directly affected by his accrued wealth. They did not consent to his proportional gains and hence they could not consent to the added power this wealth affords him in the society.

Cohen argues that the patterning of outcomes that egalitarian forms of state create act to ensure that individuals have proportional liberty and equality in society. These redistributed resources provide freedom and preserve liberty by ensuring that individuals who did not participate in transactions are not made worse off for them having taken place. The consideration of disproportionate power in society legitimizes these actions due to the need for individuals to be equal and avoid exploitative practices within the market structure. The protection of rights is important but the liberty to act in an uncoerced manner requires the state to scrutinize the conditions market practices leave certain individuals in.

Cohen argues that "to have money is (*pro tanta*) to have liberty. The richer you are, the more courses of action that are open to you, which is to say that you are freer

than you would otherwise be.’⁴¹ The citizens that Wilt hypothetically represents are disproportionately advantaged socially and politically. If we take equality seriously, Cohen urges we must look at the permissions disproportionate wealth allows particular people. Cohen is arguing that it is important to consider individual liberty in a way Nozick’s rights primacy does not allow. Issues of liberty are related to rights security in that having secure rights is a pre-requisite of being able to act freely in society. However, the constitution of the rights Nozick projects on individuals and the protection of these rights, does not allow the state to act on Cohen’s intuition about freedom. Van Parijs will be very sympathetic to this point and uses it to show how the commitment to rights security and self-ownership are not nearly as expansive as Nozick claims.

Nozick’s answer to this critique would be that all individuals, including these third parties, are capable of undertaking what Wilt has undertaken to gain his wealth. They are all equally conceived (philosophically speaking) moral agents. They have control over their individual actions through an equal and absolute protection of their rights. Ergo, they can all pick up a basketball and become a basketball player should their talents allow. These rights comprise the inalienable aspects of human beings. The protection of these rights assures that individual actions are undertaken without fear of having these rights breached without their consent. With these conditions set, they are capable of entering into transactions just as Wilt did. They are capable of utilizing their talents in the same way Wilt did. Wilt’s rights dictate he can determine the compensation he desires for exercising his talents and labor just like everyone else. The transactions that created his wealth were consensual and procedurally justified. Individuals can enter all sorts of transactions on their own or in collective associations that can yield them greater market share.

As we discussed, the entitlement theory is not quite so straightforward. The condition individuals must be in before market transactions can occur justly is paramount to the project. This places redistribution to address certain issues and a Fair Shares

⁴¹ Cohen, G.A.: ‘Back to Socialist Basics’ in *The New Left Review*, (Issue 207, September-October 1994), pp. 3 - 16; p. 6

Proviso into our considerations about justifying the market. Cohen spots this as a weak point in Nozick's theory. If the power relations from end results impugn Nozick's assumption of initial condition, then Nozick's consideration of self-ownership being preserved simply through his set of formal rights and procedures is not enough. Cohen argues that Nozick's consideration of the proviso is not expansive enough. Cohen mirrors the strict interpretation critique that Nozick had of Locke, which we discussed in the previous section. Cohen argues that if we consider the issue of worsening, a proviso will cause us to negate private property rights or at least subordinate them from the primacy Nozick gives them.

Cohen argues that individual property rights should not to be considered as vital a formal freedom as the rest of the Nozick's rights. One's property need not include a claim to resources, even labor added resources, with the same indomitable attributes that say life and health morally engender. Cohen claims it is this stringent and comprehensive understanding of property rights role in self-ownership that lends force to Nozick's argument. The "minimal" state relies on justice in transfer, which assumes that individuals' acquisition of and use of labor with resources, under a proviso, give them entitlements over the products. Cohen argues that if we take the idea of worsening present in the proviso seriously, it could be argued that private property may not be legitimate at all. Some individuals in society are likely to have been made worse off by most every acquisition.⁴² Changing circumstances, the available resources over time and the conditional decisions of individuals given their talents would yield plenty of legitimate claims which result in the conditions of some becoming worse than the pre-acquisition baseline condition.

Cohen notes private property claims require a conception of just acquisition. As a result, arguments like Nozick's and Locke's depend on resources being unowned and available for private acquisition as opposed to being collectively owned. Collective initial ownership would place different restrictions and considerations on legitimate ownership and entitlement. The collective ownership baseline, Cohen argues, provides a

⁴² Cohen, G.A.: *Self-Ownership, Freedom and Equality*, p. 133. See also, chapter 3, pp. 67-91

better baseline condition than a private acquisition baseline allowed by *any* proviso. Cohen urges that Nozick's argument for an entitlement theory lacks the consideration of the proviso that would uncover this profoundly troubling aspect of the argument.⁴³

Cohen argues that private appropriation worsens the conditions of all because of the loss of liberty that a lack of resource control creates. This is a condition of worsening that no material distribution can alleviate appropriately. The reference in Locke that Nozick uses to describe the validity of private appropriation out of common use is commonly referred to as the "Tragedy of the Commons" argument.⁴⁴ This argument discusses how individual appropriation can be justified if the acquisition does not worsen or improves the condition of all subject to the acquisition by the private ownership of the resource. By allowing private acquisition, the material condition of all is better, or not made worse, by not having access to the acquired resource publicly. Individuals in a sense have their conditions improved and as such are compensated for allowing the disproportionate acquisition as their share is made better or at least no worse than having left the resource sitting unused. Cohen argues this improvement in condition is superficial. Locke argues that private ownership, construed in this way, assures that common resources are used to their maximum potential instead of languishing in common use, provided that all privy to the acquisition are left with "as much or as good as"⁴⁵ of the resource in keeping with the Lockean proviso. The baseline condition must be determined based upon the conditions individuals would find themselves in had no one acquired the resource in question. The relevant point for the baseline is the condition that existed before acquisition of any sort versus the condition that exists after private ownership and presumably use or trusteeship.

The fear for Locke in allowing public ownership is that the resources will either be wasted or at least not maximized. Locke has this concern for private property as well and includes waste clauses, including adverse possession, to ensure the 'proper' use of

⁴³ IBID, p. 84

⁴⁴ Locke, John: *Two Treatises of Government and a Letter Concerning Toleration*, Second Treatise, Chapter 5, Sections 28-35

⁴⁵ See Footnote 21

resources.⁴⁶ Locke's belief is that resources are given to man in common by god but that man has a duty to cultivate and utilize the earth. This right, ordained by god, allows the unowned resources to pass into private ownership. Though these aspects of Locke's natural law argument have some dubious historical precedents,⁴⁷ it does place another obligation on the idea of acquisition. Acquisition is a matter of rights, but these rights have another corollary obligation in how these acquired things are to be used. The acquirer has a duty to himself or herself in that god has property in them, but this is tempered by the obligations they have to others. This seemingly qualifies further what our worsening standard is going to look like and perhaps further drives home our need for liberal justice prior to considering the market. It is difficult to say if Nozick's flirtation with Locke runs this deep or how a Kantian argument could arrive at a similar yet secular conclusion. However, this is how Locke uses the proviso to legitimize private acquisition and shows the nuance lacking in simply addressing the proviso as a singular presupposition justifying acquisition and the operation of the market. Nozick does clearly share the position that individual rights, be they from god or otherwise justified, allow acquisition of resources to occur within the fulfillment of a proviso.

Cohen argues that the private acquisition assumptions of Locke and subsequently of Nozick, fail to be compelling if the condition of ownership originally facing individuals is not one of no ownership, *terra nullius*⁴⁸, but rather joint collective ownership. Individuals are worsened through private acquisition because their joint right is violated. If the baseline condition is collective ownership, Cohen believes individual conditions will be harmed in a meaningful and incontrovertible way by private acquisition. To articulate this point, Cohen shows how Locke and Nozick's argument for just private acquisition is flawed by working through the logic of Lockean acquisition in

⁴⁶ Locke, John: *Two Treatises of Government and a Letter Concerning Toleration*, Second Treatise, chapter 5, Section 36

⁴⁷ See Pateman, Pateman, Carole and Mills, Charles: *Contract and Domination*, (New York: Polity Press, 2007) and Boucher, David: 'Property and Propriety in International Relations: the Case of John Locke' in *Classical Theory in International Relations* ed. Beate Jahn, (Cambridge: Cambridge University Press, 2006), pp. 156 - 177

⁴⁸ Locke, John; *Two Treatises of Government and a Letter Concerning Toleration*, Second Treatise, Chapter 5

a two-person world.⁴⁹ Cohen explores this by framing this A & B world with the aggregate conditions of individual vs. individual & individual v. joint (common) ownership. In this model, Cohen posits that A & B are the only individuals and both need the resource, land, to survive. Cohen contends that individuals may not be made worse by private appropriation in comparison to each other but may be worse off in comparison to their own pre-appropriation condition if the pre-appropriation condition is one of joint ownership.

Cohen suggests we consider the following scenario. Persons A and B both use the land harmoniously to produce a product. This aggregation is not a problem and appears to work under a proviso in the vein we have discussed. Cohen argues that only one scenario that is acceptable under a proviso. Cohen states that the acquisition of all the land is also feasible. Cohen argues that if A appropriates all the land and gives B a wage that improves B's condition, B is better off or at least no worse than the baseline condition. Cohen urges that this appearance could be deceiving. He asks us to consider the possibility that B could have been better off appropriating the land but this outcome is not discernible due to the appropriation of the land by A. Cohen states that B might have done better than A if B had appropriated the land and thus B's position is made worse off. B is better than the baseline, no ownership, but is in a worse condition than his condition would be if the assumption of no-ownership were replaced with joint ownership. Cohen argues a proviso allows this because the calculation of what makes someone worse off is not comprehensive enough. Cohen states that A & B, realizing these potential issues should then agree to joint ownership as a baseline condition. Cohen argues that a joint ownership baseline ensures individuals are better off than the baseline conditions allowed by a proviso and private appropriation. Cohen argues that Nozick (like Locke) in choosing no ownership/terra nullius as the baseline condition fails to account for alternative conditions of appropriation and how these may affect the aggregate condition of all. This leaves a socialist or collective ownership answer to property rights as favorable.

⁴⁹ Cohen, G.A.: *Self-Ownership, Freedom and Equality*, pp. 79-87

Cohen rejects the self-ownership thesis as Nozick propounds it. Cohen argues that Nozick's position that the protection of natural rights ensures self-ownership simply does not ensure individuals are free from coercive, unfair and unjust inequalities. Nozick claims that these rights are inviolable in order to ensure that individuals can act in anyway they have license to act. The lack of rigidity in property rights, such as that proposed by Cohen, could license the state to violate natural rights as Nozick sees them. Nozick would likely argue that this does not take individual autonomy seriously enough as the claims of others in how one disposes of their labor and the fruits of this labor would be relevant criteria in determining their actions. Actions that Nozick would argue they have clear license to undertake and enjoy the benefits of undertaking.

Cohen argues alternatively that certain redistributions can be rejected based on claims of individual autonomy.⁵⁰ Cohen argues that this removes the fears that Nozick had of redistributive measures violating the atomistic rights of individuals. This construction of what amounts to an alternative self-ownership argument rejects the extensive property rights aspects of Nozick without presumably violating individual autonomy as an ideal. Cohen grants individual rights and use of resources but not the private ownership that entitlement theories advocate.

This is a troubling critique of Nozick given his defense of extensive property rights. If individuals are worse than the baseline condition through acquisition and private ownership then a coherent proviso dictates we enact collective ownership rather than private appropriation and ownership. Cohen is arguing that our conception of worsening must be sharper than Nozick or Locke allows, and if we take this criterion seriously, we end up at a collective ownership baseline. If Nozick is arguing as Cohen claims, that the entire world is "up for grabs"⁵¹, then the consequences of this will always result in a lower level of baseline condition that can leave individuals worse off compared to another plausible account of the baseline, the joint ownership baseline. In this light, a strict reading of the proviso puts Nozick's defense of entitlement in a tenuous position.

⁵⁰ IBID, p. 102

⁵¹ IBID, p. 84

Cohen's reading of Nozick's property rights argument is not an unfair one but crucially misses an argument that Nozick himself does not fully articulate in his work.

Cohen's claims about total acquisition are salient against the Nozickean proviso, but as we have discussed, a proper proviso ought not to be as permissive as Nozick's. This "messy"⁵² subject is not worked out properly in Nozick's theory. If it were, it would lead to our qualifications of the market and a Fair Shares Proviso in order to allow acquisitions after we have secured moral agency through redistribution. If our considerations about circumstances related natural endowments could be satisfied, this conception of the proviso still holds power and still works to justify private ownership. Nozick does not elaborate on the idea that a proviso may bring into conflict core aspects of his need for moral agency. Cohen's critique poses a problem for Nozick but we must consider if Cohen's critique this is a problem for our Fair Shares Proviso. Cohen thinks it is as powerful a critique against any proviso that accepts the worsening of condition as a criterion. Cohen believes these will collapse in on themselves because if we consider a joint ownership baseline, such a condition will always leave individuals better off. However, this is only the case if we accept joint initial ownership as operating in the way Cohen says it will. To explore this, we have to revisit and expand upon Cohen's argument.

Cohen's exposition does not elaborate enough on the aggregate conditions. In Cohen's model the outcomes of A & B assume co-operation, namely that A & B can decide on a division of labor or at least use under a collective ownership baseline. What if under collective ownership they do not agree? It is assumed that A & B under collective ownership will, in the absence of consensus, be free to continue their use of the land as they had originally intended, wheat farming and moose milking respectively.⁵³ In this scenario, A and B can continue their activities even if one or the other decides to do nothing and starve. However, if we take seriously the collective ownership baseline, any use of the resource, in this case the land, must respect A & B's equal right to the whole

⁵² Nozick, Robert: *Anarchy, State and Utopia*, p. 185

⁵³ Cohen, G.A.: *Self-Ownership, Freedom and Equality*, p. 79

resource. If they cannot come to an amicable arrangement of the activities each wishes to use the land for and/or compensatory measures in the case of mutually exclusive aims, one individual has a trump on the other to prevent the use of the land. The individual worsening of the baseline condition could be extremely high and in fact, much worse than a private appropriation baseline if the intended use is a legitimate pursuit that does not harm the other individual or worsen their condition beyond losing their veto.

For example, let us say A wanted to do something needed to survive, in Cohen's terms, harvest wheat. B hated A and wheat so no matter what A offered or tried, B would not let the action take place on the jointly owned field. Let us further assume that A's wheat harvesting would not affect B's ability to use the resource to milk his moose or do anything else for that matter. B's joint ownership right still trumps A, and Cohen has to argue this is ok because it is B's individual privilege to do so if no agreement can be reached to allow A to harvest wheat. It is hard to see how A's condition in this scenario is better than the baseline one if our Fair Shares Proviso provides as a baseline an equal initial share of resources that neither A nor B can refuse from each other.

Cohen could claim that such a scenario would never occur due to the mutual need to survive. However, this would be a dubious argument on both a theoretical and practical level. Instead, Cohen's claim of autonomy has to kick in here and do all the work because otherwise A can prevent B from milking moose and B can prevent A from harvesting wheat. As a result, they will both die due to each other's claim rights, which is clearly the worst baseline condition conceivable. However, this assertion of autonomy comes in direct conflict with Cohen's operating assumption that A and B have joint rights in all resources being used for both of these activities. A can stop B and B can stop A as they both have equal claims on all of the land in question. This is what leads to the bargaining and sharing of production that Cohen argues is extrapolated from this collective ownership position. If these conditions persist, we are left to wonder why does B have a right to trump A's legitimate use of the resource in one regard but not another and is this truly a better baseline than our private ownership baseline. Cohen has to give us some expansion on this idea or a consciousness/sociability argument in order for us to

make sense of what takes priority. Moreover, this explanation has to be compelling for us to come to the decision he has, that the baseline condition of shares and private ownership allowed by our Fair Shares Proviso is lower in some cases than the stalemate we just uncovered in a joint ownership scheme.

Cohen argues that claims of autonomy can act to ensure violations of individual rights and liberties do not occur. In joint ownership, we have just seen that B can have a say in the direct actions of A in every aspect of A's interaction with the tactile world except those protected by claims of autonomy. Cohen's right to autonomy encompasses one's own body but arguably not the ground on which it stands or the air which it breathes. Cohen would not deny the right to either of these privileges, but it appears if he is to do so he has to come to an uncomfortable position. Individuals have to have use, in keeping with their own needs, of natural resources. In order for this use to be fair and equal, the shares must be equal and the use must allow A to self-authenticate the legitimacy of the resource use. This is in effect a private property right and similar if not identical to the threshold our Fair Shares Proviso represents. If Nozick failed to articulate a proviso adequately, Cohen may be equally as guilty of not working through individual autonomy adequately. If claims of autonomy can legitimize individual private use of a common resource, then surely this implies property rights must be a primary aspect of autonomy.

If we take individual autonomy seriously, then individuals must be free to do what they have license to do based upon such a claim. The ability to use an equal share of resources is an inescapable part of such a claim. Our egalitarian concerns about measuring such a share must stem from calculations of impact/worsening upon political equals including their ability to utilize their share. Nevertheless, our autonomy must extend to a claim on the resources of the tactile world, or else it is a term with no constituency. A and B are autonomous individuals who can choose how to dispose of their labor to produce the products in question that were impossible to produce without the land. This means the permission between them needs not to be one of absolute individual veto or approval.

A claim that Cohen also raised was that a proviso, if expansive enough like Locke's, can be a reason to prevent conceptions of private property ownership altogether in much the way Nozick feared. Taking the Lockean proviso seriously, which is something Nozick does not do appropriately, requires that in the A & B scenario the complete ownership of the land by one or the other is illegitimate given the land's fundamental role in individual rights and assuring agency. The share has to be projected on A & B or even C, D or Q who show up later. With this scenario removed by our Fair Shares Proviso, the worst baseline liberty objection it poses is adequately defused from Cohen's initial critique. Furthermore, the equal share solutions are only troubling if the result is complete individual ownership of a rights providing resource. Such an outcome is incoherent with the qualified way we have arrived at the Fair Shares Proviso as individuals have to be left "as much or as good" and be assured, through resources, of their moral agency. Therefore, there may be a way to conceptualize a proviso without having it meet the extreme end Cohen says it must arrive at.

Cohen's argument then brings us to an important conclusion about property rights. It is not that things are privately acquired but what things and how much of them are acquired that matters for individual freedom and rights. The state must respect rights bearing individuals equally. These rights require resources, but do not give individuals a right to all of something or to some of everyone's product. It is in this light, that we can see where liberal conceptions such as Van Parijs' have fertile territory to place their claims in the area existing between accounts like Nozick's and Cohen's. It becomes a matter of where the priority is placed in treading a path between these positions.

Cohen allows the reciprocal relationship of choices between individuals to be too expansively drawn. Though our Fair Shares Proviso takes us away from his conclusions, we may be able to support them in some respects if our consideration of circumstances leads us to question property claims. If choices are given too much space to count, they could have unjust outcomes. So we must inspect Cohen's argument about why individual circumstances and natural endowments cause him to advocate for collective ownership.

The A & B objection is only one of Cohen's concerns with capitalist justice. Cohen argues that the "inequality of condition"⁵⁴ is more than simply a discussion of external resources. He urges that these inequalities justify actions of redistribution and collective ownership. Cohen is concerned that market processes do not take seriously enough the conditions that face some individuals, in particular those with fewer talents or natural endowments. Cohen explores the idea of talents and disproportionate individual wealth in his "able" and "infirm" argument.⁵⁵ In this two-person world, these two autonomous individuals have unequal abilities but equal property in the world of natural resources. Cohen's concern is that individuals, who have a lack of talents or in even more troubling bodily circumstances, are unable to use resources. As a result, philosophically equal individuals will not be able to use their share of resources under an arrangement like our Fair Shares Proviso. As we have discussed, Nozick and Locke require individuals to acquire and use resources autonomously, as their approach is purely negative. The fact an individual is unable to use a resource to achieve the needed moral agency is beyond the distributive discussion pertinent to the state, even if neither author would deny the individual moral duty to help others in such a situation. Cohen argues these individuals will be unequal due to unchosen circumstances, namely their lack of certain natural endowments.

These individuals have a claim to autonomy that Nozick's purely negative obligation does not address. Cohen explains that through the collective ownership of resources ensures that "able", understood as the talent-laden individual and "infirm", as the less or non-talented individual, would come to certain prescribed divisions of labor and product distribution. Cohen asserts that the distribution that "able" will receive in any scenario that assures they will both survive will yield "able" no more than an egalitarian outcome due to the equal material status of "infirm". Since "able" is using a joint-share, he must produce enough resulting resources to sustain them both. They will share the product fairly in order to ensure "infirm" agrees to the ongoing use of the

⁵⁴ IBID, p. 69

⁵⁵ IBID, p. 94

shared resource. “Infirm” is able to use their veto, either directly or through proxy, to ensure fair conditional outcomes. The talents of “able” are still exercisable but the fruits of this exercise must be sensitive to the resource use he is undertaking of “infirm’s” jointly held resource. If “infirm” demands too high a price for this use, he will not be able to convince “able” to utilize his talents and labor. Cohen believes this will result in a level of equilibrium between the two while providing an egalitarian outcome for those who are unable to use resources.

For Cohen this equilibrium can be maintained even if either individual has a particular aversion to the labor. An individual’s aversion to labor counts within this calculation but Cohen argues this is not troubling as this is a part of any calculation of undertaking a task. The inequalities in the division of the resulting product come solely from the use of labor and the preferences of the talented to undertake this labor. The willingness of a talented individual to apply their labor would then determine fair compensation from “infirm” to “able”. Since the difference in talents and yield between the two is not the attribute in question but rather the equal right to the jointly owned resource and “able’s” willingness to labor, Cohen believes any resulting inequality is likely to be small or at least relative.

Cohen’s argument is based on a relatively complicated set of bargaining assumptions on the part of “Able” and “Infirm”.⁵⁶ However, the most important one for discussion here is the belief that the two individuals, understanding the disproportionate yield of one another, would agree to an egalitarian, unequal yet sustaining distribution of the resulting product.⁵⁷ Cohen argues that due to the shared resource used, the product must be divided. The ownership of the product is not wholly owned by the individual producer due to the shared ownership in the resource used to make it. The decision that Cohen suggests is reached is a matter of balancing the claim of “infirm” to compensation and the affinity of “able” to undertake the labor. “Able” as the greater producer could

⁵⁶ See IBID, pp. 94-101

⁵⁷ IBID, p. 96

legitimately negotiate a greater share of the product but he would have to provide something to “infirm” from his product.

Cohen’s example gives “infirm” and “able” ownership of themselves and ownership of their labor but never complete ownership of the product of their labor. Joint ownership still yields inequality as “infirm” and “able” are materially unequal based upon natural endowments and individual choices. Cohen argues this inequality is justified given the equal joint ownership in the resources used and the concern of autonomy. The question becomes whether our Fair Shares Proviso sufficiently defuses this critique. Cohen has already stated it cannot but his argument missed some key issues in coming to this conclusion, so we need to inspect this matter for ourselves

“Infirm” needs to get support from “able” in a way that is reciprocally fair to “able’s” self-owned labor. Cohen’s argument is that if private acquisition occurred, “infirm” would have one chance to strike a deal that secured his compensation. Joint ownership on the other hand gave “infirm” a trump that he could constantly pull out to revisit his compensation. In the process, Cohen argues “infirm” has secured conditional welfare in a way that still allowed “able” to be materially better off. This argument only holds if we continue to adopt a joint ownership baseline as Cohen has described it. However, his baseline is not coherent because Cohen does not work through his autonomy claims and how they legitimize private resource use. Therefore, the ability of “able” to provide for himself and only himself through a claim to autonomy and over-ride the use veto of “infirm” is never resolved. Any coherent working out of this paradox undermines much of Cohen’s argument. The result is that Cohen’s strong claim of an improvement for the welfare of “infirm” is no greater than the rent “infirm” could negotiate, directly or through a proxy, that a fair share of resources could yield through an appropriately drawn proviso like our Fair Shares Proviso. These projected shares are subject to abstract claims of worsening and this is true for everyone, including “infirm”. The market itself is operating in a subordinate place within our theory of justice because the projection of shares comes first. The rental value of a share can be revisited but this does not rule out private acquisition as we have shown in working through our Fair

Shares Proviso, it simply qualifies these claims. The property claims exist if shares are provided but what individuals do with their shares from here is up to them if we have done what it takes to ensure moral agency. The choices of ‘Able’ and ‘Infirm’ have to be equally valued and to do this they need a share of resources, or the fair rental value of that share. This does not imply that they have a claim to the use of all of everything as Cohen implies. Without a worked out position on autonomy, Cohen is left in this position. Any working through of an autonomy claim will cause such a position to value use rights, which are in fact property claims that are not subject to the objections of others. This would undermine the joint ownership baseline.

As much as this poses a problem for Cohen, this critique shows a deep tension in the entitlement conception of justice. ‘Infirm’ will be politically unequal in his property rights if through unchosen circumstances of natural endowment, he is unable to use or acquire his initial share of resources granted to him by our Fair Shares Proviso. Such considerations and redistributions must come first. This further illustrates our need to subordinate the claims of the market and why we move easily from our libertarian account to a liberal account of justice. We will revisit this problem throughout the text, as it is one that I will suggest no liberal author has wholly addressed properly. However, for now, let us assume that this problem is resolvable and focus instead on our resource and property argument as I have argued libertarianism has something specific to add in conceptualizing a just market.

Cohen’s critique of capitalism potentially yielding exploitative power relations is only true if the market is not placed in the proper context and if the Fair Shares Proviso is not in place. The Fair Shares Proviso ensures that individuals have claims to equal resources and can demand compensation from those who borrow/rent this share. The Fair Shares Proviso would yield private ownership and not the joint ownership bartering position Cohen forwards. However, it would allow the kind of rent and stewardship Cohen points out is needed. This is because air shares are granted to everyone and the concerns of liberal justice that we will argue must precede the actions of the market have taken place. Once we have fulfilled these commitments, allowing private ownership does

not appear troubling. If individuals have a right to an initial share of resources, then surely it is legitimate for them to consume or use this portion in a way they see fit provided it does not harm other's portions. Cohen's need for an account of autonomy backs him into this same conclusion if we extrapolate his theory. Questioning how much individuals are entitled to of these resources over time and in different circumstances is a different concern from allowing private ownership and as such places different considerations on our conception of distributive justice rather than causing us to abandon the idea of private ownership altogether. Once resources are provided to ensure moral agency through redistribution and we project equal shares onto individuals, we are left to consider the market and how it works to distribute what is left. There ought to be little we can say about how individuals use their fair share if we take moral agency seriously. The joint ownership Cohen argues for fails to articulate this point.

Nozick's failure to provide these key aspects of the self-ownership thesis does not revoke the potential legitimacy of the idea. It instead implies that a large part if not the overwhelming consideration of justice occurs through conceptualizing the material and political demands of the proviso and any other commitments of redistribution that happen prior to the market device. If pre-conditions like the proviso and the resources needed for agency are met in an ongoing way, the transfers that follow through acquisition and property claims of the market require protection in our state as these flows from autonomous individual actions. This is a massive move away from Nozick's conception of procedural justice but retains a crucial element of his argument about agency and how we ought to honor individual choices. Libertarianism makes a large and inappropriate assumption about what it takes to ensure human individual agency but this does not undermine the argument completely. If we do what is needed to ensure this agency and justify the market through our Fair Shares Proviso, libertarian claims tell us there are actions in the market we need to protect because they are the legitimate result of the agency we have worked to secure.

1.3 - Conclusion

The inspection of Nozick leaves us with some important ideas to consider moving forward. Nozick's primary claim is that the state cannot violate individual rights legitimately. These rights form strict constraints on the actions of the state. Nozick argues that private property is one of these rights. For Nozick, the existence of these individual rights rules out the redistributive projects of Rawls and Socialism/Communism. We have also seen the power that aspects of arguments like Cohen's have against the strict nature and formality of Nozick's claims. These positions placed against each other show that there are conceptual problems with each that leave us requiring some other way forward through the ideas of choice, circumstance and distributive justice.

The theories approached in this chapter represent the unadulterated forms of capitalism and socialism, which form the ends of the political spectrum Van Parijs references in his development of liberalism. Van Parijs will take aspects of these positions seriously, which I have noted throughout this chapter. Van Parijs will attempt to weave them together as part of a broader development of the liberal project that legitimizes a UBI. However, we have asserted our own conclusions as to where these theories fail and what developments we truly need to make in order for us to develop liberalism appropriately.

We have worked through the libertarian argument to arrive at a subordinate but necessary role for the market. This understanding shows what must be addressed prior to market actions. Individuals must have shares of external resources through a Fair Shares Proviso. Redistribution must take place in order of individuals to have the resources required by asserting individual moral agency. There must also be some treatment of natural endowment inequalities in order for the moral agency of individuals to be fulfilled in keeping with the assumptions of the market argument. Nozick does not give us a way to work through these issues appropriately and this is why we must depart from his

viewpoint. It also illustrates why we progress naturally into a liberal account of justice.

However, with these in place, the market appears to fulfill something important concerning our individual moral agency. The market fulfills our choices. These choices have to count in an appropriate way if the state is to take our agency seriously. Private property can be defended but requires specific commitments first. Our considerations open the door for liberal egalitarian commitments to distributive justice. The liberal authors that follow will need to deal with the claims we have asserted here about our markets, the developments we have argued they need to make beforehand and what they need to reflect in terms of formalizing individual choices. These claims will motivate, in part, the development of the liberal account of justice I will present.

The relationship between elements in our calculation of distributive justice may be “messy” but no one said justice was neat, easy or a concise process. The balance between addressing individual circumstances and honoring properly the choices individuals make within a fair political society is difficult. As we move forward, I wish to keep our Fair Shares Proviso in mind and what it tells us about a just market. It implies something specific about a just market on one end and ultimately I will argue tells us something about what counts when considering what measure we use to redistribute when we expand on the taxation argument in chapter 3. This is because it asserts what individuals are owed, in terms of redistribution even if the scope of these measures remains unclear. We now have to move into the Rawlsian liberal debate and work through what our commitments to individual circumstances and redistribution ought to be.

The problem we face going forward is considering and creating institutions that live up to the claims about the market and the needs of justice at the same time. Still, one might say that there is little that I am suggesting we take from Nozick directly aside from a core intuition about the importance of rights, the legitimacy of choices granted to us through moral agency and how these can support private property claims and the importance of the market. I do not feel this would be an unfair statement but as Nozick

himself says, “Even the reader unconvinced by my arguments should find that, in the process of maintaining and supporting his view, he has clarified and deepened it.”⁵⁸

Nozick shows us how the market and its action serve an important role in affirming our moral agency, even if he fails to work this position out coherently. He moves us more naturally than it would first appear to adopt a liberal viewpoint. He shows us that taking choices too seriously can cause problems, as there are considerations of justice that clearly come first. We can reconstitute some of his core intuitions and use them as a tool in guiding our development of liberalism.

⁵⁸ Nozick, Robert: *Anarchy, State and Utopia*, Basic Books, p. x

Chapter 2 – Rawls, Circumstance and the Welfare State

Introduction

Those familiar with the material scrutinized here may question why the material is arranged in this order. Nozick's arguments were at least in part a response to Rawls system of justice presented in his earlier work, *A Theory of Justice*. It will be Van Parijs' claim, in developing his account of liberalism that a coherent libertarian ought to adopt his approach to justice and his state structures. This is why it is important to understand Nozick's libertarian argument in detail and develop this position ourselves. Perhaps most importantly, our inspection of Nozick has yielded us what we should take forward from libertarianism, where we should place these claims and what commitments we need to undertake to make market claims coherent. The exposition of the previous chapter arrives at a different conclusion as to the validity of Nozick's claims and how we can work through them than will be presented by other authors. Van Parijs will attempt to reconcile the claims of libertarianism with the liberal argument. It was paramount to assert what these libertarian claims ought to be before appraising how liberal arguments can or cannot be reconciled with the limited but valid aspects of this account. Rawls conception of securing fair institutions of political and distributive justice will be the cornerstone of the arguments to follow including Dworkin, Van Parijs and ultimately my own developed position.

The deep tensions I will show within Van Parijs account arise from his attempt to reconcile actions of choice with Rawlsian liberalism. We have shown that the development to a liberal approach is necessary in appraising libertarianism. It is how this development is accomplished that makes all the difference. It is only through the exposition of Rawls thought that we can understand how we ought to develop the liberal argument alternatively. Rawls account of justice and his rigorous progression to principles of justice will show how claims of liberal justice are needed prior to justifying

the actions of the market. As a result, how we harmoniously reconcile liberalism and the power it has in dealing with individual circumstances with choices and market claims requires we inspect how Rawls treats these issues. How this move can be made will be illuminated in the chapters to come and underline why my proposed development of liberalism is so necessary.

Rawls provides us initially with an explanation of how the modern welfare state, with its redistributive measures, can be morally justified. Rawls provides a conception of how individuals should conceive of just processes and institutions. His thought has shaped much of the debate in contemporary political philosophy over the past several decades since the initial release of *A Theory of Justice*. His account of justice is both compelling and contentious but perhaps unparalleled in its rigor. It is an argument that both critics and supporters have had to frame their opinions against. Rawls continued to expand and amend his theory of justice in his subsequent work.⁵⁹ In turn, this has garnered even greater critique. The tome of literature that this ongoing academic process has amassed is so vast that I simply cannot embrace it all or even most of it sufficiently in the space I have available in this dissertation. Instead, I will provide a summary account of Rawls' system of justice focusing primarily on the issues and conceptions Van Parijs and Dworkin embrace and/or critique in constructing their own political theories. This will begin with the account of political liberalism in *A Theory of Justice* and some important amendments and elaborations Rawls provides through some of his subsequent primary texts. I will focus on the treatment of issues such as individual circumstance and choice within liberalism and the developments of these positions and devices over the course of Rawls career. I will also discuss Rawls use of the market and property claims in keeping with "justice as fairness".⁶⁰

After examining this argument broadly, we will move to the development of Rawls project presented by Ronald Dworkin in the next chapter. These two arguments articulate different extrapolations of Rawls' hypothetical thought device and the liberal

⁵⁹ Please refer to the works of John Rawls listed in the bibliography

⁶⁰ Rawls, John: *A Theory of Justice*, (Cambridge MA: Harvard University Press, 1971), chapter 1, pp. 3-53

argument. Through a close examination of Rawls' argument for distributive justice, I will set the stage for the issues to be raised in later chapters. One of the steps forward Rawls will take is to highlight the importance of natural endowments to external resources. This is one of the major failings of a libertarian account as we have discussed it so far. I will highlight the specific arguments Rawls presents about talents, disabilities/handicaps, choice and material inequalities. I will show how important these conceptions are to arriving at Rawls' principles of justice before illuminating why they are so problematic in the next chapter. These will become a central factor in amending the liberal accounts of justice that follow. It is my argument that balancing the claims of choice and circumstance will form the center of the divergence between alternative conceptions of liberal justice that follow. I will show this is because Rawls will give us a specific and ultimately inappropriate weighting of these issues in our devices for creating principles of justice. However, we must first assess where the imbalance caused by Rawls concern with individual circumstance comes from and why Rawls treats it as he does. This will highlight why we require a development of the liberal argument, which I will forward.

2.1 Rawls and A Theory of Justice

The aim of Rawls is to institute a fair state. Justice is derived from the fair treatment of equal citizens. Fairness implies political equality and Rawls wants to ensure these attributes of justice in an ongoing way. The project of justice for Rawls is a matter of creating a comprehensive political framework that allows individuals to pursue equally their various conceptions of the good life. For Rawls, the creation of justice should avoid intuitionist or comprehensive moral judgments. Rawls aims to create a comprehensive account of political justice that individuals justly obligated to through the coercive power of the state. Rawls project is to create “a theory of justice that generalizes and carries to a higher level of abstraction the traditional conception of the social contract. The compact of society is replaced by an initial situation that incorporates certain procedural constraints on arguments designed to lead to an original agreement on principles of justice.”⁶¹ The goal is to create a fair system that no individual, upon removed and reasoned consideration could deny even if they did deny such logic within non-abstract contexts. Coming to fair principles of justice requires that individuals abstract into a thought experiment that is necessarily removed from some of the conditions that face them. For Rawls, the goal is to find an impartial device from which to derive principles of justice that guide the political, social and economic institutions that follow. This is necessary to ensure the decisions that are reached about justice in such an experiment are not biased to particular outcomes. Rawls argues a thought experiment that is sufficiently representative yet sufficiently impartial will allow us to come to ex parte decisions about justice that can be applied and revisited.

Justice is secured by the fair arrangement of society. Individual equality is necessary in society to ensure individuals are treated as ends and not as means. This is an important perspective shared with Nozick. These core assumptions are not argued across the theories, rather how best to define, interpret and secure them. However, it is important to note the relationships Rawls sees between these ideas, as they are the engine

⁶¹ Rawls, John: *A Theory of Justice*, p. 3

for Rawls' argument for "justice as fairness". It is not that any of the theories wish to be unfair, rather that they have different interpretations of what is fair. Rawls argument is that fairness is an ideal that we apply out of our individual context and ignorant of certain cultural, social and individual particularities.

Rawls argues that disproportionate distributions of wealth in society lead to unfair power relations between political equals, as the liberties of some are more valuable than others. The uneven bargaining positions that follow lead to unfair and unjust political inequalities. Individuals are not free in this sort of context to pursue their conceptions of the good equally. Their freedom is dependant on accessing certain aspects of society that provide them with actual liberty to use or access ends. Without an initial set of liberties provided by resources, some individuals are not truly equal and as such, are treated unfairly.

To decide what is fair and just, Rawls argues that we are best served by using a hypothetical thought project that allows us a neutral initial position from which to reach decisions about justice. Rawls calls this the "original position"⁶² and it is intended to give us a hypothetical impartial bargaining scenario. Rawls argues that the decisions and institutions that result in such context form the legitimate bipartite responsibilities between individuals in the state. To ensure a fair outcome, the original position features representatives intended to account for all the members of society. Rawls argues that using an original position argument will create the basis on which individuals can reflectively look at their decisions and institutions. This reflection will act to ensure their actions and institutions are just given the equality of everyone in such a hypothetical situation. Rawls urges that the device can be used to understand what individuals would agree to, being reasonable, had they been in such a hypothetical position. The device of the original position works to ensure the impartiality of the decisions and structures that follow from it.

⁶² IBID, p. 12

However, this requires that the individuals in such a situation are not aware of their general conditions and context beyond the original position. If they were, the knowledge of certain aspects of their social and physical predispositions would color unjustly the resulting state. Rawls believes neutrality can be achieved by invoking the idea of a “veil of ignorance.”⁶³ Rawls describes the veil thusly,

‘... no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.’⁶⁴

The veil of ignorance places parties arriving at the original position in circumstances where they are unable to determine where they stand in respect to one another in their shared environment. The veil of ignorance is designed to make individuals ignorant of many of the specific conditions of their existence. Rawls constructs the veil to remove individual knowledge of their class, social status, talents, abilities, aversion to risk, social proclivities, and even their individual conceptions of the good life.⁶⁵

Rawls removes these attributes from the representatives in the original position to ensure that these factors do not prejudice the outcomes of justice. The goal is to show through the device how we can create principles that balance our legitimate choices with measures to address individual contingencies. Rawls uses the veil to screen out conceptions that should not be relevant to the pursuit of justice as fairness. Individuals’ knowledge of their class or social status could cause them to sustain economic relations that are unfair and politically unequal. Knowledge of their social proclivities or

⁶³ IBID, pp. 136 - 142

⁶⁴ IBID, p. 12

⁶⁵ IBID, p. 136

conceptions of the good could cause the resulting system to bias these particular conceptions of the good rather than accept them all equally as legitimate ends. Knowledge of talents, abilities and even one's willingness to gamble on having these sorts of attributes could result in the legitimization of inequalities in the possession of natural endowments that are arbitrarily awarded. Rawls urges that the discussion of justice must leave these factors out of consideration when creating a system of fair mutual cooperation. Though these individuals are ignorant of certain aspects of existence, the veil is not to be construed as a blindfold. Just as important as what is screened out, is what is allowed in. Rawls allows individuals to know a great deal about the social, economic and physical sciences that inform the principles and decisions created in the original position.

We can see now the three aspects that make up Rawls' account of justice. The first is a presupposition of equality and fairness, which is assumed in some sense by all the liberal authors appraised in this text. The second is a device to achieve neutrality that is represented by the original position. This impartial position is meaningless without an account of what attributes individuals in this position base their judgments on, and as such, the veil is working to achieve this necessary aspect of the project. The veil of ignorance is intended to be as the metaphor suggests an opaque view of what is in front of these original position representatives. Rawls states that individuals in the original position "... know general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice."⁶⁶ These individuals then have a robust yet limited knowledge of their situation. Rawls urges that they understand the relative scarcity of resources, the potential frailties and misfortunes that could befall them, and the relationship economic and social conditions have on political equality. Once these conditions are in place, Rawls walks us through the decisions they will make given their potential options.

⁶⁶ IBID, p. 137

The role the veil of ignorance plays in Rawls' theory cannot be overstated. The selectivity of attributes that should be taken into account and those that should be removed is as important as the premise of fairness and the impartiality of the original position device in arriving at principles of justice. Each exclusion and inclusion needs to stand on its own as these make impressions on the principles that follow. They constitute the attributes of individual contingency that we will act to rectify given our lack of knowledge as to what we possess in terms of natural endowment and the relationship this will have with our choices in our society. To take issue with a principle of justice that follow requires some development of this impartial device. Rawls' identification of principles of justice flow from these arguments and it is important to understand their crucial role in Rawls' thought. The attributes that are perceived through the veil must be relevant to the discussion of justice and aptly accounted for. Those that are blocked by the veil must be illegitimate considerations in coming to principles of justice if we accept the equality, fairness and the impartiality ideas Rawls forwards.

Rawls believes the veil of ignorance will ensure a relative level of uncertainty across all the represented and equal parties at the original position. These individuals will not know where they will end up socially, economically or physically outside their veiled position yet understand how these factors and the complex inter-relations of various elements can yield certain outcomes outside of the veil. Rawls argues that from this point they will rationally choose specific principles of political justice, including distributive justice. It is the latter that will define the space the market and our choices within it are given. These principles and their demands on the structures of the state make up much of the institutional suggestions that Rawls posits. They are also vitally important in assessing Dworkin and later Van Parijs' who undertake the general premise of the Rawlsian argument but develop it in certain ways.

Rawls argues that individuals, in such a position, will choose to ensure and protect a maximin set, the maximum minimum set, of "primary goods"⁶⁷ in order to

⁶⁷ IBID, p. 62

preserve equality of condition. “Primary goods” are described as being more than simply material items. As Rawls explains,

‘As a first step, suppose that the basic structure of society distributes certain primary goods, that is, things that every rational man is presumed to want. These goods normally have a use whatever a person’s rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth. (Later on in Part Three the primary good of self-respect has a central place.) These are the social primary goods. Other primary goods such as health and vigor, intelligence and imagination, are natural goods; although their possession is influenced by the basic structure and they are not so directly under its control. Imagine, then, a hypothetical initial arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and organizational powers would make everyone better off than in this hypothetical starting situation, then they accord with the general conception.’⁶⁸

Rawls intends primary goods to be a description of anything individuals need no matter what else they may want.⁶⁹ This includes resources but also basic liberties, rights and associative protections. Rawls is careful not to describe these in specific detail. Leaving them broadly sketched affords the idea a level of flexibility as well as refraining from making decisions of the good rather than the right. Individual equality dictates the provision of these goods no matter an individual’s physical or social attributes. Individuals ignorant of where they will end up socially and/or materially would agree unanimously that it is in their individual interest to have more rather than less social primary goods. To ensure they all have fair value for their liberty, individuals will decide that no matter whom ends up where in the resulting state, all individuals will have an appropriate set of primary goods.

⁶⁸ IBID; p. 62

⁶⁹ IBID, p. 62

Rawls delineates primary goods into two different types. The first are natural primary goods.⁷⁰ These are physical attributes of individuals such as talents, handicaps and other aspects of human embodiment. The second are social primary goods.⁷¹ These are institutionally provided rights and resources. Rawls believes rational individuals will act to ensure that they receive a fair and equal maximin distribution of social primary goods. Rawls explains, “[t]he term “maximin” means the *maximum minimum*, and the rule directs our attention to the worst that can happen under any proposed course of action, and to decide in the light of that.”⁷² Rawls defends through relatively complex exposition on game theoretic philosophy, maximin reasoning. Individuals will, under the veil of ignorance, be unable to determine their preferences or propensities in the larger society. This ensures that no matter what their individual distribution of natural primary goods, individuals will safeguard themselves (and in the process everyone else) from a fundamentally unequal position in society. This is accomplished by distributing and subsequently redistributing a maximin amount of social primary goods. This resource equality ensures that all individuals will have equally valued liberty to undertake whatever their conception of the good may be.

For Rawls, this line of reasoning leads him to assert specific principles of justice. The first principle of justice is stated as “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.”⁷³ For Rawls, this ensures that individuals have equal institutional rights and liberties in government and society. If this provision is not met, individuals will not be able to act equally in society. The resulting conditions of inequality will have direct and unacceptable political results. This places restraints on some excesses and actions. This first principle has lexical priority as a principle of “justice as fairness”. It requires that this concept cannot be subverted for gains in the principles to follow or for

⁷⁰ IBID, p. 62

⁷¹ IBID, p. 63

⁷² IBID, p. 154

⁷³ IBID, p. 60

gains in economic efficiency. Rawls does this to avoid decisions of utility that might arise in assessing claims in society between the principles.

Second Principles of justice relate to the economic and material circumstances in society. These principles are motivated by equality, fairness and the importance of equally valuable liberties to individuals. However, simply stating the need for a fair and reciprocal arrangement of an equal set of primary goods is not enough. This account of primary goods needs to have some conception how distributions are realized. This is where the second principles of justice do their work. Rawls argues that upon reaching the first principle of justice, the second principles of justice, namely the “Fair equality of Opportunity” principle and the “Difference Principle”⁷⁴, would follow. Van Parijs will lodge most of his critique of Rawls within the context of the difference principle. This illustrates precisely how deeply Van Parijs construes his project to be congruent to Rawls conception of justice. All the steps that have proceeded would need to be followed in some way to arrive at this point.

The fair equality of opportunity stipulates that individuals have the opportunities to act equally in government and society. Individuals being ignorant of where they would fall would further agree that all would have the equal ability, no matter their economic circumstances, to pursue conceptions of the good, obtain social positions and careers based upon merit as well as act in government/democratic processes equally. This would affirm structures that remove economic decisions from governance and education that engender the political/social disparities between individuals that exist in modern societies due to economic conditions. This principle further motivates the actions of the difference principle and the set of primary goods it is intended to provide. It is important to note here, that Van Parijs does not explore this aspect of Rawls thought in much detail although his commitment to opportunities is one of the three tenets of his theoretical framework. For Van Parijs, opportunities mean something slightly different and are perhaps better understood as being encompassed by Rawls nebulous set of primary goods. Van Parijs more closely associates resources to opportunities. However,

⁷⁴ IBID, Chapter 2, pp. 54 - 117

Van Parijs is likely to agree with the political overtones of this aspect of Rawls thought which as we will see in Chapter 4 places most of his criticism of Rawls on the difference principle.

The difference principle posits that inequalities in material wealth (the inequality of condition) are only just if they benefit the least well off. Individuals in acting to secure a set of maximin social primary goods will arrange society so that any material inequalities are only arrived at if they benefit those at the bottom of society in terms of the value of their liberties. Rawls argues that the difference principle still allows for varied distributions of wealth and proportional economic disparity arrived at through the market. The set of primary goods being distributed is simply an initial set of resources from which legitimate disparities may arise. This is justified because the least well off are rewarded for allowing these disparities in the society as these afford a greater maximin set of primary goods for everyone. Importantly, these material inequalities can only be legitimate if the least well off have benefited from it in this way.

Rawls argues this principle is the reasonable result of the original position device. Individuals would wish to protect themselves from the worst possible material and political/social outcomes. Rawls argues they would also understand that the ability to gain disproportionate wealth was in part the result of affirming a system of social cooperation. Rawls argues that individuals wishing to sustain their initial judgment about justice over the duration of their lives would then come to decisions about institutions of redistribution in keeping with the difference principle. The arbitrary ownership of talents or social proclivities ensures individuals would choose to protect themselves from the worst of these uncontrollable natural outcomes through principles that ensure equally valued liberties and redistribution. The principle of benefiting the least well off is then something everyone would agree to, as no one could be sure who was least well off outside the veil. Yet, these individuals would understand what the implications were for being in this position.

For Rawls, these principles deductively resolve justice for all political actors. It is only at this point that the actions of the marketplace that reflect individuals' choices are allowed to operate. For Rawls, this is because the constraints needed to address potential individual circumstances have been addressed and redistributed for by the actions of the difference principle. For Rawls, the representatives in the original position would work to guarantee these outcomes even if maximum outcomes could be achieved with violations of some of these principles or the structures they motivate. Economic efficiency is not to trump principles of justice. Rawls believes individuals possess the "two moral powers", namely individual abilities for rational revision and the ability of these same individuals to accept and apply a system of justice.⁷⁵ This is what makes up Rawls account of moral agency. In this way, individuals can be understood to hold vastly different cultural/moral views yet agree on the basic precepts of justice.

Affirming a basic structure in a fair way is for Rawls the ultimate aim of his project. Rawls describes the basic structure as, "...the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation. Thus the political constitution, the legally recognized forms of property, and the organization."⁷⁶ For Rawls, the basic structure comprises all of the major social institutions we might commonly associate with a modern society. It is only through these institutions that we enjoy the benefits of society and our mutual cooperation.

Property claims are one of these benefits rather than a natural right. Any given structure is then subject to the constraints of justice, including property and relative material wealth. As Rawls states, "Unless this structure is appropriately regulated and corrected, the social process will cease to be just, however free and fair particular transactions may look when viewed by themselves."⁷⁷ Unless these inequalities yield a greater maximin set of primary goods for the least well off, they endanger the fairness of

⁷⁵ Rawls, John: *Political Liberalism*, (New York: Columbia University Press, 1995), p. 19 & Lecture VIII, pp. 310-323

⁷⁶ Rawls, John: 'The Basic Structure as Subject' in *American Philosophical Quarterly*, (Vol. 14, No. 2, April 1977), pp. 159 – 165, p. 159

⁷⁷ IBID, p. 160

the basic structure of society. Rawls argues that property is a right against the individuals who comprise society rather than the result of a natural claim an individual has. As such, disproportionate wealth and the actions of the market are subordinate to the claims of the principles of justice and the fair society they create. This is at the heart of Rawls' argument against libertarian claims and is an aspect of his thought we will revisit as we proceed through the chapter.

These later amendments are very important in affirming Rawls' claim that his theory of justice is a conception of the right rather than the good for political society. Rawls wishes to assume as little as possible of those within the state in order to encompass all the potential circumstances they face. The Rawlsian conception of determining political justice has distinct stages, which are important to understand separately in appraising his theory. The first is the conception of a fair arrangement of political equals as the goal of a just state. The second is that to derive principles that make this goal realized in society we need a neutral thought device, the original position. In order for the position to be impartial and yield fair outcomes, it must be a position of specific ignorance. In the third step, he uses the veil of ignorance to give his theory the neutrality he argues is needed to yield a just system. Individuals knowing little about what awaits them would work to affirm a basic structure through social cooperation that is fair to their potential conditions outside this ignorant state. Rawls insists this does not privilege any conception of the good. Instead, his theory of justice works to everyone's benefit no matter who they are or what they might have or desire. Individuals are able to pursue any conception of the good equally. This is one of Rawls' strongest claims and will be used by Van Parijs in justifying a commitment to basic income and "real freedom". However, to ensure this, individuals must have certain conditional needs met in an ongoing way, given their potential shortcomings. This leads to the fourth step for Rawls, which are the principles of justice. With the conception of justice met Rawls believes that our conceptions of the good and our individual choices granted by our moral agency, can flourish.

2.2 Institutionalizing Distributive Justice: The Difference Principle in Detail

The difference principle becomes the focus for discussions of distributive justice, the market and the space given to individual choice. The role it plays is crucial in developing the conceptions of justice to be assessed moving forward and why I will argue certain developments are appropriate while others are not. Van Parijs argues for a direct amendment to this part of Rawls theory. Dworkin will also argue for an amendment but one that stems from a systematic development deeper within the Rawlsian project. However, it is important to understand the arguments that Rawls uses to lead to the difference principle. Rawls' argument is hard to critique in its own terms. Justice is creating a system of cooperation and basic social structure that is fair. Fairness requires that all individuals are equal. We can discern what fairness and equality in society are in working through an abstract thought project that detaches us from our bias. In this process, humans have initial conceptual equality. Equality in the political sense implies individuals need to have equal value for their liberty in order to follow our own desired path in respect of the equal rights and liberties of others. To ensure that we enact principles X, Y and Z in Q order we need to follow this prioritized path. These are just a progressive exercise to provide the just state that allows for legitimate conceptions of the good. In assessing Rawls' argument in these terms, the intuitive appeal of his justification can be observed. It also illustrates why liberal conceptions are developed from this position rather than refuted in the theories that follow.

Rawls is using the difference principle to tread a very interesting path between the arguments for providing for individual circumstances and allowing the inequalities that result from our autonomous choices. Rawls offers a crucial distinction in aspects of liberty. Rawls argues that individuals need more than just formal liberties. They need the means to exercise these liberties in order to be equals in society.⁷⁸ This is a powerful argument against the kind of position Nozick adopts. As we saw in working through Nozick's position, this aspect of his theory is not worked out appropriately. In working it

⁷⁸Rawls, John: *A Theory of Justice*, p. 290

out appropriately, we see how his position requires a Fair Shares Proviso, resources to ensure moral agency and actions to address discrepancies in natural endowments, which legitimize redistribution and subordinate the claims of the market. Although Rawls position appears at odds with Nozick, it is not at odds with what a working through of the libertarian position ought to have been. We establish the need for redistribution but Rawls further distinguishes how this will work. Rawls argues that the difference principle redistributes the resources needed to ensure a maximin set of social primary goods that are required for all individuals to exercise fair value for their liberties in society. The differences in material distribution it allows are relational to the set of primary goods afforded the least well off. They are only permissible if by their existence they raise the maximin conditions these individuals face. The redistribution is particularized in this way and Rawls asks us to accept something beyond just the needs we asserted in our inspection of libertarianism.

The focus of this section will be on some precise issues facing the difference principle. We will ask some important questions of the principle and the position used by Rawls to defend it. For Rawls, the difference principle is part and parcel of “justice as fairness”. Its role is integral to the exercise of providing a fair society. Nevertheless, the commitment to the difference principle needs to establish why his redistribution is as particular as it is. This discussion will give us the requisite background from which we can discuss the primary issues of contention between the liberal position and the operation of the market presented in the last chapter. For our discussion of Van Parijs and Dworkin, it will be particularly important to discuss what primary goods count in our calculations and why they are a maximin procedure. It will be from these arguments that we will see why development of Rawls liberal approach is necessary. It is vital that we inspect Rawls’ argument for the explanations of how principles of justice, in particular the difference principle, legitimize and determine the scope of redistribution.

The difference principle formalizes redistribution to the least well off, as they are owed a maximin set of social primary goods in keeping with the fair and equal structuring of society. Rawls argues the difference principle ensures that everyone has

equally valued liberty even if some individuals have greater material assets and social standing within society. Unequal wealth in some material senses is allowed and even necessary for the operation of society but is always subject to considerations of fair value and the commitments of a fair basic structure. Rawls urges that the difference principle is subordinate to the assertion of the “first principle of justice”, but is equally necessary as it works with the other principles of justice to affirm the coherent application and operation of social institutions in a fair society. The difference principle provides the equality of condition that equal political actors would envision everyone would need in the original position.

The difference principle postulates a relative curve concerning resources but not where all individuals in society should fall upon it.⁷⁹ Rawls believes that where they fall is a matter primarily of their choice but this is not troubling because the principles have ensured the primary goods necessary for everyone to determine where they wish to fall on the curve. Rawls wishes to articulate that the assessment of the difference principle as a political requirement of justice does not require economic growth, as the principle is a matter of reciprocity. Individuals are capable of attaining greater rewards provided these do not affect the condition of equally valued liberties for the less well off. Rawls urges that policies and institutions affirming the difference principle, including the market, will have to be subject to constant inspection and revision. However, Rawls argues this does not contradict the reciprocal formulation of the difference principle as a principle of justice as fairness.

Rawls’ assertion that talents are a factor that must be screened out in a certain way using the veil of ignorance becomes crucial in arriving at Rawls’ difference principle. Rawls argues that differences in natural primary goods are morally arbitrary and undeserved. Rawls argues they are a result of a “natural lottery”.⁸⁰ Talent (or the lack of a talent) is bestowed upon individuals arbitrarily and through circumstances they neither controlled nor chose. We are the owners of our arbitrarily assigned natural

Rawls, John and Kelly, Erin (eds.): *Justice as Fairness: A Restatement*, (Cambridge, MA: Harvard University Press, 2nd edition, 2001), pp. 61-63

⁸⁰ Rawls, John: *A Theory of Justice*, p. 74

primary goods, but their endowment to us is arbitrary. We have no role in choosing our parents. We have no role in choosing our assignment of genes or many maladies that may befall us. Because genetic predisposition is arbitrary, Rawls believes we should remove this factor from our thought project of deciding principles of social justice. No one is responsible for possessing talents, or conversely not possessing a talent. Therefore, our challenge of finding the balance between choices and circumstances has to take the consideration of natural factors very seriously. Rawls believes that circumstances like natural endowment weigh very heavily in this calculation due to their arbitrary nature and the effect they have on material conditions. They effectively limit choices. Individuals in the original position are aware of this relationship and Rawls argues ought to choose to discredit them as a legitimate reason for allowing disproportionate wealth and in turn disproportionately valued liberties in the resulting society.

Rawls further urges that talents, understood as the application of natural primary goods, are as much about the development opportunities and environment that an affirmed just social structure provides. Ergo, talents are not just about our natural endowments but are a matter of having the appropriate social structures to realize them. Because they are dependent on these social resources, which are affirmed by the whole of society, we need to avoid making them the deciding factor in distributions of wealth. Rawls' conclusion is that the wealth afforded by talents would affect exercisable liberty due to arbitrary and socially contingent factors. The talented then are treated fairly through redistribution as their possession of natural primary goods is arbitrary and their ability to exercise them is socially dependent on a fair system of cooperation. As Rawls writes,

'We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out. The naturally advantaged are not to gain merely

because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunate as well. No one deserves his greater natural capacity nor merits a more favorable 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. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.⁸¹

For Rawls, the difference principle provides the required environment of social co-operation and background justice that is pre-requisite to any property claim.⁸² Rawls argues that the difference principle can allow market processes and private property, as these take place within the confines of a difference principle.⁸³ The entitlements changing hands do so in keeping with the principles of justice. Rawls argues that individual property is needed for the individual “self-respect” posited by the two moral powers.⁸⁴ Private property claims affirm self-respect in social contexts and Rawls argues that properly constrained, property rights are an important individual privilege. Rawls tempers this idea in stating that natural resource acquisition and acquisition of the means of production are not a “right” but can be justified within a “property owning democracy” in keeping with the “difference principle”.⁸⁵

This is where we see a stark contrast in the primacy and role that Rawls and Nozick give market claims. Rawls is not denying the legitimate transfer of entitlements but he is placing these matters in a separate frame of reference. Entitlements are objects that effect exercisable liberty within society. Because of the need for equally valued liberties, entitlements and/or the resources these entitlements represent cannot be thought of as formally as Nozick describes. This is in keeping with our unbundling of libertarian

⁸¹ Rawls, John: *A Theory of Justice*, pp. 101 - 102

⁸² Rawls, John: *Political Liberalism*, p. 16

⁸³ This discussion is largely taken up in Rawls, John: *Justice as Fairness*, Part 2, Lecture 20, pp. 72-74

⁸⁴ IBID, Lecture 32.6, p. 114

⁸⁵ IBID, p. 51

claims in the last chapter. The market is prefaced by considerations of justice that take into account individual circumstances and the effect these have on our political equality. The question becomes if Rawls account of how subordinate they are is appropriate given the vast actions of redistribution that the difference principle requires. These claims are still present and justifiably less formal, but this still leaves us matters of degree that are very important. Van Parijs will offer a similar argument against strict libertarian claims. The transfer of entitlements over time can have effects on equality and freedom that a system of justice should do something to rectify given that not doing so would yield unequal liberties. As Rawls writes,

‘A further point is this. We saw that the system of natural liberty and the liberal conception attempt to go beyond the principle of efficiency by moderating its scope of operation, by constraining it by certain background institutions and leaving the rest to pure procedural justice. The democratic conception holds that while pure procedural justice may be invoked to some extent at least, the way previous interpretations do this still leaves too much to social and natural contingency.’⁸⁶

This does not rule out a role for market processes. Rawls argues that matters of market operation can be taken care of as legislative matters. These matters can be adjudicated in light of the reciprocation and political equality that the principles of justice enforce. They are simply matters of practice that have no claims derived directly from an account of justice. Any market operates justly if it is coherent with the principles of justice as fairness. For Rawls, market claims are subordinate to the principles of justice as fairness in a well-ordered society. Claims to property are justified in terms of the other individuals in the cooperative arrangement. Due to the liberty property claims give their holders, these claims have to be subordinate to our systems of equality including redistribution. Rawls argues that entitlements are a matter of political decision making not a natural right. Van Parijs largely agrees with these claims by Rawls and will use them to justify the methods of taxation and redistribution that he places in his UBI state.

⁸⁶ Rawls, John: *A Theory of Justice*, p. 79

Nozick also argued that Rawls does not take seriously enough the idea that objects in society have claims on them. Nozick argued these claims are justified by our property rights and redistribution of these items will violate legitimate title. However, Rawls does not want to refute historical title or claims, just the scope of them. Rawls states that the difference principle is a guideline by which legislators should adjudicate rather than a comprehensive account of all the arrangements in society.⁸⁷ Historical claims and transfers can be just but only if they have met the scrutiny of the principles of justice first. The argument underlines that the historical nature of a title may not imply that it has remained just if the private ownership of the title has an adverse effect on the liberties available to the least well off. As Rawls puts it,

‘... the two principles of justice as they work in tandem incorporate an important element of pure procedural justice in the actual determination of distributive shares. They apply to the basic structure and its system for acquiring entitlements; within appropriate limits, whatever distributive shares results are just. A fair distribution can be arrived at only by the actual working of a fair social process over time in the course of which, in accordance with publicly announced rules, entitlements are earned and honored. These features define pure procedural justice.’⁸⁸

This is in harmony with one of the criticisms we have already asserted of Nozick, namely that his conception of what it takes to ensure individual agency and the conditions needed to allow market processes to enforce legitimate choices are not robust enough. Rawls argues that markets are just only if redistribution is undertaken first. Nozick urges that this commitment to redistribution results in the state having to keep re-shuffling assets from A to B.⁸⁹ Rawls’ answer to this criticism lies in extrapolating his previous assertion that the difference principle is just a benchmark guideline. Rawls argues that taxation would be a matter of procedure so individuals would be aware of it and partake in it without the kind of constant re-assessment by the state Nozick argues would occur.

⁸⁷ Rawls, John: *Political Liberalism*, p. 276

⁸⁸ Rawls, John: *Political Liberalism*, p. 282

⁸⁹ These sentiment about paternalism is best captured in Nozick’s exposition found in Nozick, Robert: *Anarchy, State and Utopia*, (New York: Basic Books, 1974), pp. 14-16 and pp. 320-324

As we saw in working through Nozick's position, a libertarian position will need to embrace redistribution in order to contribute to a discussion about how the market can enforce our individual choices. Rawls' answer is essentially that no one could rationally choose, within the parameters of his thought experiment, not to have such a paternal mechanism. It is not overly paternal but instead appropriately paternal. This aspect of Rawls argument becomes particularly important for Van Parijs when discussing his disbursement method of UBI. Van Parijs defends his paternalism based upon a similar claim related directly to a liberal commitment to justice. These aspects of the difference principle Van Parijs will retain in his development of the liberal project.

Our exposition on the commitments of a Fair Shares Proviso in the previous chapter would appear to do something similar to what Rawls is suggesting. We asserted that this is what Nozick should have accepted. Such a proviso asserts a specific claim to resources and allows room for actions to address natural endowments before legitimizing the market. These ground rules are, in essence, a set of goods individuals must be at liberty to acquire or use equally with all other individuals in society once we have undertaken the actions needed to assure their moral agency. Property rights are then better understood as being secondary claims. We must first address the matter of individual circumstances and once this is done appropriately, we can approach the issues of choice that we want to provide through a market. Our consideration of choices can have something to say about how our markets have to work, but we must meet the consideration of individual circumstance first.

The Fair Shares Proviso also invokes the use of impartial reflection upon distributions to ensure the legitimacy of outcomes in a similar if not identical way to the approach taken by Rawls'. The difference in this account is that the Fair Shares Proviso takes on the account of worsening rather than one of maximin redistribution. Rawls gives us a device to actually look at this standard and make sense of it even if it is different. Rawls also uses it to include our other considerations about justice that we stated in the last chapter we needed. Our impartiality device allows us to address these matters needed to justify a market, as they precede our market considerations. It is in this

light that Rawls' general premise about the subordination of property claims can be upheld as the correct step. However, our claim from our Fair Shares Proviso is different and this difference is important. It does not assume maximin actions of redistribution even if it clearly legitimizes redistribution. It is rather an account of fair initial distribution and actions to rectify injustices. The Fair Shares Proviso and our discussion of libertarianism takes us to a liberal account of justice, but we still place claims through our moral agency and the market which are different from those presented by Rawls. It is the push and pull between these issues and why Rawls argues for maximin reasoning that will be the focus of much of our forthcoming debate. This very basic contrast of the difference principle with our needed pre-market actions and a Fair Shares Proviso shows why we are going to have such a conflict. These accounts appear to take on the same relative concerns in qualifying our market but redistribute for very different reasons. Rawls himself will work to qualify maximin actions to a greater degree because such actions curb the results of choices in a marked way. If developments of the liberal position are to reconcile these positions such argument will need to honor the shares claim of libertarianism while specifying correctly the political nature and scope of other property claims.

The difference between these two positions is that Rawls attributes everything to a calculation of comparative liberty in society. Justice as fairness and the principles that follow reflect decisions made by individuals about these liberties with a very specific understanding of themselves and their world. These understandings come from the attributes and conditions allowed in or blocked out by the veil of ignorance and these must be appropriate in order for us to accept his principles of justice even if we accept his impartial premise. A Fair Shares Proviso, even in the specified and subordinate form we have discussed, only posits a fair initial and ongoing share of resources, even if we expand this definition of resources. Our Fair Shares Proviso is a form of allocative justice in that it allocates a set of resources, sensitive of individual circumstance and the needs of moral agency. Once this is accomplished in an ongoing way, it allows market practices to do the rest of the distributive work due to the moral agency attributed to

individuals. This market is needed to allow choices to count. However, Rawls urges this kind of approach is not enough to ensure justice as fairness.

Rawls argues that simply attributing resources to individuals is not enough to ensure an equal value of individual liberty in society.⁹⁰ Rawls argues that giving a share of resources does not do enough to ensure the equal value of liberty through a maximin set of social primary goods. The welfare of everyone is not an appropriate measure either as some may want more resources without affirming through labor the basic structure of society. The difference principle is intended to be just the right balance. As we will see through Van Parijs and Dworkin, this balance may not be quite as straightforward. Resources are needed for moral agency and to rectify issues of unchosen individual circumstance. Rawls urges we cannot ascribe an appropriate level pre-market condition from simply providing resources. The resources needed for fairly valued liberties must be reassessed based upon the liberty they provide. Rawls argues that if one receives just an allocation of resources, these will either reflect a conception of the good rather than the right or be inadequate for the concerns of equality in a fair society.

This claim does not appear to hold against our Fair Shares Proviso if we draw our conception of resources appropriately. The Fair Shares Proviso just asks us to divvy everything up so there is no conception of the good imposed. Instead, these shares of everything are projected onto individuals. Everyone receives an equal share, so there is no resource inequality provided internal endowments are somehow dealt with. Our concern becomes attributing the resources to which we ought to have a share to such a calculation. I believe it is possible to move our Fair Shares Proviso to encompass a more expansive account of resources. This would include resources created/protected through the basic structure of society. Drawing this definition out is extremely important but likely a dissertation/book on its own. So I ask you to simply imagine that such an idea is plausible, which I believe it is. Our liberal authors all make this relative jump and I do not think it is a hard one to sustain even given my eventual development of the liberal position. This appears to be a needed move if we are going to make good on the claims

⁹⁰ Rawls, John: *Political Liberalism*, p. 221

of justice that Rawls has argued should preface our account of the market. So far, we have discussed resources in the sense of simply being naturally existing resources. Though I still feel this is part of how we should conceptualize the Fair Shares Proviso working, Rawls asks us to consider the resources of society as a whole and to make sure our moral agency can be fulfilled through access to careers as well as social and political positions. This is because they exist through an affirmed basic structure to which we are all participants. These roles that must be open to us, which implies they are in fact resources. The Fair Shares Proviso can then say something about them if we work through this position. It will be my argument that Van Parijs gives us a way to develop this thought. Defending processes of allocation will be a major concern for a UBI like Van Parijs' that formalizes specific allocative practices to ensure distributive justice. Allocative approaches require a development or amendment to the Rawlsian argument in order to be justified. This is because the approach is concerned with providing maximin liberties through resources rather than a fair allocation of resources. I have argued this is in part fulfilled by our Fair Shares Proviso given we can account for individual circumstances in an appropriate way.

For Rawls, ensuring that individuals have an equally valuable set of liberties requires the state to be more proactive than simply providing access to or a share of resources. The demands of the principles of justice require more. This is because we cannot assume individual circumstances and our need to ensure the equality of opportunity. It becomes a matter of determining whether the eventual development of the liberal position I will present balances these correctly. It is my position that Rawls has not done this. The problem for Rawls is that he allows the consideration of our circumstances to constrain our ability to legitimize choices in the market to an inappropriate degree. He reaches this decision about how each should matter through an incorrect sensitivity argument present in the veil. Rawls draws too broadly the role that natural endowment has in the choices individuals make. He argues natural endowments constrain choice sets / opportunities, which they do. Nevertheless, this does not mean that they dictate the choices people make given the options they do have. It also does not mean that a society can completely rectify natural endowment inequalities. I would even

stress that it is unwise and even dangerous to think this should be the goal of society. Therefore, it is unfair to expect individuals within a society to act towards an unattainable and arguably unjust goal. Our account of fairness, knowing these issues could befall us impartially and hypothetically has to be more detailed in order to be properly sensitive to the factors at play. A development in how we make things reciprocal and let choices count to the degree they ought too is required. Choices have consequences and so the differences in outcome allowed in a liberal account of justice have to reflect this, even if a consideration for natural endowment clearly accompanies a commitment to justice. The actions of how we redistribute, to whom we redistribute and to what level we redistribute are all going to change based upon whether these considerations are properly reflected in our impartiality device. Rawls does not draw his account of what comes in and out of the veil to reflect the nuance I have suggested here. As a result, the principles of justice enforce this mis-drawn balance even if we agree that our move toward liberalism and most of its conceptual structures is warranted. As we move forward through this chapter, I will show how deep this issue is and how it links in to most of the arguments Rawls makes about how we conceive a just state. It is assessing the degree of this imbalance that becomes crucial in justifying the development of liberalism I will suggest.

This imbalance is apparent in Rawls argument for maximin redistribution, which works as follows. The well-off are assumed to be talented/naturally endowed. This gives them an advantage in achieving entitlements in the market. This advantage is unfair and as such legitimizes the maximin redistribution that follows to the least well off. Rawls argues this relationship from one party to the other is "... compensated for in this sense: the all-purpose means available to the least advantaged members of society to achieve their ends."⁹¹ This is true for the well off as well since they would be ignorant of their abilities due to their arbitrary ascription. The concern of the least well off would then be the paramount consideration and act as a veto, albeit a specific one, on the liberties of the better off. The inequality that could exist between the least-well off and the better off would have to benefit the least well off in providing a set of social primary

⁹¹ IBID, p. 327

goods. These goods are likely to be resources but our concern is with the liberties these resources provide and as such, the shares needed to accomplish this are going to be motivated by liberty provision not a fair or equal share.

Although the ownership of natural endowments is guaranteed under the first principle of justice, this does not in turn imply complete ownership of the entitlements produced or accrued through the same morally arbitrary processes. Rawls states that the variation in talents is a “common asset”⁹² and cooperative arrangements allow these to be realized. This places individual reward into the public frame while not removing legitimate entitlement to them (although constrained) in society. Simply put the greater endowed, not deserving to be more endowed, can still act to benefit themselves. In order for this to yield disproportionate entitlements justly, the arrangement must benefit the least endowed as they did not deserve to be less endowed. Rawls believes individuals do not deserve their place in society if this is derived from their distribution of natural endowments. Rawls emphasizes how these two factors and the entitlements they can yield have a profound effect on equality, liberty and fairness if not constrained by the difference principle.

For Rawls, this explanation of entitlements works to assert how justice as fairness is appropriately egalitarian without being unfair in some procedural sense. However, this is only part of the potential equation. If it were, we may end up moving towards total material equality because material inequalities all result from unfair circumstances. Rawls sets out to address the critique that endorses Marxist equalization. Such a solution would imply a lump sum tax, which Rawls refers to as a “head tax”,⁹³ under which the better-endowed pay more tax to provide for the less well endowed. Rawls argues that such a solution is flawed because figuring out if natural endowments led to realized advantages is impossible to decipher. Although individuals may have favorable natural endowments they may not choose to realize them or even know of their existence. Rawls argues these imposed taxes would have to be based on potential / kinetic talents instead

⁹² Rawls, John: *Justice as Fairness: A Restatement*, Part II, Lecture 21, pp. 74-77

⁹³ IBID, Part IV, Lecture 48, p. 157

of realized talents. In doing so, individuals would be forced to pursue ends simply for the payment of tax. Such an arrangement would be unfair, as individuals would be coerced into labor that they may not wish to undertake. This would not take our moral agency and the legitimacy of our choices seriously enough.

Rawls argues that because the basic structure is to our mutual benefit, we cannot rationally choose to ascribe to different principles of justice. Choosing not to labor due to the material distribution that would result is a matter that we will return to in this text as it is at the heart of Dworkin and Van Parijs' critique of Rawls. Rawls implies that choices in undertaking labor are a legitimate exercise of autonomy and can justify a disproportionate reward or conversely, the lack of one. Crucially for Rawls, our ability to choose to do X is arbitrary even if our choice to do it is not. As a result, the reward of the choice must be constrained within the framework of the basic structure.

In essence, the difference principle and its maximin actions become necessary due to the initial undeserved physical and mental inequalities innate in human beings and the ongoing material and conditional changes present within states. The importance of this single factor is critical. The inability to provide an equal share of these natural endowments to all leads to a distributive scheme in which rational individuals will act to prevent a comparatively low aggregate condition. This argument requires that we agree that talents are the result of an arbitrary genetic allotment and further that our choices are a subordinate consideration in exactly the way Rawls says they are. If our choices are not accounted for properly or require a more comprehensive account of their constituency than Rawls gives us, then our talents appear to be an exercise of moral agency that we need to protect in a greater way. If this is true, or at least true to a greater degree than Rawls allows, it leads us to reconsider the maximin actions of the difference principle and to accept some other development of the liberal argument.

2.3 Moving from the Welfare State to a Property Owning Democracy

‘It is true that the theory need not define a cardinal measure of welfare. We do not have to know how disadvantaged the least fortunate are, since once this group is singled out, we can take their ordinal preferences (from the appropriate point of view) as determining the proper arrangement of the basic structure.’⁹⁴

Rawls’ initial work *A Theory of Justice* was largely received as legitimating the western democratic Welfare State upon its release. This characterization although not contextually unfair, is something that Rawls distanced his work from over time. Rawls wished his system of justice to be a freestanding political conception and although this entailed what we could fairly call welfare provisions, Rawls was not completely happy with the conception of the Welfare State to which his system of justice was ascribed. The Welfare State had become the focus of greater criticism over the years and Rawls’ theory was now conflated with an increasingly unpopular state system. Rawls, particularly in *Justice as Fairness – A Restatement*, works through the commitments of the principles of justice in reflecting on and addressing criticisms of *A Theory of Justice*.

As part of this discussion, Rawls formulates state categorizations and attempts to show what state models coherently adopt the principles of justice. These arguments are enlightening as they sharpen, but do not completely answer, the specific institutionalization of a Rawlsian state. Rawls, in working through this argument, addresses several suggestions for a just distributive system that will be helpful in addressing the arguments of Dworkin, Van Parijs and eventually my own appraised in this essay. Perhaps more importantly it will give us the final refinement of justice as fairness that will serve as the departure point from which we can assess Rawls’ theory. The state models presented here act to set the stage for Van Parijs’ institutional model. Van Parijs will argue that his state model is the ideal embodiment of these finalized and

⁹⁴ Rawls, John: *Political Liberalism*, p. 396

tweaked conceptions of political and socio-economic structures that Rawls himself forwards as ideal types of states.

Rawls begins by outlining five separate kinds of political economies to consider. These are *Leissez-Faire Capitalism*, *Welfare State Capitalism*, *State Socialism with a Command Economy*, *Property Owning Democracy*, and *Liberal Democratic Socialism*.⁹⁵ Rawls begins by asserting briefly how the first three of these models violate the principles of justice through material inequality and/or the failure to realize democratic rights respectively. The first of these, *Leissez-Faire Capitalism*, is described very much like Nozick's minimal state. The status of individuals as equals is secured through negative rights protection alone and the continued just operation of capitalist justice. Rawls states this fails to meet the idea of justice as fairness because it "... secures only formal equality and rejects both the fair value of the equal political liberties and fair equality of opportunity."⁹⁶

The second of these systems, *Welfare State Capitalism*, Rawls argues has a greater concern for equality of opportunity but still "...rejects the fair value of ... political liberties."⁹⁷ The welfare state provides, through redistribution, resources to the least well off and in doing so provides individuals a greater set of opportunities. However, Rawls argues it falls short in providing justice as fairness due to the continued inequalities in liberty that persist through distributions of wealth. The welfare state then provides subsistence living to some extent without realizing appropriately the reciprocal fair value of liberties across individuals required by a fair system of cooperation. The third of these systems is *State Socialism with a command economy*. Rawls argues this violates the equal rights and liberties of individuals.⁹⁸ The command economy and form of rule needed in *State Socialism* dictate that the processes of markets and democratic rights that are a part of a fair cooperative state are not possible.

⁹⁵ Rawls, John: *Justice as Fairness – A Restatement*, pp. 136-138

⁹⁶ IBID, p. 137

⁹⁷ IBID, pp. 137-138

⁹⁸ IBID, p. 138

Rawls argues the latter two, Property Owning Democracy and Liberal Democratic Socialism, can provide justice as fairness coherently. Rawls describes Liberal Democratic Socialism as a political system in which “the means of production are owned by society ... in the same way that political power is shared among a number of democratic parties, economic power is dispersed among firms, ... elected by, if not directly in the hands of, its own workforce. ... [F]irms under liberal socialism carry on their activities within a system of free and workably competitive markets. Free choice of occupation is also assured.”⁹⁹ Rawls believes that Liberal Democratic Socialism is unattainable in present context in most states. In the alternative, we should work toward applying a Property Owning Democracy that conforms to the principles of justice. Though both Liberal Democratic Socialism and Property Owning Democracy are focused on how to affirm a just basic structure, which encompasses social, political and economic resources, they do so in different ways and to hence to different degrees. The modes of economy and political structure in each imply comparatively different institutions. As a result, the principles of justice imply the least well off must have fair value for their liberty but what these liberties are or ought to be can be different contextually while still being just. As Rawls writes,

‘In property-owning democracy, ... the aim is to realize in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal. To do this, those institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these means is human as well as real capital, that is, knowledge and an understanding of institutions, educated abilities, and trained skills. Only in this way can the basic structure realize pure background procedural justice from one generation to the next. Under these conditions we hope that an underclass will not exist; or, if there is a small such class, that it is the result of social conditions we do not know how to change, or perhaps cannot even

⁹⁹ IBID, p. 138

identify or understand. When society faces this impasse, it has at least taken seriously the idea of itself as a fair system of cooperation between its citizens as free and equal.’¹⁰⁰

Access to these assets is required to have a fair society and affirm the basic structure. However, it does not say how robust these assets need to be aside from them being distributed fairly. As such, Liberal Democratic Socialism and a Property Owning Democracy both meet this standard. It is important to add here briefly that these are precisely the sort of resources I would suggest our amended Fair Shares Proviso would need to take onboard. Importantly for Rawls, this distinction is met by a Property Owning Democracy but not a Welfare State. Rawls argues a Property Owning Democracy is not a Welfare State because a Property Owning Democracy works to disburse private ownership and allows all individuals a comprehensive set of primary goods. In contrast, Rawls argues a Welfare State only universally provides these goods to the least well off upon being less well off. In doing so, it does not empower individuals to enjoy a necessary level of equal opportunities. In not realizing justice appropriately, the Welfare State entrenches social and economic inequalities. On the other hand, a Property Owning Democracy empowers all to, over time, attain anything possible in society (ideally speaking). Equal liberty requires equal condition that in turn requires equal distributions over a lifetime. This is the aim of the Property Owning Democracy that institutes justice as fairness coherently. As Rawls states,

‘It [the just state] supposes that citizens have at least an intuitive plan of life in the light of which they schedule their more important endeavors and allocate their various resources so as rationally to pursue their conceptions of the good over a complete life. This idea assumes that human existence and the fulfillment of basic human needs and purposes are good, and that rationality is a basic principle of political and social organization.’¹⁰¹

Rawls notes, the Welfare State, although enforcing and endorsing redistribution, does not go about redistribution in a way that can be reconciled with the principles of

¹⁰⁰ IBID, p. 140

¹⁰¹ Rawls, John: *Justice as Fairness: A Restatement*, p. 141

justice. Rawls notes that the exchange value in material wealth equals greater and thus unequal liberty. The Welfare State instead of addressing this issue initially and multilaterally simply waits for them to occur. It is only upon their occurrence that it addresses these issues and frequently acts upon problematic criteria. Rawls fears that such a tactic only enforces unacceptable social inequalities based on entrenched economic inequalities.

Rawls continues his critique of the modern Welfare State in pointing out further status inequalities. Rawls is concerned that non-Property Owning Democracy systems of justice do not allow the same access to political processes based on material affluence.¹⁰² Rawls is deeply troubled by the correlative relationship material wealth has in successful forays into politics. Rawls argues in a well-ordered society, justice as fairness precludes levels of inequality in the ability to attain positions in government. The material requirements of government office entrench a particular class in society and effectively allow them to hold a dominant political and social position to other equal political actors. This is an inequality Rawls argues directly conflicts with the coherent application of the principles of justice.

Rawls turns his attention to the idea of providing only a “social minimum”.¹⁰³ This critique posits that the distributive commitment of the principles of justice is to provide comprehensively but solely the basic things needed to live a meaningful life for all individuals. The idea of a social minimum is to ensure that the distributions provided by the state are at acceptable levels to support the needs of individuals while not providing excessive support. From the outset, this sort of system appears to provide the distributions of primary goods needed to provide a fair value for liberty across society. However, Rawls argues a straight social minimum argument still does not fulfill the needs posited by the principles of justice.

¹⁰² This concern is particularly in reference to the United States and campaign finance issues. See Rawls, John: *Justice as Fairness: A Restatement*, pp. 135-137

¹⁰³ Rawls, John: *Justice as Fairness: A Restatement*, pp. 128-131

For Rawls, the principles of justice dictate that systems of distribution and entitlement must maximin the value of the liberties enjoyed by the least well off. Rawls argues that a social minimum provision only provides a minimum set of life chances that may not be equally valued. Rawls argues that systems of justice ought rather to ensure equal liberties and life chances through redistribution. Rawls concedes that the two concepts will likely affirm similar privileges and distributions but the demands of justice postulate one commitment over the other. Rawls argues that a social minimum solution cannot be based on justice as fairness. Instead, it must make claims based on the intuitive ideas that construct society concerning what the minimum provides. In doing so, a social minimum would affirm a kind of comprehensive doctrine in the prescriptive things it would provide, which would in turn violate the original premises of Rawls' project. Van Parijs will use this argument in providing a set of primary goods through a UBI rather than some form of in-kind provision. He believes, like Rawls, that the avoidance of prescriptive allocations is paramount to ensuring a just society. However, the jump in the argument is critical to note here. Rawls moves to prescriptive problems with the social minimum rather than confronting the idea that a different conception about a fair distribution could exist that is allocative yet non-prescriptive. Importantly, a different conception that could fulfill this criterion would imply some different yet legitimate sensitivity in deciding what is fair. This would cause us to reconsider some deep philosophic aspects of Rawls approach. I will show as we move on, why this distinction becomes so important.

Rawls continues by re-asserting the primacy of his account of distributive justice in comparison to allocative justice.¹⁰⁴ Rawls states that his systems can assign a role to the market as individuals acting under the rules of justice in a system of cooperation means that the resulting distributions are fair.¹⁰⁵ Entitlements arise within the system of cooperation and as such must adhere to the rules that govern its fairness. However, his account of distributive justice, unlike allocative justice, does not entrench inequalities as he feels allocative institutions would.

¹⁰⁴ See Rawls, John: *A Theory of Justice*, p. 56 and p. 77, and Rawls, John: *Justice as Fairness: A Restatement*, Part II, Lecture 14, pp. 50-52

¹⁰⁵ Rawls, John: *Justice as Fairness: A Restatement*, pp. 50-51

Rawls raises this distinction by bringing up the idea of athletic draft systems, in particular the NBA draft.¹⁰⁶ In this example, Rawls notes how teams are slotted opportunities in the draft based upon where they finished the season prior. The teams confederate in a league, not knowing who will have the highest quality players, coaches, monetary resources or plain good fortune as time goes by. In creating a fair system of cooperation for their mutual advantage, the teams agree to a fair way to distribute incoming resources. So they agree to the inverse order draft, a system that benefits the least well off.

Each season, the process starts anew and individual teams are not penalized or disadvantaged based on past performance or entrenched systems of distribution. Instead, they are simply given a draft pick relationally inverse to their order of finish. Rawls wishes to illustrate that this system is fair as an institution of distributive justice. Each individual team is awarded a material distribution based upon a quantification of their need. Over time, teams are assured of a greater distribution, a maximin distribution, through a relationally better draft pick. If teams were just allocated a draft pick each in an arbitrary fashion or equally but not in relation to their need compared to each other, these systems of allocative justice would not satisfy the equal liberties over time that justice as fairness must provide. The least well off are provided something, but not something that will equalize conditions over the various parties involved in the cooperative agreement. The value of their liberties will become less and less equal even though they are equally provided a pick through a straight allocative measure. As a result, Rawls argues we can see that we need to order our draft so that those at the bottom have a legitimate chance of getting to the top. If we do not those at the top will have an unfair advantage in a cooperative agreement that should value everyone's liberties equally.

This would appear to refute our previous support of the Fair Shares proviso within an account of liberal justice. However, this is only the case if Rawls assertions

¹⁰⁶ IBID, p. 51

about allocative justice hold. These assertions are predicated on an inappropriate account of moral agency as it relates to abilities and the way systems of allocation can be applied. In the next chapter, I will explain why Rawls arguments on these points do not hold. We will revisit this portion of Rawls argument again both through Dworkin and Van Parijs as they both find ways in which this part of Rawls thought is problematic.

2.4 Conclusion

It is at this point that we need to highlight the major issue that is to come. All of the developments to come are placed within this general frame of reference, so it is important to understand it thoroughly in order to assess the validity of the argument to come. Rawls is using justice as fairness through a specified thought device to setup background institutions of redistribution that set the environment for a market device that honors our choices.¹⁰⁷ Pure process, like that of Nozick, does not take into account the ongoing needs of individuals to ensure their equal moral agency in society. As we discussed in the last chapter, the inability of Nozick to articulate properly the demands of justice lead to an account that does not meet with our ongoing concerns. Had Nozick's argument been described more coherently by understanding the demands of the proviso, accounting for natural endowment inequalities and ensuring moral agency of individuals through resources then the arguments needed to subordinate the market and redistribute would be clear. In fact, these would lead us to accept liberal justice. Rawls' critique of libertarian systems comes to a similar conclusion as our discussion of Nozick did. Background justice has to be provided and sustained in order for market claims to hold any weight. Rawls gives us an idea of fairness to motivate these actions and a device to work them through. This is clearly a needed step in developing an account of justice.

As we have asserted our market does still have a needed role. Rawls is not averse to the potential legitimacy of the market. Rawls is even willing to go so far as to say that a market system is necessary to assure the rights and liberties of a fair society. These actions and the ability to own property are important aspects of individual self-respect and autonomy.¹⁰⁸ Ultimately the space Rawls affords market processes is significant but in a subordinate way. Our discussion of libertarianism asserted the need for precisely this distinction. We undertake actions of justice and redistribution on several counts first, but the market still has a place. Rawls describes a conception of justice that allows us to cash

¹⁰⁷ Rawls, John: *Political Liberalism*, p. 263

¹⁰⁸ *IBID*, p. 318

out the idea of worsening used by a market proviso. Rawls shows us how a thought device can work to impartially reach decisions about resource justice. Rawls gives a salient argument of why our states should care about individual circumstances caused by their uneven natural endowments. These are clear considerations about moral agency that legitimize redistribution, which our libertarian arguments missed. Rawls also shows how a commitment to equal opportunities is going to cause us to consider resources in a broader way than simply natural elements. He shows why our progression into a liberal account of justice is so easy. Rawls' argument gives us a way to deal with these issues in a more robust, nuanced and necessary way.

However, Rawls goes further with his liberal argument. He argues that allocative justice is unable to provide justice as fairness and the principles that stem from it. As we have seen in the discussion of Rawls' amendments to his original works, much of why the commitment to redistribution is so great and ongoing beyond the allocative process relies on our talents being as Rawls describes them and allocative accounts of justice being as prescriptive as Rawls fears they will be. We have to agree that talents are arbitrary and undeserved. We must further agree that the liberty to act, to choose to use a talent, is relative to the basic structure in which we live and a result of genetic luck we should not let bias our discussion of justice. Rawls points out that our talents are often the product of cultivation that requires ample social opportunities in order for them to be realized. The affirmation of the basic structure provides these opportunities and makes the claims garnered by talents subordinate to the needs of a fair society. As the basic structure is set up to maximize the opportunity sets of the least well off in order to be fair and allow the opportunities the talented need to excel, the redistribution from the well off to the less well off is legitimate.

Rawls would not argue against fair shares or the kinds of distributions that flow from a Fair Shares Proviso but he would argue that a system of allocation cannot provide them. The Fair Shares Proviso device is not needed because the principles of justice have ruled out allocative systems. Instead, we have an account of justice as fairness and the regimes that provide it which give Fair Shares but not in a strict allocative way. But this

account is dependant on our account of what makes dictates our impartial rules and how they act fairly to be the same as his own. If they are not, then allocation will have to live up to an amended critique. The Fair Shares Proviso, which works within an allocative account of justice, could have an important role in a fair society if allocation can be justified because of conceptual issues in Rawls account. As we move forward in this text, it is these conceptual problems that I will highlight and expand upon.

Rawls wants choices to matter, as it is a choice to realize an individual talent even if possessing one is arbitrary and exercising one requires the affirmation of the basic structure. But the balance between these factors is reliant on talents being exactly as Rawls describes them. It is only through this account that he can legitimize the role he gives to individual choices. If they are not, the commitments of liberal justice will be different and will likely preclude the maximin aspect of Rawls' redistribution. This would happen because the exercise of a talent would be a choice at least primarily. Although this would not bring us to Nozick's strict procedural outcome where choices are paramount, it would ask us to come to a different conclusion about what it means to affirm the basic structure and balance the claims of distributive justice. It would not rule out our amended proviso at least in regard to external resources. This is because we would have to give moral agency and the choices made through it more room to work and cause material inequalities. Both Van Parijs and Dworkin will develop Rawls argument to add or remove sensitivities that Rawls exposition overdraws. A change to the argument about talents presented by Rawls will cause us to take choices more seriously and their resulting material consequences. It will also cause us to reconsider the potential viability of an allocative account of distributive justice that is amply non-prescriptive. The maximin calculation would have to be a level of access to resources rather than an entitlement to the product of those who only used their share of these same resources. Of course, this is dependant upon addressing natural endowments in an appropriate way. In the next chapter, I will postulate how this ought to be done.

This highlights how important it is in accepting the difference principle that we must agree with Rawls' description of talents and individual choices. These come from

deep within Rawls project and simply manifest themselves most pointedly in the principles of justice that cash these ideas out into rules and institutions. If we question this account of talents, choices and natural endowment there are two ways to proceed. The first, which we will explore in the next chapter, is to amend the veil to yield different judgments as Dworkin does. By changing the parameters of the judgments, the judgments can change and so too can our conception of choices and distribution. The second, which Van Parijs will attempt, is to accept Rawls judgments from the veil and simply modify and extrapolate his institutions. To do this, we must accept the reasoning posited here beyond the veil to the principles of justice and argue that Rawls extrapolated these incorrectly or at least not completely.

Nevertheless, it is hard to see how the principles of justice, as described in this chapter, can be amended to resolve a sensitivity problem. These principles merely reflect the fair resolution of decisions made from a specific account of knowledge. It is the knowledge and the balance it imposes that is truly at fault. The account of what is in and out of our considerations at the veil drives the principles of justice to be what they are. They reflect very specific arguments about our impartial standards of justice. If they are not sensitive to the way things “really” are, they will yield principles that do not reflect a fair arrangement of society. If the Rawlsian principles have not done so, it will have to be because these sensitivities present in the veil are incorrect. This will be my argument going forward and it will be important in accepting the path I will forward through Van Parijs and Dworkin as an appropriate development of the liberal argument.

Chapter 3 - Dworkin, Talents and Ambition Sensitivity

Introduction

In the previous chapters, we have examined different conceptions of distributive justice and what these have had to offer in our consideration of choice and circumstance. In particular, we have focused on the role of systems of voluntary market transactions within these accounts. The inspection and progression of these arguments has led us to the liberal account of justice. In our inspection of Rawls, we saw the true power of the liberal argument. In exploring the difference principle, we were led to question Rawls' conception talents, natural endowments and choices. Rawls wants individual choices to matter in individual material outcomes. He explains choices can justify material inequalities in society. Choosing to exercise one's talents is a matter of autonomy and can yield disproportionate rewards within the basic structure of society. Crucially, our decisions about maximin redistributions through the difference principle rest upon Rawls specific interpretation of this issue.

However, the difference principle is not sensitive to the converse of this situation, namely individual choices yielding disproportionately negative material consequences. These cause individuals to be classified as being within the worse off group, which they may have fostered completely through their autonomous choices. These are not described as choices by Rawls but rather the unfortunate circumstance of a lack in natural endowments. These are unchosen genetic predispositions that individuals would guard themselves against in the original position thus yielding the principles of justice Rawls espouses. By Rawls account, our concerns with justice dictate such choices cannot cause individuals to drop below our maximin redistribution threshold because the value of their liberties has to be sustained in an ongoing way. But this explanation does not ring true if an individual has great natural endowments but chooses not to realize them. It does not

seem fair that these equal choices undertaken by those with the same endowments garner unequal levels redistribution. Furthermore, maximin redistributions can cause us to redistribute endlessly to people who can only realize very negligible gains in their liberties. Rawls account of individual choices causes us to question the use of the difference principle and Rawls argument against allocative justice.

Ronald Dworkin sees these issues arising from discussions of distributive justice and attempts to reconcile choices with circumstances by developing an account of liberal justice. Dworkin is concerned with the systems of justice visible in modern states and how these can be amended to reflect considerations of justice. As Dworkin states, “Equal concern is the sovereign virtue of political community—without it government is only tyranny—and when a nation's wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect.”¹⁰⁹ He agrees with the general premise of Rawls but wishes to correct the troubling issues raised by the Rawlsian project such as the difference principle.

Dworkin is concerned that Rawls fails to adequately account for non-ideal types of individuals in conceptualizing his theory. These cause Rawls to justify redistributive obligations through the difference principle that reflect incorrect sensitivities. In this chapter, I will summarize Dworkin’s argument for an auction and insurance scheme, which modifies the devices of Rawls’ argument. I will articulate how Dworkin’s argument works to amend perceived deficiencies in Rawls’ system of justice and what issues Dworkin’s state model raises.

The discussion of Dworkin is extremely important in assessing the arguments of Van Parijs in the next chapter and in asserting the need for the further developments of the liberal argument I am going to present. This is for two primary reasons. The first is that Van Parijs engages directly with the arguments of Dworkin and works in large part to refute their validity. Van Parijs’ Rawlsian conception of justice is at odds with parts of

¹⁰⁹ Dworkin, Ronald: *Sovereign Virtue: The Theory of Practice in Equality*, (Cambridge, MA: Harvard University Press, 2002), p. 1



Dworkin's argument and for us to assess them fairly, it is important to engage with them as Dworkin describes them first. The second reason is that Van Parijs himself will engage in a critique of Rawls on similar premises, even if he uses different methods and reasoning. To appraise the effectiveness of this argument, we must understand intimately the arguments of both Rawls and Dworkin so that a comprehensive analysis of Van Parijs' argument can be undertaken. It is only in seeing the shortcomings of all of these liberal accounts that we can move forward in developing a liberal account that addresses the issues that remain inappropriately resolved. This will lay the groundwork for my own development of the liberal account of distributive justice. Through the exposition of the distributive justice claims of Dworkin, I intend to show how a liberal commitment to justice need not yield the intrusive redistributions of the difference principle. By the same token, I will critique Dworkin's and Rawls' conception of natural endowments and what a fair and reciprocal system would need to reflect given a more considered discussion of this issue. This will involve a discussion of talents, disabilities and handicaps. I will show the need for a far more detailed understanding of the issues surrounding handicaps and the capability of choice. I will argue this leads us to accept what I will call the Principle of Just Access. With this general conception sketched, I will return to the idea of market and discuss what this all means for our weighting of the issues of individual choice and circumstance within the liberal account of justice.

3.1 Dworkin's Critique of Rawls

To understand Dworkin's critique, let us first discuss Rawls' argument for distributive justice over allocative justice through the difference principle. Dworkin's critique will revolve around the issues of choice, responsibility and distributive measures. I believe the Basketball Draft example¹¹⁰ that Rawls alludes to in *Justice as Fairness – A Restatement* gives us a fertile example of the major problem with Rawls' argument. This is a tangible example of Rawls' distributive claims and the problems they yield.

Basketball teams, coming together to form a cooperative association, agree to a set of rules and practices that are fair and just between them as equals. This is essentially the first step in Rawls. They set forth to determine impartial principles to ensure the longevity of each other and the basic structure, the league at hand, which is essentially step 2 of Rawls' theory. These teams, not knowing where they will end up after coming together at this bargaining point, act to institutionalize practices sensitive to potentially poor outcomes. These teams are ignorant and impartial in some appropriate way through a veiled position such as step 3 of the Rawlsian project would dictate.

The distribution of players is one of the unknown resources that a fair system of distribution would need to consider. This leads to all sorts of potential principles to ensure equality like a salary cap perhaps, but for our consideration here, let us just consider new players, as they are the resources allocated in the draft process. The drafting of new players is structured to ensure the least well off are compensated for their position over time by creating an inverse order draft. Rawls argued that the inverse ordering of the draft ensured that teams received goods based upon need, ascertained by the preceding season's performance. As the well off or successful teams would have an advantage due to the increased position their success afforded them, the teams unaware of their future success would agree on an arrangement that provided liberties, through

¹¹⁰ Rawls, John: *Justice as Fairness: A Restatement; Second Revised Edition*, (Cambridge MA: Harvard University Press, 2001), p. 51

preferential player selection to the least well off. This principle of distributive justice ensures that teams will all have equal and ongoing opportunity to succeed based upon their actions/talents/will/etc. It also affirms the basic structure of the cooperative agreement through which all the teams benefited, as the league requires a plethora of teams. Rawls felt this best embodied the commitments of the principles of justice, in particular the difference principle. Rawls argued allocative justice, although achieving an egalitarian distribution, entrenched power/privilege relations by failing to disproportionately assist the least well off. By simply giving each team a draft pick or an opportunity to sign players equally, the league would not dynamically address inequalities between the teams, which would be (in Rawls terms) unfair.

Ironically, in the mid-1980s, the very draft process in question suffered a major setback. The 1983-84 Houston Rockets, an NBA franchise at that time in the Mid-West Division, were having a competitive yet not all that successful season. By virtue of their previous seasons favorable distributive draft pick, (1st pick of the 1983 draft) Ralph Sampson, the team had improved greatly from their woeful 14-68 record in the 1982-83 season.¹¹¹ However, inexplicably toward the end of the 1983-84 season, with an improved but mediocre record, the Rockets began to lose in spectacular fashion. This spiral downward culminated when at the end of the 83-84 season, the Rockets yet again received the first pick in the draft. This pick led to the selection of Hakeem “the dream” Olajuwon with the first overall pick. Hakeem and Sampson were to lead the Rockets to the 1986 NBA finals and Hakeem would be a crucial part of many successful Rockets teams in the 80s and 90s.

However, the meteoric downfall of the 83-84 Rockets led to an uproar within the league and claims of “tanking” by the Rockets to receive the first overall pick.¹¹² The argument in our terms was that the Rockets were capable of achieving a greater outcome

¹¹¹ Refer to Basketball Reference at <http://www.basketball-reference.com/players/s/sampsra01.html> & <http://www.basketball-reference.com/teams/HOU/1983.html> (accessed 21st of April 2010, 15:33)

¹¹² The Rockets lost 14 of their last 17 games to finish last in the Division. For an excellent summary of NBA draft issues please refer to Kalb, Elliot, Costas, Bob and Collingsworth, Cris: *The 25 Greatest Sports Conspiracy Theories of All-Time – Ranking Sports Most Notorious Fixes, Cover-up's and Scandals*, New York: Skyhorse Publishing, 2007), pp. 45-56

but had chosen not to. In doing so, they harmed everyone else within the cooperative arrangement through their own actions and freely entered choices. These claims were never formally substantiated as it is difficult if not impossible to weigh the impact choices have in an outcome. However, the NBA did respond in following seasons by introducing a weighted lottery instead of an inverse order coin-flip system. The lottery system has evolved over the past few decades in part because of pick trading, league expansion, and draft conspiracies. The result of the current weighted lottery in terms of distributive justice is that it provides priority allocations to teams based upon their need, quantified through their season record. It does this by giving each a number of balls in the lottery. The team with the most need statistically receives the most balls whereas the teams with lesser needs statistically receive fewer and fewer balls in the same lottery. A draw then takes place that determines who gets which picks, first through last, in the first round. The statistically worst team receives the most chances of getting the first pick, but is not guaranteed this distributive outcome. Instead, these teams are only given a greater possibility of having a high draft choice.

I venture that Rawls would argue that this lottery system does not equalize condition appropriately, as the least well off are not assured of greater equalizing compensation, just a proportionally better chance at comparatively better compensation than other equal teams. The argument for why the weighted lottery system is just is based upon the idea that condition is in part distributive and in part the result of choices and ambitions of a given team or autonomous agent. The Rockets presumed intentional failure was believed to be a strategy that took advantage of the egalitarian distribution of draft picks and in the process all the other members of the league. The Rockets, if they tanked, used the basic structure to claim resources rather than affirm it through fair play. They were capable and talented enough, arguably, to be a better team than their record would indicate and chose to “tank” given the advantages of doing so. Although the Rockets did well to optimize these distributions, which as draft followers will know is not a given in a first overall pick, their ability to draft first gave them an advantage. If this advantage was gained due to the legitimate performance/realized talents of the team the principle of distributive justice works. However, if the outcome of condition is from the

teams' own choices and intentional actions, allowing them to receive a distributive advantage through the first pick is illegitimate. They chose, with an equally valued and thus valid decision, to benefit from the actions of redistribution rather than to legitimately finish where their natural endowments would have dictated. However, our measure on Rawls account is their position as being worse off. This standard does not allow us to make this needed distinction. Because it was and continues to be impossible to determine whether teams in the NBA "tank", the weighted lottery system is invoked to ensure that teams are proportionally compensated for their frailties but not axiomatically rewarded perpetually for a condition they may be a party to fostering.¹¹³ This is to ensure the system values the choices of the successful and unsuccessful equally while still addressing the natural/human inequalities between teams.

Think of this as the problem of choice and individual responsibility within a structure of reciprocation and it is what Dworkin sets out to address in his critique of Rawls. Put bluntly, Dworkin wants to correct the sensitivities in Rawls' conception of a fair and reciprocal agreement of mutual advantage. Choices cause discrepancies in conditional outcomes. Therefore, if these choices can be equally valued by addressing natural endowments and a provision of a set of allocative resources, then they need to have more room to operate in our distributive practices. Rawls does not do this because his concern with circumstances cuts so deeply into his project. Dworkin wishes to rectify inconsistencies he perceives in Rawls' theory of justice, in particular the difference principle, by developing an alternative liberal account of justice. Although Dworkin raises many intriguing issues with Rawls and suggestions for specific policy perspectives, we will focus here on his systematic response to distributive justice through the difference principle.

¹¹³ The Donald Sterling ownership reign over the San Diego / Los Angeles Clippers is an excellent example of this issue. Refer to Keating, Peter: 'Uncontested: The Life of Donald Sterling' in *ESPN: The Magazine*, June 2, 2009, <http://sports.espn.go.com/nba/news/story?id=4187729> (accessed 21st of April 2010, 15:34) His personal issues aside, Sterling is most known for his reliance on redistributive measures in the NBA to keep his franchise turning a personal profit.

Dworkin aims to develop liberal justice while keeping some of its primary claims and motivations. Dworkin urges that Rawls is not appropriately sensitive to the individual responsibility present when choices lead to resulting conditional outcomes.¹¹⁴ Dworkin begins by discussing in detail the various reasons why welfare calculations can be problematic. Though Dworkin does not wish to underestimate the power of various factors on choices, he states “so far as choices are to be made about the kind of life a person lives, within whatever range of choice is permitted by resource and culture, he is responsible for making those choices himself.”¹¹⁵ The egalitarian redistributions of the difference principle are sensitive to condition and obligate individuals to uphold them given the judgments that stem from the original position. These redistributions are not sensitive to the issues that arise when the choices individuals make lead to their relative material position. The more affluent are still obligated by the difference principle to provide for the less well off without assessing how they arrived at being less well off. Dworkin asserts that individuals may make expensive choices and in doing so, burden the disproportionately the well off to pay for their expensive lifestyle. In this way, the commitment to the difference principle adds inequality to society by allowing choice preferences to affect the obligations of redistribution.

Dworkin sets out to address specific problems systematically. However, it is important to note that Dworkin does not refute the overall conception of justice affirmed by Rawls and chooses primarily to focus on refining the parameters of redistribution. Dworkin develops Rawls thought from the point of the veil of ignorance and offers his own modified definition of this device, which allows individuals knowledge of their talents but not knowledge of the value of their talents. We will discuss this modification in detail later in this chapter. It is an attempt to formulate a liberal theory that wishes to find a different systematic answer to the problems of expensive tastes, reciprocation and personal choice.

¹¹⁴ Dworkin, Ronald: *Sovereign Virtue: The Theory of Practice in Equality*, p. 4

¹¹⁵ *IBID*, p. 6

Dworkin asks us to invoke an impartial thought device and envision a society of individuals washed onto a remote island due to a shipwreck. The resources these shipwrecked individuals have on this island must be distributed fairly and as such an auction is held in which each person has an equal ability to acquire goods. Dworkin suggests that in order to provide an appropriately sensitive account of justice that these individuals should envision a taste sensitive auction in which resources can be bid on by all who hold an equal amount of initial social capital, in his example “100 clamshells”.¹¹⁶ The choices of the auction are a reflection of individual choices and conceptions of the good. Individual choices are realized through this market device in a fair and reciprocal manner. The fair value of resources is determined through the motivations of individual desires and the value these desires cost in an equal bidding process. All individuals, having the same ability to acquire resources respective to each other can then be responsible for their choices and arrive at a fair distribution of social primary goods. In such a system, the political obligation is on society to provide the “clamshells” and access to the auction in keeping with the principles of justice, as these units of social value provide equally valued liberty within the auction device. The allocation represented by the clamshells is equal and thus the fair shares of resources that result, although unique from one another, are fairly distributed.

Dworkin argues that such a system, in invoking an institutionalized “envy test”¹¹⁷, will ensure that no one is upset with their distribution of goods compared with other equal individuals. The envy test is a tool to ensure that individual outcomes are the result of choices alone. It is hypothetical in the same way the original position was and intends to impartially determine legitimate distributions of resources. The idea works to ensure that no one can rationally envy another individuals allotment of resources because they had an equal ability to acquire them in keeping with the value they assign to them as individuals.

¹¹⁶ IBID, p. 68

¹¹⁷ IBID, p. 67

The non-prescriptive nature of the clamshells is intended to do precisely this task. Everyone has the same clamshells and participates in the same auction with an equal ability to utilize the clamshells. The proper operation of the envy test will then allow the state to re-run the auction should this initial equality be unjust and legitimize actions to rectify the relative inequality. The envy test works to measure if a distribution of resources is just. Individuals cannot envy each other in this context because they were all equally free to follow the courses of action available at the auction. The envy test works to ensure each individual has the same ability to acquire the goods available based upon their individual tastes and the social values set in the bidding process by other equally endowed individuals.

The standard of envy-freeness through an auction device essentially accomplishes what we have argued our Fair Shares Proviso should. To avoid envy, individuals are given clamshells to acquire as much or as good of what they actually want in keeping with the individual value of the resources available. These resources are placed in bundles that are inclusive of social roles. The auction represents the equality of opportunity to do what one might want to do, given the value one gives to the bundles respective of everyone else's value of the same bundles. They cannot envy the results of this allocative process because their choices are equally relevant in the hypothetical device. The allocation is not of resources but of clamshells. As a result, they are not prescriptive in the sense Rawls feared. The equal distribution and value of the clamshells makes the liberty of individuals who receive them the same. The Fair Shares that result are fair from our allocative process even if they appear uneven upon physical inspection. Thus, individuals can claim no relevant harm through what anyone else started with as they could have done the same. Their choices are the arbiter of what follows in terms of distribution. This is legitimate based upon the importance we ought to give to individual moral agency and the legitimate choices that come from it.

Envy-freeness through the auction device is a liberal account of allocative justice, as it affirms distributions are just even if material outcomes are unequal based upon an equal distribution of an allocated share. The clamshells and the auction act as a way of

conceiving the commitments of Fair Shares Proviso over time. As we will discuss eminently, this is not all Dworkin asks us to judge in terms of endowments as he includes natural endowments within the measure of envy. This is a needed step given the Rawlsian arguments for removing aspects of natural endowments from our considerations of principles of justice in an appropriate way. Dworkin affirms this commitment. However, it is important here to see how Dworkin is using the auction and clamshells to work out a resource allocation argument.

Dworkin argues that such an auction conception develops liberal justice appropriately to avoid the issue of expensive tastes, which is unresolved in Rawls' argument. Rawls' over-riding concept in his theory of justice was that equal individuals need a fair system of equally valued liberties within a system of social cooperation. The demands of this commitment lead to redistribution in order to provide comparative liberty. Dworkin's auction system retains these features. Individuals are equal and undertake a commitment to a fair system of cooperation. As we will discuss shortly, they undertake redistributive measures to provide an equal set of distributive liberties using the envy test and the conceptual auction. Individuals have the equal ability to pursue their material conceptions of the good based upon the value they assert to them while facing no inherent or systematic inequality in their acquisition or possession. Hence the opportunities they have, given the needs of their moral agency are met, are the same. Dworkin argues his process will provide an equal set of initial liberties and an equal set of opportunities to individuals in society. The spirit of Dworkin's conception of justice is largely in harmony with the primary Rawlsian ideas of justice.

However, unlike Rawls, Dworkin wants to build in choice sensitivity so that the liberal project will be coherently reciprocal. As we have noted, Rawls' system does not aptly deal with the issues that individual choices yield when considering systems of redistribution. Dworkin argues this is because Rawls' system is not sensitive enough to the individual ambition that drives their choices. As such, Dworkin affirms the commitment to redistribution but questions the maximin aspect Rawls gives it. The least well off under the difference principle could claim redistributed resources even when

they had chosen to arrive in their condition of being least well off. Dworkin uses the envy test driven auction to rule out this potential circumstance of the difference principle. In operating the auction as Dworkin describes it, the least well off could not rationally envy the material position of others. Individuals could have followed alternative courses of action had they made different choices and had different tastes. The least well off are responsible for their outcome because they started out with an equal endowment to acquire their conceptions of the good.

Dworkin also argues that Rawls fails to address properly an inherent inconsistency in the conception of abilities in his theory of justice. For Rawls, natural advantages or disadvantages are not to affect distribution resources over an entire society. Individuals in the original position would be unable to determine what their distribution of these natural resources would be. Individuals in this position would then agree to an equal distribution of social primary goods to provide the essential liberties postulated by the principles of justice. Rawls wishes natural endowments not to count specifically in the provision of social primary goods and liberties within the basic structure. Dworkin shares this concern, as natural endowments are relevant when considering distributive justice. Nevertheless, Dworkin argues that the way Rawls draws this argument is too broad. Dworkin argues that Rawls' system is too sensitive to natural endowments when considering redistributive measures. Rawls wants the difference principle to increase the value of liberties of the least well off through the maximin redistribution of social primary goods. If this is the case, some individuals such as the severely handicapped, are going to need immense compensation to utilize these social primary goods. This sets up a situation in which the compensation given to those with unfavorable distributions of natural endowments could spiral out of control. As Dworkin writes,

'Suppose that the welfare (on any interpretation) of an entirely paralyzed but conscious person is vastly less than the welfare of anyone else in the community, that putting more and more money at his disposal would steadily increase his welfare but only by very small amounts, and that if he had at his disposal all the resources beyond those needed simply to keep the others alive he would still have vastly less welfare than they.

Equality of welfare would recommend this radical transfer, that is, until the latter situation was reached. But it is not plain to me (or, I think, to others) that equality, considered just on its own, and without regard to the kinds of considerations that sometimes might be thought to override it, really does require or even recommend that radical transfer under these circumstances. I do not claim (as this last observation recognizes) that any community that embraced equality of welfare in principle would then be committed to the radical transfer.¹¹⁸

Dworkin notes that the condition of some of these politically equal individuals could be improved slightly by disproportionate financial support. The difference principle dictates that this action is necessary to maximin the condition of the least well off and the liberties they can enjoy. The result is that those with greater natural endowments have to pay more and more in redistributive practices to achieve less and less actual improvement in liberties for certain individuals. Dworkin argues that a commitment to an equal and fair social structure cannot reflect this kind of redistributive arrangement.

Dworkin argues that if we apply the envy test to such a conception of talent and natural endowment that the talented individuals may envy the distributions of the untalented. They may envy resources that the untalented receive in compensation for being untalented. If the talented valued leisure for instance, they may decide the increased labor for nominal financial returns, caused by the constraints of the difference principle, means that they could rationally envy being not so naturally endowed. Therefore, Rawls, in instituting the difference principle, inadequately describes talents and how to compensate individuals fairly for inequalities in natural endowments.

Rawls does react to this criticism by adding leisure to the list of primary goods to be valued within the difference principle. Rawls argues that the way to remove this sensitivity problem is not to scrap the difference principle but rather to consider leisure a

¹¹⁸ IBID, Part 1, Chapter 1, pp. 60-61

primary good, which can be valued along with all other primary goods.¹¹⁹ Rawls argues this ensures that someone who is merely lazy does not garner compensation to an unfair degree given the choice they have made to be lazy. Van Parijs will critique this approach in the following chapter because he will argue this does not take equally valid conceptions of the good seriously enough. We will visit this argument in more detail in the next chapter. However, it is important to note, how profound a problem the difference principle may be. The compensation that is required by the maximin principle of providing a set of social primary goods to the least well off yields redistribution that is so robust that the talented are liable for incredible amounts of redistributive support. Dworkin argues Rawls has missed this crucial paradox in the operation of the difference principle given his argument for fair reciprocity. Dworkin argues that even with these redistributions there are still going to be individuals unable to use their distributions or use them with the same freedom as most of the other citizens in the state.¹²⁰ Because of this, even these incredible redistributions will not equalize their condition.

Dworkin fears that unless certain natural/internal inequalities are addressed, the disparities in wealth may allow and affirm economic inequalities that make individuals, in particular the handicapped, fundamentally unequal. So although he is critical of Rawls' redistributive reasoning, he does not want to refute the need of a fair society to redistribute to those with natural inequalities. Some of these individuals can clearly enjoy a meaningful life with a level of reciprocally fair support. Dworkin needs to address this issue if he is to fulfill his conception of Rawlsian political equality. The auction logic assumes that all the bundles of goods can be legitimately used upon purchase not just purchased by equal individuals. Because this is a fundamental aspect of Dworkin's argument, it must be addressed appropriately.

Dworkin realizes that for the handicapped, their deficiencies in natural endowments mean that although they are free to bid on any bundle of goods they are not equally free to use all of the bundles available at the auction, as their natural endowments

¹¹⁹ Rawls, John: *Justice as Fairness: A Restatement*, p. 179

¹²⁰ Dworkin, Ronald: *Sovereign Virtue: The Theory of Practice in Equality*, Part 1, Chapter 7, pp. 285-305

may not permit the plausible use of a certain set of goods. Dworkin urges that the answer to this problem is not simply to provide added compensation prior to the auction, as this does not ensure equality. The handicapped, although afforded a greater ability to claim the bundles they do want and can use, are still not equally free to select various roles in society. Their equality of opportunity is hampered by circumstances we cannot rectify but can compensate for. Dworkin notes that some handicapped individuals cannot ever attain a level of equality, no matter how much of a greater distribution they receive, and as a result, they will never be able to avail themselves of all of the bundles of goods. So ensuring a greater allocative distribution in the hypothetical device does not do enough to ensure justice. The requirement to equalize their initial condition could make these individuals an unlimited drain on resources if the conception of compensation is to follow the path of the difference principle.

Dworkin states that the answer to this problem lies in assuming initially that individuals are aware of their own mutual vulnerability and see the world beyond their initial starting point through a modified veil of ignorance.¹²¹ This account allows individuals knowledge of their talents but not knowledge of the value of these talents. It is at this point we need to make an important clarification to Dworkin's argument, as Van Parijs will construe this definition in a distinct and incorrect way. Dworkin assumes that in removing the knowledge of value, he has removed the element of taste. This line of thought is relatively clear in that one cannot determine their taste for an attribute if they do not know the value of the talents such an attribute allows one to have. Van Parijs will argue that the other aspects of Dworkin's argument rely on taste distinctions in order to make any sense and that these undermine such an account of the veil. If the value screened out by the veil is the value others hold but no one's own value, then this sort of critique would be true. I will engage with this to a greater degree in the next chapter. Dworkin may fairly need to clarify this point further. The verbiage could be misleading. However, if we are to unbundle this idea, all we would need to establish is that the value removed by the veil is enough to make individual taste for an endowment unknown. This

¹²¹ IBID, p. 78 See – Dworkin's actual summary of how the Rawlsian Veil operates is on p. 136. Page 78 is a discussion of the actual modification Dworkin feels the insurers should face.

is not much of a step and I would argue what Dworkin intended to confer with his argument. Individual knowledge of talents then is more a calculation of abilities versus the set of opportunities those abilities allow you to undertake. There is no taste here, only math. The knowledge of talents holds no value other than a calculative measurement of natural endowment A allows me to undertake set B of opportunities. No matter how small or large B is, you will not know if what you want to do, your taste, is served by your set, thus allowing you to fairly calculate your insurance.

So if we establish this as what the modified veil does, we can move on to see what it is doing to our principles. This veil allows more into the knowledge of the original position representatives by informing them of their propensities but not their value. This also postulates that individuals in the original position would understand that they might face or acquire various frailties that would put them in such a precarious social position. These individuals will agree, given the knowledge present through the modified veil, that they will create a system of distribution that is sensitive to attributes of choice and that is not sensitive to aspects that are unchosen, such as a poor natural endowment.¹²² Given this grim prospect, individuals will agree to a form of social insurance that would provide for them should they be in such a disadvantageous position. Upon deciphering what individuals behind the modified veil would choose to pay as an insurance premium to protect against being handicapped, Dworkin argues that the requisite payments can be enforced as taxation to provide the social welfare for the handicapped within a society.

Dworkin pragmatically asserts that inequalities and disadvantages may still occur under such a solution, but that this process will yield just results and distributions. This is because we cannot foster perfect natural equality and it is unfair to expect society to work towards this end when it is not attainable. Some individuals will still face disadvantages, even sizable ones, due to their distribution of natural endowments. These disadvantages are acceptable, as all individuals knew in the impartial vacuum of the original position and upon agreeing to compensation, that these conditions could befall them. Dworkin argues that this yields a just outcome and a just distribution of compensation even if some

¹²² IBID, p. 204

individuals could be given an improved minimal level of social standing with massive redistributive assistance. The individual moral obligation to provide greater support than the level of compensation can and frequently will drive redistributive actions between individuals but this not the responsibility of the state to enforce coercively. Dworkin argues that some inequality in natural endowment is inevitable so the goal should be to create a just process that treats individual actors equally given that any individual might find himself or herself at a natural disadvantage.

Dworkin argues his solution adequately and appropriately redistributes resources to those with deficiencies in natural endowments while avoiding the issues of the handicapped envying the talented and vice versa. An insurance scheme is for Dworkin a check on redistribution in order to ensure redistributions are fair given the impossibility of actually equalizing the natural condition of all. For Dworkin, this development addresses the deficiencies of Rawls' theory. Individuals are responsible for their choices and preferences without placing the burden for these decisions on other citizens for their preferences. Dworkin argues these features are necessary to ensure that the distributive outcomes are not influenced by "choice insensitive"¹²³ factors. Dworkin argues that distributions that compensate those with unchosen frailties are in keeping with Rawls' general premise of creating a fair society through an impartial thought experiment. They remove the physical aspects of distributive outcomes in a way coherent with a fair system of social cooperation. Dworkin argues that this alternative explanation develops a Rawlsian account in a way more sensitive to the demands of justice as fairness. However, to do so, Dworkin urges a greater differentiation of talents than the one postulated by Rawls. Van Parijs will wish to develop Rawls theory due to some of the same shortcomings Dworkin identifies in Rawls but will do so through a method that is critical of Dworkin's approach.

Dworkin notes that individuals may cultivate their skills in various ways over time. Some of these methods and motivations may be more productive than others even across equally endowed individuals. Dworkin argues these are not legitimate differences

¹²³ IBID, p. 204

that imply greater redistribution. Dworkin asserts that distributions need to be appropriately “ambition sensitive.”¹²⁴ Ambition is the act of individual discretion that realizes the use of a talent. It motivates the choices individuals make. As this process is a matter of autonomous individual choice, it needs to be the basis on which material distributions rest after we have fulfilled the structures and commitments of justice. Individuals are responsible for their level of ambition and their preferences to which they aspire. These responsibilities and consequences that result cannot be fairly foisted upon the rest of society. They can yield material inequalities but these are justified, as ambition is an aspect of every individual no matter the skills or propensities they may possess physically. With choice insensitive factors removed, endowment insensitivity is achieved by the use of the insurance scheme. Dworkin argues the outcomes of the resulting choices are a legitimate cause of material inequalities.

Dworkin’s argument is that Rawls, in drawing the difference principle as he does to make distributions endowment insensitive, institutes measures that do not allow the project to be properly ambition sensitive. Rawls argued that the possession of natural endowments, including the propensity to undertake certain choice sets, were all arbitrary attributes, the result of good genetic luck and the apparatuses of the basic structure, that had to be screened out of our judgments about legitimate distributive outcomes. Dworkin argues that some aspects of natural endowment effect distribution and these need to be screened out and compensated for if we are to take our reciprocal responsibilities to one another seriously. Rawls justifies why we should redistribute to the least well off. However, Dworkin argues individuals have a role in exercising their talents and labor. They should be compensated for this without having to use these entitlements to realize nominal improvements in the liberties of the least well off, although they may choose to do this freely. Rawls’ maximin liberty measures instituted by the difference principle violate this consideration of individual autonomy and underline why Dworkin’s development of Rawls is so necessary. If choices are to matter, then individuals must be responsible for them.

¹²⁴ IBID, p. 89

By restricting the validity of individual choices, Rawls does not give choices the space they need to have an appropriate meaning in society. If individuals make a choice then they must by extension, accept the consequences of this choice. It is the aim of a society structured on the principle of fairness to provide resources in order for individuals to have fair value for liberty. However, it does not seem fair that some individuals can choose to be the least well off rather than be forced by natural circumstance to be one of the least well off and as a result, demand greater redistribution from other members of society. Maximin reasoning will justify redistribution sensitive to results or means, which are not always caused by natural endowment deficiencies. Choices have to count if we are going to respect rights and autonomy. Rawls does not draw the parameters of this aspect of humanity properly. Dworkin provides a way for the power of the liberal critique to account for the ambitions individuals may have in their lives. The liberal consideration of justice present by Rawls lends much to our conception of justice. However, this conception raises serious issues of its own. The first is that individuals may choose to be the least well off in society rather than end up there due to natural deficiencies. The second is that the talented cannot be held to account for these individuals' choices through constant redistribution if these choices are an aspect of individual autonomy. Dworkin develops the argument due to these issues and in the process legitimizes an allocative account of justice, which Rawls wanted to rule out. With allocative measures come markets, and our libertarian account of how markets need to work through a Fair Shares Proviso and what this tells us about kinds of taxation and redistribution that are just, is placed firmly back into our account of justice.

As starkly different as Dworkin's definition of talents is from Rawls in at least this one way, his eventual response in how we ought to best institutionalize a fair redistributive system appears to mirror Rawls. This is because Dworkin develops Rawls thought rather than discards it. The decisions as to what amount of insurance is applicable and what conditions one is to insure against are drawn through Dworkin's modified veil of ignorance. In this scenario, the knowledge the representatives have is different from Rawls account but the veil still acts to screen out certain contextual knowledge. With this understanding of the process, Dworkin questions what can be

classified as a natural disadvantage or as an irresponsible use of a talent. Dworkin sees distinct problems in dividing concerns of welfare, resource provision, capability aggregates and opportunity from each other. As Dworkin puts it, “[e]quality of welfare or well-being is subject to different interpretations. People disagree about what genuine well-being really is...”¹²⁵ Dworkin argues that these are irresolvable matters and are impossible to use in calculating individual affluence. A political theory should then take a more objective and pragmatic view of the observable relations in society. Since all of the roles these factors have played in individual condition are impossible to decipher, Dworkin suggests the threshold of redistribution will have to be material affluence even if this violates, in some ways, the conception of justice in question. Going forward I will develop the allocative argument in light of our Fair Shares Proviso and show that although we need not develop our argument away from redistribution, a coherent conception of allocation and market practices will lead us to say something far more specific about who owes what in terms of redistribution. It will be my argument that this cannot reflect naked end results but rather share use. The issue is that Dworkin deals with much of these issues in an abstract way. It is in developing the liberal account of justice beyond Dworkin that we see there are ways to apply non-prescriptive allocation in a tangible way. These systems then appeal to different decisions or at least more developed ones in relation to how these systems act appropriately. I will show how Van Parijs gives us a tool to deal with this but for now it is important to simply to understand where Dworkin feels the redistribution will come from.

This “second best”¹²⁶ approach implies that there is no way for a socio-political scheme of justice to wholly personify the ideals of the commitments of justice. Justice is a goal to which we aspire, re-inspect and measure our observable society rather than an attainable utopian end. Instead of attaining political nirvana, we should strive for it. The goal of our political philosophy ought to be to provide the system that is the most coherent with the principles of justice. This system must be fair and reciprocal but also honor the aspects of choice and taste that individuals clearly have even if we can debate

¹²⁵ IBID, p. 285

¹²⁶ IBID, Note 5, p. 478. In reference to the discussion in Part 1, Chapter 2

how they come about. Dworkin believes that the way to realize a Rawlsian liberal conception of justice is not the redistributive scheme Rawls suggests through the difference principle, but rather his auction and insurance scheme.

Dworkin attempts to show how a Rawlsian conception of justice can be choice sensitive while affirming egalitarian outcomes through amended sensitivities. Dworkin also provides us with an intriguing system. He utilizes an allocative tool, an auction, in a way that is not prescriptive of a “good life” and an insurance scheme to implement his modified development of liberal justice. Dworkin causes the reader to consider if Rawls’ accounts of the attributes that motivate the “difference principle” are correct and if not how they might be critiqued and addressed. Dworkin’s arguments will have to withstand greater scrutiny if they are to stand up in part or in full as a systematic answer to affirming a broadly Rawlsian commitment to justice. This will be particularly important when we assess Van Parijs critiques of Rawls and Dworkin in the next chapter and how he will deal with some of the common concerns he shares with Dworkin. With Dworkin’s arguments in mind, the next section will analyze aspects of what has been presented here in greater detail. This will be used to assert my Principle of Just Access as a necessary development of the liberal argument. Nevertheless, it is important to understand precisely where and how Dworkin diverges from Rawls. These divergences will provide us with something particularly unique to consider when addressing systematic answers to distributive justice.

3.2 - Talents, Handicaps, and the Principle of Just Access

Within the three liberal systems of justice presented thus far, we have at least one common thread that I would like to explore in greater detail. Each of these theories comes to considerably different decisions as to how we weigh claims about individual talents. In order for us to continue the process of deciding what level of distribution or redistribution is necessary, we must inspect these arguments and come to a conclusion as to whether these accounts are coherent. It is my position that none of these accounts has truly drawn our balance between choice and circumstance correctly. As a result, we are compelled to develop our account of liberal justice further than these authors have. We will do this by first revisiting Nozick, and the “Wilt Chamberlain” argument.¹²⁷ In revisiting this argument, we will discuss the responses Rawls and Dworkin would have and where these arguments succeed and fail in critiquing Nozick’s argument. This will leave us with a distinct conception about what the state’s position on talents ought to be in light of these different beliefs about talents before yielding us some conclusions as to what parts of each of these arguments hold.

Nozick holds a distinct position on talents. For Nozick talents are simply arbitrary attributes individuals can use in tandem with their labor to create or gain property rights.¹²⁸ Nozick felt as Rawls did that the possession of talents is arbitrary. However, these attributes are solely self-possessed. The self-ownership of talents makes them the sole possession of the individual. It is up to the individual’s discretion to use them. This makes talents an attribute protected by individual rights and hence not morally relevant to the state. Anyone’s particular distribution of genetics is immaterial to their use of these natural features as it is their choice to use them that matters. The fruits of this labor are then protected by individual rights as long as they have met the conditions of the entitlement theory. If someone uses their talents to gain entitlements from individuals through just processes, then they are entitled to these acquired things.

¹²⁷ Nozick, Robert: *Anarchy, State and Utopia*, p. 160-164

¹²⁸ IBID, p. 185

Talents play a crucial role in Nozick's entitlement theory because they are the one aspect of individuals that ideally creates their ability to deviate, through actions of their individual liberty, distributive outcomes. Nozick believes that these talents are not only arbitrary but also incontrovertibly self-possessed. As such, they are an aspect purely resident in the individual and their exercise or lack thereof is a matter of individual choice. Ergo, if someone uses their talents to gain or create an entitlement, through voluntary and just processes, then they are entitled to these acquired things.

Rawls holds a very different belief about talents. Rawls believes that genetic propensities are arbitrary much as Nozick does. However, Rawls argues the arbitrary assignment of natural endowments should not be relevant in determining equality in a fair arrangement of social cooperation. Their arbitrary nature means they must be removed from personal consideration at the original position through the veil of ignorance. Talents are arbitrary, and since in the original position individuals would not know what talents they had and be aware they may have none at all, they would agree that talents should not entail that one's arbitrary natural advantages entitle material superiority and meaningful differentiations in condition. Fair value of liberty dictated material redistribution. The decisions about how to protect each other from deficiencies in natural endowments meant that a maximin principle was required to ensure a fair arrangement of society.

Importantly, Rawls is keen to note non-genetic social advantages and the effects these factors have on the exercise of talents. Although natural endowments are self-possessed, the ability to exercise and foster them through labor requires the affirmation of a basic social structure. The distribution of talents is arbitrary but the way institutions react to them out of a concern for justice need not be. The self-ownership of an attribute does not imply that the resulting entitlements are absolute since these attributes are often fostered by the structure of opportunities and liberties in society. For Rawls, talents cannot be considered an individually deserved attribute in creating the state because of the arbitrary good fortune in receiving them. The randomness of talents means they

should not enter in the conceptualization of state institutions, as individuals cannot know in the original position if they possess one. Rawls contends that people in the original position knowing of talents but not whether they possess them would decide to adopt redistributive measures to protect their liberties in a fair way.¹²⁹ The arbitrary nature of talents over-rides any potential deservedness in the initiation of the state, and helps dictate the redistributive state.

Rawls' commitment to justice means that the talented must provide a maximin set of liberties for the least well off even if they are "free-riders."¹³⁰ This is primarily because free-riding is something individuals would not do given their mutual advantage in affirming the basic structure. Rawls attempts to address this problem by instituting leisure calculations into the difference principle. As a result, if individuals are still in the worst off group, this has to be the result of poor natural endowments. However, as we saw in our draft example, this is not an adequate explanation. As we will see in the next chapter through the critique of Van Parijs, Rawls attempt to correct this explanation through assessing leisure as a primary good is an inadequate amendment. The very construction and operation of the difference principle is called into question. The implication here is precisely what Dworkin notices. The least well off may be least well off through their freely made choices rather than their lack of natural endowments. If this is the case, a fair system of reciprocity that takes on choices as a relevant attribute of distribution is needed and Rawls does not give this idea appropriate space to work due to the actions of the difference principle.

Rawls gives us tools to work through impartial judgments. These add much to our considerations about individual circumstances but fail to address wholly our concerns about taking individual choices seriously. Through this process, he illustrates why such judgments should include a consideration of natural endowment. Nevertheless, this does not undermine all of points about the market and the role it can play in formalizing our choices. Rawls states when considering the distribution of opportunities and resources at

¹²⁹ Rawls, John: *A Theory of Justice*, pp. 71-75

¹³⁰ Not used by Nozick but a reference to those who do not contribute to the society.

the original position, “[a]n arrangement of the basic structure is efficient when there is no way to change this distribution so as to raise the prospects of some without lowering the prospects of others.”¹³¹ The fact that careers are open to all individuals does not change the fact that some individuals will have greater liberty simply by virtue of their availing themselves of an opportunity. The outcome will be that some individuals will enjoy greater liberties and conversely suffer inequalities due to arbitrary and socially affirmed criteria. Rawls argues that this is a decision of efficiency and is coherent in that sense.

However, Rawls argues that efficiency is not all that should be considered when arranging a distributive system. As Rawls notes, efficiency arguments could be made for all manner of unjust economic arrangements.¹³² These arrangements raise the economic efficiency but at the cost of maximin social liberties for the least well off. To avoid these potential outcomes, the individuals agree to prioritize the principles of justice prior to considering calculations of economic efficiency. If this threshold is to be sustained, the difference principle is required. This is in part why Rawls argues we should opt for the difference principle over allocative justice. Rawls argues the equality of opportunity alone still privileges natural endowments in yielding material outcomes as these endowments are reflected in the opportunities available to individuals. To remove this differentiating factor from considerations of justice requires the difference principle. The implication here is that Rawls would argue, given our Fair Shares Proviso or any other allocative account still has a problem beyond the lack of a consideration for natural endowments. Rawls is arguing that allocations will allow unfair inequalities. However, if the strong undertone of securing oneself against inequalities of natural endowment is removed or at least dealt with in some other way from this process, this critique does not hold any power. This is in part because Rawls has to allow choices space and by doing so allow some legitimate inequalities. If the difference principle is motivated by incorrect or at least incomplete criteria about natural endowments, the spectrum of these legitimate inequalities will have to change within Rawls’ own argument.

¹³¹ Rawls, John: *A Theory of Justice*, p. 70

¹³² IBID, p. 71

What is left is how we deal fairly with individuals whose natural endowments are unequal and if the difference principle reflects a proper account of this issue. For Rawls, talents cannot be appropriately neutralized in the discussion of distribution to allow them to operate unconstrained. Perhaps more important than this aspect of Rawls treatment is the level of constraint we should have in allowing these to work. Political equality drives our commitment to distribute as Rawls suggests due to the problematic nature of talents. The subtext of this argument is that natural endowments work to privilege some, while the lack of them works to subordinate the life chances of others. Natural endowments determine opportunities and the resulting distributions these opportunities afford cannot reflect these arbitrary conditions. As a result, the maximin principle is needed to ensure the outcomes of these natural endowments are constrained.

I believe it is important to note, as Dworkin does, that discussing talents and handicaps as a binary condition (you have one or you do not because of your natural endowment) is a mistake. A handicap does not preclude one from having a talent. Nor does having a talent preclude one from having a relatively poor endowment of natural attributes. It is true having either a talent or a handicap is arbitrary but this does not mean that they have an absolute effect on opportunities, social liberties or material outcomes. It further does not imply that the choices one makes no matter how limited their opportunity sets, are illegitimate. I would argue most handicapped individuals are capable of making judgments and clearly meet an equal if not close to equal status of moral agency. Not all handicapped people are capable of moral agency, but most are. Handicapped people are still capable of making choices given their available attainable ends. These choices are as valid as any other individual choice. What is problematic is the restriction on attainable ends caused by certain deficiencies or anomalies in natural endowments. On Rawls' view, the well off or better off are obligated to redistribute to the least well off due to his contention that non-rectifiable inequalities in natural endowments cause the least well off to be least well off. 'There but for the grace of god go I'¹³³, with an unchosen handicap on the other side of the veil. Being a bad chooser is not an unchosen handicap by its very description unless we are willing to defend an

¹³³ This is a phrase attributed to John Bradford (1510 - 1555) the 16th Century English Evangelical Martyr

extremely problematic position that sustains a comprehensive level of biological determinism. Yet Rawls argues we would protect ourselves from this very outcome and it would be fair of everyone else to do the same. As Dworkin notes, this not only treats choices and responsibilities inappropriately, it leads to a commitment to redistribution that is increasingly less effective in increasing the liberties the legitimately handicapped can enjoy.

I argue a better way of conceiving a handicap is as an unchosen natural condition that prevents or hampers the exercise or acquisition of talents. This makes the relationship between the two clearer and removes their mutual exclusivity. It may also place legitimate considerations on how society views outputs and quantifies handicapped individuals, particularly in education systems.

I do not have time to expand on this issue here but I will briefly elaborate. The thrust of the issue is this. How we judge people is based upon merit but merit systems attribute levels of merit based upon specific outputs. These outputs can be and frequently are ability normative in that they reflect standards expected of someone with a “normal” set of natural endowments. This is less a measure of talent or ability than it is a measure of someone being able to produce a specific kind of quantifiable output. These outputs are not sensitive in an appropriate way to the actual merit someone may have who simply cannot excel in the medium of quantification used by the system of merit due solely to their unchosen natural endowment. I do believe that this ought to have an effect on how we conceive our provisions of accessibility. These are considerations of justice that are philosophically important to work out rather than simply a matter of amending specific policies or practices. These legitimate issues are pertinent here and will become part of my future academic focus in working through a Principle of Just Access. It is a matter that has been noted by some critics of Rawlsian Liberalism perhaps most notably Martha Nussbaum, Amartya Sen and advocates of the capabilities approach.¹³⁴ Although functioning, ability and merit are important matters, I believe that Sen’s account of

¹³⁴ Please refer to the works of Amartya Sen and Martha Nussbaum in the bibliography of this text for more details.

impartiality and Nussbaum's account of obligation are quite troubling. As a result, the capabilities approach does not pose the kind of comprehensive critique of Rawls it appears too at first blush. The capabilities approach is motivated by observations about ability that are important and lack appropriate description in Rawls account. However, to be more than an intuitive account of how to treat the handicapped, the capabilities approach will need serious reconsideration. Rawls project may more readily adopt these considerations with proper extrapolation, which I intend to undertake when approaching the Principle of Just Access. I simply ask here that you the reader explore the binary distinction Rawls utilizes in approaching natural endowment as a singular issue. I ask you simply to reserve issues of unbundling this distinction to this level of abstraction even if further considerations are appropriate and important.

The amended conception of handicap I am forwarding here calls into question the conceptions of this issue that have been used by all of our authors. The argument that talents are purely realized at the behest of the individual is true. Natural endowments are arbitrary and unchosen and cause obstacles in realizing labor. This is clearly a matter of fairness and a concern for a system of justice. This removal of liberty through an arbitrary factor makes an individual fundamentally unequal when labor protection is unaccommodating to their unchosen condition. When their resulting condition is dependent on their ability to actualize their talents, the result is an ongoing inequality that is not fair or just.

Rawls does well to illuminate the fact that talents are largely a product of cultivation and arbitrary natural circumstances. But again, this is only part of the story. Individuals must choose to realize their talents through these opportunities in order for them to yield anything. Natural endowments are arbitrary and in most cases unequal. However, the lack of an ideal natural endowment does not preclude the possession of a talent or the ability to utilize it. Having a very favorable natural endowment does not preclude an individual from wasting their talents and even being a member of the least well off group. All a favorable natural endowment actually means is that the potential preferences one can elaborate on are greater. Without the choice to do so, these

endowments have no actual material benefit. These endowments are not realized into talents by individuals simply to sustain the basic structure due to the mutual advantage in doing so. Rawls is right in that the ascription of natural endowment is arbitrary and dependent on a structure of opportunities but he oversteps in saying it is everything in the consideration of talents. It makes more sense to compensate individuals who have unchosen handicaps initially rather than constrain talents from determining material end-result outcomes. This is what Dworkin adds to our debate.

Dworkin develops Rawls account given the problems that he observes in the operation of the difference principle. Dworkin shows that these issues stem from an argument about what should be allowed through the veil of ignorance used in the original position argument. We can now take stock of what our consideration of distributive justice needs to reflect. It is important to embrace an example of talents and entitlement to work through our discussion of them thus far. To expand on the example of talents offered by Nozick, Wilt Chamberlain was a talented, perhaps the most talented, basketball player of all time. However, the portion of talent that was arbitrary was the genetics he possessed which allowed him to be an incredibly effective center. Wilt may have been untalented as a point guard or as a free throw shooter¹³⁵ but if he was a talented basketball player, why was this so? If we analyze Wilt's propensities, his height and large hands helped him be an excellent rebounder, shot blocker and an excellent inside offensive player but made it difficult for him to shoot free-throws, ball-handle and shoot long range jump shots. Moreover, Wilt's height and large hands did not simply, by their mere existence, make him good at any of the three things at which he excelled. His physical attributes may have made him well suited to play basketball and perform the tasks attributed to centers of his era, but he had a great deal of help at Overbrook High School and later at the University of Kansas, which helped cultivate him into one of the most effective big men in NBA history. Wilt's willingness and effort to learn his craft throughout his career and become a better player is what set him apart from some with

¹³⁵ Wilt's Free Throw percentage was 51% for his NBA career, compared to an 82% conversion rate for Yao Ming (as of the end of the 2006/07 season), 72% for Kareem Abdul-Jabbar (also a successful actor), 74% for Willis Reed, and 58% for Wilt's nemesis, Bill Russell. Refer to <http://www.basketball-reference.com> (accessed 21st of April 2010, 15:43)

similar or even identical genetics. His individual choices applied these natural circumstances in a specific way. However, he could not exercise this will or learn his craft without tutorial resources. This means that for Wilt, his talent and hence his quarters came from three particular attributes, natural endowments (embodiment), social opportunities (tutorial resources), and his will and labor to apply the two in tandem to a particular set of tasks (autonomous choices and moral agency).

Rawls might argue that Wilt's drive to learn, improve, and apply himself is itself genetic, the result of specific neurological impulses within the brain.¹³⁶ This might be quite true, but Wilt did not need to apply genetic talent A in company with genetic talent B. Wilt has to have made a choice to use his skills, however they were relayed to him, and as such there has to be some level of choice to any skill. Imagine, if you will, that Wilt had no other natural endowments other than those alluded to above. He was not capable of being a movie star or a notorious lover.¹³⁷ It just so happened that his ambitions lined up with his natural endowments. He could actually have had an unfavorable natural endowment. I would imagine he had a difficult time purchasing a car, walking in certain buildings and acquiring appropriate clothes. He could have even faced a natural handicap that prevented particular preference schedules, yet he chose to maximize his endowment for a reward he desired. If he had decided instead to become a point guard, he would have languished in relative obscurity because his choices led to his natural endowment being under utilized. This was his choice and one we need to protect if we treat Wilt as the producer of "self-authenticating claims".¹³⁸ A natural endowment has no value on its own. It requires equal social liberties but it also requires choice in order to have any measurable consequence.

The degree of effort or labor required to produce a product is something unique to an individual and an act of individual autonomy (a choice). This does not mean that a natural endowment precludes the ability to make such a choice. Instead, it implies that

¹³⁶ This point was brought to my attention by my advisor, Dr. Peri Roberts and I would like to thank him for bringing this point to my attention.

¹³⁷ Chamberlain, *Wilt: A View from Above*, (Seattle: Signet Press, 1992)

¹³⁸ Rawls, John: *Political Liberalism*, p. 32

certain conditions of natural endowment reduce the available opportunities/choices individuals can make in comparison to each other. This requires us to consider forms of compensation and a system of equal liberties, much as Dworkin postulates. Ensuring against certain physical outcomes and providing equally valued liberties are commitments dictated by our need to construct a fair society. These outcomes have effects on the opportunities individuals have and as a result, our commitment to equal opportunities requires that we consider these factors. They are not neutral as Nozick argued and they do not have the kinds of effects or warrant the maximin processes Rawls argued for either. Although the commitment to providing resources and affirming our fair basic structure ought to include a consideration of how we are going to deal with inequalities of natural endowments, their role in determining the amount of redistribution we are to undertake has to be different from the conceptions given to us by Nozick and Rawls.

A commitment to liberal justice dictates redistribution and market constraints but the material discrepancies that occur within the market stem from individual choices, which need to be equally valued. We could not say Wilt was free if he was expected to be a center by society based upon his natural endowments. He must dictate the compensation he is to receive to exercise his talents more broadly, even if his price is so high his talents are never realized. He has to have control of how he dictates the use of his talents and bare the consequences of doing so. Though this was Rawls' clear intention, the redistributive criteria caused this aspect of individual autonomy to be constrained too tightly based upon hypothetical obligations that were incorrectly drawn. What we must consider is if Dworkin's commitments are the correct ones given the added nuance we have now asserted in considering talents, handicaps/natural endowments, and redistribution.

To do this, let us once more re-consider Wilt. Throughout Wilt's career, depending on the coaches he was around, the players who surrounded him, and the team strategy employed, his skills ebbed and flowed. For instance, his assist total in 1967-

1968.¹³⁹ It is not that in 1965 or 1972 Wilt was genetically less or more capable of passing a basketball but in 1967-1968 more effective passing schemes were employed. Wilt excelled through the presented avenues of cultivation using his labor and genetic endowment. His ownership over these talents means that it is acceptable that he receives more entitlements over genetically equal or similar individuals. Conversely, in areas he did not excel, free throw shooting and winning championships for example, it would be acceptable to discriminate against having him on your basketball team or compensating him less than another player because he does not have these propensities. However, these two statements are only true if the characters involved have the same relative tutorial resources or bundles of social goods to utilize in a way sensitive to their social value to others. Their initial allocation has to be fair and allow them access to the same bundles. Without them, individuals would have inherently unequal opportunities to exercise their labor to cultivate their arbitrary talents. Such an inequality would void the moral neutrality between talents and would drag us away from allocative practices because the opportunity to undertake initial choices would be unequal. However, if this is avoided, what individuals do with their bundles and how successful they are is down to their equally valued choices.

Dworkin and Rawls rightly point out that people's talents are not easily discerned as to their deservedness but arrive at different conclusions about what this means within the framework of equality. As we have discussed, a natural endowment does not preclude a talent. These are in fact only realized through individual preferences. Without the ability to gain desired compensation, it is unclear why one should be obligated to realize the potential of their natural endowments if doing so does not meet their preferences.

Let us return to the gifted Mr. Chamberlain for a moment. Let us say that he wished to be a point guard even though he clearly has the physical disposition to be a center and further that he was a failure at this endeavor. Wilt would now end up with a

¹³⁹ Wilt Chamberlain had 702 assists during the 1967-68 season, averaging 8.6 assists per game. Refer to <http://www.basketball-reference.com>

much smaller share of resources, especially given the basketball pay scales of the 1960s, compared to being an all-star center. Simply because he was born with the physical disposition to be a center does not mean he had to apply his natural endowments in the most materially yielding way or in any way at all. He could have legitimately chosen to sit at home eating Doritos all day. Why should he, having been given greater natural endowments, be given redistributive resources to equalize his material condition if his distribution of natural endowments was great but his choice to use them, or not use them as the case may be, yielded a lower distributive share? For Rawls, the justness of the redistribution to Wilt in these circumstances rests wholly on his inability to access a maximin set of social primary goods and the resources implied therein. His actions placed him in a circumstance in which he needed redistribution for this reason. Every single aspect of talents being present or not present is the result of arbitrary natural factors for Rawls. Even if this is not what Rawls wanted, it is what his theory implies. Reworking the index of primary goods does not change this fact. Wilt's unwillingness to be a center, his desire to be a point guard, his physical attributes to undertake either must all be arbitrary for the maximin redistribution to be legitimate.

Although this is clearly true about Wilt's distribution of genes, this cannot be said of his choices if they are in fact attributable to individual autonomy. Rawls wants us to allow choices to count but his model does not honor these factors coherently. Certain levels of resources are needed to access essential liberties but maximin redistribution goes beyond this point. Dworkin is not denying the need to provide Wilt with a distribution of resources and to take into account any legitimate handicaps he may have in his distribution of natural endowments. Dworkin is denying Wilt's claims to an ongoing maximin set of primary goods. Rawls claimed that such arguments are fueled by an account of efficiency that is not in keeping with the principles of justice. However, in Dworkin's case, the level of efficiency is not the motivation for accepting differentiations based on talents. The motivation is to question Rawls principles of justice based on a different account of what these principles ought to reflect. Dworkin's position comes from a better comprehensive understanding of what is required to enact a talent and the knowledge that a handicap or lack of a natural endowment may not preclude having a

talent or an actionable preference. This further illustrates precisely how deeply the Rawlsian project needs to be amended in order to yield a fair and just result, which will be a major obstacle for Van Parijs. This understanding stems from the veil and that is why Dworkin amends it. Moreover, this appears to be a needed development of the liberal argument given an appropriate balance of the issues at hand.

It is from this veil modification that Dworkin wants us to assume a resource auction with equal buying power between citizens for resources in order to come to just distributions. This system affords individuals an equal distributive share, an equal allocation of “clamshells”, from which individuals are allowed to make value choices about their resources. As we discussed in the previous chapter, Rawls argued against allocative justice even though he felt it would create outcomes similar to the distributive justice argument he forwards. This is because Rawls felt allocations would enforce decisions about what constitutes a minimal account of the good life. In doing so, Rawls feared that allocative justice, in undertaking calculations of a social minimum, would actively enforce a conception of the good through intuitive arguments of what was needed to sustain the minimum. For instance, humans need to eat, so the state hands out bread even though this may not be an individual’s actual preference.

In Dworkin’s case, the allocation is not a prescribed minimum but an equal tool to realize a taste and envy sensitive distributive share of the available resources. The actual resources being acquired are or can be in keeping with individual tastes with one notable exception, if individual’s tastes dictate they want more than the allocated clamshells get them. Rawls’ critique of allocative justice is true only if the system of justice ascribes what individual needs either are or ought to be or if it wishes to defend choices of expensive taste being an essential liberty of the least well off. The auction provides the provision of equally valued liberty through access to individually selected bundles of social primary goods. The value of the liberties provided by the auction to the auction goes is fair and equal in theoretical terms. Moreover, if there is a problem with how fair these distributions are or were, Dworkin gives you the ability to re-run the auction to determine what a new fair distribution would be. It is important to note here, that this

idea will need to be cashed out in some way in society, which is why I will argue Van Parijs has something specific to offer us. However, theoretically speaking this commitment to allocative justice accomplishes the goals of reciprocity established by a Rawlsian account of justice without the difference principle and is in keeping with our Fair Shares Proviso.

The first of these claims can tell us a lot about what is and is not an acceptable form of allocation. Moreover, the principles of justice still imply a distribution of “clamshells” given the goods and liberties in a particular society. However, individuals cannot be expected to provide for the expensive tastes of other citizens or to compensate them for their poor or less wasteful practices with their goods. When contemplating redistribution we have to keep the following aspects in mind. The redistributions must affirm an ongoing set of usable liberties. Due to the natural inequalities individuals face, these redistributions must compensate those with unchosen obstacles to their preference schedules. These tasks must be accomplished while ensuring the system is sensitive to the choices individuals make due to their tastes.

It is my argument that Dworkin’s auction and insurance scheme do not accomplish these tasks in full. These are needed steps forward and take us away from Rawls and ultimately Van Parijs as well. Therefore, we are taken down Dworkin’s path of liberal development. However, his account requires further development once we work through the commitments his account implies. The re-running of the auction allows processes of liberty provision to be ongoing. The operation of insurance ensures that individual handicaps are compensated for while being reconciled with the fair costs shared by all. However, Dworkin argues these systems still require massive result-based redistribution through an unqualified end-result income tax. This is troubling given how we have asserted allocative justice ought to work and we will revisit this issue. What is more troubling is that Dworkin argues for a specific kind of compensation from insurance that we cannot reconcile with actually providing appropriate sensitivity to ambition for the handicapped. Dworkin’s assertions are all predicated on a very precise modification of the veil of ignorance argument. If natural endowments do not have the relationship to

talents and distributive outcomes that Rawls proposed, we have to discuss if the sensitivities Dworkin suggests meet our modified understanding of what handicaps and talents mean within the liberal argument.

Before suggesting how best to proceed, it is important to explore Dworkin's argument a little further. Dworkin builds into his theory an insurance scheme due to the inability of the disabled and handicapped to partake equally in all the bundles of biddable goods at the auction. Handicapped individuals, even if given greater social buying power, may still face an inability compared to other individuals to choose bundles of goods when socially endowed with clamshells. In order to make his theory endowment insensitive, the insurance scheme assesses what individuals would pay to protect themselves from this fate should they end up in such a situation outside his account of the veil of ignorance. These assessments result in levels of taxation that fund the redistributive coffers to help those in need of compensation prior to the auction to the greatest reasonable degree allowed within the parameters of Dworkin's modified liberal argument.

What we must ask ourselves here is whether this account of handicaps is appropriate, just and detailed enough to merit the kind of insurance scheme Dworkin is suggesting. His reasoning is difficult to refute on first glance, as the handicapped clearly are not able to use certain sets of goods available at the auction. Surely, individuals who we would see as able-bodied will also be unable to partake in sets of resources. We would not think this is unfair as though they may be able bodied, their lack of Wilt Chamberlain-like height might preclude them from being a center for the Lakers or conversely Wilt's size might preclude him from being a steeple-chase horse jockey. These claims offset one another even if we are aware that we could have endowment A and wish to have bundle B or vice versa. What a handicap actually consists of is a difficult issue and one Van Parijs will take up in the following chapters in critiquing Dworkin as he wishes to constrain these claims to a greater degree, so let's for now assume that generally speaking what a handicap is can be ascertained fairly. We must

now ask ourselves why the able-bodied are obligated to the reciprocal degree Dworkin postulates.

Handicapped individuals have equal rights to resources yet equal liberty to utilize these bundles escapes them in some cases without extra assistance and in other cases completely. However, handicaps are as diverse as the people who have them. Certainly, some individuals are not going to be able to pursue any meaningful talent or utilize bundles of goods without stewardship, but this is a minority of handicapped individuals. Capabilities overlap, adaptations are made and for the vast majority of individuals whom we could reasonably see as handicapped, they are capable of living meaningful lives, exercising conceptions of the good and understand the bundles of goods/lifestyles they are unable to utilize. What we cannot say is if their lack of endowments has actually curtailed completely or to some relevant degree their desired set of talents and preferences.

The condition of being handicapped in the contexts in which we have addressed it thus far is a categorization that says very little specifically about what precisely afflicts the individual aside from an established deficiency in natural endowments causing a disparity in the ability to use bundles of goods.¹⁴⁰ The scale of this disparity is not elaborated on in any greater detail. It says nothing also about the “handicapped” having talents or conversely the “talented” having handicaps. The two are clearly not mutually exclusive by any account as we have argued. This means that some handicapped individuals are capable of utilizing bundles including bundles they may “want” as opposed to “settle for” given their condition and gaining disproportionate material affluence. Whereas some handicapped individuals clearly cannot act in these ways.

¹⁴⁰ This is not a minor point. I will simply state here that I believe it is likely that different kinds of natural endowment deficiencies such as mobility, cognitive and sensory all require different treatments which will be part of extrapolating the practices of a Principle of Just Access in the future. This is not simply because they are physically different conditions, but rather in part because they are treated differently by our social structures as well. It will be this social treatment that will add considerations that take us well beyond our present policy measures in realizing the pervasive social and political inequalities that result from social approaches to handicaps. This will move us away from a pure physical/medical conception of accessibility. It is simply important here, in the context of this work, to assert the theoretical need for development rather than assert exactly what this is going to look like when we work it through comprehensively.

Leaving aside any potential argument about deservedness of physical condition,¹⁴¹ let us say for now the circumstances of these generalized handicaps are spontaneous or at least morally neutral circumstances. I have asserted that being unable to utilize particular bundles one is at liberty to purchase is something everyone faces, even those of average natural endowment. By this account, to be handicapped is a calculation of proportion in regard to the use of bundles given that in all likelihood even an able-bodied individual will not have 100 percent discretion in using all the available bundles.

The choice issue raised by Dworkin in the selection of bundles is a valid one. For Dworkin, the auction is presumed to address the choices of the equally able bodied in the selection of bundles and attribute distributive need accordingly. The process is aggregative in the way it would need to be due to the lack of mutual exclusivity between handicaps and talents. The insurance is an aggregative measurement formulating the compensation you would want given potential distributions of natural endowments taken against the background of the bundles such a condition might keep you from using and ignorant of the value you could realize through the set of bundles you can use.

The handicapped, like all other humans, are capable of making expensive aesthetic choices as well and it would be unjust to deny the handicapped access to the auction if they could legitimately participate. After all, the bundles are not just goods, but actually ways of life and professions. Dworkin's auction system underpinned by an insurance scheme seems to assume that the proper compensation for being infirmed in X way by an insurance agreement is going to be adequate and appropriate. Insurance conceived in this way would undoubtedly have to take on judgments about what a good life in condition X would consist of. If having a handicap does not preclude having a talent and the provision for having a handicap is realized in compensation for the ownership of that malady, the issue of having a handicap and having equal liberty seems to be still unresolved. You could have a handicap and be at liberty to do as you choose. You could have a handicap and still have an expensive taste or unachievable desire. Furthermore, the goal of the auction itself is to be ambition sensitive. This sensitivity

¹⁴¹ Negligent actions that lead to a handicap such as sawing off one's own hand intentionally

does not appear to be wholly served if the handicapped can make legitimate choices with the options they have or ought to have.

It appears that Dworkin's answer to this difficult question appeals to pragmatism. Dworkin asserts it is not possible to reconcile completely and harmoniously all of our competing liberal claims with factors and information that we are neither completely aware of nor in some cases able to change. As Dworkin writes,

'We shall therefore ignore practical difficulties, like problems of gathering information, that do not impeach these theoretical goals, and also make simplifying counterfactual assumptions that do not subvert them. But we should try to notice which simplifications we are making, because they will be of importance, particularly as to the third and most practical application of our projects, at any later stage, at which we consider second-best compromises of our ideal in the real world.'¹⁴²

So it is best to come up with a solution that corresponds with the ideal of justice driving the entire project, namely what equal ignorant parties would agree to as just practices. Compromises from what are ideal principles of justice to how we actually conceive our project should only trouble us if we could come up with a better alternative way of applying these standards of justice in a fair and reciprocal manner given the problems we face in our 'real' and thus imperfect situation. For Dworkin, this is used to underpin his assertions about how the auction and insurance schemes are paid for even though his plan for doing so appears to violate the ideal principles of endowment insensitivity and ambition sensitivity that motivate the model.

Dworkin points out what is wrong with Rawls in terms of ambition sensitivity. He postulates a system of legitimate allocation that seems to address this problem. However, his conception of handicaps and how to address them falls short. If we are to accept Dworkin's argument for an insurance scheme, we must accept that it is the best of the "second best" options for providing for the handicapped based upon properly

¹⁴² Dworkin, Ronald: *Sovereign Virtue: The Theory of Practice in Equality*, p. 73

impartial judgments and the brute fact we are largely unable to change their natural circumstances. Clearly, individuals do not choose their distribution of natural endowments. Equal individuals deserve equal liberties and fair value for these liberties in a system that provides like liberties for all. It is fair to acknowledge that individuals' natural endowments allow greater access to initial bundles of goods. Choices and talents cause unequal distributions in wealth and have a causal relationship. Individuals must make a choice to realize or not realize a talent in a system of equal liberties. The possession of a certain set of natural endowments does not preclude having a talent, choices or the availability of a preferred set of preferences. Individuals in this position not knowing, 1. what the value of their distributions of these natural endowments are, 2. how these distributions will affect their choice of bundles given their preferences outside the modified veil of ignorance, and 3. how they would like to be compensated given their unknown situation in regard to 1 and 2, would agree to something other than the strict compensation and subsequently the redistributive measures Dworkin suggests.

Taking on all of the matters simultaneously may indeed be impossible given the conception of justice presented here. However, taking Dworkin's argument based upon his own aims (an endowment-insensitive and ambition-sensitive account of distributive justice) shows how he has not given us the best possible systematic solution. Dworkin, in trying to make an endowment insensitive theory, has painted over aspects of natural endowment that have a far more subtle impression on distribution than the simple cause and effect reasoning that he presents. It is the fact that Dworkin draws the compensation argument so broadly that fuels much of Van Parijs' systematic refutation of Dworkin. The idea of having no capabilities at all or extremely limited ones that would relegate you from being able to achieve other ends would clearly motivate you to provide yourself with an adequate level of compensation in order to survive and enjoy what you could out of life. This extreme case and how Dworkin argues we ought to handle it, is not problematic. Ensuring the means to secure trusteeship in the case of being truly infirmed is adequate. Trusteeship is needed because being severely disabled is a known outcome outside even the modified veil. As a result, individuals would insure themselves against ending up in this condition by providing the kind of trusteeship required to represent their

rights, their needs and their interests even if they would be unable to do this themselves due to their natural endowments. The level and expense of this trusteeship is balanced by the insurance calculation. This ensures the compensation is not too expansive, nor inadequate given our standard of fairness. In this outcome outside the veil, individuals have little or few opportunity sets and the trusteeship would ensure they have these available to them in keeping with the insurance calculation.

However, this does not seem appropriate for all of the cases that fall between being typically embodied and those in need of complete trusteeship. Dworkin's attempt to tackle handicaps fixates far too much on a conception of handicaps that is incomplete. The extremes of the conception are articulated fairly well, that is extreme handicap and the possession of negligible deficiencies in natural endowment (although Van Parijs will disagree with this latter point).

However, the distributions that fall in the middle may or may not preclude particular preference schedules. Dworkin argues that the process here is to calculate our inconvenience and needs from a given condition and to compensate based upon this standard. Dworkin's modified argument gives knowledge of talents/propensities but not their value. I argue that if individuals knew that there was a possibility these conditions would not harm their preference schedules, they would act to insure themselves against not being able to access bundles they would actually want first. Dworkin does not address this appropriately, because it is not sensitive to the fact individuals may be able to utilize bundles with appropriate accommodation. These individuals envy the endowments of others so the insurance compensation is intended to remove the envy from A to B. However, this compensation could have made the bundle available to A at no added insurance cost to B. It would only be in lieu of this being possible within a system of fair reciprocal cooperation, that individuals would seek to be compensated. Individuals would want to exercise their reasonable capabilities if this adaptation was reciprocally reasonable.

Crucially, this appears to take on the idea of Dworkin's insurance scheme broadly but envisions the adaptive and compensatory measures of it in a different way. Dworkin does not draw his scheme this way because he argues the expenses will be too expansive. Dworkin argues the maximization of preference schedules would make expansive redistributive claims. This was part of his critique of the actions of the difference principle. The expansive redistributive claims would only improve nominally the conditions of the handicapped while enforcing great and unjust expenses for the embodied. In moving this theory away from Rawls, he argues against this maximin redistribution conclusion. Their potential set of ends would only improve slightly while the rest of society faced an inordinate financial burden.

The insurance scheme is generally intended to prevent the overcompensation of the least well off and the handicapped in a society while still affirming the equal political condition of all in a way sensitive of legitimate frailties. Given the allocative measures present in the auction, I am arguing that the decision we would reach in the provision of the insurance will be quite specific in itself. This is a particularly important nuance given the type of state Van Parijs argues for and his arguments against Dworkin. I would further urge that all liberal arguments need this development because none have treated this issue appropriately. This is because we need to take the moral agency of the handicapped seriously and not overdraw it when balancing the claims of circumstance and choice. An adaptive commitment does not repudiate the action of mitigating cost through a reciprocal calculus such as the insurance scheme Dworkin suggests. Accessibility accommodations are not a maximization of condition or of the access to the most bundles possible, which Dworkin summarizes such a commitment would do. Instead, the accommodation is one we could fairly reach in abstraction as constrained by our insurance calculation. For example, an adaptation that might be required for someone is a wheelchair. The provision of the wheelchair can be legitimized if it meets the fair reciprocal cost of the insurance and it would give the individual a far greater set of bundles to choose from. This commitment does not say, as Dworkin fears it might that we should provide a diamond studded wheelchair or individual hovercrafts because we are committed to a maximin account of redistribution. These kinds of adaptations would

be very cool and the case of the hovercraft may allow some individuals greater access to bundles, but it not fair to expect society to provide an exorbitant adaptation. Our insurance calculation can constrain cost but it can fairly prioritize adaptation over compensation based upon our desire to take choices and the moral agency of the handicapped seriously.

However, this is only accomplished if the costs of adaptation are not in themselves taste sensitive. My implication here is not just one of second-best practicalities but rather the logical commitment of the principles of justice that resulted from the modified veil. This principle I will call the Principle of Just Access.¹⁴³ It is only after this that generalizations of condition can come into play as they can assert the needed faculties to access a set of goods based solely on the set of goods not the personal preferences of the individual to a set of goods. The Principle of Just Access will work as follows. In the original position, it could be asserted that individuals with handicap X will need adaptation Y or Y, P, and Q to do Z. Individuals calculating how much they would want to compensate themselves for having a handicap would determine the reciprocal insurance but prioritize how they receive it. If Y or Y, P and Q are cheap enough to be paid for by the level of compensation, this is what they should receive in order to access Z. If Y or Y, P and Q are too expensive and would disproportionately burden society, then the individual would receive compensation for not being able to access Z. Taken over a society where those with meaningful handicaps is sizeable although still a distinct minority, this would allow the state to legitimately mandate forms of access in infrastructure and adaptive provisions that could allow those with handicaps that are not extreme to participate in a full range of activities permitted by their natural endowment. Given Dworkin's, and as we will see Van Parijs', development of the Rawlsian project, this is an added layer of nuance that is needed for the commitment of providing equal opportunities. This principle, which preceded the difference principle, dictated that careers as well as social and political offices would be open to all based upon their ability to fulfill these roles. Given what we have now established about

¹⁴³ My sincere thanks to my advisor Peri Roberts for giving my idea this very appropriate and far more straightforward moniker.

handicaps and talents, a principle that provides for accessibility claims reciprocally is required by our conception of justice. The Principle of Just Access is this principle and is needed to take the ambitions of the handicapped seriously even if we constrain reciprocally the actions of the principle. The Principle of Just Access acts to leximin, fairly through insurance calculation, the choices individuals can make. It is important in affirming moral agency for the handicapped. However, it is also crucial in moving us further toward allocative justice and a distribution of fair shares. This is because we have a need to equally value the tastes individuals have which motivate these choices. The latter of these points I will return to in the next chapter but let us for now focus on the internal endowment and ambition aspects of my principle.

The handicapped are in this way empowered to take part in more bundles of goods as a matter of justice rather than simply to receive compensation for their inability to do so. In a compensatory scheme, the handicapped are materially provided for but not necessarily given the ability to access the bundles of goods their embodiment prevents them from partaking in. If the agreement is to provide the access necessary to partake in bundle selection with the greatest plausible equality through reasonable adaptive provisions, handicapped individuals actually receive the access to exercise choices and talents that the material compensation on its own will not provide. The Principle of Just Access is a better systematic commitment given our inability to change natural circumstances completely compared to the nebulous and irreducible compensatory actions of insurance given to us by Dworkin. It is better because it is ambition sensitive and yet endowment insensitive in a far more coherent and equal way.

Within the confines of Dworkin's experiment, the veiled individuals have to take seriously their potential ambitions while insuring themselves against certain conditions and balancing these claims against the possibility they have no "natural" obstacles whatsoever to their preferences. This arrangement allows the constraint intended by the insurance to be retained in deciding what kinds of accessibility and compensation are required. However, the accessibility must come first given that these individuals could all equally have ambitions within any natural set of opportunities their endowments

afford them on the other side of the veil. Because accommodations are calculated, as Dworkin suggests, we are able to discern what accommodations are reasonable and which are not in helping individuals realize a set of opportunities. The question we must ask Dworkin, given he does not add this wrinkle to this theory, is why compensation is what we give the handicapped person when a fairer value for their liberty would be to provide them with these reasonable adaptations first through a Principle of Just Access. Then after undertaking such a process examining the constraint of the insurance calculation and deciding when compensation is more appropriate (presumably due to the cost of the adaptation). This development is vital if the handicapped are going to be subject to the property claims of a system that is ambition sensitive. Their ambitions and choices must count too and it should be our foremost concern when considering how to treat the handicapped in an allocative scheme like Dworkin's.

The major advantage to a Principle of Just Access constrained by an insurance scheme is asserting first the appropriate level of reciprocal redistributive obligation. More simply put if Y or Y, P and Q are needed to do Z and this is what we would agree to, we only do so if we knew the cost of Y or Y, P and Q on our collective society. Indeed some adaptations may make activity Z available to a person with a specific handicap but some of these provisions are quite costly, so we must envision a way this could be provided without disproportionately obligating the talented or industrious. The insurance scheme works to strike the balance of reciprocity in devising a system that affords a set of actionable ends for the handicapped with a set of equal liberties for all. If the burdens of providing the adaptations needed for a specific handicapped individual to partake of a bundle of goods are so costly that it reduces the bundles and liberties disproportionately of either the equally handicapped or the society as a whole in obligating them to provide the adaptation, it would be an unfair arrangement of society. It would be unreasonable of individuals to expect to be able to partake in absolutely any of the available bundles in the societal auction. All individuals are clearly capable of making taste choices given their general particularities and the handicapped in this respect are no different. So although they are clearly owed compensatory measures to counteract their frailties and insure their condition when a great deal of stewardship is

required, this obligation cannot be absolute given that it is equally arbitrary that other individuals are born with other natural endowments. Crucially, providing adaptation would make the distribution sensitive to what handicapped individuals choose to do with their talents and labor. Handicapped individuals may need assistance but this assistance must prioritize access reciprocally prior to monetary compensation even if these actions are justly constrained. A proper inspection of society should yield precisely this sort of commitment if motivated to ensure endowment-insensitivity and ambition-sensitivity in distributive outcomes.

Dworkin does not give us this nuance in the insurance scheme. It is important to accept the Principle of Just Access given the aims of his system and the changes he urges should be made to an account of justice. Dworkin's development of liberal justice is important in making an account of justice balance matters correctly. However, without moving beyond his account, we will not be doing enough. The issues that surround discerning what effect ambitions and talents can have on distributions are difficult conceptual arguments. It is important to understand Dworkin's pragmatism in addressing it as realizing absolute natural justice is not possible in practice. However, accepting compensation without the Principle of Just Access operating first is far from even a second-best solution. Handing handicapped individuals' compensation in the form of money, which is clearly the implication of the project, does not take seriously their ambitions, choices or moral agency. Perhaps most strikingly, this is an argument about how we conceive justice, not how we undertake best practices in our non-ideal world beyond the veil. The Principle of Just Access will undoubtedly imply different things in different contexts. However, the Principle of Just Access will be needed no matter what to drive this process and ensure a fair society. Striking a fair balance may require a "second best" approach but this does not mean that we should not allow ambition to count for the handicapped as much as it can count. The Principle of Just Access allows us to develop the liberal argument in this way. It also does not impugn Dworkin's allocative development of the liberal argument. It simply prioritizes how elements of this argument have to work in order to be coherent and just.

The problem of pragmatic assertions within Dworkin's response rears its head again in Dworkin's acceptance of end-result taxation. In the following chapters, I will show how Van Parijs gives us a way around this problem even if he does not use it himself to accomplish this task through resource rents. It is important here to simply understand the issue. Dworkin wants choices to count but argues it is simply too difficult to figure out which material end-results are legitimate and which are not given the possession of certain endowments. Because of this, end-result taxation is the best way, even if it is not an ideal way, of calculating redistributive obligation. This account falls short if we have a better tool for realizing our ideal principles through institutions of justice as I have argued our Principle of Just Access does. Given Dworkin's allocative account of fair distribution, I will argue that there is a better measure than using naked end-results given the need for ambition sensitivity. The Principle of Just Access removes the aspects of natural endowment that are troubling in our account of realizing talents. It is the best we can do. As such, it makes us take more seriously how our allocative processes work. In the forthcoming chapter, I will suggest there is a better tool to measure obligation within an allocative system of justice and I will inspect Dworkin's argument more during this process. It is important here to understand where Dworkin's extrapolation of a modified veil does not go far enough. This is the case in terms of the ambition sensitivity of the handicapped and I will argue it is also the case in envisioning a scheme of fair reciprocal taxation on an allocative account of distributive justice.

The Principle of Just Access must be part of our conception of compensation through insurance if this conception is to be coherent with its own aims. The Principle of Just Access requires a constant inspection of "reflective equilibrium"¹⁴⁴ in conditions of technological advancement. The rules of what is too much and what is not enough in respect to any given handicap and bundle of goods Z is going to be a moving target based upon the technological advances and their relative share of distributive resources in a society over time. As troubling as this inspection and commitment may be logistically, these hard discussions are just part of the ongoing process of best realizing moral commitments in imperfect conditions. Given the strain on distributive resources is the

¹⁴⁴ Rawls, John: *A Theory of Justice*, p. 10

same as Dworkin's scheme because constraints created through insurance, I believe the clear advantages to envisaging a commitment to the handicapped in this way are seen in how the scheme could better address the commitments to ambition sensitivity and endowment insensitivity of all parties in a society including the handicapped.

3.3 - Conclusion

It is important at this juncture to note what precisely Dworkin adds to our considerations of justice. Choices realize talents. This is why a consideration of justice ought to be ambition sensitive. These choices are affected by individual and social circumstances. These considerations cause us to take steps of remediation in order to ensure a fair society. Rawls gives us a way to work through these considerations and ensure a fair society. Dworkin acknowledges this and develops this liberal argument due to the sensitivity problems that caused Rawls to endorse maximin redistribution. Dworkin's development of liberalism, in this regard, is a needed step.

Rawls clarified the decisions about justice we ought to make. A just system is a fair system and it is for this reason we must question our procedures rather than treat them as a deontological consequence of our rights. The redistributive scope of the difference principle implies actions of maximin transfer to the least well off within the spectrum of efficient distribution. His theory relies on an argument about talents that I have asserted is not detailed or sensitive enough to articulate the true nature of talents. The problem is that choices are not properly accounted for in Rawls' position. A natural endowment need not always place such individuals in the categorization of being the worst off in society. In fact, they could be quite affluent if their preferences and ambitions do not conflict with their physical condition. Inversely, those with preferred sets of natural endowments may choose not to utilize them legitimately and become the least well off. This is not because of their natural endowment but because of their individual choices. Knowing this potential exists, the reasoning of the difference principle is problematic.

Dworkin highlights these problems and uses them to motivate the auction and insurance scheme. These devices articulate the concerns we should have in terms of natural and social resources while building in greater considerations for the legitimacy of individual choices. This leads to a system of allocation by refuting the strong contention

Rawls had against this kind of system ensuring justice as fairness. It is through our inspection that we can see why this move is a necessary one and why it comes from a modification of Rawls' account of the veil of ignorance. However, Dworkin falls short on fully addressing what is needed to ensure the correct balance between ambition sensitivity and endowment insensitivity. This is not a matter of questioning his project but rather extrapolating it properly. I have argued for some distinct developments of the liberal argument through the Principle of Just Access and an allocative market.

In the last section, I argued a better way to address these considerations in the modified process suggested by Dworkin would be to accept the Principle of Just Access, which would provide reciprocally fair accessibility provisions to the handicapped. This comes through prioritizing how we conceive appropriate modes of compensation. Dworkin wrongly discounts this option because he places it before the insurance calculation. The calculation of the obligation is legitimate, but it acts only to provide compensation. Given a deeper understanding of the issues at hand, individuals would act to insure they had access to plausible reciprocal ends rather than to be simply paid off. If our insurance calculation acts in a subjugated order, it creates a leximin set of choices for the handicapped that is constrained fairly and reciprocally. Disabilities do not preclude individuals from having talents nor from making choices. These individuals are not always incapable of interacting in a market system. Thus implying the illegitimacy of allocative claims from a consideration of natural endowment is not appropriate even if such a discussion leads us to include these factors in our considerations of justice. It instead implies that choices have to be valued equally even for the handicapped and our obligation to provide opportunities to make choices can be constrained by fair standards of reciprocation.

In this way, disabilities would be taken as contributory to the exercise of talent but not as the sole factor. Given we cannot actually equalize distributions of natural endowments or fairly commit to the maximin principle this appears a better "second best"

option.¹⁴⁵ The disabled are entitled to greater compensation due to the morally arbitrary nature of their handicap. However, to conflate the handicapped as being unable to use bundles of goods or make choices is to overstate the helplessness of the handicapped and to belittle their autonomy. The issue is meeting the extra needs their handicaps create in accessing aspects of society. These individuals need help to reach and retain an initial starting point in society over time comparable to the non-handicapped but this does not mean that the handicapped are untalented nor are they unable to economically excel in a capitalist society. The cases in which the handicapped are truly incapable of being equally able to participate in society no matter the resources provided are relatively small. They need to be provided for in an account of justice and Dworkin gives us a way to deal with this matter fairly and reciprocally. Still, to conflate talents and disability as the same question is to make a tragic and gratuitous over simplification of the two matters taken separately. One does not imply the other.

Although Dworkin does well to address Rawls' mis-step in constructing the difference principle, the lack of articulation in the consideration of talents still poses a large problem. It is a problem that will appear again when we discuss his measure of taxation based upon end results in the next chapter. Dworkin provides us with a way in which an allocative scheme can work within the framework of a Rawlsian account of justice broadly speaking. Dworkin posits a development of Rawls theory to build in needed sensitivities. It also highlights precisely where in the Rawlsian project this development has to arise in order to account for these sensitivities properly. Even if Dworkin's "second best" options lack needed nuance and extrapolation, Dworkin's general premise and developments of Rawls' project are going to be extremely important going forward. He rectifies shortcomings in Rawls' thought and Van Parijs will need to do the same in some manner to pose a convincing argument about distributive justice.

¹⁴⁵ It is important to note here in passing that I am not even sure we need to think of this as "second best" course of action. Even if we could "fix" natural endowment issues, I believe that individual agency may preclude actions to rectify, through bodily operations, these factors without individual consent. Our obligations and conception of liberal justice are then always going to require a Principle of Just Access even if this dictates in context medical remediation. I feel there is much to be written about natural justice and the social aspects/interpretations/treatment of handicaps which I hope to elaborate on if I am fortunate enough to expand on the idea of a Principle of Just Access as a singular written work.

Our discussion needs to move on to discuss Van Parijs' critique of what a legitimate disability is and how we balance the claims of choices and circumstances. Van Parijs will put the ideas of Dworkin under scrutiny in the next chapter. It will be important to note the way Van Parijs uses a similar frame of reference to Dworkin but takes it in a very different direction. We will also have to see if Van Parijs has properly addressed the problems that I have asserted exist in accepting the liberal arguments we have assessed. They will ultimately be a focal point in deciding how Van Parijs' system of justice works or ought to work in developing liberal justice.

Chapter 4 - Van Parijs and “Real Freedom”

Introduction

In the past three chapters, we have explored several different explanations of distributive justice. These answers raised important critiques and concerns that will be our tools for assessing conceptions of justice moving forward. The intent of this exposition was to determine a conception of justice should encompass and how a state might best fulfill these needs. I have argued through this process for some specific developments in our conceptions of justice given some of the shortcomings I believe they have. With these arguments in hand, we now move onto the work that will be the primary focus of this text, the commitment to “real freedom” and basic income state presented by Philippe Van Parijs.

Van Parijs presents an approach that develops Rawls conception of justice. From a cursory look, Van Parijs’ suggestion for an Unconditional Basic Income (UBI) and the reconciliation of various claims of justice seems counter-intuitive. As we have seen through the progression of this text, given some key developments, our approach has moved more naturally to a specific account of liberalism that embraces allocative processes. As a result, Van Parijs presents an account of liberal justice and state practices we need to take very seriously. For Van Parijs, our goal is to work to provide optimal individual freedom within a just state. For Van Parijs the resulting commitment of justice, “real freedom for all” hence referred to simply as real freedom, intends to justify capitalist practices and the operation of choice-based market mechanisms with the redistributive concerns a coherent conception of liberal justice raises. The result for Van Parijs is a “real libertarian” state, which institutes a maximized unconditional basic income (UBI) to provide individuals with “real” opportunities to pursue their conceptions

of the good life.

As we move through this chapter and the conclusion, we will first engage with a summary of Van Parijs' argument for "real freedom" and the institutions he argues this idea requires of the state. We will move from this understanding to explore how Van Parijs and his conception/institution of "real freedom" deals with the issues raised in the previous chapters, namely choice sensitivity, endowment insensitivity, property rights, background justice and equal initial material condition. We will also place Van Parijs' suggestions against the developments to liberal justice I have forwarded and see what his claims do or do not do to realize these needed moves in the liberal argument. To accomplish this, we will first assess what exactly "real freedom" is and where it fits into our previously asserted canon of liberal thought. The first step will be to assess what Van Parijs' theoretical argument is along with assessing the aims and objectives therein. This exposition is necessary to understand the institutional motivations and structures that we will assess in consideration of Van Parijs' critics in the following sections. Through this initial exposition, we will see the role of the market and choice Van Parijs places within a Rawlsian project. We will then discuss how this system construes market relations and if it succeeds in correcting capitalism. We will see if Van Parijs has met our intuitions about structures of entitlement, the market, autonomy, circumstances and choices.

By elaborating on his arguments, we will show where greater articulation is needed if Van Parijs' systematic suggestions are to meet our decisions about how to develop liberal justice. It will be my position that Van Parijs can flow more naturally than it first appears from a straightforward liberal argument. However, his argument requires a development like that of Dworkin and a Principle of Just Access as I have outlined in the last chapter. I will show how Van Parijs helps us make good on our conception of the Fair Shares Proviso and how it works within an allocative market structure. I will show at the same time that Rawls, Dworkin and Van Parijs do not work these needed aspects into their theories and this causes us to embrace further development of the liberal position, which I will forward in the conclusion. In this chapter and in the conclusion, I will show how this development can be arrived at and

explain how some of Van Parijs' institutions can be defended by this account. In the conclusion, I will tie these arguments together. I will highlight what developments Van Parijs gives us and why these must be motivated by the bespoke liberal argument I present to work coherently. However, we must address presently what Van Parijs' substantive account of liberal "hybrid" justice is and how he intends to provide the benefits of "real freedom".

4.1 “Real Freedom for All” and the Unconditional Basic Income State

Van Parijs’ ideas have developed over the course of the past thirty years in response to problems and developments he saw emerging in political systems around the world. His theories and subsequent state model are an attempt to solve the problems he sees in each and amalgamate their individual benefits. As he writes,

‘Slipping back ever more deeply into laissez-faire capitalism, reaching desperately for the Swedish model, clinging defensively to the welfare state—is there any other future worth contemplating for advanced capitalist countries, now that whatever of genuine socialism was still left on the list of political possibilities has been decisively squeezed out by what happened in Eastern Europe? Along with a growing number of people in Western Europe, I believe that there is, and, moreover, that this further possible future is more desirable than the three I have just mentioned. Basic income capitalism is the expression I shall use to describe this further possibility. It refers to a socioeconomic regime in which the bulk of the means of production is privately owned, while each citizen receives, aside from any income she may derive from participation in the labor or capital markets or may owe to some specific status, a substantial unconditional income.’¹⁴⁶

Van Parijs’ project is bold. Our systems of political economy are tugged in many different directions that seem in one way or another troubling. Van Parijs suggests there is another way forward that can resolve these conflicts. Van Parijs’ theories and institutions are an attempt to solve the shortcomings of socio-economic and political arrangements of societies and governments. Importantly for Van Parijs, this solution is derived through correcting the issues and retaining the intuitively strong arguments that exist with other theories of distributive justice. Van Parijs’ solution is one of systematic change but this requires that we reframe our thinking about arguments of justice.

¹⁴⁶ Van Parijs, Philippe: ‘Basic Income Capitalism’ in *Ethics*, (Vol. 102, No. 3, Apr. 1992), pp. 465 – 484, p. 465

Van Parijs argues that these systems have taken state structures in different directions because they do not consider the proper philosophic principles when motivating the structures of the state. Generally, these states either focus far too strictly on rights, such as the libertarian capitalist model of state. Alternatively, states redistribute in an incorrect manner based upon a conception of equality or condition, such as welfare and contemporary socialist/communist models. Van Parijs argues that we must change our thinking about these issues to arrive at alternative institutions of distributive justice that correct the shortcomings of the states we see today.

To do this, we must reconcile the importance of individual freedom with the need for individual resources and political equality. Van Parijs argues that the way forward is to consider what it means to provide individuals with the freedom to do “whatever one might want to do”.¹⁴⁷ This is what Van Parijs calls “real freedom”.¹⁴⁸ It differs from the considerations of freedom we have thus far assessed. “Real freedom” is an expansive account of the freedoms individuals ought to have in society. Van Parijs argues our conception of individual freedom is incomplete if it is only the freedom to do what we currently want to do or only the freedom from coercion. Our freedom ought to be ongoing and allow us the means to access the greatest set of opportunities over the course of our lives in the most non-prescriptive way possible. Van Parijs is setting out a development of the liberal project specifically focused on providing an optimal level of individual freedom, which the projects of Rawls and Dworkin have done improperly.

The argument for “real freedom” justifies the systems he later suggests. For this reason, accepting his system requires us to analyze closely the commitment to freedom he is asking us to make. Van Parijs is specific in outlining what must be done to provide this conception of freedom both theoretically and institutionally. Van Parijs understands the importance of formal rights protections but argues this is only part of a proper consideration of freedom. Van Parijs wants the reader to recognize that “real freedom”

¹⁴⁷ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, (Oxford: Clarendon Press, 1995), p. 4

¹⁴⁸ *IBID*, pp. 25-29

requires legitimate access to ends. He wishes to retain the important and appealing emphasis on individual freedom present in capitalist societies while addressing the immoral inequalities current capitalist systems can yield.¹⁴⁹ This requires Van Parijs to use “real freedom” to depart from unfettered capitalism but on different grounds and/or in different ways from contemporary socialist and welfare practices. Van Parijs states the commitments of “real freedom for all” as follows:

1. There is some well-enforced structure of rights (security).
2. This structure is such that each person owns herself (self-ownership).
3. This structure is such that each person has the greatest possible opportunity to do whatever she might want to do (leximin opportunity).¹⁵⁰

The first two of these commitments are present in “right” libertarian state models such as the model drawn by Nozick, which we inspected in the first chapter. These obligations lead the minimal state to provide only rights protection and endorse what Van Parijs refers to as a “pure” capitalist system in order to protect property rights. These protections are formal freedoms in that they only act to ensure that individuals are able to do what their individual rights license them to do.

However, Van Parijs does not encourage understanding self-ownership and rights security in these strict ways. Van Parijs calls such a fixation with rights, “rights fetishism”¹⁵¹ and urges a more nuanced view of rights protection, in particular a more specified understanding of property rights. The lack of clarity in rights aside, Van Parijs still asserts them as one of the foremost concerns of “real freedom”. This is because rights security and the formal self-ownership provided by the possession of these rights secure individual autonomy. Legitimizing and providing the appropriate background for individual choices is the basis needed for the third commitment and later the structures

¹⁴⁹ IBID, Introduction, p. 1

¹⁵⁰ IBID, p. 24

¹⁵¹ IBID, p. 15

needed to fulfill all three of the commitments of “real freedom” simultaneously. “Real Freedom” requires real options so that individuals can do whatever they might want to do within the constraints of a fair and just society. In many ways, the formal rights security and self-ownership show similarities between the “right” and “real libertarian” approaches. However, this is where the similarities largely end. Van Parijs’ freedom-based approach urges that the State must take on board further commitments. This is a stark deviation from the rights-based minimal commitments espoused by Nozick and other “right” libertarian theories of justice that support procedural capitalism as a matter of rights protection. However, the move Van Parijs is making is one we can support given what we have asserted about libertarian claims in the previous chapters.

For Van Parijs, rights are important but they are only part of what our conception of individual freedom ought to be. This fixation with rights leads Nozick and other libertarians to endorse conceptions of procedural justice that do not adequately consider the needs of justice and initial equality. At the same time, the importance of rights is implicit in the self-ownership and rights security tenets of “real freedom”. For these ideas to mean anything, they must substantively protect a set of individual rights. However, Van Parijs argues that in order for individuals to have an optimal level of individual freedom, they must have a leximin set of opportunities to accompany these rights. These opportunities require redistribution and a set of meaningful resources. Though this includes the protection of rights, these rights do not solely secure individual freedom.

This difference plays an important role in Van Parijs’ refutation of “pure” procedural capitalism. This argument is important in coming to the eventual liberal conclusion Van Parijs is asking us to arrive at about freedom and justice. It is evident at this early stage that Van Parijs is taking us down a similar path to the one we have already asserted about the libertarian argument and how it leads more naturally than one might think into a liberal account of justice. Capitalism, for Van Parijs, is not implied by rights security. The market is an important but subordinate consideration. Instead, it will be an instrumental result of realizing a commitment to “real freedom” in specific socio-

economic contexts. This commitment encompasses rights, but puts these in context as part of the larger egalitarian commitment. In order for individuals to engage fairly, equally and most importantly with an optimal level of individual freedom, Van Parijs argues they must have a leximin set of opportunities, which includes a distribution of all-purpose means.

Van Parijs sets out to verify his claims by working through how they could be institutionalized. The first question he sets out to answer is whether a capitalist or socialist model of government best fulfills the commitments of “real freedom”. Van Parijs begins by discussing how neither of the systems is inherently unable to provide the first two commitments of “real freedom”. Van Parijs argues that socialist structures do not violate rights or self-ownership simply by institutionalizing the public possession of property. He argues that socialism and capitalism hold as paramount the formal self-ownership of those participating in either system. The public ownership of property does not refute this imperative.

“Right” or “pure” libertarian theories of justice and property rights, like that of Nozick, argue that socialism is inherently unjust as a state system because it violates the rights of individuals. For Van Parijs, the “pure” form of capitalism is characterized primarily by the complete legitimization of private ownership including ownership over the means of production. Van Parijs argues these kinds of claims rest on the idea that in putting one’s labor into an object, the fruits of this labor are the rightful entitlement of the laborer.¹⁵² Van Parijs urges instead that one’s labor may not garner a complete property right over the product. Instead, Van Parijs suggests his more nuanced understanding of property rights. Van Parijs uses the following example, “[i]f she uses no resource in scarce supply, she can legitimately keep the whole of her product. If she does—as all her kin do in the real world—then she cannot fairly complain about a scheme that distributes maximally among all the value of the scarce assets very unequally appropriated by some.”¹⁵³ Van Parijs differentiates and qualifies claim rights. They are only absolute in

¹⁵² IBID, p. 160-164

¹⁵³ IBID, p. 135

certain cases in keeping with a resource account of redistribution. If this is not the case, collectivization of a product produced through labor can be just.

For Van Parijs, his approach intends to correct the problems of not just capitalism but Marxist-style socialism as well. Van Parijs argues against a “pure” form of socialism as a system that legitimizes public ownership of all resources including the means of production. Van Parijs argues socialism in a “pure” form will be unable to provide the more nuanced understanding of property rights he describes as all property will be collectivized. However, he argues an “impure” form of socialism may be able to work with such an entitlement structure. Instead the argument for “impure” capitalism, such as basic income capitalism, is that socialism, even in an “impure” form, is less capable, in an ideal situation, of providing optimal “leximin opportunity” sets when compared to an impure capitalist structure.¹⁵⁴ For this to be so, Van Parijs sets out to address the charge that capitalist structures are inherently exploitative and as such violate the formal self-ownership of individuals.

The refutation of such claims lies in the same property distinction argument Van Parijs posited to refute the same kind of claim against forms of socialism. Van Parijs explains in the same example that having a property right over a self-produced good made with a plentiful resource is not inherently exploitative and thus neither is a claim right garnered from this labor. The idea of a qualified yet robust claim right is a concept that socialist structures have difficulty protecting. Private property rights can be constrained by public provisions for the basic structure but are plausible and necessary, which makes complete public ownership, schemes a problem. As we noted in discussing the argument of Cohen for collective ownership in the first chapter, the complete public ownership of resources required an untenable account of autonomy due to the unqualified veto individuals had over each other. Van Parijs never enters this debate in any deeper detail at least in forwarding “real freedom”.

¹⁵⁴ Impure capitalist structure meaning one that has this more detailed and stipulated understanding of property rights counter to the absolute property rights propounded by Nozick.

I venture to add here that his description of both systems protecting formal rights lacks at least a certain amount of deep inspection into what a socialist account has to look like. We could argue that many of the systems we attribute to being “socialist” are not socialist in a comprehensive way. If claims of property are qualified but important, we have to assert that they fulfill something deeper in our account of justice like the choice aspect of individual moral agency. Although both socialism and capitalism may have formal protections, they do not have the same formal protections. Choices do not matter to the same degree in each. One ends up being better than the other at providing qualified claim rights because it attributes power to moral agency and choices the other does not. These nuances are important and will be returned to but for now, let us just continue because the argument being posed is in keeping with what we have asserted about our development of a liberal conception of justice. Although some capitalist systems may be exploitative, not all capitalism is by nature exploitative. This implies that capitalism is capable of being morally coherent in an “impure” form. This is in keeping with the qualifications needed to reconcile a market device with an appropriate conception of justice.

So if both systems in an “impure” form can answer the moral questions asked of them in respect of the first two tenets of “real freedom for all”, the question in terms of “real freedom” becomes which “impure” system provides the third commitment of “real freedom” (leximin opportunity) better. Van Parijs argues this is, in ideal situations¹⁵⁵, a specific type of “impure” capitalism. Van Parijs argues that “impure” socialism has trouble optimizing preference schedules as decisions of utility are made on some level and the personal value of needs and entitlements are harder to allow given public claims of ownership. Although socialism provides for needs universally, it does so in a prescriptive manner by providing the item regardless of its value to a given individual. Although an overwhelming majority of people may “need” X, the value people associate with that need is not taken into account and thus there is a violation of their ability to choose, which could be reconciled under an “impure” form of capitalism. Socialism

¹⁵⁵ Please refer to, Van Parijs, Philippe: ‘Philippe Van Parijs Responds’, *Boston Review*, (October/November 2000, updated 2005), <http://bostonreview.net/BR25.5/vanparijs2.html>

must assume social value or utility. In doing so, Socialism has a hard time reconciling the provision of resources with the choice sensitivities that Van Parijs argues should be a part of our conception of freedom.

Capitalism becomes optimal, if envisaged correctly, for providing these optimal preference schedules because it allows individuals to self define the value of their needs and desires. This increased freedom secures a level of opportunity selection and choice not present in even “impure” forms of socialism. However, Van Parijs argues this form of capitalism implies an unconditional basic income (UBI) in order to make sure that the commitments of “real freedom” are met. The UBI will be discussed in more detail later in this chapter but it is important here to understand why this measure is needed in a fundamental way to secure “real freedom”. To be able to do whatever one might want to do in a state that utilizes a market, individuals have to have some equal way of accessing this market. The UBI becomes necessary in providing individuals with the access to the market that quantifies their choices, needs and desires. The purpose of this project is to layout the framework of a state model that addresses the problems seen in modern states. So, without this crucial piece of the “impure” capitalist state, the capitalist project is untenable as it realizes only the formal aspects of individual equality. “Real freedom” requires a way for individuals to access the means of production and the resources present in the society and the UBI is to fulfill this role.

As Van Parijs will utilize aspects typically attributed solely with socialist or capitalist systems, he uses this exposition to legitimize why his standard of “real freedom” borrows aspects and corrects the shortcomings of each in a unique way that we should accept. “Impure” capitalism is not as strict as the “pure” version and does something both forms of socialism cannot. As I have alluded already, Van Parijs reaches this distinction in a way that is not troubling but perhaps requires deeper inspection. Choices count but are relative to the reciprocal claims of others relative to the resources used. This effectively qualifies property and market claims. Van Parijs is asserting our need to accept his “impure” account based upon our need to take these claims, caused by our choices seriously. Therefore, our need to honor property claims comes from a far

deeper philosophic consideration about the importance of honoring choices and their outcomes. Van Parijs will construe resources with freedom because he assumes they provide the needed level of moral agency and equally valued choices we have been arguing for, but they clearly do not do this on their own. Formal protections have to do some work here. It is what it takes to fulfill a commitment to valuing choices fairly and reciprocally that needs to drive our developments. It may be that “impure” forms of distribution work based upon context in more or less appropriate ways. To have the resources individuals need for moral agency and a set of leximin opportunities, how a state distributes goods is likely to change in a way reflective of what is available contextually. However, the importance of the systems is to provide the means to fulfill ends, in other words, the ability to make choices. What gets handed out is only part of the story because we need to be able to choose how we value and dispose of these resources. This implies a market and would drive the criticism of socialism (in many forms) far deeper than Van Parijs believes. .

However, this is based upon an argument about choices that Van Parijs simply never has. Being concerned with what one might want to do means that individuals have to be able to choose what they want to do in a just and reciprocal way. The freedom we are talking about does nothing without choices, so our attention has to focus on how this issue is balanced against our other claims not just that choices happen in either context. If one provides for them better it is because it does not constrain them in a way that is unfair and hence unjust. It is this factor, in part, which shows why Van Parijs gives us useful institutions but an inappropriate or at least incomplete account of distributive justice. The intuitive notion about choices mattering is present in driving his theory and institutions in a certain direction. The “impure” system he advocates has to fulfill the commitments of “real freedom” but so too must illustrate why “real freedom” legitimately falls within the liberal family in which Van Parijs says we should place it. The “impurity” of the system being used shows the need for background justice, as the claims he wants to allow are qualified. It also removes “real freedom” from the strict egalitarianism and ownership structure of “pure” socialism and the “pure” rights account of libertarianism. What is left is the liberal middle ground. Nevertheless, as I have

shown through my development of this middle ground argument, there is a right way and a wrong way to develop such an account. Van Parijs in missing the role this point plays in his argument begins to show why he will develop liberalism incorrectly and why this will lead to some major problems.

This commitment to providing “leximin opportunity” is a development of the Rawlsian conception of justice as fairness. Rawls’ concerns about material liberty and political equality highlighted how formal rights protections were not enough to ensure a fair and just society. This argument is compelling, as we have discussed in the previous chapters. Van Parijs argues “real freedom” is an exercise in ‘reflective equilibrium’¹⁵⁶ and as such can be seen as taking on a Rawlsian conception of liberal justice. Van Parijs’ “real freedom” project is one that adopts the Rawlsian argument as to how to resolve justice and develops it. However, as his argument does not mirror Rawls completely, it will be vital to assess where Van Parijs develops a Rawlsian project into his own. Van Parijs adopts this position through his general commitments to equal liberty and opportunities. The Rawlsian leaning of Van Parijs’ standpoint has a profound effect on the use of the market in the “real libertarian” state. He advocates the use of the market but not because it protects rights. Van Parijs argues the use of the market is necessary to ensure individual freedom.¹⁵⁷ The value of capitalism is instrumental rather than a matter of strict formal rights protection.

It is in this light that we can see how Van Parijs is specifically developing Rawls project. “Real libertarianism” is not actually libertarian in any classical sense. Van Parijs states that the third principle, that of leximin opportunity, “... requires that the amount of external resources given to those who are given least of them should be as large as it can

¹⁵⁶ Van Parijs, Philippe: ‘Hybrid Justice, Patriotism and Democracy: a Selective Reply’ in Reeve, Andrew and Williams, Andrew (eds.) *Real Libertarianism Assessed: Political Theory after Van Parijs*, (Basingstoke: Palgrave Macmillan, 2003) pp. 201 – 218

¹⁵⁷ Van Parijs, Philippe: ‘Egalitarian Justice, Left Libertarianism and the Market’ in Carter, I., de Wijze, S., and Kramer, M. (eds.) *The Anatomy of Justice. Themes from the Political Philosophy of Hillel Steiner*, (London: Routledge, 2009) pp. 145 -162

sustainably be, with resources measured by their opportunity costs, as approximated by their competitive market values.”¹⁵⁸

Van Parijs diverges in this way because he wants to correct the deficiencies a purely procedural and rights focused conception like Nozick’s has. As Van Parijs notes, “One is really free, as opposed to just formally free, to the extent that one possesses the “means,” not just the “right,” to do whatever one might want to do.”¹⁵⁹ Van Parijs emphasizes, “Liberty comes in through this neutrality postulate, through the constraint of self-ownership, and through a concern, not directly with people’s happiness itself, but with the means required to pursue it.”¹⁶⁰ As we have seen, this move from libertarianism to a liberal approach flows more naturally than it first appears it might which gives Van Parijs’ argument power.

Van Parijs argues that “real freedom” shares the concerns that all of these positions (‘coherent’ libertarianism, welfare egalitarianism and socialism/communism) have in common. As Van Parijs writes, “real freedom” “...further shares with these positions (as well as with standard libertarianism and modern utilitarianism) a general postulate of neutrality, that is, the demand that what counts as a just society should not be determined on the basis of a particular conception of the good life. Along with these positions, real libertarianism can therefore be presented as a meaningful way of articulating the importance we ascribe to liberty, equality, and efficiency.”¹⁶¹ Van Parijs illuminates here at least part of a Rawlsian / liberal process. The commitment to “real freedom” stems from a neutral position of equality that extrapolates into a provision of external/social resources to ensure equality and individual freedoms. Importantly for Van Parijs, these resources represent the social liberties needed for individual freedom, so it is there provision in particular which will be the focus of his actions.

¹⁵⁸ Van Parijs, Philippe: ‘Hybrid Justice, Patriotism and Democracy: a Selective Reply’ in Reeve, Andrew and Williams, Andrew (eds.) *Real Libertarianism Assessed: Political Theory after Van Parijs*, (Basingstoke: Palgrave Macmillan, 2003) pp. 202

¹⁵⁹ Van Parijs, Philippe: ‘Basic Income Capitalism’ in *Ethics*, (Vol. 102, No. 3, Apr. 1992), pp. 465 – 484, p. 470

¹⁶⁰ IBID, pp. 469 - 470

¹⁶¹ IBID, pp. 469

As a result, Van Parijs can place the claims of libertarianism as subordinate to the values of a liberal conception of justice in much the way Rawls and Dworkin did. Capitalism is not required to protect rights because it has merely an instrumental value. This instrumental value can only exist after the background commitments and institutions of justice are created and sustained. Whether this instrumental value is the same value we have asserted to the market so far will become an important question, but let us say for now that at least the market is sitting in the right place within our political thought. As a result, Van Parijs argues we ought to follow a liberal conception of justice.

Van Parijs argues that because “real freedom” defines and balances these claims properly from a position of neutrality, the true measure of the “real freedom” standard comes in assessing the institutions it advocates. “Real freedom”, like its egalitarian counterparts, takes these arguments about justice seriously and uses them to motivate institutions. The question becomes which of these solutions fulfills and balances these claims appropriately. As Van Parijs writes, “Whether one can sustain this ... claim that real libertarianism should be preferred to the other members of the [Liberal] family, can only be assessed by spelling out and assessing its institutional implications.”¹⁶²

Van Parijs is still giving us a different argument from the liberal theories we have encountered thus far. Van Parijs argues we must amend aspects of Rawls’ project if it is to balance our commitments to justice given the contexts present in contemporary states. The difference between Rawls and Van Parijs is already evident in the very basic commitments of “real freedom”. They deviate from Rawls’ construction of the difference principle in a fundamental way as the practice is one of leximin not maximin proportions. As Van Parijs writes,

‘...a defensible liberal conception of social justice, as characterized, needs to be real-libertarian, that is, must maximin - possibly subject to some constraints - people's real freedom, that is, the means they require for the pursuit of their conception of the good life, whatever that is. By "maximin" I mean that a strong priority is being given to

¹⁶² IBID, p. 470

the real freedom of those with the least amount of real freedom. This characterization is meant to be broad enough not to exclude the lexicographic variant of the maximin (or leximin), indeed, to accommodate a formula that would allow for significant increases in the real freedom of some of the better-off at the cost of a negligible decrease in the real freedom of the worst off.¹⁶³

This separation appears to be a semantic difference. Van Parijs wants a UBI to be maximized to provide a leximin set of opportunities. This development of the liberal project drives much of what Van Parijs suggests his institutions should reflect. But this change in the theory of Rawls works much as Dworkin's insurance did, namely to make sure the maximin actions of the difference principle do not drive redistributive levels to a point that is unfair. However, unlike other liberal accounts, the UBI is intended to draw this commitment out more explicitly. For Rawls, resources are used to ensure the fair value of our individual freedoms and liberties but that resources do not constitute liberty or freedom in and of themselves. Van Parijs on the other hand, believes that the more resources we have to do "real" things, the freer we actually are. Greater resources equal greater freedoms for Van Parijs, so the concern becomes providing the resources to realize the freedoms we are trying to optimize. The UBI becomes a tool to provide the resources we need to be optimally free. If individuals do not use the tool to realize these liberties or utilize these opportunities, they may face inequalities in society.

The UBI does not act to correct these if they occur, whereas the difference principle argues otherwise. The redistributive mechanisms of the difference principle discussed in the previous chapters yielded some distinct problems in terms of choice, the market, property rights, and talents. These result-based principles maximined opportunity sets for the least well off without the proper regard for how individuals arrived in their condition in terms of the redistributive scale. In providing a leximin commitment instead of a maximin principle of opportunities, Van Parijs hopes to provide

¹⁶³ Van Parijs, Philippe: 'Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income' in *Philosophy and Public Affairs*, (Vol. 20, No. 2 Spring, 1991), pp. 101-131, pp. 103-104

us with a “hybrid”¹⁶⁴ account of liberal justice that will address the deficiencies of the difference principle and ultimately Dworkin’s auction and insurance scheme, which noticed this problem as well.

Van Parijs asserts this because he argues that the liberal accounts of justice we have so far assessed have adopted incorrect sensitivities and hence inappropriate institutions. We will discuss Van Parijs’ issues with Dworkin’s sensitivities later in this chapter. It is important to understand first what Van Parijs is developing in Rawls project. Van Parijs is concerned with the amendments of the difference principle Rawls uses in his later work. Van Parijs argues that in adding leisure to the list of primary goods, Rawls changes his theory in a way that is unfair to certain valid conceptions of the good. Rawls undertook this change to deal with criticisms of the difference principle, like that of Dworkin, and moved his theory away from supporting non-contributors (free riders). Rawls argues that by adding leisure to the list of primary goods, the value of this good can be taken into the calculation of the difference principle. As a result, the difference principle can give value to those who do not contribute and choose to sit on a beach all day instead. However, this amendment causes certain conceptual problems as leisure receives a prescriptive value. Van Parijs wants to reconcile the commitment to providing a leximin set of opportunities with the need to ensure this prescriptive aspect is removed from institutions and principles of justice. Living a leisurely existence may be a legitimate conception of the good, and Van Parijs wants us to take this claim seriously when discussing our liberal account of distributive justice. As Van Parijs writes,

‘I shall argue that a defensible liberal theory of justice, that is, one that is truly committed to an equal concern for all and to nondiscrimination among conceptions of the good life, does justify, under appropriate factual conditions, a substantial unconditional basic income. An unconditional basic income, or, as I shall usually call it, a basic income, is a grant paid to every citizen, irrespective of his or her occupational situation and marital status, and irrespective of his or her work performance or availability for work. It is, in other words, an individual guaranteed minimum income without either a

¹⁶⁴ Van Parijs, Philippe: ‘Hybrid Justice, Patriotism and Democracy: a Selective Reply’

means test or a (willingness to) work condition. It is the absence of the latter condition that has aroused most ethical controversy.¹⁶⁵

Van Parijs argues that our concern for “real freedom” must be to provide an optimal level of “real freedom” to everyone through rights security and a leximin opportunity sets. This is a similar commitment to the original construction of the difference principle by Rawls, which arranged distributions in such a way, as the condition of the least well off is maximized systematically. This principle is not troubling for Van Parijs, as he will eventually simply qualify what is materially maximized in order to provide the leximin opportunities of “real freedom”. By adding leisure to the index of primary goods, Van Parijs argues that the principles of justice are compromised. He writes,

‘If we were to put Rawls's proposal into practice, this index would go up as a result of the exogenous change. But, clearly, this improvement in the measured condition of this fraction of the least advantaged is purely fictional. It hides a stagnation of their situation in absolute terms and a worsening of their relative position, and simply reflects the fact that their leisure is postulated to be equivalent, at any particular time, to the income enjoyed at that same time by the least advantaged full-time workers.’¹⁶⁶

For Van Parijs, this change to the Rawlsian project means that the index of goods privileges income and certain forms of labor and as a result harms politically, socially and economically those who simply have a different and legitimate conception of the good. Van Parijs argues our liberal commitment to justice simply cannot be coherent if it does not provide for these individuals in an equal systematic way even if we wish to condone as legitimate some of the material inequalities their choices create. Society has to provide for “free riders” as part of their commitment to liberal justice even if this means providing them with a maximin basic income simply for being a citizen. Their

¹⁶⁵ Van Parijs, Philippe: ‘Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income’, p. 102

¹⁶⁶ IBID, p. 111

conception of the good should count equally.

Van Parijs argues that if we revert to the older and properly stripped down conception of the difference principle, we can arrive at a Rawlsian argument for basic income. Van Parijs argues that Rawls actually lays the groundwork for a system of justice that would endorse a “real libertarian” position. Van Parijs writes,

‘Thus, what I here take to be Rawls's version of the real-libertarian position and in particular his Difference Principle appear to recommend, subject to the respect of fundamental liberties and of fair equality of opportunity, that one should introduce a wealth-distributing, power-conferring, self-respect-preserving unconditional basic income, indeed, that one should introduce such an income at the highest sustainable level. For the Difference Principle is a maximin criterion, and the level of the basic income determines the bundle of socioeconomic advantages available to the worst-off, to those who have nothing but that basic income.’¹⁶⁷

However, Van Parijs argues, that Rawls as presented does not give us this position. Van Parijs continues “... if this argument were sound, we would not need to go any further. But the argument so far is not just a bit loose, because of the lack of a precise index of primary goods. It is fundamentally flawed, because a liberally indefensible bias has crept into the interpretation of real freedom provided by the Difference Principle.”¹⁶⁸ The bias Van Parijs alludes to is that the difference principle, as presented, still privileges those who value leisure, “lazy”, if not amended. Yet, if we do not amend it as Rawls suggests, the difference principle will privilege those who work to gain wealth, “crazy”. Van Parijs argues being an industrious laborer is also a conception of the good, which is valid but must be equally valued. We will revisit these points about the value of choices and conceptions of the good, as these are important arguments going forward, but it is important here to understand what Van Parijs is asking us to accept instead of Rawls verbatim argument about distributive justice. Rawls utilizes an

¹⁶⁷ IBID, p. 105

¹⁶⁸ IBID, p. 105

unwieldy metric of work and leisure calculations to make his way around the initial problems with the difference principle.¹⁶⁹ The initial conception of the difference principle caused a social structure in which resulting conditional outcomes were compensated without regard to how individuals arrived in them. To work his way around this problem, Rawls suggests that justice as fairness should reflect the value of leisure as a primary good.¹⁷⁰ Van Parijs argues any implementation of this amendment either biases the system to favor the leisure lover or the extensive laborer rather than valuing both as equal conceptions of the good. To illustrate this, Van Parijs uses the Clever/Dumb example.¹⁷¹ In this example, Clever gets paid in total half of the amount Dumb gets paid but only has to work 1 hour to earn this amount compared to Dumb's eight hour shift. Van Parijs argues that Rawls still allows the redistribution from Clever to Dumb because Clever has so much more leisure time. The reason this occurs is that the assessment of Dumb's primary goods comes from his/her position as the worst off given the yield for his/her labor and lack of resulting leisure time. This criterion factors in leisure but still causes some individuals to be responsible for other individual's choices, say choosing to labor at a more relaxed pace. Van Parijs argues this does not allow individuals equal "real freedom". Rawls' difference principle opens the door for conditionality to be placed on the provision of primary goods through workfare or means testing, which Van Parijs argues is an illiberal outcome if we are going to take leisure and industriousness as equal conceptions of the good life. What Van Parijs does not work out of this position is that he is implying the choices people make have to be equally valued and if they are, they have unequal results, which question the motivations for maximin (or leximin) actions. This effects the difference principle, but at a far deeper point in the liberal project. Though the UBI is intended to value the chosen tastes of individuals equally, there is more to this idea, which ultimately creates the contradictions in his work.

¹⁶⁹ Refer to - Rawls, John: *Political Liberalism*, pp. 181 – 182 and Rawls, John; *Justice as Fairness: A Restatement*, p. 179 and Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 132

¹⁷⁰ Rawls, John: *Political Liberalism*, pp. 181 – 182 Rawls, John: *Justice as Fairness: A Restatement*, p. 179

¹⁷¹ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 132

Van Parijs argues that instead of instituting a redistributed maximin set of primary goods, we ought to work toward providing a leximin set of opportunities and understand the tools to do this must be maximined in order to provide this leximin set. These tools must work so that the bias of the difference principle is not allowed to determine the distribution of the tool. Therefore, the principles guide the tool and then what happens with it does not privilege any given account of how it ought to be or is used. The aspect that matters is the “real freedom”, the actual opportunities individuals have, and these are what must be leximined in a maximin way rather than the maximin provision of social primary goods. For Van Parijs this removes the prescriptive problem he sees in Rawls and adds a limit to maximin actions needed to ensure redistribution is constrained. The leximin aspect is just a development of maximin reasoning so Van Parijs is giving us nothing new to lead to why we accept this account. The tool is needed to remove prescriptive aspects of Rawls but Van Parijs gives no greater reason than this to accept such a tool. The two in tandem simply imply the access to all-purpose means for everyone to realize this commitment and Van Parijs argues that the UBI can do this.

The general hypothetical thought project and many of the arguments present in Rawls, Van Parijs is asking us to accept. Yet Van Parijs is asking us to accept a different measure for our redistributive standard and a specific system to institutionalize these measures. Crucially, the “real libertarian” account is drawn to avoid the construction of the difference principle as stated by Rawls, even if we agree to some form of maximin standard to provide leximin freedoms. Van Parijs asks us to hold these arguments as separate and perhaps most puzzlingly, does not rework his way through Rawls’ account (systematically, institutionally, or teleologically) beyond this issue with the difference principle. Van Parijs explains the issue as solely a matter of procedure and development within the difference principle rather than a matter of the issues within the difference principle flowing from a systemic issue in Rawls’ thought.

Still, it is clear what Van Parijs is attempting to do. Van Parijs is positioning “real freedom” as an account of individual freedom and justice that develops Rawls but in a way distinct from Dworkin. The hybrid explanation diverges from these other liberal

accounts in several fundamental ways. The first of these is seen in how Van Parijs fulfills this commitment to opportunity in a different way. Van Parijs proposes to institutionalize the availability of opportunity sets through an allocative process. In order to fulfill these three tenets and the commitment of the state to “real freedom”, Van Parijs argues for the inception of the UBI. The UBI is an allocation but on a distinctly different level from the clamshells of Dworkin’s extended auction. Van Parijs is instituting the use of the allocation after the provision of background justice, not as Dworkin does to define the legitimacy of distributive outcomes. The UBI provides individuals with access to opportunity sets of their own choice, much like the set of primary goods Rawls wants to provide individuals with or the bundles Dworkin allows individuals to purchase with their clamshells. For Van Parijs, the fact that they are provided through a system of capitalist transactions, namely the exchange of UBI for objects and resources valued competitively in the social marketplace, is an optimal but not necessary aspect of a commitment to “real freedom”.

The emphasis is on the liberal egalitarian justification of “real freedom” and the distribution through a UBI that the commitment to it entails. As Van Parijs writes in discussing the just treatment of surfers on Malibu beach (the leisure loving lazies),

‘Does justice require that they be fed? Somewhat more accurately, does liberal justice entitle them-no questions asked, no strings attached-to an income sufficient for them to feed themselves? If my argument is correct, it certainly does, at least in a society that is affluent enough to durably afford an unconditional income at that level. For if liberal justice consists, as I have taken for granted it does, in maximinng the real freedom to pursue the realization of one's conception of the good life, those who take an unfair share of society's resources are not those who opt for such a low-production, low-consumption lifestyle. They are people like myself and most of my readers, who, thanks to the attractive job they were given, appropriate a huge employment rent.’¹⁷²

¹⁷² Van Parijs, Philippe: ‘Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income’, p. 130

The UBI is essentially the equal share of the resources needed to have opportunities but in a way that is far more useful and non-prescriptive than actually divvying up the resources themselves. We must accept that different conceptions of the good may make us contextually lazy or contextually crazy but in either case, we have a right to the resources we need as individuals to live and to our respective conceptions of the good. This commitment we cannot escape and it will ultimately lead to Van Parijs' defense of the unconditionality of the basic income. The fact that some individuals do not contribute to our society economically, being 'free-riders', does not mean they alienate their right to a liberal egalitarian distribution of resources over a lifetime. What is more, these commitments led us in the same breath to move away from basic income if it is not available at a high enough level to ensure we can buy our hypothetical lunch. Furthermore, the ascription of need does not alienate individuals from the important freedom of self-defining even the most basic of these needs or preferences. The sensitivity to choice and taste in distribution can be done while then avoiding the prescriptive problems Rawls feared in a "social minimum" systems of allocation. Van Parijs dodges this issue by placing his tool within the constraints of Rawls difference principle account (broadly speaking) so that the allocation is not prescriptive but still maximin (in a leximin sense).

Rawls argued in a similar way for the use of the difference principle. The difference principle was needed in order to assure just these sorts of provisions for individuals. The problem with this conception, that Dworkin and Nozick helped articulate, is that it failed to take onboard the outcomes of individuals' choices. Systems that allocate support based upon outcomes can yield unfair redistributive obligations between individuals. Choices need to matter in a deeper way, and Van Parijs appears to believe this in his arguments for privileging the UBI as a device. If it is important to define needs, this must be because choices need to be equally valued. Van Parijs' may have worked his way around Rawls critique by aligning himself with Rawls but in doing so he has not acknowledge the powerful intuition we need to accept in order to arrive at these conclusions. This intuition, properly understood, takes us away from Rawls altogether.

Van Parijs' critique of Rawls follows a similar and yet distinct mode of argument. Van Parijs argues that Rawls fails to adjust rather than construct the difference principle correctly when calculating the aforementioned objection into his theory. Van Parijs refers to the arguments for a property-owning democracy that Rawls argues fulfills the commitments of justice as fairness. This amendment was undertaken by Rawls to move his theory away from welfare capitalism. Van Parijs argues that upon inspecting the argument Rawls is making when amending his theory, his basic income system is the epitome of a property-owning democracy, properly institutionalized.¹⁷³

As we have seen, Van Parijs argues that Rawls, in adjusting the sensitivities in the difference principle, lays the groundwork for a system that redistributes the goods needed to enjoy social liberties without the ongoing conditional maximin actions that the difference principle was intended to invoke. Rawls argues for the importance of self-respect, property-ownership and the liberating aspects of a free market mechanism. Van Parijs argues a UBI properly adheres to the choice sensitivities that Rawls wanted in a property-owning democracy.

Van Parijs takes on many essential elements and even in large part the teleology of Rawls' argument but he separates his model in a clear way from Rawls. Van Parijs ultimately also distances his conceptions from the singularly domestic nature of Rawls' theory as well.¹⁷⁴ Yet his foundations are similar in that they support the hypothetical processes Rawls argues for and many of the resulting principles from this exercise. Both aim to provide a fair society. Both aim to act upon individuals being equals and engendering this treatment throughout the course of their lives. Both aim to give fair value to liberties through the provision of resources and opportunities. Both affirm the importance of rights and the value of a market mechanism. Important for our discussion here, Van Parijs adopts a conception of freedom that mirrors Rawls' concern for resources and a fair set of liberties. Van Parijs wants "real" options for people to enjoy.

¹⁷³ Van Parijs, Philippe *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 46

¹⁷⁴ *IBID*, p. 226

For this reason, the redistribution of resources and provision of opportunity sets is very much in keeping with Rawls' general project.

However, I believe it is important to note here before moving on that Van Parijs' theory is very Rawls-like in the same sense that Nozick was Locke-like. Van Parijs argues for an allocative system that is unlikely to embody Rawls' commitment to a property-owning democracy quite as readily as Van Parijs claims it would. This will ultimately come forth from a deep tension between the two that I will articulate later in this chapter. Rawls' concern with systems of allocation was that they did not properly endow a fair and equally valued set of liberties through primary goods. The reason being, these allocations are not the goods themselves and the natural endowments of individuals affect the use of the allocations in an unfair way.

As we have seen through my development of the liberal argument, in order to justify allocative processes, we had to work through the issues of moral agency, circumstance and choice are accounted for in order to arrive at an allocative market structure. Van Parijs argues that the use of in-kind provisions and natural endowment compensation will mitigate the problems Rawls has with allocation. It is clear, even now, that such an argument will lean on the validity of choices without working this position out. We will return to, and describe in greater detail, these arguments and institutions later in this essay. For now, it is important to assert where amongst the projects we have so far assessed Van Parijs fits. He is more accurately using portions of Rawls' argument to justify his systematic suggestions. He is not developing Rawls at the same point Dworkin does. Van Parijs has specific problems with Dworkin's extended auction and insurance project that lead him to refute in large part the suggestion of it as properly embodying an account of liberal distributive justice.

Van Parijs argues that Dworkin's system does not provide "real freedom" due to the calculations and stipulations Dworkin places on his system through the application of the insurance scheme. Van Parijs refers to the insurance scheme as "counterfactual"¹⁷⁵

¹⁷⁵ IBID, p. 59

and Van Parijs argues there are many specific problems with it. Van Parijs' primary objection to Dworkin is that he allows the insurance scheme to compensate individuals with identical natural endowments due to their potentially expensive tastes.¹⁷⁶ The details of this argument we will explore later in this essay, but it is important for now to understand why this problem prevents the extended auction and insurance scheme from providing "real freedom". Dworkin's goal of providing choice sensitivity with endowment insensitivity fails if Van Parijs' contention holds. If individuals are to have "real freedom" then their choices must count equally. The system can only compensate those with legitimately unfavorable natural endowments and not those who make expensive choices. Van Parijs is eager to show that Dworkin's insurance calculation does not use the proper criteria for legitimizing compensation. As a result, the redistribution of the scheme will compensate those with particular tastes rather than those who actually lack natural endowments in a meaningful way.

Van Parijs also argues that Dworkin and other market-based basic income/allocative advocates like Hillel Steiner, need the market in a deeper, non-instrumental way.¹⁷⁷ Van Parijs argues that Dworkin needs the market due to the operation of the extended auction and the procedural outcomes that happen thereafter. Van Parijs argues this treats the capitalist system as a necessary good, rather than a tool to realize optimal freedom if and when our other considerations of justice are met. Van Parijs argues that although "real freedom" is best provided when markets are available, the market is not a fundamental aspect of a commitment to "real freedom". Van Parijs exemplifies his argument that "real freedom" can be realized in certain non-ideal circumstances by instituting socialism.¹⁷⁸ The "real" aspects of freedom are resource based and as such, the market may frequently but not always provide an optimal set of "real" opportunities in a fair and equal way. As we have discussed, this position is already problematic. The idea of socialism is used by Van Parijs to refer to a mode of distribution in the sense mentioned here rather than of ownership, which was his initial description of it. If it was not optimal ideally, this was for a reason and Van Parijs never

¹⁷⁶ This conception is most clearly stated on IBID, p. 59

¹⁷⁷ Van Parijs, Philippe: 'Egalitarian Justice, Left Libertarianism and the Market', pp. 145 -162

¹⁷⁸ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, pp. 7 - 11

uncovers this. The distributive aspect here need not devolve into socialism but rather in-kind provisions. The market is clearly a needed aspect of such a position because we require a way to formalize choices and the opportunities and tastes these choices represent.

Van Parijs wants to provide the same choice sensitivity that Dworkin argued for and institutionalize a form of extended auction. The UBI can act as a tool that provides for individual needs but does not ascribe what these needs or ideally preferences are. The UBI works in a subordinate space that Van Parijs feels Dworkin gives his auction but this does not mean there is no role for such a process. The UBI builds in the choice sensitivity that Van Parijs argues Rawls lacks when describing the proper ordering of a property-owning democracy. The UBI is just a consequence of the commitment to “real freedom” being implemented in a typical, yet precise context. The difference between Dworkin and Van Parijs is how deeply they feel they need to amend the Rawlsian project to create the needed sensitivity to choices.

Dworkin and Van Parijs recognize the problem choice poses in material wealth at one end of the egalitarian spectrum and provision of need at the other end of the same spectrum. Both answer this question in similar allocative way but place this idea in distinct theoretical and institutional contexts within their theories. Choices count for each, but in different measure because they place its actions in different places within their accounts. Van Parijs places this consideration after the actions of the difference principle much like Rawls. Dworkin places them into the apparatus that arises directly after the veil because everyone is projected the ability to make choices. The conceptions are similar in intent but not in scope. Dworkin is arguing that justice is secured through an allocative process because we can make this assumption about individuals. Subsequently, the distributions that occur are ambition sensitive because choices count appropriately. Dworkin argues that this is still a hypothetical/abstract process and one largely in keeping in many respects with Rawls project.

For Dworkin, the only way to reflect choices and autonomy in a liberal system of justice is to modify the veil of ignorance and use this modification to develop a just allocative thought experiment in the auction and insurance schemes. This ensures individual freedom because the choices made are in a fair and equal environment. The consequences of these choices are an aspect of individual autonomy that ought to have no bearing on redistributive calculation if and only if the distribution is endowment insensitive. The need for endowment insensitivity creates the insurance scheme, which attempts to address it as well as constrain the level of distribution. These create the institutions of background justice for Dworkin.

The commitment to justice and scope of individual freedom for Van Parijs is on a very different level. Theoretically, Van Parijs does not argue for a distinct recalculation of Rawls' processes or the aspects present within it. In order to do this, Van Parijs argues we should accept an allocative system if and only if it allows for a maximized set of resources because these allow opportunities and hence choices. Van Parijs will ultimately draw up a standard to compensate those with poor natural endowments to bolster his position, which we will explore in detail later in this essay. The use of this device appears, although not explicitly stated, to acknowledge the need to allow choices to count in outcomes. However, if they are to count, Van Parijs will need to challenge Rawls' conception of the difference principle in a profound way given our discussion thus far of Rawls. Though this may lead us to believe that Van Parijs is questioning a foundational premise of the larger Rawlsian project that has deep implications, Van Parijs is arguing instead that we can get the needed results and changes simply by rethinking the implications of our maximin reasoning. Instead of this leading to a Rawlsian difference principle, it leads instead to Van Parijs' argument.

For Van Parijs, creating the background justice, which is the principle-driven basic structures of a fair society, appears in large part to mirror many of the commitments of Rawls. For Van Parijs the provision of this structure is the first step towards justice and ensuring individual freedom. In this way, Van Parijs wants to adopt endowment insensitivity in this practice of providing justice because it is a fundamental part of

providing individual freedom. However, individual freedom is reliant on background justice, which Van Parijs believes cannot be constituted by a market device, like Dworkin's, to determine what is and is not a just distributive outcome. In short, choices should count, but not at this juncture. What is left as a difference between the conceptions of Dworkin and Van Parijs is a matter of arguing over the institutions and theoretical practices/commitments that best realize a commitment to liberal justice in balancing the issues of individual choices and circumstances.

In assessing whether Van Parijs' argument is compelling, particularly in terms of choice sensitivity, it is crucial to see what role his ideal UBI is to play and how it is intended to work in society. The UBI is essentially a form of allocation but one that avoids the prescriptive pitfalls Rawls argues characterizes such a system. The UBI acts in many ways like Dworkin's clamshells in the extended auction but places the auction in a different place within the progression of our decisions about justice. The presence of such a market system is to provide self-valued items of need/preference. The value of objects available in this market place is a matter of self-definition and in sanctioning their acquisition, the state is conferring legitimate entitlement for the respective bidder. Dworkin and Rawls also seemingly allow this sort of societal space for the market within the eventual institutions of the extended auction and insurance scheme or within a property-owning democracy respectively.

For allocative solutions in particular, the processes of allocation and transaction are fundamental. An allocative account of justice must then institute its egalitarian commitments in a way sensitive to the market processes and individual rights within these processes, which yield the unequal results. Van Parijs argues the UBI works in the confines of the market aspect of a property-owning democracy. "Real Freedom" requires commitments to equality, liberty and opportunity that Van Parijs argues must occur prior to the use of a market device. This is a clear point of departure in approach between himself and Dworkin, even if they seem to share the same Rawlsian conception of justice. Freedom requires structures of justice first, including maximin principles of some type prior to the legitimate use of the market device. Van Parijs argues that, for Dworkin, the

market is integral to ensuring choice sensitivity in the selection of primary goods and as such plays an a-priori role in justice and individual freedom.

At this point, it is clear that Van Parijs has a distinct relationship with the ideas of Rawls. It is clear that Van Parijs feels “real freedom” does meet these considerations of liberal justice in developing Rawls argument. However, I will argue that we can see whether Van Parijs is correct about these assertions in inspecting how the UBI works in his ideal scenario. If it requires developments to the ideas of Rawls in a deeper way, the decisions about why we accept a UBI or “real freedom” are going to be very different. I will show that this is indeed the case. The reason will be that choices are more fundamental than Rawls or Van Parijs allow because it is a capacity held by everyone. Whether Van Parijs’ painting of Dworkin is fair is yet another matter I intend to revisit subsequently but it is important first to explore what more we can say about the UBI as it operates in the subordinate/instrumental space Van Parijs argues it belongs.

4.2 Ambition-Sensitivity, Choices and Amending Property Rights

As we have discussed, Van Parijs adopts a flexible theory of individual entitlement. This is a conception that is sensitive to the constraints and considerations institutions of justice place on certain resources and subsequently the liberty these resources provide. Van Parijs is concerned, like Rawls, in the provision of background institutions of justice.¹⁷⁹ Absolute or disproportionate acquisition of some resources would adversely affect the availability of fair and equal sets of opportunities and in turn, the equal value of individual liberty.

To put the problem that is come plainly, market structures imply rights. Claim rights are in fact what changes hands from one actor to another through the market. These legitimate transfers happen through choices formalized through market procedure. If these aspects are not retained, the market mechanism does not provide choices, selections or opportunities appropriately. Nozick's theory drew rights too broadly, strictly and irrespective of the actual opportunities individuals need to be free. Nevertheless, a market does not appear to be a market in any freedom producing sense if it does not honor a coherent conception of property rights. Yet, people need access to resources in order to exercise any right or to act at all. Therefore, the balance that must be struck is to provide both in a coherent manner.

It is important to revisit what we have asserted about our markets. The proportion of the share can be constrained comparatively prior to entering the market (literally what is available for sale) but once it is sold, the process can only seemingly be sensitive to affect others shares in what opportunities they have in terms of resources, not the size/value created from the purchased bundle of resources. It is at this point that we see the importance of asserting our Fair Shares Proviso. We have qualified and subordinated these claims but if we give them space to work, they have to mean something in considering our market. This is because individual choices and labor do play a role in

¹⁷⁹ Rawls, John: *Political Liberalism*, pp. 265 - 268

material distributions. So our consideration is what people should have at the starting line given this is a moving target. This ongoing consideration implies redistribution, considerations of internal/natural endowments, and constant revisitation based upon our consideration of fairness, but once this has all taken place the resulting property/claim rights have to mean something and place constraints on what our legislators and discussions of contextual politics can say or do (justly) about the results of market practices.

For Rawls in particular, property was a political claim but one that retained importance. Rawls does not intend this to prevent property rights or the privilege of private ownership. Rawls affirms these are important aspects in providing for individual self-respect and he clearly allows market systems space in his theory to operate. Our unbundling of why this privilege is important has led us to question Rawls account of choices and why they must be strictly constrained due to natural endowment considerations. It is precisely this space that Van Parijs sees his UBI operating in. This means the outcomes of the market are subordinate to the constraints of the equality and opportunity measures of a Rawlsian account of justice. This reasoning is cogent in so much as the basic structure needs to be provided. Particular acquisitions are clearly going to violate rights and equal liberties required by justice. However, Rawls redistribution had major conceptual issues that so far Van Parijs has not addressed. To see if our balance between choices and circumstances is met by Van Parijs, we need to explore the operation of the UBI. The UBI is intended to meet our concerns about initial equality in the market. This inspection will be important in assessing whether to accept Van Parijs' development of Rawls, both theoretically and in terms of his institutions.

It is important to first explore what the UBI actually is and does. The UBI is a regular equal disbursement of currency to each and every citizen. Van Parijs argues for two important aspects of the UBI. Firstly, he argues that a coherent basic income must be unconditionally provided to every citizen and that it must be provided at the maximin level possible. Secondly, he argues that basic income ought to be universal so as not to privilege any individual over another. He believes the freedom of and opportunities for

individuals must be provided in an equal and ongoing way if the application of “real freedom” is to be coherent. This is a direct refutation of the means-tested or conditional forms of support welfare or even other basic income models. For Van Parijs, the application of “real freedom” requires unconditionality when distributing basic income due to the background considerations of justice.

The universality of basic income is buffered for Van Parijs by actions to sustainably maximize the amount of UBI that is to be distributed to each individual. Van Parijs urges the unconditionality of a basic income on its own is not enough. The UBI should be maximized in a way that provides a leximin set of opportunities to individuals, while allowing these individuals to use the income to select the actual opportunities they wish to avail themselves of.¹⁸⁰ Though Van Parijs is quick to establish that the maximization cannot come at the expense of in-kind provisions, basic welfare through actions to compensate those with physical disabilities, actions of gift and bequest, or other calculations of utility, he insists throughout that the UBI must be maintained at the highest level that is sustainable in the given society.

Van Parijs further states that the UBI must be disbursed in even and frequent amounts.¹⁸¹ Van Parijs argues that the state must show a concern for the conditions of individuals over the course of a full life. Because of this, the decisions they could undertake with some other conception of basic income, like a lump sum, must be protected against. Van Parijs argues this is the sole way to provide equal concern for individual opportunity sets in an ongoing way in societies that can sustain “impure” capitalism. These commitments mirror Rawls in that they provide everyone with all-purpose means through the UBI and that these means are maximized to provide a leximin set of opportunities. This is a parallel drawn by Van Parijs, as it is his claim that basic income capitalism and “real freedom” are the embodiment of a property owning democracy properly formulated. Van Parijs argues the reason these systems work in the way that they do is because of the commitments a proper liberal account of justice

¹⁸⁰ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 25

¹⁸¹ IBID, p. 45

requires. These aspects of the UBI flow directly from the Rawlsian underpinnings of the project at hand.

This brings us to the other side of our coin, where is the UBI coming from and how is it raised if we are striking a balance between the claims at hand. Because of the principles used to motivate redistribution, Rawls adopts maximin redistributions that allow only material inequalities if these inequalities improve the condition of the worst off. This led to problems in that the reciprocal commitment such a principle applies is not appropriately sensitive to the choices individuals make as Dworkin noted in critiquing Rawls. This crucial difference in how a liberal commitment to redistribution ought to work is extremely important but despite its existence, both Rawls and Dworkin ultimately exercise redistribution through wealth measurement in much the same way. The argument for this is premised on the lack of neutrality in talents, as they are at least in part unequal and arbitrary and on the premise that material inequalities harm the basic structure by depriving other individuals of equal condition. Dworkin wants choices to matter but because he believes it is impossible to know whether choices have truly yielded certain outcomes, end results end up being our “second best” option for envisaging taxation. In the next section, I will put Van Parijs’ answer to how we provide endowment-insensitivity under specific scrutiny. However, for now I ask you to assume that this issue can be resolved harmoniously with commitments to endowment-insensitivity and ambition-sensitivity. We are left to assess whether the wealth-based end result measurement of redistributive obligation still makes sense.

Van Parijs gives us yet another way to consider taxation. Van Parijs argues for the institution of “resource rents”.¹⁸² These rents generate the income needed to fund the UBI and the other actions of the state including in-kind provisions and basic welfare. These are essentially taxes on the resources provided by the basic structure that individuals use or appropriate. As these resources are provided by the basic structure, they are political privileges afforded to individuals by our system of mutual cooperation. Van Parijs argues, much along the lines of Rawls’ argument, that this feature of these

¹⁸² IBID, p. 89

resources makes them the legitimate focal point for taxation to provide the basic structure that affords them in turn to society. Many resources would appear to fall under this conception but uniquely Van Parijs argues that jobs should be a taxable resource assessed by this fund raising device. Van Parijs argues that a job is a resource, in relatively scarce supply. It is an opportunity to undertake labor and by accepting the employment, the individual has used a resource that other individuals could plausibly use. The result is a disproportionate acquisition of a resource, which makes the job liable for a resource rent. Certain jobs will be rarer or have smaller fields of potential qualified employees, and Van Parijs argues these factors will affect the level of rent. Van Parijs asserts that the compensation an employee receives for a job reflects these factors and hence acts as a convenient measure by which to levy taxation. The resource rent is further intended to ensure that individuals are free to make choices in what opportunities they utilize, but in doing so pay appropriate rental values back to the basic structure that provides the opportunities. The end result is that Van Parijs' argument uses a Rawlsian justification for taxation of resources but uses a different thought device to legitimize redistributive obligation. The measure implied by this method is the use of the resource. This appears at harmony with our Fair Shares Proviso account of what is required to legitimize qualified market transactions. It simply expands the definition of what counts in the provisions of the device.

Why we redistribute is clear from our Rawlsian account of justice. What has remained unclear is what we should tax to get these redistributive resources while honoring choices and outcomes appropriately. All of our developments of Rawlsian justice have so far argued that we should use distributive end results as our measure. For resource rents to make sense, we have to establish why resource rents work to fulfill something end results do not. Resource rents redistribute based upon the use of resources pursuant to the effect their use has on those who have equal claim to the resource. This returns us to our Fair Shares Proviso from the first chapter. Our claim, is that once we have entered the remit of our market system, we can allow disproportionate outcomes if and only if our access to the shares of what was initially available are either afforded us or we are compensated for their use. Resource rents fulfill these criteria but perhaps

more importantly, we appear to need this argument in order for their use to yield us anything different from naked end results, which would be an unadulterated means argument. This does not contradict the idea of taxation, but rather qualifies who pays it and how much it should be based upon a specific kind of calculation.

Those with the most valuable resources and jobs pay the most rent. For Van Parijs we can tell if these resources are valuable based upon the end result wealth people achieve filling these roles. As a result, those with the most wealth pay the most tax. This is because the result-based redistribution argument is still powerful and one Van Parijs uses in much the same way Rawls did even if he claims not too. The reasons for Van Parijs will boil down to how we appraise resources and a concern that individuals who use fewer opportunities should not pay as much tax. Van Parijs will work to legitimize why this conception boils down to such a calculation but it is in part derived through Rawls so it is important first to quickly appraise Rawls more detailed aspects of market moderation.

Rawls' answer to this in *Justice as Fairness – A Restatement* appears to be that the actual remit of the procedural system of justice, what is a legitimate amount or facet of wealth, is a legislative matter.¹⁸³ This means that the Property Owning Democracy will have institutions of legitimate democratic input that can adjudicate the limits/scope of the market, distributions of wealth and by extension who gets taxed for what. For Rawls, as long as these decisions are guided by the principles of justice, including the difference principle, they will be just. This may be true insofar as the state in question would have to have these sorts of institutions in keeping with the equality and liberty principles of justice.

Surely, a comprehensive account of distributive justice must be able to tell us something about what is and is not off the table in terms of wealth and distribution aside from allowing a legislative process to determine parameters within context. If apples and oranges are valued differently as resources then our calculations kick in. This is not a

¹⁸³ Rawls, John: *Justice as Fairness: A Restatement*, p. 182

problem as oranges are not apples, apples are not oranges, and we cannot determine the value of either without context. However, if we all have oranges and these oranges are in all meaningful ways the same, a legislator should be constrained from claiming otherwise. In order to say this we must be guided by a principle of fairness in our market device like our Fair Shares Proviso and the allocative practices it implies. The fact that you may do great things with your orange, and I may not, does not give me a legitimate claim to your success given your success does not affect my ability to use or access my orange or the basic structure we share. My claim is not about the results, it is about the pre-conditions and what it takes to sustain them in an ongoing way.

Van Parijs' argument is giving a different measure than Rawls. This measure implies such a standard. The comparative use of resources legitimizes the level of taxation and this is a matter of justice. The resource rent device appears to give us exactly what our properly expanded Fair Shares Proviso would ask of us. The affirmation of the basic structure is predicated on the resource impact individuals have upon one another over time. It would seemingly limit or at least qualify what a legislative process could legitimately tax or value in a calculation of redistribution. The implication here is even greater than simply a legislative trump. A resource rent implies that naked material wealth cannot be the legitimate measure of redistributive obligation. Instead, it has to be predicated on the resource value or scarcity of the resource being acquired or used. The use of a non-scarce resource to accrue wealth would still only garner the obligation that came with the use of the resource. Conversely, the use of a valuable resource would garner a larger redistributive obligation even though an individual may not be wealthy from having made the choice to rent this resource. These were the reasons Van Parijs gave us in moving us to an "impure" form of capitalism and as such, they have to be drawn appropriately.

Van Parijs, by invoking the use of resource rents, has given us a tool not yet articulated in our discussions of liberal justice. It is a tool that provides a measure our previous discussions have led us to endorse as appropriate. Nevertheless, at the same time Van Parijs has painted himself into a bit of a theoretic corner if he is to accept

Rawlsian principles of justice. The resource rent account of obligation precludes using Rawls' argument for redistribution based on end-results to maximin the conditions of the least well off. This does not impugn the concept of redistribution, but rather changes the criteria for doing so.

This paradox is clear to Van Parijs as well and he attempts to take us away from this conception of resource-based obligation. Van Parijs does not want the kind of property rights that would stem from an account of justice that was purely allocative. Van Parijs ultimately falls on the side of measuring redistributive obligation through a calculation of salary as value. Van Parijs writes,

'First, because the proposition that workers are the creators of the whole product, on which their right to the entire product is usually supposed to rest, is either tautological and irrelevant or plainly false. And secondly because—contrary to my firm intuition and, I should hope, yours—the recognition of such a right would justify inequalities, however large, that stem, for example, from the fact that unequally fertile soil makes workers unequally productive.'¹⁸⁴

The first part of this argument follows with our reasons for redistribution and market subordination. However, this only establishes redistribution. To go beyond this, Van Parijs argues that resources are not all created the same. As a result, some individuals arbitrarily receive a better lot of the same relative resource. These uneven resources allow some individuals to prosper to a greater degree and derive a greater salary by virtue of good fortune. Van Parijs argues this is unfair and legitimizes salary-based redistribution to fund the UBI, a straightforward income tax.

This example at first is palpable when talking about land or other natural resources and the products produced from them. However, I would urge that such deviations would imply that one was an apple and the other an orange not that two resources are the same, yet somehow different. Nevertheless, our argument need not go

¹⁸⁴ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 133

to this level of irreducible skepticism. The argument becomes even less convincing when we discuss vocations or jobs which Van Parijs also asks us to place a rent upon. As an example, let us take two professors both tenured at the same institution in the same field. All of their appreciable resources in the position are the same, research money, class-load, vacation time, etc. We must also bear in mind that Van Parijs will present a way to neutralize/compensate natural/internal endowment inequalities, so they are effectively removed. One is an excellent teacher, prolific writer and excellent advisor. The other received tenure and then put his/her academic mind into cruise control. If the industrious professor ends up earning more through a full/distinguished professorship promotion and/or a good book deal, Van Parijs argues he owes more rent as his resource, the job/position, was uneven. Van Parijs has to argue that the job/position advantaged Professor 1 over Professor 2. However, this clearly is not the case as the other professor had the same opportunity and simply did not utilize it in the same way. Their rent for the social resource should be the same but Van Parijs, because of his Rawls-like position on this aspect of taxation, cannot allow an allocative account of redistributive obligation.

The implication of this is that our taxation may be from income, but it is not predicated legitimately from income as a measure. A resource rent has to be the rent owed based upon the inability of others to use the same resource. This is what our Fair Shares Proviso urged and explains why it has such importance as a subordinate claim in our development of the liberal argument. The fact that someone does well with an equal share compared to someone else does not mean that they owe more rent. The same resource has to garner the same rent. Legislators can make the distinctions of sameness but the standard by which they must make such a judgment and treat it fairly is a matter of justice. It may be hard to tell the value in absolute terms of some natural resources (though I would conjecture this is not impossible). However, when two resources are clearly the same, like our two professorships, the rent has to be the same based upon the resource that is being utilized. The value of a resource may frequently be corollary to the salary paid, but this is not always the case. This shows why it is so important to accept our Fair Shares Proviso rather than utilize the end-result systems of Rawls, Dworkin and ultimately Van Parijs present.

Though Rawls and Van Parijs may have fallen short on this point, Dworkin does acknowledge this paradox.¹⁸⁵ Dworkin argues that we must accept redistributing from the affluent to the least well off as determining what elements of ambition are natural and which are created through the social aspects that come with the affirmation of the basic structure is impossible. The best solution would be to determine how much these elements mattered and determine the resulting reward accordingly. Since this is not possible, the “second best” solution is to redistribute based on the end results. However, if individuals all have access to the same resources through the affirmation of the basic structure and the natural aspects are removed through endowment-insensitivity, the use of resources as a measure of redistributive obligations would negate Dworkin’s argument for the pragmatic use of naked end-results. The admission that something better is possible exists within his own argument. He simply fears that it is unattainable or easily misconstrued. Still, by redrawing the Rawlsian project, Dworkin lays the groundwork for ascertaining fair resource based distributions that Rawls and subsequently Van Parijs do not. The re-direction of the project proves extremely meaningful when we consider the sensitivities I have thus far argued need to be built into conceptions of choice and autonomy even if the pragmatic assertion of where the redistribution comes from is problematic.

A greater wealth of initial opportunities is problematic but the wealth accrued after a sustained distribution of these, given natural endowments are appropriately treated, appears to be a different matter. The systematic answer ought to be based on the use of more than a fair initial share of resources given our now more expansive account of what resources are. If this is the alternate choice, a resource account, we can say something even more important systematically about market claims than Rawls, Dworkin and Van Parijs have. End results are not going to honor our choices and moral agency well enough. We still have a need to redistribute and to provide resources. So our account must be based on resource use. This precludes end-result taxation simply

¹⁸⁵ Dworkin, Ronald: *Sovereign Virtue: The Theory of Practice in Equality*, (Cambridge MA: Harvard University Press, 2002) p. 73

because resource use does not cause better or worse end results without individual choices. It would be unjust to tax people based upon the decisions they made with their equally endowed moral agency.

Unlike Rawls and Dworkin, Van Parijs' system of UBI and subsequent account of resource rents can allow this market consideration, although Van Parijs does not articulate that it can or should. It needs to if it is to take choices and autonomy seriously, given these are aims espoused by "real freedom".

The institution of resource rents by Van Parijs creates an interesting apparatus from which to derive the funds for redistribution. Resource rents essentially calculate the relative scarcity of a resource and measure the redistributive obligation from this measurement. The scarcity is not a measure of utility as such, although the scarcity in question will frequently point to a corollary relationship. If something is scarce it is typically going to be more valuable compared to another option that is more plentiful. The difference between this sort of calculation and a pure end-result calculation is very important as it distinguishes what was used and the effect on the basic structure, not the result of market actions alone. Van Parijs argues that the result of a resource rent calculation is very similar to that of the Rawls and Dworkin end-result principle. This is true insofar as scarce resources, particularly jobs, will be scarce because they yield more benefits and income. Thus, resource rents may look like an income tax, but it is not so straightforward. It is a development in the conception that I argue is needed if we are going to honor choices in our society appropriately. Importantly, this drags us away from some of the arguments Van Parijs is using to justify his system. The implication is that a different account of justice is going to be needed if we are to legitimize rents in a way that is coherent with providing individual freedom and a just basic structure.

The concept of a resource rent matches our considerations of justice but it does not appear the measurement and application of this aspect of Van Parijs theory is in keeping with why a resource rent system is preferable. Van Parijs' position becomes

even odder when we consider Van Parijs' stance on "means testing".¹⁸⁶ Van Parijs argues for the unconditionality, maximization and disbursal of the basic income, all on generally Rawlsian principles. His argument mirrors that of Rawls in *Justice as Fairness – A Restatement* that individuals should be provided for equally over the course of a full life.¹⁸⁷ Each of these arguments has attracted criticism explored in the subsequent sections of this chapter. Here we will focus solely on Van Parijs' argument as to why means testing should not be a consideration of receiving basic income. Van Parijs argues that the basic income must be unconditional and universal in order to properly conceive individuals as equals. The UBI would give individuals an equal set of opportunities compared to everyone else receiving the income. Anything earned over this amount would be the result of the use of opportunities, which is an act of autonomous choice and/or ambition. Ergo, the UBI ensures that individuals have a baseline set of maximin opportunities over time.

The unconditionality of the basic income ensures that everyone, no matter how poor or on the other end how rich receives one. For Van Parijs this is an acceptable result because the opportunities afforded by the UBI must be equal even if some individuals may possess the means to realize these opportunities without the UBI. This implies that the UBI is to provide a leximin set of opportunities that is not sensitive to the increased liberties that greater material distributions afford. This sort of implication is perfectly acceptable if the judgment of redistributive obligation is predicated on the use of a resource in some way rather than the resulting wealth that comes from the choices and ambitions of the individuals in question.

Nevertheless, this result is not Rawlsian by any stretch of the imagination. The liberties afforded by increased resources have to be relevant as the equalization of opportunities must be a maximin endeavor even under the leximin variant. The results are relevant for Rawls because they equate to an increased value to an individual's liberty from one person to another. If individuals already have the means to possess or resources

¹⁸⁶ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 95

¹⁸⁷ Rawls, John: *Justice as Fairness: A Restatement*, p. 200

to directly constitute a comprehensive set of social primary goods, they do not need a further distribution to secure them.¹⁸⁸ Rawls' process yields us this conclusion directly from the veiled impartiality of the original position. In order for the differences of the difference principle to change in terms of resource distribution levels, the argument must come from the sensitivities that yield the difference principle rather than a change to the actions and sensitivities of the difference principle.

Van Parijs never gives us this explanation. Instead, Van Parijs continues to use aspects of this principle to motivate parts of his theoretical argument and subsequent institutions. The arguments and institutions Van Parijs is asking us to accept through these same theories directly compromise the aspects of these theories that Van Parijs continues to lean on as justifications. This sort of theoretical to institutional contradiction appears several times in considering Van Parijs' arguments and, as we will see in the upcoming sections, creates a fertile battleground for his critics. This is because he is trying to squeeze his theory and system into the theoretical shoes of Rawls' property owning democracy and correct the ills of many other conceptions of distributive justice rather than state clearly and comprehensively an account of justice. These warring intuitions tear Van Parijs into two directions that are never reconciled with one another. In doing so, he leans on many different singular arguments, which never quite meld together into a comprehensive argument. This is why I have suggested so far that some of Van Parijs' arguments have a great deal of credibility while others are problematic and that because of this A and B do not seem, at times, to support each other.

Van Parijs relies on the choice aspects of a UBI to provide greater individual freedom. To do this, the UBI has to amend something more critical than just how the difference principle operates. Instead, the UBI needs to amend what is subject to redistribution and to what level in a resource-based way. Properly honoring choices and individual autonomy in an appropriate way has led us to reconsider a major section of

¹⁸⁸ The issue here mirrors the critique levied by Block, Fred: 'Why Pay Bill Gates? A response to "A Basic Income for All" by Philippe van Parijs' in *Boston Review*, New Democracy Forum: Delivering a Basic Income, 2000, website: <http://bostonreview.net/BR25.5/block.html>

Rawls' argument. It has further led to considerations on Dworkin's modified example, given the ambitions of the handicapped. As I have just stated in this section, we need also to move away from end-result wealth based redistributions if Van Parijs' rent device is to take choices as seriously as "real freedom" and a UBI need them to. Van Parijs has to question the fundamental pre-suppositions that motivated Rawls' property owning democracy in the first place, rather than simply slot it into this part of Rawls' existing theory with a relatively minor adjustment.

One might argue this fact does not just pose a problem for the application of resource rents but also the maximization aspect of the UBI. The specific issues of this case are discussed in the upcoming sections but it is important here to discuss the theoretical differentiation that will make this critique unfounded. Rawls used the maximin principle to provide fair liberties to the least well off through the difference principle. If we were to interpret Van Parijs as using a leximin variant of the maximin principle in this way, the argument that Van Parijs falls prey to the same critique Rawls does would have a great deal of merit. However, the maximin aspect of the UBI is theoretically sustainable if it comes from the resource calculation properly conceived, not the end result calculation. The issue is simply drawing the resource calculations appropriately to reflect this. Van Parijs' use of income as a measurement blurs the larger conception and gives this critique of his aims power, but as we have suggested this sort of measurement critique is contradictory to the apparent aims of his apparatus. Maximin principles are only troubling if their redistributive sensitivities are not drawn correctly.

Van Parijs bounces back and forth between objectives without a systematic account of justice. The attempt to address the ills of other conceptions leads him to a liberal approach in a relatively clear way. However, from this point the argument becomes far more convoluted. To critique Rawls through arguments yet rely on concepts and principles that stem directly from Rawls' larger argument without an explanation of how they all work in concert is a major problem for Van Parijs. It is a problem in one respect because we are left to wonder how Rawlsian concepts such as maximin reasoning even in a leximin variant, a conception of redistribution that amends but largely mirrors

the difference principle, result based redistribution, and initial understandings in the original position through the veil of ignorance, which remain much as Rawls describes them, can be squared with the conception of individual freedom and a resource-based account of distribution that Van Parijs wants to institutionalize. Van Parijs' use of Rawls extends into the defense of his theory against Dworkin but it is an account of Rawls that invokes troubling selectivity.

Van Parijs' objection to the insurance scheme is discussed in the next section extensively and this relies far less on Rawls' argument than it does Van Parijs' own critique of Dworkin and Van Parijs' device to provide endowment-insensitivity. The objection to the extended auction device is a different matter. Dworkin uses this device, in tandem with a modified veil of ignorance and the insurance scheme, to argue a different way of conceiving liberal distributive justice through just allocations. Aspects of the difference principle were not reflective of autonomous choices and reciprocal burden in a fair system of cooperation. The importance of this aspect of Dworkin's argument is that it develops how a liberal account of justice can be appropriately sensitive to choices, even if Dworkin's eventual taxation technique and insurance compensation need development. Dworkin shows how the problem with the difference principle actually stems from a problem in the impartiality device used by Rawls. As a result, his theory starts from this point in reworking an account of distributive justice.

Van Parijs rejects this proposal because he argues Dworkin is reliant on the market system to yield just results and that cannot be reconciled with a coherent concern for background justice.¹⁸⁹ This criticism mirrors Rawls' argument against pure procedural justice. However, Van Parijs shares aspects of Dworkin's argument, namely choice-sensitivity and the role of the market to affirm this. This is because they are developing liberalism and are motivated to do so by similar deficiencies they saw in Rawls initial argument. Van Parijs argues "real freedom" is the "hybrid" account of liberal justice that builds in the choice sensitivities and individual responsibility argued for by Dworkin but in a way that provides for individuals in an ongoing way. This is

¹⁸⁹ Van Parijs, Philippe: 'Egalitarian Justice, Left Libertarianism and the Market', pp. 145 -162

because Van Parijs is concerned with providing individuals with the freedom to do what they might want to do over the course of a full life. Van Parijs' argument, aside from critiquing the role of the insurance scheme, relies on the argument that Dworkin's use of the market is premature. The institutions of background justice require a deeper commitment that ensures access to a set of means in an ongoing way. Van Parijs argues that Dworkin uses the market to determine if distributions are just as it asserts this through the envy free results of the auction device. Van Parijs notes that the concern is not with the auction device itself. As Van Parijs writes,

'Dworkin initially seemed to offer a dual conception of distributive justice, with the competitive auction covering impersonal resources, and the hypothetical insurance scheme covering personal resources. He subsequently moved the auction to the background and subjected both personal and impersonal resources to the insurance device. The approach developed in *Real Freedom for All* could be characterized as doing exactly the opposite. It amounts to expanding dramatically the scope of the auction, while relegating a functional analogue of the insurance scheme to a shrunk residual role. What motivated this move? Fundamentally the conviction that the opportunities we are given in life cannot adequately be conceptualized, as they are by Dworkin and in most liberal-egalitarian approaches to distributive justice (though not Rawls's), in terms of our endowments in personal and impersonal resources.'¹⁹⁰

Van Parijs is arguing that the auction device cannot fulfill a commitment to background justice. As long as distributions meet the envy test through the auction device they are acceptable according to Dworkin. Van Parijs is concerned that in reality the sanctioned distributions may not actually provide a proper or equal set of "real freedoms". Dworkin's answer is to use the insurance scheme to do the work of providing background justice in tandem with the auction. The separation and ordinal role that Van Parijs suggests exists in Dworkin's scheme are misleading. Envy is removed from both sides of our account, through insurance (internal/natural) and the auction (external). Nevertheless, Van Parijs argues that the insurance scheme is not drawn with appropriate

¹⁹⁰ IBID, p. 159

sensitivities. Because it fulfills the role it does within Dworkin's development of Rawls, it becomes necessary for the auction to operate justly. However, because it has sensitivity problems, Van Parijs argues Dworkin allows too many claims to be legitimate. Van Parijs argues our approach should be instead to provide access to the market (auction) in a more robust and ongoing way and to have a much more minimal commitment to claims of welfare (insurance).

What Dworkin does give us for background justice is a system of redistribution that funds the insurance and an argument for corrections/re-runs of the auction itself. The re-visitation aspect of this argument is important to note for our purposes here as it acts as a trump over the outcomes of the market device. Dworkin changes the criteria from those argued for by Rawls. Dworkin uses this change to invoke the envy test as the measure through which individuals can contest the results of the auction. Should a resource, which at first appeared equal prove to be unequally valuable, the citizens have recourse to re-running the auction and recalculating the obligations of the individuals involved. Therefore, the auction plays a distributive role, but it happens only after pre-conditions and qualifications are met. Van Parijs does question the use of envy as a measure of distribution but this is largely in terms of natural endowments versus expensive tastes. The aspect of the argument Van Parijs will ultimately argue with is the envy motivations of the insurance scheme rather than the auction. The discussion above highlights precisely how important it will be to compare and contrast the commitments to endowment insensitivity each argue for and why they argue they fall where they do in conceiving a system of distributive justice.

Van Parijs' argument has little effect on the actual legitimacy of the auction device in itself. Van Parijs is concerned that Dworkin's criterion of justice through the auction assumes a measurement of distribution that is not sensitive to providing for individuals in a fair and ongoing way. Their choices may be just procedurally by Dworkin's account but are not just in a liberal/fairness sense if they result in distributions that harm their real freedoms. Van Parijs is arguing we must allow access to the auction of resources, the market, in an ongoing way to legitimize the device of a market itself.

This argument is intuitively compelling but there is no reworking of the Rawlsian project to back it up. It is instead a liberal intuition pulled directly from Rawls' thought in justifying the difference principle that Van Parijs is arguing stands alone or in keeping with some loosely Rawlsian/liberal argument that is not articulated. Because of this Van Parijs' argument for a Rawlsian conception of background justice to run over the course of a full life in a robust ongoing way, and further that Dworkin's approach does not allow this to happen appropriately, is put in a precarious theoretical position. It is never explained at all and if Van Parijs were to work through the role he gives to choices versus the justifications for the Rawlsian actions he wants to keep, these arguments would conflict.

The market device is necessary for the UBI to do what Van Parijs claims it does ideally, which is provide greater opportunities and in turn allow greater choices. The result is that Van Parijs' argument against Dworkin will be reliant on his argument against the insurance scheme and the use of envy by Dworkin. In its place, we will need to accept the institution of "undominated diversity" and the use of some other sensitivity in terms of choices discussed in the next sections. Van Parijs will have to use this argument to undermine the sensitivities built in prior to running the auction by Dworkin through insurance rather than the use of the market as a part of the institution of the auction itself. It is unclear now, and it will be even less clear as we continue forward, how these arguments are tied together in a comprehensive way.

The argument Van Parijs wants us to consider is "hybrid" in that he is bringing various aspects of different theories together into a development of Rawls project. However, he wants us to fuse together arguments that are in direct conflict with each other. However, it is clear that if it can be motivated through some liberal account, this account is unlikely to be as simple as fusing other arguments together under a liberal umbrella. The ultimate result of considering "real freedom" is that it is less a complete account of justice than it is an account of how best to consider certain structures and commitments of liberal justice in keeping with providing optimal individual freedoms.

The development of Rawls requires that there is an engagement from the bottom up with his theories and justifications in order to assess where our development must come from. Van Parijs instead simply tweaks the principles that exist at the end without addressing why these same changes arise from our larger Rawlsian project. Van Parijs accepts pieces of Rawls' argument wholesale while amending others. These amendments, when we extrapolate them, lead to inconsistencies between Van Parijs and Rawls that remain unexplained or undefended. Van Parijs accepts Dworkin's motivations for seeking to develop a Rawlsian account but argues we must go in a different direction. Van Parijs is attempting to take these motivations and develop them more closely to Rawls thought through a principle amendment. However, the idea of choice sensitivity cuts far deeper into the Rawlsian project than Van Parijs believes it does. The result is that Van Parijs' institutions look counter-intuitive to a Rawlsian account of justice because he has not developed anything more fundamental in Rawls thought. This causes a deep tension between the espoused commitments of "real freedom" and the very basic structural ideas Van Parijs wants us to accept based upon this same principle. In order to Van Parijs' argument as a whole, it is important to continue into his account of endowment-insensitivity through "undominated diversity" and then to explore what decisions and choices ought to mean in an account of justice that uses the devices Van Parijs argues for.

4.3 Endowment-Insensitivity, Circumstance and Instituting Undominated Diversity

In the last section, we discussed briefly “undominated diversity” by name but with no greater detail. Van Parijs argues this is the solution to the problem of equalizing condition for individuals with disadvantages in natural endowments. However, we left much of Van Parijs’ exposition about this point out of that discussion. This is because the role undominated diversity plays in Van Parijs’ theory is a separate matter from how it acts to fulfill the philosophic commitment Van Parijs places on it. For the consideration of undominated diversity as part of a scheme of justice, it was only necessary to discuss what it was intended to correct, rather than how it corrected it and if this correction produces just consequences. Through this discussion, some details of the argument were revealed, including how important this argument ends up being in arguing against Dworkin’s reworking of the Rawlsian project. Van Parijs must show that Dworkin has failed in some way to provide the background justice needed for the market of the auction to produce just outcomes. If this were the case, the device of the modified veil and the auction would not produce just distributions and in turn would undermine the liberal values of Dworkin’s project. The insurance scheme plays a crucial role in this argument, as it is the apparatus Dworkin uses to achieve the endowment insensitivity prior to the auction in his project.

Van Parijs describes the commitment to the justness of endowments as follows, “The distribution of endowments is unjust in a society as long as there are two people such that everyone in the society concerned prefers the whole endowment (both internal and external) of one of them to that of the other. It can only be just if this is not the case, that is, if there is undominated diversity.”¹⁹¹ Undominated diversity is a concept developed by Bruce Ackerman. Van Parijs explains that it works by compensating those whose natural endowments cannot be seen as advantageous by other members of society. The intent is to compensate those who have unfavorable natural endowments. Should

¹⁹¹ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 59

one individual be able to argue rationally that an internal endowment is favorable then compensation is unwarranted.

Van Parijs argues that this commitment must come prior to the maximization of UBI within the ideal state embracing “real freedom for all”. It acts as a form of initial welfare for the disadvantaged that in turn legitimizes the market actions that follow. The goal is to put everyone on the starting line prior to letting the market do what it does. This is because the commitment to undominated diversity is a constraint (along with in-kind provisions) on the maximization of UBI. It is worth mentioning here that in-kind provisions do exist along with the UBI as we discussed earlier in this chapter). These along with the actions of undominated diversity fall prior to the maximization of the UBI. These provisions intend to provide infrastructure and preserve basic resources. Van Parijs argues that much like undominated diversity these actions will end up being nominal in relative terms. In some cases, in-kind provisions may place a meaningful constraint on the maximization of the UBI but the kinds of items that can be legitimately provided this way have to meet a relatively strict standard, which should reduce their scope. The idea is that these things can only be provided if providing them in kind to everyone if it is cheaper to provide these things in-kind given the value ascribed to it by the most dispassionate user of the resource. Van Parijs’ explains,

‘The argument is not that everyone attaches the same importance to clean air, uses streets to the same extent, or finds a safe walk equally essential to her well-being, but that even the least intensive air breathers, street users or walkers can have no less of what they want as a result of in-kind provision: they get cleaner air, or better streets, or quieter footpaths for a cost (in forgone cash grant) that does not exceed what they would have had to pay—administrative costs (in cash and bother) included—for what they would have chosen to consume in the absence of in-kind provision.’¹⁹²

This may be a larger caveat than Van Parijs lets on, but for our discussion here, it is important to note that this kind of commitment is not going to yield us much in terms

¹⁹² IBID, p. 44

of provisions for the handicapped, which I have argued we need. Undominated diversity will need to do this work.

Undominated diversity aims to decrease the amount of individuals who are owed compensation. Van Parijs argues the sensitivities of Dworkin's insurance scheme legitimize claims of natural endowment compensation that it should not, which we will discuss shortly. Undominated diversity is intended to limit these claims, as the legitimate and reasonable claims of a few to a particular endowment would lead to far fewer natural endowments being considered unfavorable. Van Parijs wants to separate the claims of the merely untalented from those who are legitimately handicapped so that compensation is geared wholly to those who deserve/need it. This is why Van Parijs argues that his sensitivities to endowment insensitivity and ambition sensitivity in a commitment to "real freedom" are inversely weighted to the roles of the apparatus given by Dworkin. Van Parijs argues that Dworkin is heavily dependant on the wide actions of insurance while the auction plays a smaller role in distributive action. Van Parijs argues that undominated diversity, by virtue of its much smaller claims, places more emphasis on the market/auction aspects of distribution that follow through the UBI. By virtue of this smaller remit, this standard also allows for a greater level of UBI and thus opportunities. It acts to screen out tastes in the endowments one "wants" versus the endowment one "needs" to a greater degree. With the existence of the UBI in an ideal situation, Van Parijs argues that there is no need to be concerned with the fundamental welfare of the individual with expensive internal endowment tastes as their basic needs are met by the UBI.¹⁹³

Van Parijs argues this is favorable because it removes subjective measures from a calculation of compensation. This commitment is favorable to that of an insurance scheme because of the potential subjective decisions that could warrant compensation. He believes that Dworkin's use of an aggregate system of insurance opens the door for these kinds of claims as the information needed to make them is allowed into the process by Dworkin's modified veil. Dworkin allows individuals knowledge of their talents but

¹⁹³ Van Parijs, Philippe: 'Egalitarian Justice, Left Libertarianism and the Market', pp. 145 -162

not their value through the modified veil. Van Parijs argues that this results in individuals making claims about these known talents being the result of natural circumstance and hence deserving compensation. Van Parijs is concerned that Dworkin legitimizes compensation to people based on the wrong grounds. As Van Parijs writes, “[t]he very notion of counterfactual insurance opens up the possibility that two people with identical internal endowments but different tastes will be entitled to unequal compensatory external endowments precisely because of these differences in tastes.”¹⁹⁴ Van Parijs argues this is the result of Dworkin’s insurance as it allows the lack of a particular natural endowment to be relevant because of tastes. Van Parijs argues this garners compensation even when another individual with the same endowment does not feel the endowment hinders their preference schedule.

As critical as Van Parijs is of the concept of the insurance scheme, he does mirror it in one key respect. Van Parijs believes the application of undominated diversity should be buffered “for example by stipulating that an ‘imperceptible’ improvement in a dominated endowment should not be achieved at the expense of a ‘massive’ shrinking of other endowments.”¹⁹⁵ Undominated diversity, although more stringent than the insurance scheme, can rule people into the dominated group whose needs maybe so great that some sort of reciprocal cap is needed to ensure the level of redistributive obligation does not rise too high. This stipulation is intended to act as a device to limit the potential reciprocal costs through redistribution the society faces much like Dworkin’s insurance scheme.

Van Parijs states that the commitment to undominated diversity could disclose legitimate disabilities instead of compensating a lack of desired talents and natural endowments. Van Parijs argues further that his commitment would not impose too much or provide too little distribution to the naturally disadvantaged. Van Parijs raises an interesting point in terms of Dworkin’s example, namely how would one calculate their insurance when they are unaware of their preferences outside of the modified veil of

¹⁹⁴ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 59

¹⁹⁵ IBID, p. 60

ignorance. The insurance is calculated upon the effect of a malady upon potential outcomes. Van Parijs argues this would taint the apparatus from acting to do what Dworkin needs it too because the only way to discern such a standard is to know of one's taste for an outcome. If the calculation did not take these outcomes on in the decisions of insurance, the actors would have no gauge by which to decide how to compensate themselves outside of the veil.

In dissecting Dworkin's scheme in chapter three, I argued that our conclusion should be different from what Dworkin states are the outcomes of this device. I argued that if we follow this line of thought the outcome would be that individuals would act to insure their access to certain ends through provisions of adaptation given the effect internal endowments might have on their ability to select and use bundles they may or may not want, the Principle of Just Access. These adaptations are still constrained by the insurance device and in doing so retain the proper level of reciprocal redistributive obligation over the actors in question. However, Van Parijs does not make this needed development due to a deeper problem he has with Dworkin.

I suggested that given the market system Dworkin used that it was important to respect the ability of individuals, even when handicapped, to participate in this system. The processes of Dworkin's theory would lead us to agree upon acting to provide access to legitimate bundles of goods given that embodiment malady X prevents use of bundle Y and this can be remedied with Z. A society committed to principles of justice such as Dworkin's would act to provide Z to individuals with X if they chose to purchase X in the auction given that Z did not prevent individuals from having equal liberties due to the cost of providing Z. The Principle of Just Access allowed flexibility in the system that made even the handicapped accountable for their tastes, while compensating them through provisions of accessibility to an appropriate set of legitimate ends. For Dworkin this is an important amendment if his system is to conceive ambition sensitivity equally. The freedom to be optimally ambitious is an important aspect of autonomy that Dworkin needs to provide for his conception of individual freedom to be compelling.

For Van Parijs, the problem is much the same. If undominated diversity is to be a compelling account of how a system of justice concerned with individual freedom ought to work, his institutionalization of it must meet this same general challenge. For Van Parijs, the goal is to provide leximin opportunity sets through the UBI. Since the Principle of Just Access removes at least in part the criticism Van Parijs has of the insurance scheme, his institution of undominated diversity must be capable of meeting our judgments about how we determine the allocation of resources through the guidelines provided by Van Parijs' principle. Undominated diversity as characterized by Van Parijs appears to be able to take the Principle of Just Access on board, although it does not do so directly. It needs too in order to appropriately conceive the moral agency of the handicapped. Van Parijs is equally as guilty of not making such a commitment explicitly. Nevertheless, his theory can accommodate it as it is constructed. The issue is really how this standard decides who is owed compensation and to what level. Once the standard of undominated diversity is applied, the Principle of Just Access can work after this process takes place. The question we have to ask changes about considering these schemes. We need to determine if undominated diversity decides who and what to compensate appropriately. This is because Van Parijs claims undominated diversity and the insurance scheme work in different ways to determine who should be compensated for what.

The way that Van Parijs utilizes the commitment of undominated diversity can be boiled down to an inverse envy test.¹⁹⁶ Individuals are compensated if and only if no one else can rationally see their natural endowment as advantageous. This standard does not preclude the use of the Principle of Just Access but it does limit whom it could act for. The problem with this conception becomes clear when we consider the situation in which someone not being compensated simply because someone else, with a different set of potential preferences, feels their natural endowment is not a handicap given these potential preferences. The deciding factor would be that individuals would have to either use their probability taste driven preferences to adjudicate such a standard (ala Dworkin) or remain wholly ignorant of their potential preferences or likelihood of having one (ala

¹⁹⁶ Inverse envy test is a term my advisor Peri gave me to express this idea as a handy piece of shorthand, I cannot take credit for it.

Rawls). On the first account, whether a frailty is advantageous or not demands knowledge of probabilities of external preferences and tastes. On the second account, undominated diversity would at least have to be amended because individuals would all, on Rawls' view, come to the same impartial agreement about what compensation was needed or appropriate. The ability for one person to rationally object would not be possible on a strict Rawlsian account of an impartiality device. There could be no single dissenter. Ergo, you would have to modify the veil in some way to get to a point where undominated diversity could utilize its operating assumptions. In doing so, this would commit the same sin that Van Parijs accuses Dworkin of, just in reverse. Therefore, some greater set of sensitivities has to be let into the account. Dworkin does this but rather than utilizing this approach, Van Parijs discards it due to a mis-characterization of Dworkin's argument.

Van Parijs wants undominated diversity to reward those who amend their preferences and to limit insurance claims to natural endowments such as eye color or skin tone that he argues Dworkin's insurance has to take seriously. As I have alluded to already, it is my position that this line of thought makes a crucial error in examining Dworkin's position. Dworkin lets in the knowledge of talents but the removal of knowledge about their value means that individual tastes cannot be determined. It may be that Dworkin needs greater clarification or development on the details of this argument. But by being generous to the argument, I believe we can see its power. If tastes come from value, then Dworkin's argument has ruled this factor out of our compensation discussion. If this argument, or some plausible modification of it holds, then what individuals base their insurance on is not tastes as Van Parijs argues but simply a calculation of having X talents due to natural endowments and then Y resulting courses of action. The greater the handicap an individual has, the less the value of Y will be, so the individual will act to compensate themselves appropriately for the lack of options while being unaware of their value and their tastes for them.

The aggregative effect Dworkin's insurance scheme will have removes Van Parijs' claims about certain natural features being compensated for. Individual claims for

and against being blue-eyed or brown-eyed abstractly offset each other due to the information veiled in and out of Dworkin's modified position. The potential value of having either of these endowments and the bundles each allows or precludes would negate an insurance claim to accessibility provisions or compensation. This is because having one or the other would have little effect on the value of Y and individuals would be unaware of whether they wanted something that either endowment would have gotten them as they do not know the value associated to what they have been naturally endowed with. The only way such claims would count is if it were truly disadvantageous to be some degree of one or the other. It would not be possible to know the social value or individual value of the talent/ability in question. Therefore, it would be impossible to state that eye color or skin tone had any negative effect for which one would wish to lodge a claim. It simply becomes a matter of seeing how many talents/bundles you could use prior to knowing which ones you might want to use. Being comatose or blind would have a clear effect on the numbers of bundles you could use and would garner claims. Van Parijs overstates the problem an insurance calculation causes, as many of the conditions he argues would be compensated for would not have legitimate claims on insurance compensation. In cases where the value of something is less clear, Y is a lesser set of bundles but not a minimal set of bundles, the aggregative calculation of insurance works to iron out these claims and reach a bipartite level of compensation rather than deny it. .

By instituting undominated diversity Van Parijs opens the door for the inverse problem, which is one individual claim removing the legitimate claims of a large section of the population. Van Parijs argues this would not happen, as the claims have to be reasonable. The ability of one individual to fulfill their preference sets minus their hands and feet does not mean those without hands and feet are not due compensation. This is because by Van Parijs' account it cannot be reasonably seen to be advantageous to have no hands and no feet. It is important to note first how much work reasonable standards have to do in adjudicating a just claim. It is doing work, nebulously and in an undefined way, which Dworkin's scheme addresses directly. Perhaps more worryingly, if the standard of reasonableness commits an error in providing opportunities that ought to be

reciprocally available to someone, the argument defeats the aims of “real freedom”. “Real Freedom” is the ability to do what one might want to do. For Van Parijs, greater resources through UBI, ensures the currency to make this account work. However, for some people, this claim requires more than just a maximized UBI. Van Parijs’ claim would have to work in one of two ways. It would either have to allow other individual’s claims about their conceptions of the good to override someone else’s legitimate claim to compensation, which Van Parijs argues we should not do due to our commitments to liberal justice. Alternatively, this standard will have to exist in such a frame of reference that its decisions will end up the same as Dworkin or Rawls due to the information withheld from its operation. The only way forward is to amend or specify undominated diversity by adopting a conception of what is and is not a rational objection to a particular endowment. This is what Dworkin’s insurance is meant to do, actually give a standard by which we can decide what claims are legitimate, which are not and to what degree we ought to compensate. Van Parijs’ use of undominated diversity does not answer this question and it needs to in order to work at all.

Dworkin argues that the insurance scheme ought to work by compensating individuals to the degree they would reach given a veiled judgment in a situation of unknown individual taste and outcome but knowledge of talents, obstacles in natural endowment and the outcomes that could result. This requires the same rational decision about what is advantageous and by extension what is not, outside the initially veiled position. The difference is that Van Parijs’ system takes the claim of one in this sense seriously whereas Dworkin takes an aggregative approach to determining the value of the claim. The end-result of the two commitments, when investigated, has to be very similar if undominated diversity is going to work. Van Parijs is simply arguing that Dworkin is not doing what he says he is by allowing too many people claims to compensation. The question is whether one is allowing too many people to be compensated (Dworkin) or conversely if the other (Van Parijs and Ackerman) are allowing too few to be compensated. They are both saying there are conditions we will or ought to be indifferent toward. Van Parijs is arguing that this category will be bigger under undominated diversity than Dworkin’s will be under his insurance scheme. Van Parijs

believes this is legitimate. If this claim is true for Van Parijs, then we can conclude that undominated diversity is not working to ensure justice for the legitimately handicapped as it refuses to take nominal but important claims seriously. If we apply these standards coherently, they are intended to screen in and screen out the same individual sets of natural endowments. As a result, undominated diversity is not an advance on Dworkin's argument and in fact is troubling simply because it has not worked out the processes that Dworkin has in his insurance scheme. By extension, neither precludes the adoption of the Principle of Just Access and both clearly need this amendment for the same reasons. In this light, any minimal aspect of Van Parijs' commitment to undominated diversity by comparison to the insurance scheme is unlikely if this standard is to be coherent with Van Parijs' espoused commitments.

It is my position that given the aims of an ambition sensitive system of justice, which both Dworkin and Van Parijs endorse, we need to adopt the aggregative insurance process rather than allowing one claim based on an undefined standard of reasonableness to offset the claims of those with a particular malady. Van Parijs never elaborates on the sort of veil of ignorance that would guide the endowment insensitive measurement process. However, he clearly uses an approach similar to Rawls and does not question, as some critics of Rawls do (like Amartya Sen and Martha Nussbaum)¹⁹⁷, the transcendental institutionalism of such an approach. We are left to assess the options. The first is if the veil is complete in much the same way Rawls described it. If individuals were completely veiled and ignorant as Rawls ascribes, the result would be that all individuals would reach the conclusion or bargaining consensus about an endowment not just one person. This would in fact be an aggregative process of bargaining and compromise at the original position. The alternative is a Dworkin-esque account of the veil and the original position. If the relationship between potential talents and potential endowments is let through the veil, the claims of one could be rational (my set is Y-7) but would not be universally applied due to the aggregative calculation of insurance (most everyone else has Y-9). An individual veto on the value of an internal endowment must be avoided, as

¹⁹⁷ See – The relevant works of Amartya Sen and Martha Nussbaum on the Capabilities Approach are located in the bibliography. In expanding on the Principle of Just Access, (as I hope to in the future) it is my intention to take on their work directly. I simply do not have the space to do so here.

this individual would reciprocally privilege their account of the good through a particular opportunity set instead of allowing a fair reciprocal amount of access or compensation to those who did not want to use this same opportunity set. The aggregative device works to offset claims against each other and then decides the level of compensation, those with the most invasive endowment claims receiving the most insurance support.

As Van Parijs never stretches the arguments presented here to the level of exposition we have just had, it appears that part of the reason he is unconcerned with a potentially small remit for insurance/welfare actions is that the UBI is constructed as it is. The actions of undominated diversity are purely compensatory. The UBI takes on the role of providing leximin opportunity sets rather than the actions of the welfare calculation. Van Parijs equal access to opportunity sets is granted through the UBI. Given that everyone universally receives the UBI, including the handicapped, the handicapped need not provide labor in order to provide themselves with a meaningful standard of living. For Van Parijs, the conditional equality of the UBI, a set of all-purpose means, provides the access for individuals to do what they might want to do. Nevertheless, what they want to do is constrained by their choices and tastes given their natural endowment. So the UBI is perhaps more correctly described as allowing individuals to do what they want and are able to do. The fact that the latter of these two claims could have drastic consequences is not truly addressed or corrected. By assuming that a lack of natural endowment leads to a conception of the good that is appropriate (not laboring), Van Parijs assumes that the handicapped will value this conception of the good over laboring ineffectively or with great difficulty. The welfare calculation present in Van Parijs simply compensates people for the opportunity sets they cannot utilize and could gain further income from. Therefore, they are granted income, instead of access to the desired and potentially attainable laboring position.

Given our discussion of the agency of the handicapped, this simply does not treat the agency of the handicapped appropriately. Access to the market system without the actions needed to allow individuals to access goods would not be an appropriate solution. As we noted with Dworkin's answer to this problem, merely providing compensation as a

greater allocative share is not enough to ensure fair conditions either. To treat taste sensitivity comprehensively, all liberal conceptions of justice need the Principle of Just Access. The constraining actions of undominated diversity are even more concerning when they allow even less remit for the Principle of Just Access to operate. If “real freedom” is to be sensitive, in an appropriate way, to the tastes and ambitions of the handicapped and disabled while constraining in some way the actions of compensation, the justifications that underpin the commitment to “real freedom” must apply to those with unfavorable natural endowments. Solely compensating them monetarily, due to an assumption of what income other bundles could have yielded them, is an inappropriate commitment in the same way it was for Dworkin.

Let us expand our compensatory measures for a moment. Dworkin noted that providing compensation in an allocative scenario simply by providing a greater amount of initial clamshells would not ensure that individuals had the same liberties because of the preclusion of certain bundles due to a handicap. This same argument holds the same weight in discussing a UBI system as it works in the same fundamental way. If the commitment that needs to be undertaken is the Principle of Just Access, the provision of compensation cannot be reasonably expected to come from within the procedural marketplace. A greater income to supplement the UBI does not fulfill the commitment that is needed out of an endowment insensitive calculation of compensatory action.

The problem with expecting a greater allocative share/UBI to properly compensate individuals in keeping with the Principle of Just Access is three fold. The first issue is that the right to accessibility coming prior to the maximization processes of the UBI presumes that the needs of accessibility, for instance specific action Z, is what the handicapped individual has a right to. Providing them with more money instead of the actual good means that they may alternatively choose to use the UBI in some other way rather than gaining the access the extra endowment was for. Such a scenario would not only fail to provide the access needed to make the commitment to justice coherent, it would also violate the principles that compelled the distribution in the first place.

Nevertheless, let us say that perhaps, through some system of monitoring, this objection could be avoided, the second objection cannot be. These material needs must be provided and if they come from the marketplace, they are subject to market volatility. Van Parijs was adamant that the role of the market in providing welfare was problematic. The capitalist market place is intended to provide taste sensitivity through the self-definition of ends. Although the handicapped are also largely capable of exercising these same distinctions in taste, the goods required to access a given social bundle cannot be seen as a taste, but rather a need. The marketplace is also taste sensitive in what the seller provides as much as the taste of the buyer. Individuals should not be forced to spend more than their allocation to provide the access they are owed by an insurance calculation simply due to market fluctuations in production. Ideally speaking, this would not happen, but one would be hard pressed to find a method of institutionalization that could act to grant more endowment the instant the cost of the needed item rose.

Perhaps of most concern is the third consideration of provision over time. Imagine if an individual 1 spent their access share at point A on technology B to do X. Over time B became outdated and individual 2, who was handicapped in the same way but arrives several years after point A and also wished to do X, got a share that bought the superior technology C. We could not say that 1 and 2 are equal because 2 has superior accessibility options to 1. The share was spent and how it was spent was an act of contextual freedom, but if the need is not addressed in an equal way over time, handicapped individuals will not be equal to each other if they exist in the same relative time slice. If the market is to be utilized but properly subordinate, their mode of compensating the handicapped needs revision if we are to take the agency and opportunities of this group seriously. These issues further underline the need for the Principle of Just Access and what issues it must address in institutionalization. Simply providing compensation through greater UBI to the non-ideally endowed does not satisfy the needs of equality within the allocative marketplace nor between like individuals.

Richard Arneson and Andrew Williams raise concerns about undominated diversity in their critiques of Van Parijs as well.¹⁹⁸ As we have discussed, Van Parijs' conception requires a great deal of amendment but we have shown how a different commitment could work, namely an insurance calculation in concert with the Principle of Just Access. With these ideas roughly sketched now, it is important to inspect the critical arguments against Van Parijs and see if they are addressed through our proposed amendments. Arneson raises many claims about welfare and Van Parijs' model and one particularly strong one will be addressed in the next section. For now, though, it is important to address his issue with undominated diversity specifically. Arneson claims undominated diversity does not do enough to be a substantive account of justice. Arneson states that under Van Parijs' explanation, if one person can see a condition as advantageous it does not garner redistributive actions.¹⁹⁹ To add to these concerns about the operation of undominated diversity Williams, in his Eva and Eve example²⁰⁰, raises the problem of delineating legitimate handicaps as well. He postulates a scenario where two infertile women, Eva and Eve, have the same internal endowments and exist in a system of undominated diversity as proposed by Van Parijs. The first of these women, Eva, sees her malady as a benefit as she is not burdened by pregnancy and finds it morally better to adopt. Eve, on the other hand, is socialized to believe that infertility is a "personal catastrophe"²⁰¹ and thus wishes to be compensated for her inequality compared to other women in natural endowment. Williams argues that Van Parijs' account would compensate Eve based upon her preferences but not compensate Eva evenly despite their equal natural endowment. Aside from the preferences of Eve and Eva, there is no physical disparity between them, but Williams argues Van Parijs' explanation of undominated diversity will make an unequal distinction about compensation between them.

¹⁹⁸ Arneson, Richard J.: 'Should Surfers Be Fed?', review of *Real Freedom for All* by Philippe Van Parijs, in Reeve, Andrew and Williams, Andrew (eds.) *Real Libertarianism Assessed: Political Theory after Van Parijs*, (Basingstoke: Palgrave Macmillan, 2003), pp. 95 - 108; Williams, Andrew: 'Resource Egalitarianism and the Limits to Basic Income' in Reeve, Andrew and Williams, Andrew (eds.) *Real Libertarianism Assessed: Political Theory after Van Parijs*, pp. 111 - 135

¹⁹⁹ Arneson, Richard: 'Should Surfers be Fed', p. 98

²⁰⁰ Williams, Andrew: 'Resource Egalitarianism and the Limits to Basic Income', p. 132

²⁰¹ *IBID*, p. 132

Van Parijs responds to these claims by urging that the goal of undominated diversity is not “envy freeness”.²⁰² To put Van Parijs’ claim into the context of Williams’ example, Van Parijs argues that the envy of Eve to possess the ability to procreate is not known in an a priori sense. The only thing we can abstractly reflect upon is the physical condition of Eva and Eve, not their preferences or their envy of one another given their preferences a posteriori. This means their compensation must be equal if, in abstraction, their condition of embodiment is deemed not to be rationally/reasonably advantageous. Given our discussion of what Van Parijs’ position has to be on this point, his answer to Williams is salient. Eve and Eva cannot have knowledge of these tastes within the abstract exercise even if they are aware of their natural endowment/talent. The tastes being screened out leaves a simple impartial decision that would yield an unbiased outcome, ideally speaking, about the value of infertility as a handicap. This argument is convincing in that the conception of the good is to be screened out through the veil, even if potential preferences, handicaps and the effects of each on each other are known in a modified sense. The compensation would have to be equal even if Van Parijs’ standard of undominated diversity dictated they receive nothing at all. Our insurance suggestion would deal with this critique in much the same way but use a different measure of the compensatory action. The outcome would be equal in respect to Eve and Eva. The two standards, if operating properly, will come to the same conclusion on this point.

Arneson’s concern reflects the argument I have lodged earlier against Van Parijs, namely that if a lone objector could rationally object to the compensatory claim, it would be refuted by this abstraction. Arneson goes after Van Parijs in a slightly different way. Arneson argues that the abstract individual could not know of their preference to have disability X and thus could not legitimately object upon becoming aware of their preferences. Thus, the a posteriori envy for a particular form of embodiment cannot be the legitimizing factor in the decisions of undominated diversity. Arneson is essentially arguing that Van Parijs’ stated criterion requires knowledge that Van Parijs’ use of Rawls account of the veil removes. This is a major problem for Van Parijs as his account flirts

²⁰² Van Parijs, Philippe; “Hybrid Justice, Patriotism and Democracy: a Selective Reply” in Reeve, Andrew and Williams, Andrew (Eds.); *Real Libertarianism Assessed: Political Theory after Van Parijs*; Basingstoke : Palgrave Macmillan, 2003,

with two competing liberal conceptions of the veil without adopting one or the other or presenting a new one. However, Arneson's criticism is not a problem if we accept our developed account of Dworkin, as we have to make no such claims about a single actor vetoing compensation. Our argument has to be not that Eve and Eva have to agree about a condition nor that they have to be ignorant of what having a condition could mean for their preferences. If a conception of compensation is going to be coherent, it must take all of these aggregative consequences in and determine compensation through this process in order to ensure proportionate compensation. This requires a position like Dworkin's that modifies the veil and applies aggregative insurance. Arneson and Williams both highlight problems in Van Parijs' argument which he attempts to resolve through an account that directly contradicts itself. The veiled impartiality device cannot maintain ignorance while applying a standard that takes singular individual claims as a veto. If it allows the knowledge of talents/abilities in but not their value/taste, then it is Dworkin's modified veil and it requires aggregation and different commitments to liberal justice than Rawls or Van Parijs express.

However, even if our amended suggestion to these objections is convincing, Van Parijs' claim revealed in his response to them of his test not being a measure of "envy freeness" is not. Van Parijs' claim is only true in a semantic sense in that undominated diversity is a test of inverse envy freeness. As we have argued, there is really no difference in the results of this idea worked out coherently from the "envy freeness" of Dworkin's auction and insurance scheme. Van Parijs will need to realize this for the sake of his argument, and it underlines the deep tensions caused in his theory due to the lack of a comprehensive account of how an appropriately impartial and abstract process yields his institutions and commitments.

4.4 Welfare, Contributory Negligence and Equality

We have now assessed the commitments present in Van Parijs' work prior to the operation of the UBI. The argument that remains relatively unexplored thus far is perhaps one of the most crucial to the entire exercise, namely asserting that a UBI is an appropriate and indeed optimal institution of a liberal commitment to justice. Van Parijs' argument has been based on providing individual freedom in a package that he argues is better than other liberal alternatives. It has been precisely upon this point that critics of Van Parijs have lodged some of their most powerful critiques of his theories. Van Parijs has to answer criticisms about the fairness and reciprocity of his particular system and why he allows the conditional outcomes that a UBI can clearly result in through negligent use. Given the lack of a comprehensive account of liberal justice and the incoherencies that have so far been uncovered, it is important to work through this larger idea of UBI to see if the thrust of Van Parijs' suggestion can be a plausible liberal reform. We will begin by discussing in more detail some of the specific aspects of UBI that Van Parijs argues are necessary before assessing the criticisms raised of his conception of basic income.

The role of the UBI within Van Parijs' theoretical model is clear. For Van Parijs, this is the clear extrapolation of a property owning democracy in keeping with justice as fairness, only with a slightly amended conception of the argument for primary goods. However, to fulfill this role, Van Parijs builds the UBI in a very precise way that separates it from other forms of basic income and welfare systems. This has effects on the operation of a UBI. The UBI is a regular equal disbursement of currency to every citizen. Van Parijs argues for two important aspects of the UBI, namely that it must be universal and unconditional by being provided to every citizen and second that it must be provided at the maximin level possible. The basic income ought to be universal and unconditional so as not to privilege any individual over another. He believes the freedom of and opportunities for individuals must be provided for in an equal and ongoing way if the application of "real freedom" is to be coherent with the liberal project.

This is a direct refutation of the means-tested or conditional forms of support welfare and the maximin actions of the difference principle as Rawls constructed it initially in *A Theory of Justice*. The action is one of providing for individuals over the course of a complete life at the level necessary to provide a set of leximin opportunities rather than some measurement of maximin condition that proved problematic for Rawls. At the same time, these principles drive Van Parijs' project away from basic income models that we will discuss later in this section. For Van Parijs, the application of "real freedom" requires a universality principle when distributing basic income due to the background considerations of justice. Van Parijs argues that our liberal precepts dictate a concern for the condition and opportunity sets available to individuals over a full life. This requires the universal and unconditionality aspects of a basic income and these stem from a liberal commitment to justice.

These aspects of basic income are buffered for Van Parijs by actions to maximize the amount of UBI that is to be distributed to each individual. Van Parijs urges the universality of a basic income on its own is not enough to secure "real freedom". The UBI should be maximized in a way that provides a leximin set of opportunities to individuals with the least set of opportunities, while allowing these individuals to use the income to select the actual opportunities they wish to avail themselves of.²⁰³ Though Van Parijs is quick to establish that the maximization cannot come at the expense of in-kind provisions, actions of gift and bequest, or other calculations of utility, he insists throughout that the UBI must be maintained at the highest level that is sustainable in the given society. Van Parijs further argues that the UBI must be disbursed in even and frequent amounts in order to accomplish the liberal commitment of providing for individuals over the course of a full life.²⁰⁴ Because of this, the decisions they could undertake with some other conception of basic income, like a lump sum, must be protected against. Van Parijs argues this is the sole way to provide equal concern for individual opportunity sets in an ongoing way. Though Van Parijs concedes this is a

²⁰³ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, p. 25

²⁰⁴ *IBID*, p. 45

paternalistic approach, it is the appropriate one due to the problems that negligent use can cause. The arbitrary nature of distribution and paternalism of disbursement are compromises that must be accepted in reconciling a conception of justice with a mechanism to enact it in society.

Acting paternally, Van Parijs argues that the state should provide a basic income via installments. He argues that although their distribution scheduling may be morally arbitrary, this is preferable to a lump sum.²⁰⁵ He worries that a lump sum payment may act in an undesired way if it is squandered upon receipt. This behavior would not only be undesired but could result in long-term consequential situations that are contradictory to a liberal concern for justice. Van Parijs argues that the state may legitimately act to disperse basic income more sporadically in order to avoid the complete disbursement of income over a short time period. Van Parijs motivates this assertion through a concern for individual condition over a complete life.²⁰⁶ Van Parijs defends the prescriptive nature of such a stipulation stating, “a mildly paternalistic concern for people's real freedom throughout their lives, not just ‘at the start’, makes it sensible to hand out the basic income in the form of a (non-mortgageable) regular stream.”²⁰⁷ Van Parijs justifies state action of this type because the state assumes “a universal desire on people's part, when ‘in their right minds’, to protect their real freedom at older ages against the weakness of their will at younger ages.”²⁰⁸

This concern mirrors that of Rawls who used the difference principle to ensure the provision of a maximized set of social primary goods to individuals over the course of their lives.²⁰⁹ Van Parijs, in placing his system within the conception of a property owning democracy, is using the same relative motivation to justify providing individuals with a frequently disbursed universal basic income. The difference is that Van Parijs wants to avoid the problems he sees in Rawls list of primary goods, particularly the amended one that includes a leisure calculation. Van Parijs wants to avoid the

²⁰⁵ IBID, p. 102

²⁰⁶ IBID, Chapter 2, Section 2.5, pp. 45 - 48

²⁰⁷ IBID, p 47

²⁰⁸ IBID, p 47

²⁰⁹ Rawls, John: *Justice as Fairness: A Restatement*, p. 200

conception of the good Rawls set of primary goods enforces and thus uses a specific tool to avoid this problem. Van Parijs' commitment to freedom leads him to create a method of providing this idea that allows individuals to decide what set of primary goods they may actually want.

As we explored already in this chapter, this uses Rawls' general argument in a very precise way. The argument that the state is motivated to provide an ongoing set of primary goods is the same. However, Van Parijs argues his method provides this, in lieu of Rawls saying how it should be done, through an allocative process that allows individuals to choose their set of resources. As a result, Van Parijs is balancing the commitments to liberal justice by providing an ongoing method of income provision in a way that minimizes through paternalism the ability of individuals to arrive in liberally troubling conditions. For Van Parijs, this legitimizes an allocative process through a development of Rawls argument. These liberal constraints act to limit the actual maximization of "real freedom" that could be possible through other methods of basic income. On Van Parijs view, the balance of providing individuals with the appropriate level of responsibility through their choices and yet access to a comprehensive set of social primary goods comes ideally, in most contexts through the implementation of a UBI.

Rawls argues our concern is for individual primary goods and this should not be left to a market device, as it is required by background justice. The need for primary goods is constant over a full life and since individuals cannot be responsible for natural endowments that make them poor decision makers with a tool used to acquire these goods, the goods have to be provided directly. This highlights the aforementioned selective relationship Van Parijs has with Rawls' theory. However, as we have noted, Rawls' conception was not without problems. So we must assess if Van Parijs' selectivity is well placed given his competing account of how to provide optimal individual freedom justly. It is important to first inspect whether the idea of dictating the disbursement method as suggested by Van Parijs violates autonomy and privileges a conception of the good rather than the right by limiting the choices individuals can make.

Many critics of Van Parijs have noticed this issue. We will discuss those critiques directly, but we must first discuss the general principle of providing a set of primary goods in any fashion.

The conceptualizing of primary goods privileges an account of individual needs in so much as it reflects the needs everyone will have no matter what else they may want. This is the case for the theories of Dworkin, Rawls and Van Parijs in that they all assume people will have needs of some kind rather than choose rationally to die and attempt to enforce this belief effectively through abstract bargaining and compromise. This aspect of our commitments to justice is not troubling. On the contrary, I have argued this is where much of the true power of the liberal critique of pure formal claims comes from. Resources clearly fall into the category of being a primary good in this way even if we do not agree as to how vast our conception of them is. The latter of these claims is very important in deciding the state structure that will fulfill the needs of the theoretical concept. This is in part why Rawls moves away from welfare states as he believes they use apparatus, which inappropriately to equalize the value of liberties individuals have through a set of primary goods. The one key advantage of Van Parijs' UBI on this account is that the conception of what constitutes a resource-based primary good is left to the individual through a tool that does not entrench inequalities systematically due to its unconditional and maximal nature. These aspects of the UBI are built in specifically to satisfy Rawls' expressed concerns with providing a comprehensive set of primary goods in a property owning democracy. Importantly, it shows where Van Parijs' resource claims lie. Choices matter prior to the actual acquisition of these goods. This is the clear implication of his system and it is one at odds with how Van Parijs has constructed his philosophic commitments. The means to secure these goods must be provided in much the way Rawls argued for, which is universally, maximally and in an ongoing manner. Van Parijs' only amendment is that the choices have to be legitimized due to the problems Rawls has in conceptualizing primary goods such as leisure. The UBI allows these choices and outcomes to matter within the appropriate sphere even if the actions individuals take with this UBI yields what would be illiberal outcomes based upon a more strict Rawlsian account of liberal justice. Importantly, the reason for the UBI is not

predicated on an allocative vision of distribution but a liberal commitment to providing primary goods amended solely at a particular point to inculcate the results of individual choices.

On the other side of the coin, the disbursal method could undo the idea of not privileging a set of goods by curtailing the goods one can purchase in the marketplace due to the method employed. This is particularly an issue if “real freedom” is the ability to do what one might want to do. If we are asserting the legitimacy of moral agency then the disbursal method could be unjustly constraining this agency compared to other forms of basic income. A limited set of goods are available due to the size and frequency of the disbursement. By limiting the preference schedule available at any given point, the UBI could be argued to be privileging a set of goods over another. The argument runs that if individuals own their basic income as their way to access a distribution of resources in keeping with their reciprocal agreement about primary goods, how they choose to have it disbursed, such as over time or all at once, should be up to them. Individuals are owed a reciprocal allocation given their status as equal citizens and the paternalism of the distributive method undermines their liberty to act as they ought to be able to act with their endowment.

One defense of a lump-sum system is provided by Bruce Ackerman and Ann Alstott in their work *“The Stakeholder Society”*. Ackerman and Alstott suggest a one-time lump sum grant would act effectively to enfranchise future generations of Americans within the United States. This sort of grant is intended to provide an initial distribution that will allow individuals to self-conceptualize their needs and goals, thus imparting greater freedom upon them. Unlike a UBI, Ackerman and Alstott argue that such a solution is also considerably more feasible as a practical reform as it would not require the constant monitoring and disbursal requisite of a UBI. The lessened administration results in the system being considerably cheaper to run and administrate.

Ackerman and Alstott are not the only individuals to advocate lump-sum solutions,²¹⁰ but their argument is one of the most comprehensive examples.

Ackerman and Alstott argue that their system would provide a generation of young Americans with a meaningful initial endowment, \$80,000, and that such funds could be easily generated by taxing minimally (2% property tax) the most affluent (top 40%) of United States citizens.²¹¹ They further argue that this plan will increase the opportunity sets that young Americans can access, which is ostensibly the goal of “real freedom”. Although Van Parijs does not mention any particular state in his work, the United States seems to be precisely the sort of state Van Parijs might view as a good candidate to adopt a UBI.²¹² Basic Income solutions also have precedent in the United States both in negative income tax experiments in the 1980’s and the Alaska Permanent Fund.²¹³ Furthermore, Van Parijs states that the third precept of adopting “real freedom” is providing leximin opportunity for individuals. A lump-sum of money, a “stake”²¹⁴, seems to provide this optimum set better than a slow disbursement of money over time if for no other reason than the sheer market slice it provides. Lastly, the system posited by Ackerman and Alstott also seems to be capable of embracing the resource-based form of taxation if the definition of affluent is construed in a manner similar to Van Parijs’.²¹⁵

The lump-sum endowment, much like the UBI, is given so that individuals can address their preference schedules. The benefit aside from ease is that this provides a greater account of freedom and autonomy if the ongoing value can be addressed somehow. The “stake” removes the paternalism from the use of the tool of distribution. If this is the provision that citizens are owed, then the argument is a strong one that a

²¹⁰ Refer to - Dowding, Keith, De Wispelaere, Jurgen and White, Stuart: ‘Stakeholding - A New Paradigm in Social Policy’ in Keith Dowding, Jurgen De Wispelaere and Stuart White *The Ethics of Stakeholding*, (Basingstoke: Palgrave/Macmillan, 2003), pp. 1 - 30

²¹¹ Ackerman, Bruce A. and Alstott, Anne: *The Stakeholder Society*, (New Haven: Yale University Press, 2000), pp. 1-5 and pp. 82 - 85

²¹² The U.S.A. is the state in which the idea of the “stake” is set by Ackerman and Alstott. Although no particular state is mentioned by Van Parijs, the United States appears to be close to if not an “ideal” capitalist situation as alluded to by Van Parijs.

²¹³ U.S. examples of basic income

²¹⁴ Ackerman, Bruce & Alstott, Anne: *The Stakeholder Society*, p. 3

²¹⁵ Although this is not their suggested plan, it could plausibly be amended as such to make affluence a measure of material possessions concurrent with Van Parijs’ construction of property rights.

basic income state should embrace this structure instead. The account poses a difficult point in that the UBI removes a monetary freedom and in doing so, the paternalism results in paternal enforcement of an account of what is the good life.

This is a logical point one might saliently make about autonomy and moral agency. If choices are to count, even to the point they yield negative outcomes in terms of comparative distributions of resources, then the paternal constraint on the distribution that formalizes these distributive choices constrains unjustly the choices individuals ought to be able to make. However, this conception makes a key mistake. The basic income acts as an initial allocative distribution because it is an equal tool to actualize resources, not the resources themselves. If the state is to administer UBI for the expressed purpose of providing equal fair value of liberty in the selection of primary goods over the duration of a human lifetime, it seems legitimate to enforce an installment method because the state must assure equal value over unequal life-durations and market conditions. Individuals live variable amounts of time and income will undoubtedly fluctuate in relative value over time. The state, in ensuring that all receive competitive equal value within the market, can quite coherently dictate the manner in which the basic income is allocated. In order to ensure maximal basic income for leximin opportunity, the state would undoubtedly have to disburse income in installments. The point is simple. If UBI is to work as a tool of providing a just distribution over time, it has to provide the same time-slice liberties to everyone as a baseline condition. This is the natural extrapolation of our commitments to legitimize the market implied by our Fair Shares Proviso. The use of an unequal tool would be reciprocally unfair and hence an impossible outcome of an appropriate hypothetical process.

The deprivation of freedom argument is not as convincing as it first appears. A UBI may act to extend the receipt of the endowment, but it does not prevent it. The value of the lump sum can still be realized should one's conception of the good motivate them in such a manner through proper fiscal management. The lump sum can only guarantee the equal condition of those individuals receiving their distribution at precisely the same time. The UBI works to avoid this unacceptable aspect of a fair and equal distributive

system. Certainly, variations in UBI will occur over time and for many reasons not the least of which being time spent in the state over differing life spans may afford certain individuals greater preference schedules. The UBI provides a better tool to realize equal time-slice utility. A stake may not have the same socio-economic utility from moment to moment for individuals receiving it. Fluctuations in the market may make the value of the stake more useful for an individual who received it at point A compared to a person who received it at point B. The “stake” could of course adapt and increase or even decrease a “stake” subject to these fluctuations but that will not compensate or penalize an individual who received an unequal initial stake by virtue of the time they received it. The individual’s “stake” is aimed to enfranchise them equally but it is not necessarily equal from franchisee A to franchisee B given their potential differentiations in time slice. As a result, the ability to make the same level of choices afforded by individual agency is not the same from one person to another which results in an unfair market.

The answer I am forwarding here is clearly a different approach to this question than Van Parijs asks us to take. Van Parijs’ argument against these systems is that individuals, if given a lump sum, might make non-provisory decisions with the whole of their endowment. The disbursal method allows this and Van Parijs believes that they may later see these actions as foolish.²¹⁶ As a result, it becomes legitimate to ensure individuals have a steady disbursal of their endowment over the course of their lifetime. Because these decisions threaten their equal contextual liberties and fair opportunity sets over time, Van Parijs argues the state should act to insure individuals against this potential outcome by using an installment system. Van Parijs’ liberal foundations require the provision of primary goods over a full life and cannot be secondary to the consideration of leximin opportunity sets that another disbursal method, like a lump sum, might provide, as they are needed to insure ongoing political equality.

This sentiment is affirmed in Van Parijs’ alternative arguments for other systems in “non-ideal” cases instituting other non-capitalist forms of political economy. If a UBI

²¹⁶ Van Parijs, Philippe: *Real Freedom for All, What (if anything) can Justify Capitalism*, Section 2.5, pp. 45 - 48

could not realize actual equality or the provision of primary goods in a “non-ideal” case, the needs of background justice require an alternative solution. As we have discussed, Van Parijs’ appeal to this argument needs deeper consideration. It may be that we move away, based upon our liberal conception of justice, from capitalist/market distributions of primary goods through a disbursal of currency when the market is incapable of providing such things. This however does not lead us to a form of “impure” socialism. Rather, it simply moves us to a greater in-kind system of providing primary goods. Our individual agency, which Van Parijs wants to affirm, dictates that such a system will require a market, as we want individuals to be able to determine the value of the good they actually want. To be free in such a system, individuals have to be able to make choices with what they are given, be that money or direct goods/resources. As a result, it will not be socialist in any deep sense, rather a rhetorical one. Individuals may make choices within either “impure” system and we have to honor these and their results. Importantly, Van Parijs only argues for part of this argument. He argues that the concern for a distribution of primary goods over a lifetime dictates the disbursal method rather than a concern about the inequalities another disbursal method could cause. This is again a result of his argument being predicated on his belief that a UBI can replace at least in part a distribution of primary goods within a Rawlsian account of justice. However, this account will not yield him an appropriate account of agency based upon the motivations Rawls gives us for redistribution.

I believe, given what we have asserted of Van Parijs’ argument so far, that it is far more coherent to argue this form of distribution is required based simply upon a concern for equality in allocative distribution rather than a development solely of the difference principle sensitivities. UBI does not represent the actual set of primary goods individuals would need given whatever they might want, so it cannot act as Van Parijs says it will within a Rawlsian conception of distributive justice. If we were to employ it, as Rawls would suggest, the UBI would only be sufficient if it ensured this set of goods and no one used it in any other way. This is clearly not Van Parijs’ intent nor is it one I would argue we should accept.

If we were to accept Van Parijs' argument for installments through a purely Rawlsian justification, the logic falls in on itself and highlights Van Parijs' distinct theoretical problem in envisioning his liberal project the way he does. If he wants choices to count and even allows them to yield unequal conditional outcomes aside from the continued access to a UBI through an amendment to the Rawlsian project, then constraining choices paternally out of a concern for minimizing these outcomes is out of the question. These outcomes are either legitimate, as a lump sum account or allocative would dictate or not as a Rawlsian account would dictate. Van Parijs appears to want some weighting of choices so that individual actions cannot violate the provision of primary goods, much like Rawls. However, this is incongruous to a position that wants to legitimize a choice-driven tool, like a UBI, to decide the just distribution of actual resources. This paradox indicates the problem Van Parijs runs into when trying to shoehorn UBI and "real freedom" into Rawls' conception of a property owning democracy. An alternative approach is needed if choices are to count and are seen as an important aspect of individual autonomy and freedom. Nevertheless, this does not mean that we are unable to defend Van Parijs' stipulations on disbursement based upon different grounds.

The claim against a lump sum, or subsequently other forms of basic income²¹⁷ other than an unconditional and maximin UBI has to come from some other claim about justice but we appear to have an appropriate claim. On an allocative claim, such as the Fair Shares Proviso or the clamshells at the auction, we have a clear argument against a lump-sum system and for an incremental distribution of a basic income. The reason would be that the institutions we put in place must be intergenerational in order to legitimize the equal initial liberty/freedom producing share of a changing and choice sensitive set of resources through a market device.

²¹⁷ Please refer to the reciprocity arguments of Stuart White referencing Republican Basic Income, Time-Limited Basic Income and Selective Basic Income in White, Stuart: 'Fair Reciprocity and Basic Income' in Reeve, Andrew and Williams, Andrew (eds.) *Real Libertarianism Assessed: Political Theory after Van Parijs*, (Basingstoke: Palgrave Macmillan, 2003) and White's other works listed in the bibliography. White shows how other systems of basic income can be justified given different perspectives on what he terms "fair reciprocity".

The argument for the stipulations of UBI is for Van Parijs troubling in another sense. If the judgment for UBI were to be predicated on conditional welfare, the system can fall prey to a different form of critique. One notable critique of Van Parijs in terms of his commitment to welfare comes from the aforementioned Richard Arneson in his article "Should Surfers Be Fed".²¹⁸

Arneson critiques "real freedom" as a systematic answer to distributive justice. Arneson argues, "... there is a deep tension between the egalitarianism of Van Parijs's do-the-best-one-can-for-the-least-advantaged conception of distributive justice and his insistence on strict neutrality on the good."²¹⁹ Arneson argues that conceptions of distributive justice like the one proposed by Van Parijs' favor "good choosers" over "bad choosers".²²⁰ This is because choices matter in the actual distribution of resources even if the tool to acquire them is equally provided. In doing so, it is not taken into account that "bad" choice making may not be a conscious or controllable decision. Thus, the least well-off are simply re-categorized and not actually provided an equal level of respective welfare. Those who make poor choices always end up on the bottom of society, as their resources are less due to these choices. In fact, the provisions Van Parijs builds into a conception of basic income still allows outcomes like these because a basic income, no matter how frequently it is disbursed, can always be squandered or misused. Van Parijs simply mitigates the frequency of this occurring through his argument for the structure of the basic income device. Arneson's concern is then best understood as two pronged. The first issue is that an equal and ongoing distribution of basic income does not ensure welfare universally. This objection is raised because of Van Parijs' espoused development of Rawls. Van Parijs is solely concerned with freedom. It is Van Parijs' lack of articulation as to why we develop away from welfare, or his assumption Rawls has done this appropriately prior to where he develops the theory, that causes this kind of objection to arise. The second is that the disparities that arise through the operation of Van Parijs' system are not a matter of consequentialism resulting from actions for which we can hold individuals accountable.

²¹⁸ Arneson, Richard: 'Should Surfers be Fed'

²¹⁹ Arneson, Richard: 'Should Surfers be Fed', p. 97

²²⁰ IBID, p. 98

This critique of a responsibility approach to distributive justice is troubling for any system of basic income. It is in part this concern for equal condition over a lifetime, which Van Parijs' noted in his defense of installments. The argument has to run that UBI provides the best ongoing choice-sensitive tool to realize individual conceptions of the good and that this is the way distribution should be provided rather than providing welfare directly. To do this, we have to assert choices are more important than Rawlsian accounts claim.

The problem of individual citizen's foolishly disposing of their UBI is not sufficiently answered merely by instituting installments. If they are owed a set of primary goods, then they are owed these goods rather than just a tool to get them. This highlights why the development of Rawls has to stem deeper than simply amending the sensitivities of the difference principle. Our freedom to choose our set of primary goods, given we meet some conception of moral agency, is paramount to actually having a set of them that sustains a notion of the conditions we face given the potential outcomes of these choices. Van Parijs never legitimizes this point. Given we can assert the importance of choices, a UBI provides this sensitivity even if the problem of negligent use persists. However, this is an account of justice incongruent with Rawls and subsequently Van Parijs' project, as it would require a development of liberal justice at a deeper level to yield it.

There is a potential shortcoming with a UBI structure if individuals chose to dispose of their income foolishly. Henceforth, I will refer to this particular issue as the problem of contributory negligence.²²¹ Arneson's critique of Van Parijs is very salient given the argument Van Parijs has forwarded in defense of his UBI. Arneson again highlights Van Parijs' reliance on parts of Rawls' arguments that do not necessarily support his amendments and institutions. However, we must ask if contributory negligence causes a troubling and avoidable hierarchy of certain individuals based upon a factor that is out of their control, the ability to make good choices.

²²¹ I would like to thank my friend, Geoffrey Bickford, for providing this legal terminology

Arneson is arguing for a welfare calculation due to the potential of individuals being unequal due to choices they make, which are out of their control. This argument mirrors that of Rawls and why the difference principle acts as it does. As we have discussed first through Dworkin and now through Van Parijs, this fails to take on choice sensitivity appropriately. Van Parijs does not extrapolate his theory of why choices can legitimately count as he clearly implies they can in distributions. Arneson appears either to imply a standard of determinism that is troubling in its' own right, or to fall pray to not taking autonomy seriously enough as Rawls did. Choices need to count and have tangible consequences. Arneson has to dispute this on some level for his position to make sense. This kind of position could be a classical liberal approach but as we have discussed our development away from this position is needed due directly to our need to build in choice sensitivity for everyone and honor the moral agency of the handicapped. If we include these considerations into our discussion, we can see how a UBI can defuse Arneson's challenge. The first point is a pragmatic one, in that the abuses of contributory negligence can and will happen no matter what the state provides, be it a tool or an in-kind resource thus causing a conditional hierarchy. Therefore, the problem of contributory negligence will befall any distribution and Arneson does not show how a welfare approach avoids this problem or approaches it in a way more appropriate than a basic income would.

For the argument Arneson forwards to have any power, it has to be predicated on the idea that the UBI state cannot compensate for the natural factors that affect moral agency and the choices these actors make. Deciding the natural and unchosen conditions that cause "bad choices" are a matter of abstract decision making. The natural elements, where relevant, are factored out through the actions of endowment insensitivity. As we have discussed, using undominated diversity to achieve this needed aspect of distributive justice caused problems. Perhaps the biggest implication of this measure was that many natural conditions would end up being uncompensated through welfare actions prior to the UBI. However, if the system were reshuffled to be more encompassing, as the aggregative calculation of insurance presented by Dworkin would be, this problem is

adequately addressed. What remains in our calculation as a distinguishing factor is individual choice, but these choices now lack the moral coloring of “natural” inequality. I have argued the choices individuals make have to be protected as a matter of individual autonomy and with these choices come the consequences. Natural inequalities should not cause us to disregard this aspect of human moral agency and autonomy. As I have shown, with specific developments to the liberal argument, our balance between these issues can be drawn in a more coherent way. The goal of providing a coherent conception of freedom in a fair and reciprocal arrangement of society needs choices to count if they are legitimate. Arneson fails to give us a compelling alternative argument because the critique, although valid in terms of Van Parijs argument, can be easily avoided with a closer systematic understanding of how a UBI must work to be reciprocal and fair in terms of interpersonal obligation.

4.5 Conclusion

This brings us to a crossroads with Van Parijs. Van Parijs simply does not provide us with enough elaboration to see how his argument for a Rawlsian conception of distributive justice can be made to honor the other arguments he uses to affirm his UBI system. Van Parijs gives us powerful arguments for adopting a basic income. But these arguments lack a comprehensive account and reworking of the Rawlsian liberal argument to support them. Van Parijs' intends to use Rawls' exposition as a justification of the system. Van Parijs' aims only to amend small aspects of the overall conception and criticizes the distributive schemes of Nozick/libertarianism, "pure" socialism, and the alternative process of Dworkin. However, in weaving his way between these many conceptions, he ultimately contradicts key aspects of Rawls' argument without showing how these aspects can be justified by a developed Rawlsian account of justice.

This is because Van Parijs fails to see how deeply the development in a Rawlsian account of justice must be in order to yield the required changes, particularly in how important choices and the market are in actual distributions. Van Parijs assumes correctly that everyone is capable of making legitimate choices that have "real" outcomes. Rawls does not do this appropriately due to his overstated concern with natural endowments in a property-owning democracy. To get the changes in sensitivities Van Parijs' advocates for requires that we question the very information that is allowed into and out of the original position as these are attributed to natural circumstance. Rawls did not draw the balance between choice and natural circumstance appropriately and the need for the developments of the liberal position I have argued for stem directly from this shortcoming. This is why the actions of the difference principle are unable to provide what was needed of them upon our inspection. They are predicated on a decision about how to attain impartial decisions about the institutions of justice that is not appropriate. It lacked a systematic account of handicaps and the moral agency that all human beings can have to some extent. This problem cannot be appropriately corrected by simply fiddling with the difference principle itself. It further implies that we may not come to the

decision of using or describing, as Rawls does, a property owning democracy, which leaves Van Parijs in a precarious theoretical position. He must either change the account of the veil of ignorance or create some alternative device to ensure impartiality. Without such an account, his theory is left with direct conflicts between its prescriptions and the theoretical processes used to justify them.

The development of Rawls presented by Dworkin, Van Parijs largely rejects. In arguing against Dworkin's use of the market, Van Parijs uses a Rawlsian argument to critique the role of the market in justice. Procedural market transactions do not constitute a complete account of justice as we have shown. However, if the market is subordinated and prefaced correctly, it is a necessary aspect of honoring our individual choices and can result in fair yet unequal outcomes. Rawls' argument for a property owning democracy relies on this same relative point, just instituted at a different level. However, by prefacing the market on incorrect grounds, he did not allow it to do the work it needed to. Rawls missed this crucial aspect of justice, and without a substantive correction to this oversight, it is hard to see how Van Parijs' resulting system can work as he says it will. Dworkin gives us tools that allow for the choice sensitivity that Van Parijs argues for. However, in rejecting his argument Van Parijs fails to explain how the Rawlsian project is to accept his own espoused choice sensitivity. Van Parijs does not explain how his account of choice sensitivity is different from Dworkin's outside of rectifying calculations in the devices used by Dworkin.

Since choices are supposed to count, we have to assess clearly and comprehensively what the implications are of such a position. I have argued the considerations of justice ask us instead to inspect and rectify the conditions that exist upon entering the market. This is by all accounts what Dworkin is accomplishing with the distribution prior to the auction and insurance scheme. These are an account of background justice. Although I have argued for developments of this position, the market that follows is just by these measures, run properly and repeatedly. If the measures of justice have taken place, it becomes hard to see how the UBI operates on a different objective plain than the auction itself. The implication that follows is that Van

Parijs will have to object to Dworkin on different grounds, namely that he fails in some way to draw the organizations of background justice properly. If the market were to yield unjust results no matter how considerations of background justice constrained the operation of the system, Van Parijs would have to utilize a critique that would undermine his own argument for a UBI. The system he proposes uses a market to create choice sensitivity and just outcomes.

The use of Rawls' argument to motivate UBI or basic income in general without correcting the conception of choice at the heart of Rawls' argument is extremely problematic. The resulting system would not allow choices to count appropriately. The results would be constrained based on criteria that would determine obligation from the resulting market consequences, not the use of liberty providing resources. The effect would be the deprivation of the freedom to act in a way one may want to, and ought to be able to, even given our concern for reciprocal fairness. Van Parijs attempts to use resource rents to get around this issue, but in describing them as measuring income to determine redistributive obligation, the theory enforces the end-result determinations that undermine the general premise of the resource rent idea. Equal resources employed by equal individuals through their moral agency can yield unequal results. When this is considered in terms of individual labor, it is counter-intuitive to say that the differences in output and the liberties these outputs afford are not just.

The calculation of proportionality must occur in a way comparative to other individuals upon entering the market. The results from the choices that follow must be honored. Rawls does not accomplish this due to the constraints of the difference principle, even in its amended format. Dworkin tries to do this but draws the initial market leveling measures incorrectly. By drawing them incorrectly, or not articulating them well enough, Dworkin left us with an answer to the problem of handicaps that was not appropriate given an inspection of the issue and left us with a "second-best" solution to redistribution that instituted end-result calculations. Our development of liberalism has a place to stand because the issues about how we balance choices and circumstances have become more informed but remain unresolved. This requires we assert a new way

forward and a different conception of how to develop liberal justice. We are left with the task of discussing whether our conclusions of justice can be tied together. Furthermore, we must see if in tying them together, we still arrive at supporting a UBI or other parts of Van Parijs' argument, given he did not undertake the task of comprehensively working through an argument of liberal justice that takes on an appropriate account of choices himself.

Conclusion – Developing Liberal Justice

It is at this point that we must take stock of what our exposition has yielded. Each of the theorists we have successively addressed has added some aspect to our discussion. Through these theorists, I have argued we can see the distinct virtues of each theory. We can also see how our development occurs from issues each position successively faces in developing the liberal argument. These arguments show how we can progress through successive accounts of liberal justice quite naturally to arrive at the need for further developments and specific institutional ideas. This development is needed as the balance of choices and circumstances gains greater clarity and definition. These developments reflect what our fair balance should be between honoring individual choices while addressing the issues of natural circumstance that unevenly befall philosophically equal citizens.

I have argued that as enlightening as these arguments are, they have not completed the developments we need to make. There is another step we require, a Principle of Just Access. This step is an addition to the development of the liberal argument, which we have traced through this text. This lineage becomes important in understanding the development of the liberal argument. It represents continued refinement of what is needed to honor choices and provide for unchosen physical circumstances in a fair way. These issues ultimately drive deeper than has been explored, particularly where these two issues converge in the choices of individuals who are handicapped or disabled. The Principle of Just Access helps us make sense of this occurrence. It creates a guideline through which individuals can have their choices equally valued while fairly limiting an obligation to compensation. A clarification of the moral agency of handicapped individuals leads us to a distinct commitment that has been otherwise unarticulated. Though this is ultimately a concern for the “real” welfare of the handicapped/disabled, it also erodes the idea that choice related outcomes are as unclear or problematic as other theorists have postulated. This allows us to consider institutions

of choice and circumstance with greater clarity and I argue ultimately leads us to support an Unconditional Basic Income based upon the balance the Principle of Just Access allows us to assert. It does the best we ought to do, fairly and reciprocally, for the handicapped and disabled while honoring the validity of their agency as represented by their choices.

Fairness is a powerful idea as the basis of constructing a liberal society. It is the basis for Rawls, Dworkin and Van Parijs. I would further argue it is an idea present even within Nozick's dialectical approach to Rawls. However, this concept only takes us so far. It gives us a basis from which to think about the hard decisions of politics, society and economic arrangements. It requires of us to consider a position from which we can be impartial about the decisions that follow based upon the idea of fairness. How we think about these ideas systematically and how we implement political structures in a way that reflects these ideas is just as important as accepting fairness as a motivating idea. The institutionalization and extrapolation of the idea of fairness is vital to a political theory even if it is messy and problematic. This requires us to consider the proper weighting and presence of issues within our account of impartiality. Fairness only works appropriately if the device used to institutionalize it considers all the proper factors in a properly balanced way. The account of these issues is what tips our scales of justice. It is only from these accounts that we can arrive at principles that motivate our institutions in a fair and appropriate way.

Rawls gives us a device to achieve our impartiality through a hypothetical account of individuals, their collective bargaining and their sets of knowledge. In spite of the contentions critics have with the specifics of this argument, the general device and what it is intended to accomplish is a needed step. Rawls argument is fraught with assumptions and devices we may find cumbersome or insensitive to aspects of equality and fairness, which we expect in our fair society. The device of the original position can lead to troubling outcomes upon a strict reading but I would argue this is largely due to the details and specifics of the device. In fact, this why I argued we needed to develop

Rawls, as Dworkin does. We need to develop these ideas in a specific way in order for our principles to strike an appropriate balance between choices and circumstances.

Nonetheless, if Rawls argument were taken as a stark framework, I would argue it is conceptually strong. In fact, I would argue it is stronger than many of his critics, particularly those who have based their criticisms upon device objections, have given it credit for. Broadly speaking Rawls point would be condensed to the idea that societies need to be fair and to have fair rules. These rules must be impartially created. To create impartiality, we remove knowledge X and Y, assume everyone's interests are brought to the table and in doing so this yields certain basic but universal principles of justice. Though I would argue Rawls ideas of X and Y are problematic and that he perhaps has not done what is needed to actually represent everyone in question, the idea for how we create principles is still strong as a device in itself. The device, if taken in its broadest terms, is only a way for us to envision our decisions in an impartial way. If we remove the baggage from the device that arguably biases the outcomes that flow from it, it is hard to argue with as an abstract idea. This could be simply stated, as a fair society requires an abstract and impartial position from which to make decisions about the institutions of justice that follow.

Dworkin and Van Parijs clearly ascribe to the latter statement. They are developing this general premise in different ways. It could be critiqued that the device given to us by Rawls does not accomplish the task of being impartial given the descriptive aspects Rawls gives to it. However, for our purposes here, it is only important that a device like it, stripped of its problematic aspects, could still work or at least, work in an optimal and living way to formulate principles and institutions of justice. I believe that it can if we give Rawls a fair and close reading.

Yet again, this tells us very little about our liberal siblings. For Rawls, the impartiality of the original position is created by the implementation of the veil of ignorance. The position is a device for impartiality but the impartiality itself is only

obtained through the application of the veil. This makes the account of the veil paramount to the institutional claims that follow from the original position.

It is Rawls' account of the sensitivities allowed into and withheld from veiled individuals that is at the root of our need for development. Rawls works throughout the remainder of his career after *A Theory of Justice* to amend the scope and sensitivities of his project as a whole. This is a direct reaction, in part, to the problems his account of the veil creates and the subsequent treatment his principles and institutions of justice give to the actions of human agency. The aspects of the veil are ultimately what motivate the impartial decisions that follow and why we go down Rawls' prescriptive route to the principles of justice. This account acts as the arbiter of what decisions are fair as it screens conceptions in and out of our decisions about fairness. It sets the ground rules and as a result dictates the principles and institutions that come out of our thought device. It is the account of what is in and out of our fair decisions that has caused the resulting criticisms of Rawls levied by his critics, including the theorists addressed in this text.

Van Parijs is quite clear that his theoretic approach and institutions diverge from Rawls in some crucial ways. The departures are needed to justify the institution of a UBI, the use of undominated diversity and the commitment to "real freedom". Van Parijs explains what these departures are, how they are to operate, how they can be defended and even where he believes they fall within a Rawlsian conception of justice. But what is this Rawlsian conception of justice? This question is never answered in a comprehensive way by Van Parijs. Van Parijs' development of particular institutions is motivated by ideas that appear to conflict or contradict each other because his development of Rawls theory does not work as comprehensively as it needs too. As we have just seen, a Rawlsian conception says very little, but Rawls himself says a whole lot about the institutions of justice as these follow from a particular conception of how to envision impartiality within the impartial device.

Van Parijs instead attempts to fit "real freedom" and his institutional approach within explanations that must fundamentally change if we are to accept Van Parijs'

developments to Rawls' project. The principles Van Parijs wants us to amend flow from an account of impartiality that yields specific outcomes. It is the criterion upon which these decisions are made rather than the decisions themselves that require amendment or at least further stipulated explanation, if we are to accept them as the legitimate extrapolations of a Rawlsian project. The problems with Rawls flow back to this very basic stage of the Rawlsian project. Van Parijs is clearly motivated, as is witnessed by his institutions, by the intuition that Rawls has not balanced our considerations properly in reaching principles of justice. Without an account of how these intuitions are developed from Rawls, we are left with an interesting institutional argument that is contradicted by aspects of Rawls argument retained and undeveloped by Van Parijs.

These are the same issues, that choices should matter in an appropriate way, that drive Dworkin to develop Rawls as he does. Van Parijs' same concern with choices requires him to do more than reconsider leisure calculations in the Difference Principle because this only represents one kind of choice sensitivity problem. This aspect of Rawls argument is indicative of the imbalance between circumstances, choices and the degrees of legitimacy in outcomes that occur due to problematic sensitivities in the device. To correct the imbalance requires that we conceptualize the knowledge of our impartial bargainers from Rawls account not just the value of leisure as a valid conception of the good. This is the only way to arrive at the kind of robust choice provision Van Parijs is adamantly arguing for in his institutions. Such an account is likely to take Van Parijs further towards Dworkin because of the importance of choices, agency and choice-sensitive outcomes at work in his project. If "real" opportunities come from "real" choices that are provided by equal streams of basic income, then these choices have to have equal value and equal consequences. A Rawlsian account does not allow these choices to have the kind of merit in determining conceptions of the good that outcomes represent due to the actions of maximin redistribution his ignorant parties agree too. It is a problem in Rawls theory that Van Parijs clearly recognizes, but it requires more than a change in the account of ideal political economy existing within Rawlsian side-constraints. It requires a change to the side-constraints themselves that Van Parijs simply does not give us.

This is why Dworkin's critique and development of Rawls is so important to consider. Dworkin does take the theory back to the level of the veil and works upward to the institutions that follow. These changes are motivated by sensitivity problems Dworkin saw in Rawls' project that required amendments to the veil to fix. Dworkin develops Rawls and tries to place claims about the market in an appropriate frame of reference while taking their role in our agency more seriously. In our terms, he asks us to address an imbalance in how we weigh choices and circumstances in considering principles of justice. When these amendments were put into place, the resulting institutions and systems changed with them to yield the auction and insurance scheme. Van Parijs, in flirting with and analyzing both Dworkin and Rawls, leans on aspects of these arguments but they are not one in the same. All they share at a basic level is the liberal concern of fairness and an impartiality device to reflect fairness into the institutions of society. These theories from this point forward go off on different distributive trajectories even if they converge at certain points (rightly or wrongly) in institutions, scope and practices.

As large as this issue is for Van Parijs in terms of his theory, his institutions do work in our development of the liberal position because they are motivated by choice sensitivities that we ought to treat in certain ways. Van Parijs may fail to give us the account of how we arrive at these sensitivities and why we treat them in certain ways but that does not mean they are not appropriate, important and even needed ideas. It is not that a liberal conception of justice cannot support his arguments. Van Parijs simply does not give us an account that works comprehensively in support of itself. Van Parijs' conception is unique and interesting in that it finds a new way to think about the liberal project even if the critical link between the thought device and the practices/institutions of justice are not fully articulated, as they need to be. Simply because these concerns about impartial claims and constructing a just and fair society are not described does not mean that these are not present. In fact, I argue that Van Parijs' development reveals ideas about how a fair and reciprocal society can treat individual choices appropriately if

we inspect what our commitments ought to be in developing the liberal argument ourselves.

There is, at least at the moment, a certain fear of creating a comprehensive or grand account of justice in the way that Rawls did. In fact, one could argue that Rawls himself does this to a certain degree. Instead, there is a retreat into focusing on the non-ideal or institutional theory to motivate effective change in our world. The idea roughly stated being that the big picture is too hard and does far too little so let us just do something to move forward. Although I admire the intention and effort to bring about change rather than to speculate on nebulous ideas, such an approach falls prey to what we see here with Van Parijs and what our retreat from dealing with the “airy fairy” issues of political existence leads to. Critiques carry power against the institutions Van Parijs argues for, based upon his lack of a deeper, larger, grander philosophic argument. There is no non-ideal or institutional theory that exists without a larger motivational argument, just as there are no grand theories that do not intend to tell us things about how to construct and motivate just political practices. To focus solely on one or the other is to do a disservice to the theory and ultimately the practices it wishes us to undertake. Ideal and non-ideal theory may be a division that has failed to do the one thing a theoretical distinction ought to do, be useful in asserting some kind of transcendental difference. These two paradigms are inexorably linked. It may be fair to talk about oxygen and to talk about hydrogen when discussing water, but ultimately, if you have water, you have both. Therefore, I do not believe that my deep seeded belief that Van Parijs’ owes us a greater explanation is unwarranted. Nor do I believe that working larger grand philosophic principles, like the importance of choices, down to very tangible political systems is unwarranted either. It is coherent to do both and I hope to have shown how systems can result from the developments I have posed both in how we can envision the importance and operation of markets and how our reciprocal compensation must work to ordinarily provide for the welfare of the handicapped and disabled.

I have argued the need for greater development is caused by an imbalance in how we treat individual choices and circumstance in a liberal account of justice. We saw

through our inspection of libertarianism that taking individual agency and the choices that result as our sole consideration was not enough. Human agency requires security and resources. These require us to redistribute. Individuals do not start with the same natural endowments, and we need to consider this also. Even if or when we achieve these requirements, the market that formalizes our choices necessitates the ongoing provision of fair shares as dictated by our Fair Shares Proviso. We also asserted, through inspecting liberal claims about justice that the definition of what counts as a resource under such a proviso needed to be robust enough to include social rather than just natural resources. Although the market is important in formalizing our choices and ensuring our individual agency, we move quite naturally into a liberal account of justice that balances the issues of choice and circumstance more readily. Though we make this move naturally, the market retains an important role when in protecting the choices and conceptions of the good individuals have and the outcomes that result.

It is at this point that we can see what the argument is as a comprehensive account and why we begin and end where we do. The movement here is one of accepting and working through the role and importance of choices and circumstances in conceiving a just state. They both have a role to play and they both must be entered into our calculations. However, their roles and the degrees of inter-relation and importance require greater clarification. Nozick presents no balance between these issues aside from individual charity. Systematically speaking, Nozick's proceduralism is based primarily, if not wholly, on choices, as individual circumstances are completely arbitrary and hence non-binding in a political although possibly moral sense. Nevertheless, circumstances have a direct relationship to the value and intensity of agency and the value of choices. The consideration must be more prominent than Nozick argues it is. However, choices serve to formalize our equally endowed agency even if their effect cannot be absolute in the sense Nozick argues for. They are still important and still create unequal outcomes. If we are to value agency and honor the choices and outcomes that flow from it, there are going to be just practices and a subordinate but important role for the devices that ensure these choices are made equally and fairly. The market plays a subordinate role in this

process but one we appear to need in order to work through the implications of agency if we value it equally for everyone capable of enjoying it.

Therefore, we are left with the need to come up with some way to balance these claims against each other and discern principles of justice from this balance. Rawls gives us a way to balance these claims through a hypothetical device that has a great deal of value in making impartial sense of these claims and their effect on justice. Rawls argues that both of these ideas ought to count when considering principles of justice. However, Rawls argues that circumstances drastically outweigh choices in our consideration. Rawls argues that our choices are largely if not always contingent on the circumstances, both social and physical, in which individuals find themselves. On Rawls view, it is this contingency which individuals would use to motivate maximin redistribution in order to ensure equal valued liberties.

However, this is not the case because although we need to care about providing reciprocally constrained opportunities, this does not undermine the validity of choices people make with them and what effect these choices have on outcomes. People with equal endowments can make equal decisions with distinct and unequal consequences that are legitimate. Maximin principles also create an obligation to redistribution that has little effect on the actual opportunities some people with severe handicaps have while severely constraining the opportunities others have through a commitment to realize these incremental gains in liberty. Although Rawls device gives us a framework to work with, it needs to be developed to reflect the balance it requires to be fair.

We end up at Dworkin who realizes these shortcomings and attempts to address them through a development of Rawls project. Dworkin gives us a way of working through the imbalance of these issues witnessed in Rawls account while retaining the premise and structure of his theoretical project. In order to achieve an appropriate balance between choices and circumstances, Dworkin argues we must modify the veil of ignorance to allow in a modified set of knowledge to the original position representatives. The knowledge of talents but not their value (individually or socially) allows this

development, which creates new principles from which to decide the fairness and justness of distributions. We move toward envy-freeness and Dworkin argues this is ensured using a hypothetical auction and insurance scheme.

It is when we place this argument next to the argument of Van Parijs, that we can see the problems Van Parijs has. Van Parijs does not undertake these veil modifications. Therefore, although he clearly values the development of individual choices and outcomes within a Rawlsian liberal framework, he does not undertake this needed development to balance the issues of choice and circumstance within the hypothetical creation of principles. This development is needed to correct sensitivity issues in the creation of principles not just the institutions that stem from the principles of justice.

The move towards Dworkin is needed to create the requisite balance between these issues that our project requires. However, if we work through Dworkin's account of the veil appropriately, our understandings about handicap, compensation and obligation need more development than Dworkin gives them. It is this lack of development that I argue takes Dworkin back to largely Rawlsian outcomes in terms of institutions and redistribution. What we need to understand is that extreme or complete incapacity is only part of our discussion. In fact, I argue this is only a small part of our discussion of handicaps and disability. Incapacity bears consideration and Dworkin does well to give us a way to reciprocally constrain our commitments in reflection of this potential outcome.

However, most individuals with handicaps can make choices from a potentially robust set of opportunities. The disproportionate inequality in opportunity sets is something that must be weighed in our decisions about an appropriate balance between choices and circumstances. These would motivate us to forms of reciprocally constrained compensation. However, these opportunities are valuable and may actually represent something that the individuals may desire regardless of their endowment. Handicapped and disabled individuals have opportunities, which are not just equally valuable. They represent choices that can have outcomes and consequences, which the agency of these

individuals creates. This may result in unequal outcomes for handicapped and disabled individuals in the same fashion as anyone else with a typical/average/“normal” endowment. Therefore, our concern for condition and compensation must be reflective of all of the subtleties that are not expressly built into Dworkin’s account. Because they are not, his ideas about compensation lack vital prioritization, which can reduce the pragmatic conclusions of his project.

I argue these are ideas that are justly allowed in through the modified veil of ignorance. It clarifies the principles that would result from the impartial bargaining of the representatives at hand. They would understand that handicapped and disabled people could make valid choices. These choices are equally valuable to everyone else’s choices. Therefore, the concern for condition becomes a calculation of comparative opportunity sets. This is what our compensation amount through insurance is based upon. Importantly, it is compensation for a specific purpose first and foremost, to provide access to a greater set of opportunities that are reciprocally fair. Compensation in a monetary/discretionary form only becomes a consideration if and when this first aspect is exhausted. This nuance is not present in Dworkin or any other liberal project. It needs to be if the agency of the handicapped is to be treated equally and fairly.

This leads us to the Principle of Just Access. The Principle of Just Access creates a priority rule in the idea of compensation that accomplishes what our considerations would actually be if we understood the importance of agency for the handicapped appropriately. It formalizes our commitment to a specific form of compensation, which supersedes the consideration of another form of compensation. This development accomplishes our need for an appropriate balance in our systems because it takes the idea of choices and places it upon everyone. Choices are not removed by handicap and disability, opportunities are. Therefore, our commitment must be to make society less disabling to those who are handicapped rather than to simply compensate them in a way that does not value their ability to make choices seriously enough.

It further clarifies our thought and has some specific outcomes for our considerations of justice. If choices are something that we have done our best to provide in a reciprocally fair way and we have provided compensation for those who need it then the choices that happen have to be equally valuable as are their consequences. This implies that a market device has to have a role in our consideration of justice. It formalizes these choices even if it comes after many other considerations and institutions of justice.

It is at this point that we must divert from Dworkin's pragmatism because we have made sense of our commitments and asserted that choices are more clearly determinate than he believes they are. This takes us back to the development of a fair market device and the assumptions built into it. We require the development of the Fair Shares Proviso because it undertakes the presuppositional work assumed by procedural accounts of justice. This development is important because it shows us why Van Parijs' institutions are so vital in honoring the choices people make and the opportunities they ought to have. We come to his systematic positions through a very different path than Van Parijs takes. The kind of importance Van Parijs gives to choices may require a great deal more development, as we have outlined, in the liberal project than he provides us with. However, this development is possible and because of this, his institutions can play a vital role in cashing out what it means to have a just market and the value this can have in assuring individuals have the kind of "real" freedom these choices represent.

My developments stand very much upon the theoretical shoulders of academic giants but they are necessary if we are going to understand to a greater degree the balance we ought to strike between choices and circumstances. The agency of the handicapped is important and it is not accomplished appropriately unless our theoretical understanding of these issues is comprehensive. If we apply philosophic equality, our commitments have to respond dynamically to these issues. This is only accomplished if we understand what is at stake and endow proper constituency upon all those we find in our diverse society. For the handicapped and disabled, this requires a far deeper understanding of their issues than is presently represented in liberal arguments. Though the Rawlsian liberal argument

lends much in its structure and development to get us where we ought to be, it lacks nuance in this area, which leads to deep tensions. It is these tensions which if allowed to remain unresolved undermine the motivational ideas of the liberal project and ultimately lead to institutions and policies that have troubling outcomes for individuals who are handicapped and disabled.

These developments lead us to deeper commitments and understandings, which are necessary in a philosophic way to conceptualize the agency of the handicapped. They also allow us to reconsider choices and what is needed to honor their validity given these can be equally valued for everyone. This takes us to the development of fair shares principles in a limited, subordinate but important market structure. The institutions that come out of this appropriately balanced account allow us to consider the role and structure of such a device, which can draw us particularly to the institutions like the UBI of Van Parijs. These are important developments if we are to balance our commitments to choice and circumstance in our theories and practices of government.

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