Economic Inequalities and Choice:
A Reassessment of Ronald Dworkin's Theory of Distributive Justice

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Abstract  

This dissertation proposes a new reading and appraisal of an important theory of distributive justice, Ronald Dworkin’s “Equality of Resources” (ER). ER is traditional in holding that choices made by rational, ignorant and purely self-interested beings are relevant to distributive justice. ER is novel both in its use of such choices and in incorporating the (previously exclusively conservative) idea that one’s success is largely one’s own responsibility into liberal egalitarianism. 

I argue that the tax-and-redistribution scheme Dworkin proposes to make actual distributions just is flawed because he misconceives the role of choice. He errs in thinking that the conditions for person X to receive compensation depend on the choices of such beings, although he is right, I argue, insofar as the relevant choices include X’s hypothetical choices. (Further, Dworkin’s critics err in thinking, that, according to him, these conditions wholly depend on X’s actual choices.) Dworkin errs in that ER implies that whether X meets these conditions can depend on X’s irrational choices, although he is right that whether X meets these conditions can depend on some of X’s actual choices. ER becomes flawed, I argue, when Dworkin derives a tax-and-redistribution scheme designed to achieve distributive justice in reality from the auction he proposes for making hypothetical distributions just.  

I then consider whether ER withstands stock objections and how plausible it is relative to rival Theories. Dworkin argues that ER, but not Rawls’ Theory, meets the following condition for a Theory to be plausible: the distributions a Theory deems just must be sensitive to choices. I argue that Dworkin’s argument is no longer plausible once we realize to which choice sensitivity principle he is himself committed. However, I argue, Seana Shiffrin’s objection to ER fails because she misunderstands the role of choice in ER, although she is right insofar as there is a related, though superficial, objection. I also argue that ER is inconsistent and show how to resolve this inconsistency without leaving ER vulnerable to attack by G.A. Cohen’s rival Theory. I trace ER’s inconsistency and the failure of Dworkin’s argument against Rawls’ Theory to Dworkin’s method of justification.
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# Table of Contents

Acknowledgements .............................................................................................................. 7  
Introduction .......................................................................................................................... 9  

Chapter I: Dworkin’s Theory of Distributive Justice and the Role of Choice .......... 29  
  Preliminaries ..................................................................................................................... 30  
  1 ........................................................................................................................................ 34  
  2 ........................................................................................................................................ 52  
  Conclusion ......................................................................................................................... 76  

Chapter II: Choice Sensitivity and Dworkin’s Case against Rawls .................... 79  
  1 ........................................................................................................................................ 79  
  2 ........................................................................................................................................ 84  
  3 ........................................................................................................................................ 102  
  Conclusion ......................................................................................................................... 110  

Chapter III: Choice Sensitivity and Freedom ................................................................. 113  
  1 ........................................................................................................................................ 114  
  2 ........................................................................................................................................ 135  
  Conclusion ......................................................................................................................... 147  

Chapter IV: How Dworkin Can Consistently Refute G.A. Cohen’s Theory .......... 151  
  1 ........................................................................................................................................ 153  
  2 ........................................................................................................................................ 169  
  Conclusion ......................................................................................................................... 183  

Conclusions of the Dissertation ......................................................................................... 185  
Bibliography ........................................................................................................................ 193
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Introduction

It is natural to be curious about which distributions, or momentary arrangements of our society's scarce goods, are just. Past and present distributions have an enormous impact on our lives. Our wealth, relative and absolute, largely determines the quality of healthcare and education that we receive, as well as our political power, self-respect and ability to pursue personal projects. Our predictions about future distributions determine our decisions between spending and saving. We also have an interest in knowing which distributions are just, because we have an interest in living in a just society. Most of a just society's distributions must themselves be just, so we need to ensure that the state knows which distributions are just when it chooses policies that redistribute goods.

We disagree about which distributions are just. We disagree about which goods are relevant to distributive justice (for instance, resources, welfare or opportunities),\(^1\) how these goods should be allocated (for instance, equally or according to merit) and who or what should receive them (for instance, persons or institutions). We also disagree about the proper scope of a theory of distributive justice. Can an inequality be unjust if it exists between two New Yorkers and yet not unjust if it exists between a New Yorker and a Ugandan? This question has enormously important implications for our duties towards, and the welfare of, persons in developing countries. A theory of distributive justice (henceforth Theory) must take a stand on at least some of these issues.

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\(^1\)Welfare and opportunities are not necessarily scarce goods: that I have a high level of well-being, for instance, does not imply that you cannot. However, I will make the simplifying assumption that they are, on the grounds that my welfare level depends on the quality and quantity of food I can obtain, and quality food is usually a scarce resource.
A Theory with powerful appeal -- *Egalitarianism* -- holds that an unequal distribution of goods is *prima facie* suspect: an unequal distribution may be, all things considered, compatible or even required by justice, but an unequal distribution requires special justification. There are many egalitarian Theories. *Strict Egalitarianism* claims that, at each time, the total value of relevant goods that person X has (or X's *goods value*) must equal any other person's goods value. Strict Egalitarianism is now widely rejected because it seems unjust that persons should have the same goods value irrespective of the choices they make. Suppose that the relevant good is welfare, that is, a just distribution of goods is one in which everyone's welfare level is equal. Suppose also that Louis intentionally acquires a taste for plover's eggs and pre-phyloxera claret (to cite G.A. Cohen's famous case), knowing that he will, as a result, need more goods than other people to reach the same level of well-being. Strict Egalitarianism implies that Louis is entitled to a greater share of goods than other people, but -- in the opinion of most persons -- the corollary of this "expensive taste objection" is absurd.²

Accordingly, *Moderate Egalitarianism* claims that a distribution which is not absolutely equal in terms of the value of goods that a person owns can nonetheless be just. In what sense is Moderate Egalitarianism *egalitarian*? To answer this question, most versions of Moderate Egalitarianism make an assumption that is about social equality but is not explicitly concerned with the distribution of goods. Some moderate egalitarian Theories assume that the members of society have equal moral status, other Theories

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that the members of society are entitled to be treated equally by the state. The moderate egalitarian Theory then argues that this equal status, or equal entitlement, limits the extent or type of just inequalities.

For instance, Ronald Dworkin’s Theory, which he calls ‘Equality of Resources’ (henceforth ER), holds that the following equality principle is an axiom:

Equal Respect and Concern: The state must treat the members of society with a sufficient and equal degree of respect and concern.

ER considers as unjust, and requires the elimination of, inequalities caused by the fact that some (but not all) persons are handicapped. The rationale is that a state permitting such inequalities treats the handicapped with an insufficient and lesser degree of respect and concern.

Dworkin also wields Equal Respect and Concern to disarm the expensive taste objection, as I will next explain. He argues that Equal Respect and Concern commits the state to a principle called Special Responsibility:

Special Responsibility: Each person has a special responsibility for how well his or her life goes.⁢ According to Dworkin, it is because Louis has a special responsibility for how well his life goes that Louis is not entitled to a lion’s share of his society’s scarce resources. If the state were to give Louis a lion’s share, it would act with insufficient respect in his regard: it would treat him like a ward of the state, relieving him of any responsibility to make his life a success. Special Responsibility allows, however, that a just state has some

responsibilities which are instrumental to the success of citizen's lives, such as aiding handicapped persons as mentioned above.

Before Dworkin first presented his Theory in 1981, it was conservatives -- not egalitarians -- who appealed to the notion of responsibility in order to justify withholding goods from individuals, arguing that the poor are not entitled to aid because they are responsible for their poverty. Dworkin incorporated the notion of responsibility into his moderately egalitarian, liberal Theory, not only to deal with the expensive taste objection but also to argue that the poor are entitled to compensation because they are largely not responsible for their condition. Most current egalitarian Theories accept a responsibility or an equality principle as fundamental, although they disagree over what we are responsible for and consequently disagree about which inequalities a just distribution can contain.⁴

*Choice-based Theories* claim that the permissible inequalities include inequalities that have arisen because persons have made different choices, for instance, choices about whether or not to acquire an expensive taste.⁵ Indeed, Choice-based Theories make a stronger claim:

Choice Sensitivity: A distribution of resources is just only if it is sensitive to persons' choices.

Suppose that, at time t, Julian freely chooses to work hard whereas Rebecca freely chooses not to work, and that, as a result of these choices, Julian is much wealthier than

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⁴My characterization of moderate egalitarian Theories is strongly influenced by Scheffler (2003) and Scheffler (2004).
⁵A Choice-based Theory can (but need not) be egalitarian.
Rebecca at t + 1. Choice Sensitivity implies that the distribution that exists at t + 1 cannot be just unless Julian is wealthier than Rebecca. However, Choice Sensitivity does not claim that Julian is entitled to be richer at t + 1 than he was at t or richer than Rebecca. Choice Sensitivity merely says that, if Julian happens to become wealthier than Rebecca as a result of their choices, then a just distribution must preserve that inequality.

Dworkin adds that the state must not eliminate the inequality between Julian and Rebecca in order to accommodate the thought that each has a special responsibility for his or her own success and to treat them with equal respect and concern. Thus, Dworkin takes Special Responsibility, and so Equal Respect and Concern, to support Choice Sensitivity.

There are two ways of understanding the term sensitive, yielding different interpretations of Choice Sensitivity. According to the weaker interpretation, a just distribution must not eliminate inequalities that have arisen because persons have chosen differently; according to the stronger, a just distribution cannot even reduce such inequalities. Choice-based Theories disagree also about which choices are relevant.

Any plausible Theory must imply Choice Sensitivity. First, Choice Sensitivity accommodates our intuitions about expensive tastes: it implies that, if Louis becomes poorer than his twin as a result of Louis’ choice to spend all his money on pre-phylloxera claret and his twin’s choice to save, this inequality must not be eliminated. Second, only a Theory that implies Choice Sensitivity is compatible with efficiency because, as a matter of fact, most of us need assurance that greater effort today, for instance, increases our chances of being relatively well-off. Many persons think that a
Theory must allow a society that satisfies it to be reasonably, if not optimally, efficient. Certainly, a Theory that does not do so risks being ignored: politicians may enforce some inefficient measures, such as price ceilings, intending to make distributions more just, but efficiency is always -- or at least should be -- a weighty concern.

This dissertation is about Choice Sensitivity: in particular, about the role of actual and hypothetical choices in interpreting it, and about the implications for Dworkin of reading his version of Choice Sensitivity as his texts imply. I will start by motivating some of the issues that arise for a proponent of Choice Sensitivity and then outline the roles of hypothetical choices, first, in theories of social justice and, next, in Dworkin’s Theory. Last, I will explain my aims.

Choice Sensitivity

A proponent of Choice Sensitivity must answer these questions:

Question 1: Does sensitivity to choices allow the reduction of inequalities that have arisen because persons make different choices?

Question 2: Which choices are relevant? In other words, which choices render a resulting inequality just?

Regarding Question 1, the choice between a stronger or weaker reading of Choice Sensitivity has vitally important implications for public policy. The state cannot redistribute wealth from the better- to the worse-off unless it can reduce inequalities due to differences in choices, because, presumably, some of the highest earners owe their relative success to working uncommonly hard.
Question 2 matters because not every inequality caused by differences in persons' choices is just. (Indeed, some inequalities caused by differences in choices are unjust, for instance, an inequality that arose solely because one person stole from the other.) There are many reasons why persons choose differently. Some persons have a better start to life than others. Persons are rational to differing degrees or differ with respect to what they believe. Some have talents that are more marketable than others'; usually, only the talented are able to choose a well-paid career. Some persons cannot afford insurance, but would buy insurance if they could. Not all inequalities that arise because persons choose differently for such reasons are just.

The relevant choices might be acts of choosing or opportunities to choose one way rather than another. Assume that the relevant choices are acts of choosing. One might think that the relevant choices must be ones that the agent makes when fully (or adequately) rational and informed about her options (or when she is as rational and informed as everyone else), and has opportunities that are as good as they can be (or adequately good, or of the same value as the opportunities that any other person has). One might also think that the relevant choices must be choices that the agent has reason to believe will affect her future wealth. Further, a proponent of Choice Sensitivity might hold that this principle sometimes picks out hypothetical, rather than actual choices. Suppose that the sole reason why John is so much poorer than Jane is that only Jane received an adequate education and that, as a result of John's bad education, he made unwise choices. A proponent of Choice Sensitivity might argue that: first, there is no requirement for a just distribution to preserve this inequality, because John's choices are
irrelevant and, second, the choices John would have made in adequate conditions should be used in determining which inequalities are required by distributive justice.

A fully elaborated choice-based Theory must answer a third question if it holds that whether an inequality N is just depends more on some relevant choices than on others:

Question 3: What is the correct ordering of the relevant choices with respect to how relevant they are?

For instance, a Theory might hold that, as an agent becomes increasingly rational and relevantly informed, her choices become increasingly relevant to distributive justice. A choice-based Theory that aspires to give practical recommendations for achieving distributive justice must also answer two further questions:

Question 4: How can a state achieve the highest feasible degree of distributive justice?

Question 4 is answered by identifying institutions, for instance, fiscal policies, designed to achieve just distributions. The last question is:

Question 5: Can an actual distribution be perfectly just?

A Theory might hold that the conditions for a distribution to be perfectly just cannot, in practice, be satisfied.

A *practicable* Theory is a Theory whose conditions for a society to be just are sufficiently weak that either some distribution satisfies them or the state can bring about a distribution that satisfies them within a reasonable time-frame. In addition, a
practicable Theory is stated in terms of verifiable facts (for instance, facts about a person's income, rather than facts about which insurance policy a person would buy in hypothetical conditions), allowing the state to verify whether or not a particular distribution is just. Some notions of practicability are more demanding than others, depending on the type of societies that must be able to achieve distributive justice.

According to a more demanding notion of practicability, a Theory applies to a relatively wide and heterogeneous set of societies, a set that includes societies that are not as advanced as ours today or differ widely from our society today. All these societies must be able to achieve distributive justice, so the conditions for a distribution to be just must be relatively weak. According to a less demanding notion of practicability, only societies similar to ours today must be able to achieve distributive justice, so the conditions for a distribution to be just can be relatively strong.

Is a Theory that endorses Choice Sensitivity practicable? Suppose that the relevant choices are X's actual choices (as distinct from X's hypothetical choices or the choices of a hypothetical being other than X). The state must know which choices X made in order to preserve just inequalities and reduce the unjust ones. However, it is not always possible to discover which choices X made and even if it is, this may be impossible without violating X's right to privacy. A society that violated such rights solely to attain distributive justice would be unjust (in a broad sense of unjust that covers not only distributive injustice but also, say, the violation of rights).

If the relevant choices are, instead, X's hypothetical choices, this problem about knowledge may be insurmountable: it may be impossible, in principle, to know which
choices X would have made. If a Theory both holds that the relevant choices are hypothetical and needs to know which the relevant choices are in the case of a particular person, the Theory might make the following assumption. For each person X, the relevant choices are the choices that a single, particular ideal being would make, where its choices are a function of knowable facts, such as facts about the revealed preferences of the society's members.

Hypothetical Choices and Theories of Social Justice

Hypothetical choices have a broader significance in the literature about social justice. They are not merely used in order to give an account of just distributions. The literature about social justice aims to find the best principle of justice: a principle that gives necessary and sufficient conditions for a society to be just. A principle of justice has implications for distributive justice, but social justice is a wider notion than distributive justice: only the notion of social justice includes, for instance, the protection of religious liberty. Both John Harsanyi and John Rawls appeal to hypothetical choices to argue for their respective principles of justice.  

In more detail, both philosophers support their respective principles by arguing for their views about which choices ideal beings would make in a particular, hypothetical scenario. Each being has the task of choosing a principle from a given list, knowing that the principle it chooses, if and only if chosen by all the beings, will become the principle of justice that governs the society in which they all will live. Harsanyi and Rawls argue that whichever principle these beings would unanimously choose is the

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6Harsanyi (1955); Rawls (1971, 1999).
correct principle of justice for that society. The hypothetical scenario, or original position, is defined by the fact that each being is perfectly rational, purely self-interested and ignorant of most facts about itself. Each being knows that it has a rational plan of life and beliefs about what is right or good. However, no being knows what its particular preferences and beliefs are, its race, age or sex, or its socio-economic position in the society in which it will live.

Why does Rawls appeal to hypothetical choices made in the original position? He argues that the principle of justice must be chosen impartially: it must not be chosen so as to favor any particular person on the ground that he has white skin, or any other morally irrelevant feature that other persons lack. Actual persons tend not to choose impartially because they are self-interested and know facts that, according to Rawls, are morally irrelevant. Suppose that actual persons were to choose a principle of justice, knowing all they know about themselves. It is plausible to suppose that the rich would tend to veto principles that require extensive redistribution and the poor would tend to veto principles that do not. By the same token, the beings can agree unanimously on a principle of justice only if they are ignorant of such facts.

Rawls appeals to hypothetical choices also because persons are imperfectly rational. However, Rawls argues, the beings must be rational because, intuitively, the unanimously chosen principle is thereby the principle of justice only if each being

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They disagree, however, about which principle would be chosen and therefore on which the principle of justice is. Rawls endorses a principle that requires equal protection of basic liberties and that places constraints on the extent of inequalities. I will explain his principle in detail in Chapter 2. However, Harsanyi adopts a principle according to which an act is right if and only if it maximizes average utility.
realizes how bad it might be to live under that principle. When explaining impartial choice, Rawls thus appeals to hypothetical choices: the choices of rational beings that know nothing morally irrelevant about themselves.

There are many critics of Rawls' claim that the principle of justice is whichever principle would be chosen in the original position. For instance, although Thomas Scanlon has a similar view to Rawls, he argues that Rawls is mistaken in thinking that hypothetical choices made in the original position are relevant. Rather, Scanlon thinks, the principle of justice is the principle that no actual person could reasonably reject (knowing what he or she actually knows) if everyone desired to reach agreement on such a principle. Scanlon agrees that hypothetical choices are important: a principle, he thinks, can be the principle of justice even if people have not deliberated about whether or not to reject it. However, the hypothetical conditions for deliberation are the same as the actual world's (assuming, as Scanlon does, that everyone in fact desires to reach agreement on a principle that no one could reasonably reject). In particular, persons are imperfectly rational and know facts that Rawls considers morally irrelevant, such as facts about their age and race.⁸

Dworkin's Theory

Dworkin's Theory, "Equality of Resources" (henceforth ER), also gives a crucial role to hypothetical choices made in conditions of ignorance. Like Rawls, Dworkin's ultimate aim is to propose institutions that can make an actual society just, but he skips Rawls'
intermediate phase of arguing for a principle of justice. Instead, Dworkin uses his original position to identify and motivate, first, a conception of a just distribution; second, an interpretation of the abstract principles to which he is committed and, third, institutions for achieving distributive justice.

Recall these three principles:

**Equal Respect and Concern:** The state should treat the members of society with a sufficient and equal degree of respect and concern;

**Special Responsibility:** Each person has a special responsibility for how well his or her life goes; and

**Choice Sensitivity:** A distribution of resources is just only if it is sensitive to persons' choices.

Consider how Dworkin develops ER. He assumes Equal Respect and Concern and then argues for his view of how best to explain Equal Respect and Concern. Next, he develops an account of institutions designed to bring about distributions that satisfy the best explanation of Equal Respect and Concern: first, an institution (a hypothetical auction) for making hypothetical distributions just and then an actual institution (a tax-and-redistribution scheme), inspired by the hypothetical auction, for making actual distributions just. Last, he justifies the tax-and-redistribution scheme in terms of Equal Respect and Concern and the principles in terms of which he explains Equal Respect and Concern, such as Special Responsibility and Choice Sensitivity.

Dworkin also believes that Equal Respect and Concern supports the following principle:
Endowment Insensitivity: A distribution of resources is just only if it is *insensitive* to persons' *endowments*.\(^9\)

A person X’s *endowment* consists of features or capacities, the possession of which is beyond X’s control, which affect the rate at which X can acquire resources, for instance, congenital handicaps. Endowment Insensitivity considers unjust inequalities caused by factors that persons *cannot* choose to change. Thus, Dworkin thinks that justice prohibits, or at least requires the reduction of, inequalities due to differences in how marketable persons’ endowments are. If a state did not bring about endowment-insensitive distributions, Dworkin thinks, it would show more concern for the fates of luckier citizens.

Rather than define *endowment, choice* and *sensitive*, Dworkin describes a hypothetical situation, similar to Rawls’ original position, in which, he argues, Choice Sensitivity and Endowment Insensitivity are satisfied. Dworkin’s driving idea is that a distribution that is sensitive to choices and insensitive to luck is one that might have emerged (or in fact emerged) from a particular, hypothetical situation. In this situation, persons are rational but ignorant of their social position, and have fair and equal chances to buy insurance against ensuing bad luck and scarce goods in an auction. Dworkin seems to think that, because all persons in the hypothetical situation are rational, they will all buy at least basic insurance. However, he holds that some will buy more coverage than others. So if two persons are subsequently blinded, they may receive differing amounts of compensation.

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The hypothetical situation has a crucial role in Dworkin's Theory. First, although Dworkin does not argue systematically for his conception of a just distribution, he uses the auction and resulting distributions to motivate his conception. Second, the resulting distributions constitute Dworkin's favored interpretation of Choice Sensitivity and Endowment Insensitivity. By examining these distributions, we can infer which versions of these vague principles he endorses. We can infer, for instance, which choices he thinks are the relevant choices and whether he thinks that sensitivity to choices is compatible with reducing inequalities that have arisen because persons chose differently. Third, the actual institutions he proposes to bring about just distributions are inspired by the idea of the hypothetical auction that he proposes for bringing about just distributions in the hypothetical situation. The sort of auction that Dworkin describes in the hypothetical situation cannot in practice be held, because persons are imperfectly rational and know their earning capacity or state of health, and the market does not supply at reasonable prices all the insurance persons may reasonably want to buy.

In lieu of the auction and insurance offering, Dworkin proposes a tax-and-redistribution scheme as a different means to achieve distributions that might result from such an auction. To explain this scheme, we will need the related concepts of a counterpart and of an average counterpart. Let person X's *counterpart* be a hypothetical person who is rational, young and healthy, able to choose freely, and ignorant of X's earning potential, but otherwise has all of X's other properties. Now take all the counterparts of an actual society's members and consider what the *average counterpart* might be. Dworkin does not explain the concept of an average counterpart. However, if
we are to take seriously the idea of averaging in this case, then the attitudes of the average counterpart for a society will be constrained by the actual rational and informed attitudes of the society's members. For instance, if most persons are very risk averse and their attitudes to risk are rational and informed, the average counterpart will also be risk averse.

The tax-and-redistribution scheme is based on the average counterpart's choice of policy. This scheme, first, obliges each person to pay the state the price of this policy P in taxes and, second, obliges the state to pay X any compensation to which X is entitled by P's conditions of compensation. Thus, the relevant choices in an actual society, Dworkin thinks, are the choices of the average counterpart, in that whether an actual inequality between person X and person Y is just depends on which policy the average counterpart would choose. Contrast Dworkin's account of distributive justice for the hypothetical situation, according to which whether an inequality in that situation between person H1 and person H2 is just depends on the choices H1 and H2 themselves made.\textsuperscript{10}

Why does Dworkin think that the relevant choices in the actual case are the average counterpart's, rather than the choices of particular actual persons or their hypothetical choices? He holds that a Theory must be practicable and that a Theory according to which the relevant choices are the choices of particular counterparts cannot be practicable: the state cannot know which insurance policy a particular person would

\textsuperscript{10}From the standpoint of our world, the average counterpart's choice is a hypothetical choice, as are the choices of H1 and H2. However, relative to the world that H1 and H2 inhabit, their choices are actual choices.
choose in the conditions of Dworkin’s auction. Dworkin also thinks that the state can know which insurance policy P the average counterpart would choose. So a pragmatic reason -- ensuring that his Theory is practicable -- motivates Dworkin to propose a tax-and-redistribution scheme based on the average counterpart’s choice rather than the choices of individual counterparts.

Aims

In this dissertation, I endorse Choice Sensitivity as a principle of distributive justice that any plausible Theory must include and also the view that the choices which fall under Choice Sensitivity include hypothetical ones. However, I reject Dworkin’s particular choice-based account of distributive justice in an actual society and Dworkin’s particular interpretation of Choice Sensitivity in terms of hypothetical choices.

I first show that Dworkin’s critics have overestimated the role of actual choices in his Theory and highlight the importance, for Dworkin, of the average counterpart’s choice. Then, I argue that we should reject his views about which hypothetical choices are relevant and about the role of hypothetical choices. Unlike Scanlon, I do not challenge the relevance of hypothetical choices made by rational beings ignorant of key facts about themselves,11 or Dworkin’s account of distributive justice for a hypothetical society. Neither do I reject all accounts of distributive justice for an actual society according to which the choices that a particular actual person X would make in the original position determine the conditions for X to be entitled to compensation. Rather, I reject Dworkin’s appeal to averaging; I reject Dworkin’s reasons for stating his account

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11Scanlon objects to Rawls’ Theory, whereas my objections are to Dworkin’s.
for an actual society in terms of particular hypothetical choices -- the average counterpart’s choices -- and I argue that this account is false by his own lights. I also outline two roles that other hypothetical choices might play.

I then assume my new interpretation of ER and reassess ER relative to rival Theories and in the light of some objections. I argue that my interpretation of Dworkin’s Theory renders it more plausible in some respects and in other respects less plausible than it previously seemed. I also point to two problems for Dworkin rooted in his practice of justifying his account of distributive justice for an actual society in terms of the vague principles of which he claims his account is the best interpretation: first, his Theory is inconsistent and, second, his *prima facie* plausible argument against Rawls, on closer inspection, is not plausible at all.

I show that ER can withstand some important objections widely considered fatal to it: for instance, Seana Shiffrin’s objection that there is a tension between the egalitarian commitments to a requirement of equal freedom and to Choice Sensitivity.\(^{12}\) Shiffrin’s objection does not harm ER, I argue, because Dworkin does not endorse the version of Choice Sensitivity that Shiffrin attributes to egalitarians.

However, I argue, Shiffrin is correct insofar as Dworkin’s Theory is deeply flawed in regard to equal freedom and sensitivity to choices. The flaw is not, however, that the requirements of equal freedom and sensitivity to choices are incompatible. Rather, the flaw is that Dworkin’s theory does not include a particular version of the equal freedom requirement, according to which there must be equal freedom to choose a

\(^{12}\)Shiffrin (2003).
career. As a result, the requirement of choice sensitivity, as it should be understood by any egalitarian theory of distributive justice, can be satisfied only if this equal freedom requirement is also satisfied.

Moreover, I argue in Chapter 2, we must reject Dworkin’s *prima facie* plausible argument that his Theory is more attractive than Rawls’.

Dworkin argues that his Theory, but not Rawls’, meets a necessary condition for a Theory to be plausible, namely, that the distributions the Theory deems just must satisfy Choice Sensitivity and Endowment Insensitivity. I argue that Rawls’ Theory passes all the relevant tests that Dworkin sets a Theory and his own Theory passes.

In Chapter 4, I point to an inconsistency in Dworkin’s account of a just distribution and show that it can be resolved without leaving Dworkin’s Theory vulnerable to attack by a prominent rival Theory. Why should an inconsistency that turns out to be inessential to ER interest us? The inconsistency illuminates Dworkin’s strategy of justifying his Theory and why this strategy fails. Consider first how he motivates his Theory. He assumes Equal Respect and Concern, which he interprets in terms of less vague (but still somewhat vague) principles, Special Responsibility and Choice Sensitivity. Then he interprets the less vague principles and uses them to develop accounts of institutions for bringing about distributive justice: initially, institutions for a hypothetical society and, next, for an actual society. Last, he attempts to justify his account for an actual society with the uninterpreted principles. This method of justification, I show, is the source of the inconsistency.

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This problem concerning method of justification, I argue, is also at the root of the failure of Dworkin’s argument against Rawls’ Theory. Although Dworkin’s final proposal (the tax-and-distribution scheme) commits him to particular interpretations of the vague principles on which he bases his tax-and-distribution scheme, he uses the vague principles in order to argue against Rawls. I demonstrate that Dworkin’s argument loses its *prima facie* plausibility once we run it in terms of the interpretations to which his tax-and-redistribution scheme commits him.
Chapter I: Dworkin's Theory of Distributive Justice and the Role of Choice

In this chapter, I state and evaluate Dworkin's theory of distributive justice, focusing on the role of choice. Dworkin's readers have assumed that, for him, whether or not an inequality between the total value of resources that person X owns and the total value of resources that person Y owns is just, is entirely determined by the choices that X and Y made. It was thought that Dworkin was explicitly committed to this view until he argued, in Dworkin (2002, October), that he had never been committed to it. Nevertheless, the view persists that Dworkin considers choices highly relevant to distributive justice. Does this view fairly represent Dworkin's theory of distributive justice? If not, what is his theory and how plausible is it? Let a *Theory* be a theory of distributive justice: a theory that implies necessary and sufficient conditions for a distribution to be just.\(^4\) Further, let person X's *resource value* be the total value of resources that X owns.

My chief contention is that, although we should accept Dworkin’s driving thought that choices are relevant to distributive justice, we should reject Dworkin’s particular Theory: for some choices, it is wrong about whether or not they are relevant and, for other choices, it is wrong about their degree and mode of relevance. The broader implication of my contention is that we must reject Dworkin’s approach to developing and justifying a Theory, based as it is on the concept of a hypothetical auction designed to achieve distributive justice in a hypothetical society. Insofar as

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\(^4\)The theories of social justice that I will consider in this dissertation are not concerned solely with distributive justice, but I will call them *Theories*, as my focus is distributive justice.
Dworkin’s approach fails, my argument casts doubt on the viability of founding a Theory on the concept of a hypothetical auction.

In more detail, I will argue that Dworkin is wrong in holding that the choices of a particular, ideal being determine the conditions for person X to be entitled to compensation. Further, he considers too few of X’s actual choices relevant to determining these conditions and too many of X’s actual choices relevant to determining whether or not X meets these conditions. I will also reject Dworkin’s reasons for considering the choices of this ideal being relevant to distributive justice, reasons stemming from his view that a Theory must give practical directives for organizing an actual society so as to achieve distributive justice.

I will start by explaining some terms, the view attributed to Dworkin prior to Dworkin (2002, October) and his strategy. In Section 1, I explain Dworkin’s Theory: his conditions for a hypothetical inequality to be just and his conditions for an actual inequality to be just. I will argue, in Section 2, that we must accept Dworkin’s driving thought about the relevance of choice but reject his Theory. In Chapter 2, I will use this chapter’s conclusion that, for Dworkin, actual choices have little relevance to distributive justice in order to argue that we must reject Dworkin’s contention that his Theory is more attractive than John Rawls’.

Preliminaries

Terms

1. The phrase X’s and Y’s choices is shorthand for X’s choices and Y’s choices.
2. I will use *choice* to mean *act of choosing*, rather than *opportunity to choose*, unless I specify otherwise. The word *choice* in Dworkin's text is ambiguous.

3. I will assume that:

An inequality \( N \) between \( X \)'s and \( Y \)'s resource values is *sensitive to \( X \)'s choice* \( C \) if and only if whether or not \( N \) is just *depends on* whether or not \( X \) makes \( C \).\(^{15}\)

Dependence admits of degrees.\(^{16}\) These three questions are the same:

a. How sensitive is \( N \) to \( C \)?

b. What is the degree to which whether or not \( N \) is just depends on whether or not \( X \) makes \( C \)?

c. How relevant is \( C \) to whether or not \( N \) is just?

**A Misinterpretation**

Dworkin (2000/1981) presents a Theory which critics of Dworkin understood to imply:

Choice Sensitivity Critics (CS Critics): An inequality \( N \) between person \( X \)'s resource value and person \( Y \)'s resource value is just if and only if:

1. \( N \) was caused by some choice \( X \) made; and
2. \( N \) was caused by some choice \( Y \) made.\(^{17}\)

\(^{15}\)Dworkin writes of the sensitivity of an inequality to choices, rather than the sensitivity of the justice of an inequality to choices. The latter locution is more natural, but I will keep Dworkin's.

\(^{16}\)Possible worlds help explain my claim that dependence admits of degrees. Suppose that \( N \) is just. If whether or not \( N \) is just depends strongly on whether or not \( X \) makes \( C \), then in the closest possible worlds in which \( X \) does not make \( C \), \( N \) is unjust. If the dependence is weak, then in some but not all of the closest possible worlds in which \( X \) does not make \( C \), \( N \) is nevertheless just. If there is no dependence, then in the closest possible worlds in which \( X \) does not make \( C \), \( N \) is just.

\(^{17}\)CS Critics has been attributed to Dworkin by Samuel Scheffler, Elizabeth Anderson, Seana Shiffrin and Richard Arneson. For example, “...inequalities in the advantages that people enjoy are acceptable if they derive from the choices that people have voluntarily made, but... inequalities deriving from unchosen features of persons’ circumstances are unjust” (Scheffler (2003), p. 5). See Anderson (1999), p. 292, *pussim*; Arneson (2002), p. 371; Shiffrin (2003), pp 2-3.
It is possible for N to be just and have causes other than X's and Y's choice(s). CS Critics implies, for example, that if the only reason Ben's resources are less valuable than Amit's is that Amit chose to work and Ben chose not to, then N is just. But CS Critics also implies that if the only reason Ben's resources are less valuable than Amit's is that Ben has a lower IQ, then, since Ben did not choose his IQ, this inequality is unjust. The choices that CS Critics mentions are the choices that X and Y make, not the choices they might make but do not or the choices of an ideal agent. The role of X's and Y's actual choices is crucial: whether or not N is just is determined by whether or not N's causes include X's and Y's actual choices.

CS Critics has been the target of many objections. Dworkin (2002, October) argued that the Theory expressed in Dworkin (2000/1981) was misunderstood: this Theory does not imply CS Critics. Dworkin argued, further, that the objections are ineffective, because they assume, incorrectly, that this Theory implies CS Critics.

**Dworkin's Strategy of Argument**

Dworkin's strategy of argument is to consider it an axiom of any theory of social justice that the state must treat each person with respect and concern, and equal respect and concern, and to give successively clearer explanations of this axiom, at each step arguing for his explanation by rejecting rivals.\(^\text{18}\) Then, he proposes social policies to make it the case that, in the society which implements them, all future distributions satisfy the axiom that the state must treat each person with equal respect and concern as he has

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\(^{18}\)He thinks that the precisely explained principles are interpretations of the principles that are expressed in unclear terms. In this chapter, I will not address the question of what he means by the phrase is an interpretation of.
explained it. Thus, part of his Theory consists in clarifying concepts and part in presenting policies. I will not be concerned with most of his "derivation" of the successively clearer explanations (it is obscure) but I will outline the steps here, to contextualize the step on which I will focus in this dissertation.

Dworkin argues that the axiom that the state must treat each person with equal respect and concern implies, among other claims, the claim that each person has a special responsibility for how well his or her life goes. This special responsibility, Dworkin thinks, covers consequential responsibility for one's choices: one is entitled to keep the benefits that result from one's choices and not entitled to compensation for misfortunes that result from one's choices. Moreover, he thinks, that one is consequentially responsible for one's choices implies the following principle:

Choice Sensitivity: A distribution of resources is just only if it is sensitive to persons' choices.

The axiom concerned with equal respect and concern, he argues, implies also the following principle:

Endowment Insensitivity: A distribution of resources is just only if it is insensitive to persons' endowments.¹⁹

Both Choice Sensitivity and Endowment Insensitivity express a necessary condition for a distribution to be just; other conditions may also apply. Dworkin uses the italicized terms with technical meanings that I will explain briefly here and more fully later.

A person $X$'s *endowment* consists of features or capacities, the possession of which is beyond $X$'s control, which affect the rate at which $X$ can acquire resources, for instance, congenital handicaps. Endowment Insensitivity considers unjust inequalities caused by factors that persons *cannot* choose to change. Thus, Dworkin thinks that justice prohibits, or at least requires the mitigation of, inequalities due to differences in how marketable persons' endowments are.

Choice Sensitivity implies that a just distribution must not eliminate any inequality between person $X$'s and person $Y$'s resource values that was caused by the fact that $X$ and $Y$ chose differently. (Dworkin thinks that the relevant choices include choices concerning how much to consume, how lucrative a profession to pursue or how hard to work, or the choice of whether or not to purchase insurance.) Thus, Dworkin's Theory can sometimes permit -- and indeed require -- the continued existence of inequalities that have arisen as a result of choices. It is easy to understand why Dworkin's critics have thought that his Theory implies CS Critics: the above principles are naturally understood in terms of actual choices.

1

My aim in this section is to explain Dworkin's Theory. I will start by explaining CS *Hypothetical*: a principle Dworkin thinks expresses the conditions for an inequality in a particular hypothetical situation to be just and that he introduces in order to motivate his conditions for an actual inequality to be just.\textsuperscript{20} CS Hypothetical is the explanation of

\textsuperscript{20}The conjunction of Choice Sensitivity and Endowment Insensitivity differs from CS Hypothetical in that the conjunction gives conditions for a distribution to be just, whereas CS
Choice Sensitivity conjoined with Endowment Insensitivity that Dworkin considers most appropriate for the particular hypothetical context he describes.

CS Hypothetical claims that:

An inequality is just if and only if:
1. The person (X) whose resource value is lower had a fair chance to reduce the probability that an inequality of this sort would come to exist;
2. X knew that X could reduce the probability; and
3. X did not take the opportunity to reduce the probability.

Suppose that Joe and Amanda know that health insurance is available and that buying insurance eliminates the probability that one will fall ill without being insured, but only Amanda chooses to buy insurance; Joe does not do so. Further, he does not choose not to buy insurance either. Suppose also that both Joe and Amanda subsequently become very ill and because Joe spends all his money on medical care, his resources are now less valuable than Amanda’s. CS Hypothetical implies that the inequality between the values of Joe’s and Amanda’s resources is just because Joe knew of an opportunity to reduce the probability that he would subsequently have less valuable resources than persons with health insurance.

CS Hypothetical, therefore, holds that the choices relevant to distributive justice are opportunities. According to CS Hypothetical, the inequality between Joe’s and

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Hypothetical gives conditions for an inequality to be just. However, the conjunction is related to CS Hypothetical in that a distribution is perfectly just if and only if each inequality it contains is just.

Economists use a concept of revealed choice, according to which Joe chooses not to buy insurance in that he does not buy insurance; this omission reveals his choice. This is not the concept of choice I use here. According to my concept, Joe does not choose not to buy insurance in that he does not decide against buying insurance.
Amanda’s resource values can be just even though no relevant act of choosing that Joe performed caused it.

I will next explain CS Actual: a principle that, according to Dworkin, expresses the conditions for an inequality in an actual society to be just and best explains, for an actual society, the conjunction of Choice Sensitivity, Endowment Insensitivity and other factors that Dworkin considers relevant to distributive justice. I will also give evidence that Dworkin is committed to CS Actual and discuss his concept of sensitivity. Establishing that Dworkin endorses CS Actual will enable me to argue, in the next section, that whether or not an actual inequality N is just, for Dworkin, depends little, in most societies, on the actual choices of the persons between whose resource values N holds.

My claim that Dworkin endorses CS Actual hinges on two textual claims. First, Dworkin holds that in a just, actual society, there must be a social safety net: there are basic social services and a person’s resource value cannot fall beneath a particular sum. He appears to think that basing the tax-and-redistribution scheme on the policy that the average counterpart would buy ensures that there is a social safety net. Second, Dworkin thinks that the best Theory is one that an actual society can satisfy. To substantiate these textual claims, I must first explain how Dworkin develops and argues for CS Actual, which expresses necessary and sufficient conditions he endorses for an inequality to be just, and how he argues that a just, actual inequality must satisfy CS

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22Dworkin thinks that there is a social safety net in the hypothetical situation because he holds that it is rational for each counterpart to insure against calamities. However, not every actual person is rational or has a fair opportunity to insure, so the mere fact that there is a market for insurance in the actual world does not ensure that there is a safety net.
Actual. I will also explain the role of a particular hypothetical scenario in Dworkin's Theory.

Dworkin's argument that an actual inequality must satisfy CS Actual has three stages. In each stage, he proposes a way to bring about just distributions. However, these stages differ with respect to:

1. The context in which just distributions can be achieved:
   a. A particular, hypothetical society *versus* a real society;
   b. A society with people who are equally endowed *versus* a society with people whose endowments differ;

2. The period of time during which just distributions can be achieved: a single time *versus* all future times.

In Stage 1, Dworkin argues for a way to achieve distributive justice for a single instant in a particular hypothetical scenario in which everyone has an equally marketable endowment and no one is handicapped. In Stage 2, he argues for a way to achieve distributive justice in perpetuity in that hypothetical scenario -- except that, as in an actual society, persons' endowments differ with respect to marketability and some persons are handicapped. In Stage 3, he offers a means of achieving distributive justice in an actual society in perpetuity. I will describe these stages in 1.1, 1.2 and 1.3 respectively.

1.1

This section describes the process by which Dworkin thinks a just distribution can be achieved in a particular hypothetical scenario at an instant in time. A fixed number of
healthy, equally endowed, rational persons of the same age are stranded on a previously uninhabited island. Travel to or from other places or trade with outsiders is impossible. Everyone is destitute and accepts that no one has a prior claim to any of the island's resources. Dworkin proposes the following procedure to achieve distributive justice at the instant this procedure terminates.

Each person is given the same amount of intrinsically valueless currency (clamshells) to spend in an auction of all the resources available on the island, for instance, plots of land or fishing rights.²³ The following conditions hold. First, none of the auctioned lots have proper parts that someone prefers to the lot itself. This condition is violated -- to take Dworkin's example -- if Sam prefers to have a tiny plot of land to grow vegetables for his own consumption but all plots on auction are as large as a baseball field.²⁴ Thus the castaways' preferences influence how the island is partitioned into resource lots. Second, everyone has reasonable rights to use the resources they buy. For instance, Sam's right to use the land he buys to grow vegetables can be overridden only to protect other persons' rights. Third, no one can have a "head start" in the auction: initially, they must have the same amount of currency and no other resources. Fourth, the persons' preferences are authentic: such preferences cannot have been formed as a result of indoctrination, false beliefs or ignorance.²⁵

In the auction, resource lots go to the highest bidder, the supply and demand of resources determining their monetary value. The auction is repeated, adjusting the price

and sequence of offerings, until the distribution that exists when the auction terminates satisfies the *envy test*: nobody prefers anyone else's bundle of resources to the one she purchased. The bundles are of equal value when and only when a distribution passes the envy test and -- Dworkin claims -- at that time, there is distributive justice.

Two questions arise. First, if persons' endowments differ in this hypothetical scenario, how can distributive justice be achieved in this scenario *in perpetuity*? Persons' bundles of resources will change when persons begin to work, trade and invest, and these bundles will change in various ways, for the rates at which persons accumulate resources depend, among other things, on their choices and endowments. Second, how can distributive justice be achieved in perpetuity *in an actual society*? The second question is crucially important for Dworkin because a principle contention of his Theory is that a legitimate society -- a society that is not only just but also has a legitimate government -- must achieve distributive justice in perpetuity.

1.2

This section explains Dworkin's answer to the question of how to achieve distributive justice in perpetuity in the hypothetical scenario if persons' endowments are not equally marketable. Let there be differences in how marketable the castaways' endowments are, due to differences in their talents and preferences. Let us stipulate: first, the castaways

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26A distribution can pass the envy test even if no one likes her bundle (O'Connor (1992)). Colin McLeod has argued that it is possible that no auction resulting in a distribution that meets these conditions ever occurs (McLeod (1992), Chapter 2 (pp 79-105)). According to Dworkin, the satisfaction of the envy test is necessary, but not a sufficient, condition for a distribution to be just (Dworkin (2000/1981), pp 67-68; Dworkin (2000), 134-62). For an account of the envy test, see Varian (1975, Spring), pp 240-47.

have the same chance of subsequently becoming handicapped. Second, there is a computer that takes in information about each person’s talents, choices, attitudes towards risk, preferences, and also the raw materials and technology available to the society, and from these facts predicts the income structure of the society in which the castaways will live. Third, the castaways know what proportion of the population falls into each income bracket (the income structure) and what their talents are. Dworkin submits that, nevertheless, they will not be able to predict from these facts how marketable their talents will be in this society and therefore will not be able to predict their own or anyone else’s income bracket.

Fourth, in the auction, each castaway is given the chance to purchase insurance against lacking the opportunity to earn a particular level of income, the level that the castaway chooses to specify. The higher the value chosen, the larger the compensation package if the purchaser is not given the opportunity, but the greater the price of the insurance policy (or premium). Call person X’s choice of how much insurance, if any, to buy X’s insurance choice. Fifth, Dworkin stipulates that there is no monopoly on insurance and that the premiums are low enough, relative to the value of coverage, for the expected utility of purchasing the policies to exceed that of not doing so, given the castaways’ attitudes to risk. Hereafter, the hypothetical scenario refers to the hypothetical scenario that has been modified in these ways.

\[\text{To be precise, this fourth stipulation must be true of enough persons, at each value of coverage offered, to make it viable for an insurance broker to offer the policy. Insurance companies offer only bets that are financially disadvantageous for their clients: bets whose expected value is}\]
After each castaway X chooses whether or not to buy insurance, X learns how much money X can make. If X is not entitled to compensation through the insurance scheme, X pays the premium of the insurance policy X chose (not before, as is usually the case); if X is entitled to compensation, X then receives the compensation package that policy guarantees. The demand for insurance in the above conditions depends on persons' attitudes to risk, and the computer uses the information in its database to calculate the supply of insurance. Supply and demand together determine the price of insurance at each value of coverage, as usual in a (theoretical) free market that preserves the standard assumptions of microeconomic Theory.31

Dworkin argues that the value of coverage purchased by the average, rational person would be fairly low. It would not be rational for X to insure, for instance, against the possibility that X lacks the mental and physical attributes needed to command a movie star's salary: the premium would be prohibitively expensive. If X turned out to have these attributes and had purchased such insurance, X would have to take the most negative. But such bets can have a positive expected utility, since many persons are averse to taking large risks (Dworkin (2000/1981), pp 95-97). Dworkin does not use these terms from microeconomic theory.

Eric Rakowski claims that the castaways can work out the income structure of the society in which they will live and argues that since persons will be able to predict how marketable their talents will be, the auction will not achieve distributive justice (Rakowski (1991), pp 132, 133-34). Rakowski is wrong to think that the castaways can work out the income structure: Dworkin says that the computer predicts the income structure on the basis of the distribution of talents, handicaps, and preferences, and he says explicitly that the potential purchaser of insurance does not know what is in the computer's database except the information contained about his endowment (Dworkin, (2000/1981), p. 94).

31 Presumably the insurance companies do not know the particular endowment that a particular person has. If they did, then they would refuse to sell insurance to persons whom they know will have reason, in the future, to press a claim against the company that insured them, and so persons would not have equal opportunities to insure themselves against whichever risk might ensue.
lucrative job X could find and work hard just to pay the premium.\textsuperscript{32} Dworkin also argues that to make insurance policies financially viable, brokers would leave it to claimants to prove that they did not have a chance to earn the covered amount, and give successful claimants somewhat less than that amount (co-insurance), thereby making it harder to press a successful claim.\textsuperscript{33} So the compensation that a successful claimant receives would be the covered amount minus both the maximum salary she could earn if willing and the co-insurance factor.

Dworkin does not say whether or not he thinks it might sometimes be rational not to insure against a possible calamity. Presumably, if the technology needed to alleviate or cure disease D is extremely expensive, a policy that covered D would also be expensive. If the incidence of D were sufficiently low, it might be rational not to buy a policy that covers treatment for D, even if it would be a calamity to suffer from D. In any case, Dworkin does not exclude this possibility.

In sum: Dworkin thinks that in this hypothetical scenario, a market for goods plus a market for insurance against inability to earn at or above a given value suffice to achieve and also perpetuate equality of resources on the island.\textsuperscript{34} Why does the final distribution pass the envy test? (Recall that the envy test gives a necessary and sufficient condition

\textsuperscript{32}Dworkin (2000/1981), pp 97-99. One might object, however, that it would be rational to insure yourself against earning a salary that you know nobody in the society will earn. In this case, you would be certain to be in a position to press a claim, even if you turned out to be in the highest income bracket. To counter this objection, Dworkin can say that the insurance companies have access to the information stored in the computer, and thus will not offer such policies. Dworkin could also argue that the demand would drive the price too high. (I owe the second counter to Eric Swanson.)


\textsuperscript{34}Dworkin's claim is that just distributions are achieved in the hypothetical scenario, rather than distributions that are nearly just.
for each person’s bundle of resources to be equal in value: a distribution passes this test when nobody prefers anybody else’s bundle of resources to the one he or she purchased.) Dworkin redefines the envy test to apply, not to the resource bundles each castaway X owns at the moment the auction ends, but to each of the bundles that consist of the resources X owns over the course of X’s lifetime. Each of the resources is indexed to the time during which X owns it, as are the choices X made that affected X’s future entitlements to resources.

Suppose that Diligence spends the fifty years after the auction slogging in an investment bank and when he retires, he has a respectable nest-egg. His bundle includes his repeated choices to work hard at that profession, indexed to the times at which he makes them, as well as his wealth, indexed to the times at which he possesses them. Indolence, on the other hand, spends those fifty years life playing tennis, funding himself by giving the occasional private lesson, and lives his twilight years in penury. His bundle contains his choices to play and to teach, indexed to time, and his holdings of resources, indexed to that time of his life.\textsuperscript{35}

We can now discuss how Dworkin thinks Choice Sensitivity and Endowment Insensitivity should be understood in the hypothetical society he describes. I will begin with Endowment Insensitivity. Consider two alternative interpretations:

\textsuperscript{35}I have adapted Dworkin’s example in Dworkin (2000/1981), p. 85. Although Dworkin does not say, the person’s bundle cannot include the actual outcomes of her choices. This is because whether or not the envy test is satisfied depends on what each person thinks of her bundle in relation to other peoples’ bundles, rather than what an impartial judge, for instance, thinks of all the bundles. How many persons will prefer their bundle to everyone else’s if their bundle includes a choice to gamble that they know causes their ruin? It must be, therefore, that the bundles include the choices and \textit{the probabilities of each outcome}, rather than the choices and \textit{their actual outcomes}.
Strong Endowment Insensitivity: An inequality $N$ between the resource value of person $X$ and the resource value of person $Y$, where $N$ is entirely due to a difference in how marketable $X$'s and $Y$'s endowments are, must be eliminated; and

Weak Endowment Insensitivity: An inequality $N$ between the resource value of person $X$ and the resource value of person $Y$, where $N$ is entirely due to a difference in how marketable $X$'s and $Y$'s endowments are, must be mitigated, but need not be eliminated.

Strong Endowment Insensitivity requires inequalities due to differences in endowments to be eliminated. Weak Endowment Insensitivity does not require this, but does require such inequalities to be mitigated. These two principles cover the possible interpretations of Endowment Insensitivity. Dworkin does not state or suggest these two principles; I am suggesting them to see whether or not the distribution that exists when the auction terminates satisfies them. If this distribution satisfies Strong Endowment Insensitivity, this gives us some reason to believe that this principle has the meaning that Endowment Insensitivity has for Dworkin. He must deny that distributions that he considers just in the hypothetical scenario satisfy Strong Endowment Insensitivity, because he argues that it is irrational to buy a policy that cancels the effect of misfortune on one's stock of resources. However, he must hold that these distributions satisfy Weak Endowment Insensitivity, because he argues that it is rational to take out some insurance against calamities.

Consider now Choice Sensitivity. Here are two interpretations:

Strong Choice Sensitivity: An inequality $U$ between the resource value of person $X$ and the resource value of person $Y$, where $U$ is entirely due to a difference in choices that $X$ made and $Y$ made, must not be mitigated; and
Weak Choice Sensitivity: An inequality $U$ between the resource value of person X and the resource value of person Y, where $U$ is entirely due to a difference in choices that X made and Y made, may be mitigated, but must not be eliminated.

Strong Choice Sensitivity forbids the mitigation of inequalities that have arisen because people made different, relevant choices. Weak Choice Sensitivity allows this, but requires such inequalities not to be eliminated. These two principles exhaust the possible interpretations of Choice Sensitivity, given that this principle forbids inequalities due to differences in choices to be eliminated. Both principles allow persons who made the same sort of choice to have different resource values, for instance, if two persons buy lottery tickets and only one person wins.

Weak Choice Sensitivity implies Strong Choice Sensitivity. Suppose that, in a society $S_1$, the value of a person's resources is not permitted to fall below a particular level $L$. A society $S_1$ that ensures that the value of a person's resources does not fall below $L$ can satisfy Weak Choice Sensitivity but not Strong Choice Sensitivity if implementing this safety net requires some inequalities due to differences in choices to be mitigated, but does not eliminate inequalities due to differences in choices. A society $S_2$ that allows a person's resource value to fall below $L$ can satisfy Strong Choice Sensitivity and Weak Choice Sensitivity, supposing that there is no redistribution. In $S_1$, the relatively wealthy are less wealthy than they would be in $S_2$, because $S_1$ but not $S_2$ redistributes wealth to the poor. For the same reason, in $S_1$, the relatively poor are less poor than they would be in $S_2$. 

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Choice Sensitivity is satisfied by the hypothetical distributions that Dworkin considers just in that each castaway chooses his or her initial basket of goods, and subsequently chooses between spending and saving, labor and leisure, and so on. Furthermore, the division of the island’s resources into lots is guided by the castaways’ preferences. Which version, if any, of Choice Sensitivity is satisfied by the hypothetical distributions that Dworkin considers just? I will argue that these distributions satisfy Strong Choice Sensitivity but not Weak Choice Sensitivity.

When describing the hypothetical scenario, Dworkin supposes that two persons in the scenario are equally likely to become blind and can insure themselves against becoming blind at reasonable prices and at whichever level of coverage they desire. He also supposes that only one of these two persons insures himself against becoming blind. Dworkin thinks that

... (there should be no) redistribution from the person who had insured to the person who had not if, horribly, they were both blinded in the same accident. For the availability of insurance would mean that, though they both had brute bad luck, the difference between them was a matter of option luck... 36

Consider the persons in the above passage. It is highly likely that, after they go blind, the uninsured person will have a lower resource value, yet Dworkin does not think the inequality should be mitigated. So the distribution cannot satisfy Weak Choice Sensitivity.

The passage also supports my claim that Dworkin thinks that CS Hypothetical applies to the hypothetical scenario, because he denies that the uninsured blind person

should receive compensation for going blind. CS Hypothetical also denies this because it claims that an inequality is just if the less well off person could have reduced the probability that this inequality would come to exist. CS Hypothetical also concurs with Dworkin's claim that the insured, blind person should be compensated for going blind.

1.3

I will next present CS Actual, which expresses the necessary and sufficient conditions Dworkin thinks an actual inequality must meet to be just, and the institutions Dworkin proposes to achieve just distributions in perpetuity in an actual society. Although Dworkin does not state CS Actual explicitly, he is, I will argue, committed to holding that it is the best interpretation of Choice Sensitivity and Endowment Insensitivity for an actual society. I will show that CS Actual and the relevant institutions are also shaped by motivations concerning paternalism and practicability.

Dworkin thinks that a Theory should be practicable. A practicable Theory is a Theory whose conditions for a society to be just are sufficiently weak that either some distribution satisfies them or the state can bring about, within a reasonable time-frame, a distribution that satisfies them. In addition, a practicable Theory is stated in terms of verifiable facts (for instance, facts about a person's income rather than facts about which insurance policy a person would buy in counterfactual conditions), allowing the state to verify whether or not a particular distribution is just.37

37Some notions of practicability are more demanding than others, depending on the type of societies that must be able to achieve distributive justice. According to a more demanding notion of practicability, a Theory applies to a relatively wide and heterogeneous set of societies, a set that includes societies that are not as advanced as ours today or differ widely from our society today. All these societies must be able to achieve
The sort of auction and insurance offering that can achieve just distribution in perpetuity in a hypothetical scenario cannot in practice be held: persons are imperfectly rational and know their earning capacity or state of health, and the market does not supply at reasonable prices all the insurance persons may reasonably want to buy. In lieu of the auction and insurance offering, Dworkin proposes a tax-and-redistribution scheme. To explain it, we will need two terms.

Let person X's counterpart be a hypothetical person who is rational, young and healthy, able to choose freely, and ignorant of X's earning potential, but otherwise has all of X's other properties. Now take all the counterparts of an actual society's members and consider what the average counterpart might be. Dworkin does not explain the concept of an average counterpart. Does the average counterpart have each person's conception of the good or some unspecified conception of the good? If we are to take seriously the idea of averaging in this case, then the attitudes of the average counterpart will be constrained by persons' actual rational and informed attitudes. For instance, if
distributive justice, so the conditions for a distribution to be just must be relatively weak. According to a less demanding notion of practicability, only societies similar to ours today must be able to achieve distributive justice, so the conditions for a distribution to be just can be relatively strong.

In more detail: first, the third condition that an auction must meet to result in an equal distribution -- the bidders must have equally valuable resources -- is never met in practice because at all times some persons own more valuable resources. Second, at all times persons are aware of their state of health or of how much they can earn. If insurance were optional, healthy persons and persons with marketable talents would tend to buy no insurance or policies with a low premium and coverage value; unhealthy persons and persons without such talents would prefer policies with a high premium and coverage value, and the resulting distribution would be more endowment-sensitive than Dworkin's Theory allows. Third, the fourth condition, that an agent's preferences should be "the true preferences of the agent rather than preferences imposed upon him by the economic system itself" is not satisfied in an actual society (Dworkin (2000/1981), p. 70). Another condition that an actual society seldom fulfills is each person must be able to insure himself at a reasonable price against lacking the opportunity to earn any value of income.
most persons are very risk averse and their attitudes to risk are rational and informed, the average counterpart will also be risk averse. Although I doubt that the concept of the average counterpart is coherent, I will not pursue this issue here. Hereafter, it is the pronoun that I will sometimes use instead of the average counterpart.

Dworkin argues that the average counterpart insures against the outcomes, and only the outcomes, it considers disastrous, because insurance is expensive relative to its expected value. The price of a policy that cancels the effect of one’s becoming blind (say) on one’s stock of resources would be prohibitively high and greater than the policy’s expected value. Yet not all situations, in which one has fewer resources than one would if one were sighted, are so calamitous that they must at all costs be avoided. Therefore, the average counterpart does not buy a policy that cancels the effect of going blind (say) on one’s stock of resources. So the compensation one would receive if blinded does not guarantee that one’s level of resources is as high as it would be had one remained sighted.

Dworkin thinks that, although the state cannot know which insurance policy a particular counterpart would choose in a suitable initial situation, the state can know which insurance policy P the average counterpart would choose. The state, he thinks, should take a stand about which policy P is, assume that each person’s counterpart would buy P and base its tax-and-redistribution scheme on P. In outline, this scheme, first, obliges each person to pay the state the price of P in taxes and, second, obliges the state to pay X any compensation to which X is entitled by P’s conditions of compensation. Everyone is guaranteed compensation on the terms specified by the
policy the average counterpart would have bought: presumably, there are basic services and a resource value L below which nobody’s resource value can fall, where these services and L are determined by the average counterpart’s preferences.

However, Dworkin argues that the tax should be a progressive income tax on the ground that the scheme would otherwise be unfair to persons with lower incomes. It follows that, for Dworkin, the average counterpart’s choice does not entirely determine X’s tax burden and the compensation to which X is entitled, if any. What is true is that if there are n persons in society S, then the total tax burden must equal the product of n and the price of the policy that the average counterpart would buy, to ensure that the state has sufficient funds to compensate each person according to the terms of that policy. However, for simplicity, I will say hereafter that the average counterpart’s choice determines X’s tax burden and the compensation conditions that apply to X, unless I specify otherwise.

Why does Dworkin think that a society with this scheme has only just distributions? He thinks that a just distribution could have emerged from a situation in which persons have equally valuable resources and equal opportunities to buy reasonably priced insurance. If the state implements this tax-and-redistribution scheme, then, for all we know, the resulting distribution might have emerged from a suitable initial situation, because each person receives the compensation which he or she would receive if he or she owned the policy that the average counterpart would have bought. Dworkin thinks that this is as close as the government can get to ensuring that persons’

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resources have the value that they would have if everyone had had a fair chance to buy reasonably priced insurance.

Since Dworkin denies that average counterpart buys a policy that cancels the effect of a bad endowment on one's resource value, he does not endorse Strong Endowment Insensitivity in the context of an actual society: he does not think that justice requires the elimination of inequalities due to differences in endowments. However, it is plausible to suppose that he endorses Weak Endowment Insensitivity, insofar as the average counterpart buys a policy that gives some compensation to claimants with very unmarketable endowments, thereby mitigating at least the most egregious inequalities due to differences in endowments.

Thus, Dworkin’s tax-and-redistribution scheme is driven by concerns about practicability. Some passages suggest that paternalism is also a factor: he claims that the state should protect persons from making choices whose serious consequences they are likely to regret, like not buying health insurance.\(^4^0\) It is unclear whether he thinks an extra measure is needed to ensure that everyone has adequate insurance, as well as forcing each person to buy the average counterpart’s policy, since he does not say whether or not he thinks the average counterpart always buys adequate insurance. I have argued that it might be rational for a counterpart not to insure against some medical calamity, in which case an extra measure might be needed.

Dworkin does not explicitly state necessary and sufficient conditions for an actual inequality to be just, but his tax-and-redistribution scheme commits him these:

CS Actual: An inequality $N$ at time $t$ between $X$'s resource value and $Y$'s resource value is just if and only if:

If everyone paid the state the price of the policy that the average counterpart would buy and was compensated according to the conditions attached to that policy, then $N$ would still exist.

In other words, just inequalities are, for Dworkin, the ones that would still exist if everybody were charged the price of the policy the average counterpart would have bought and received the compensation, if any, to which the policyholder is entitled.

Unlike the auction and insurance offering, the tax-and-redistribution scheme does not yield distributions that satisfy Strong Choice Sensitivity: first, the taxes mitigate the positive impact of good luck on persons' resource values and, second, the terms of compensation mitigate the negative impact of bad luck on persons' resource values. So Dworkin gives the values of paternalism and practicability priority over achieving highly choice sensitive distributions.

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Having explained Dworkin's Theory, I will next argue that, although we should accept Choice Sensitivity, we should reject Dworkin's interpretation of it. I will answer four questions:

(1) What sort of sensitivity to choices does CS Actual require: to which choices must a just distribution be sensitive and what degree of sensitivity is required?

I will argue that the choice Dworkin thinks should determine the conditions for entitlement to compensation that apply to person X is the average counterpart's insurance choice, which in most societies depends little on X's actual choices or
preferences. However, X's actual choices may, for Dworkin, determine whether or not X meets these compensation conditions. Further, Dworkin endorses Weak Choice Sensitivity but not Strong Choice Sensitivity. In other words, he does not forbid the reduction of inequalities caused by differences in choices; he only requires that such inequalities are not eliminated.

The second question is:

(2) Does distributive justice require some sort of sensitivity to choices?

Answering (2) implies saying whether or not Dworkin's driving idea about distributive justice is correct. I will argue that the answer to (2) is "yes", thereby endorsing his driving idea.

The third question is:

(3) Does CS Actual require the right sort of sensitivity to choices?

Assuming Dworkin's driving idea is viable, answering (3) requires us to take a stand on whether or not Dworkin's worked-out Theory adequately captures it. Drawing on my answers to (1) and (2), I will argue that the answer to (3) is "no".

I will take issue with Dworkin about which choices are relevant, and the way in which they are relevant, to distributive justice. I will argue, first, that whether or not X meets these conditions depends less on X's actual choices than Dworkin thinks. Second, X's actual choices (or hypothetical choices if X's position for deliberation is inadequate) play a much larger role in determining the conditions for entitlement to compensation than Dworkin thinks.
It may be that, even though CS Actual is false, there are non-truth based reasons, for instance, concerns about practicability, sufficiently strong to compel us to accept it. Hence my last question:

(4) Do non-truth based reasons compel us to accept CS Actual?

I will argue that Dworkin does not give good enough non-truth based reasons to state the conditions for entitlement to compensation in terms of the average counterpart’s insurance choice and that, intuitively, the average counterpart’s choice does not, as a matter of justice, determine the conditions for entitlement to compensation that apply to X. (I will substantiate this intuitive claim in Chapter 3.)

To answer question (1), I will begin by considering the degree to which whether or not an inequality N between person X’s and person Y’s resource values is just, for Dworkin, depends on choices made by X, X’s counterpart or the average counterpart. I will argue that this can depend very little, not only on X’s choices, but on the choices of X’s counterpart: the choices that X would make in a suitable, initial situation. For each choice type, the answer depends on facts about X or X’s society, as I will explain. The following facts about X or X’s society can vary:

1. Facts about how many persons there are in X’s society;
2. Facts about how rational or well-informed X is; and
3. Facts about the degree to which X’s attitudes or choices resemble the attitudes or choices of the persons in X’s society.

Consider first how the degree to which whether or not N is just depends on X’s actual choices varies for Dworkin.
First, as the persons increase in number, so do their counterparts. Consequently, the average counterpart’s choices depend decreasingly on the choices of X’s counterpart and so depend decreasingly on X’s choices. (Recall that according to CS Actual, whether or not N is just is determined by the average counterpart’s choices.) Thus, as the number of persons increases, whether or not N is just depends decreasingly on X’s choices. Suppose that because Anna is unusually concerned about preserving her health, her health choices are unusually conservative compared to those of other persons in her society. In particular, she has regular, expensive medical checkups. As the population grows, it becomes increasingly likely that the average counterpart buys a very basic health policy that does not cover the cost of checkups and, in general, that the health insurance policy it buys differs significantly from the policy Anna’s counterpart would buy.

Second, as X becomes less rational or less well-informed, the choices of X’s counterpart differ increasingly from X’s choices. Further, the average counterpart’s choices differ increasingly from X’s choices, since the average counterpart’s choices are determined by the choices and preferences of all the persons’ counterparts. Thus, as X becomes increasingly rational or less well-informed, whether or not N is just depends decreasingly on X’s actual choices.

Third, let us assume that everyone is equally rational and well-informed and has equal access to the same opportunities. As X’s choices differ increasingly from the choices of the persons in X’s society, the choices of X’s counterpart differ increasingly from the other counterparts’ choices and likewise from the average counterpart’s choices.
Therefore, whether or not N is just, for Dworkin, depends decreasingly on X's actual choices as X’s preferences differ increasingly from the other persons’ preferences.

In general, then, whether or not N is just depends little on any particular person’s actual attitudes and choices, except in tiny societies whose persons are highly rational, have the relevant opportunities and are extremely well-informed. Such societies, it is reasonable to suppose, are rare.

Consider next the extent to which whether or not N is just, for Dworkin, depends on the choices of X’s counterpart and how the extent of this dependence varies as facts about X or X’s society vary. Counterparts are by definition rational and informed, so I will only consider variations in the number of counterparts and in the degree to which the preferences and choices of X’s counterpart differ from those of the average counterpart. As the counterparts of the persons in X’s society increase in number, the average counterpart’s choices depend decreasingly on the choices of X’s counterpart. Thus, as the number of the persons’ counterparts increases, whether or not N is just depends decreasingly on the choices of X’s counterpart. Furthermore, as the preferences and choices of X’s counterpart differ increasingly from those of the average counterpart, whether or not N is just, for Dworkin, depends decreasingly on the preferences and choices of X's counterpart.

To speak plainly, this means that, since I live in a huge, pluralistic society, the conditions of entitlement to compensation that apply to me are determined hardly at all by my choices or the choices that I would make in the conditions that Dworkin considers
ideal.41 In chapter 3 (Section 2), I will argue that this is not only unfair to me but also treats me with insufficient respect, and that there is a tension between Dworkin’s position regarding the conditions for entitlement to compensation and his fundamental assumption that the state must treat each person with sufficient and equal respect.42

I will next consider three objections to my claim that, according to Dworkin, whether or not N is just depends little, in most societies, on a particular person’s attitudes and choices. I will reject the first and second objections but qualify, in the light of the third, my conclusion that whether or not N is just usually depends little, for Dworkin, on particular persons’ attitudes and choices.

According to the first objection, for my conclusion to be plausible, the choices of X and the average counterpart must be of the same type. It makes sense to ask whether or not, as the number of counterparts increases, the average counterpart’s choice of how much insurance to buy depends increasingly or decreasingly on any particular counterpart’s insurance choice. These choices are of the same type. But no actual person can make the same type of choice as the average counterpart. The average counterpart

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41It seems plausible that the average counterpart’s preferences and choices may differ from the preferences and choices of particular counterparts. Since persons have different, rational attitudes to risk in real life, their attitudes may still differ in the conditions that Dworkin considers ideal: conditions in which each person is completely rational and knows how he or she wants to live. For instance, considering actual persons who are uncommonly rational, persons who want to have a family and maintain quality of life (homemakers) tend to me more risk averse when choosing insurance than persons who want to lead an ascetic, solitary life (monks). It is plausible to suppose that, in ideal conditions, it is still rational for homemakers to be more risk averse when choosing insurance than monks, so the preferences of each idealized group will differ from those of the average counterpart.

42For Dworkin’s assumption, see Introduction or Chapter 1 (Preliminaries, Dworkin’s Strategy of Argument).
can buy, at reasonable prices, any policy it (reasonably) desires, but X cannot if the actual market does not supply the policy that X would like.

Furthermore, we cannot sensibly ask whether or not, as the members of society increase in number, the average counterpart’s choice of how much insurance to buy depends decreasingly on Julian’s choice to skydive -- a choice that Julian can make, as distinct from a choice that only the average counterpart can. These choices are not relevantly related. Also, we cannot infer from X’s choices which policy X would buy if X faced the same insurance market as the average counterpart. First, we cannot infer this from X’s choice of how much optional insurance to buy; X’s willingness to buy basic health coverage may differ considerably from X’s willingness to buy optional policies that cover cosmetic surgery. Second, we cannot infer from the fact that Julian, for instance, is willing to risk his life skydiving that he would buy little insurance. Julian may justify his skydiving to himself by ensuring he has the best medical care if he survives a skydiving accident.43

However, even if these objections refute my argument that whether or not N is just depends little, in most societies, on persons’ choices, they do not refute it if taken to show that whether or not N is just depends little, in most societies, on persons’ attitudes. For instance, it is still plausible that the average counterpart’s choice of how much insurance to buy depends decreasingly on X’s attitudes to risk as the population in X’s society grows. Suppose that whether or not N is just depends little, in most societies, on

43Dworkin raises this objection to inferring what policy X’s counterpart would buy from X’s actual choices (Dworkin (2002, October), pp 111-12).
persons' attitudes. Then it is unlikely that whether or not N is just depends more, in most societies, on persons' choices. The average counterpart's choice depends on X's choices only insofar as it depends on X's preferences, which do not wholly determine which choices X makes: X's choices may be caused, not only by X's preferences, but also by X's perceptions or emotions. So if the average counterpart's choice depends little on X's preferences, it is highly plausible that it depends even less on X's choices.

The second objection to my conclusion that particular person's choices have little relevance for Dworkin concerns a Dworkinian society: a society whose state strives to make it satisfy Dworkin's Theory and whose members each choose to purchase the policy that the average counterpart would buy. The state takes a stand about which policy the average counterpart would purchase, tells its people which policy this is and bases the tax-and-redistribution scheme on this policy. One might claim, in contradiction to my argument, that the average counterpart's choice is closely related to each person's choice to pay taxes because, in a Dworkinian society, each person chooses to purchase the policy that the average counterpart would buy. I will argue that if a Dworkinian society is anything like an actual society, there is no relevant relation between the average counterpart's choice and each person's choice to pay taxes. I will suggest three plausible conditions that must be met for a relevant relation to exist. I will then argue that it is extremely unlikely that any actual society satisfies all these conditions.

Here are the conditions:

1. Each person who pays taxes also freely chooses to buy an insurance policy by paying taxes;
2. Everyone choosing to buy an insurance policy by paying taxes chooses the same policy; and
3. The insurance policy that each of these persons chooses to buy, through paying taxes, is the policy that the government claims the average counterpart would have bought.

Even if the state bases its policies on Dworkin's Theory and widely advertises this fact, it is overwhelmingly probable that some persons do not know it and pay taxes without choosing thereby to purchase insurance. In this case, Condition 1 is not met. Further, even if everyone paying taxes chooses thereby to buy insurance, it is likely that some persons will differ with respect to the policy that they choose to buy. In this case, Condition 2 is not met. Lastly, persons will probably disagree with each other and the state over which policy the average counterpart would buy, even if everyone wants to buy whichever policy this is. In this case, Condition 3 is not met. This second objection, therefore, fails.

The third objection to my argument that the choices of a particular person X have little relevance, for Dworkin, to distributive justice is that my argument fails to make a crucial distinction between the conditions for entitlement to compensation and whether or not X meets these conditions. Dworkin thinks that the average counterpart's choice determines the conditions that say whether or not X is entitled to compensation. But the average counterpart may choose a policy that makes entitlement to compensation conditional on X's choices. If so, X's actual choices determine whether or not X meets the conditions for entitlement to compensation. Thus, at most, my argument shows that, in the majority of societies, the conditions that say whether or not X is entitled to

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compensation may depend little on X’s choices. However, my argument leaves open the possibility that whether or not X meets these conditions depends heavily on X’s choices.

Consider three unemployment policies:

Policy (1) compensates person X if X loses X’s job, irrespective of the choices X made; and

Policy (2) compensates person X if:
1. X loses X’s job; and
2. X did not lose X’s job because of making a choice C such that:
   X had reason to believe that X’s making C would jeopardize X’s continued employment.

For instance, X is not entitled to compensation according to Policy (2) if X lost X’s job because, for no acceptable reason, X chose to be consistently late. The third policy is:

Policy (3) compensates person X if:
1. X loses X’s job; and
2. X did not lose X’s job because of making a choice C such that:
   (a) X had reason to believe that X’s making C would jeopardize X’s continued employment; and
   (b) It is not the case that X would not have made C if X’s circumstances had been acceptable.

Policy (3) considers X entitled to compensation if X was consistently late simply because X’s education and health care were unjustly bad. Whether or not X is entitled to compensation depends on X’s actual choices to a greater extent if the average counterpart chooses Policy (2) over Policy (3), or Policy (3) over Policy (1). This is because more of X’s choices preclude compensation with Policy (2) than with Policy (3) and with Policy (3) than with Policy (1), all other things being equal. With a large
enough sample of persons, it is plausible to suppose that Policy (1) compensates more persons than Policy (3), which in turn compensates more persons than Policy (2).

Consider Policy (3). Suppose the reason why X's resource value is lower than Y's is that X was fired as a result of being consistently late for no acceptable reason, and X's choice is not the result of injustice. That X makes this choice suffices for X not to be entitled to compensation, regardless of how many persons inhabit X's society or the extent to which X's attitudes and choices differ from those of its other members. We can also imagine a policy that compensates X for being fired only if X chooses, say, to seek work. In this case, that X chooses to seek work is necessary for X to be entitled to compensation.

Generalizing, the policy that the average counterpart would buy might consider it necessary/sufficient for X to be entitled to compensation that X makes/omits to make a type of choice. It is reasonable to suppose that the role of X's actual choices in determining whether or not X is entitled to compensation varies across societies, since the average counterpart's choice does too, and therefore also the conditions for entitlement to compensation. Further, the role of X's actual choices might vary within the same policy. It may be that whether or not X meets the conditions for unemployment compensation depends heavily on X's actual choices (for instance, if the policy that the average counterpart would buy includes Policy (2)) but that whether or not X meets the conditions for free health care does not: X is entitled to free health care if and only if X
needs health care, irrespective of whether or not this need arose as a result of \( X \)'s choices.

In sum: my argument is too hasty in concluding that whether or not an inequality \( N \) is just tends to depend little on \( X \)'s actual choices. This objection shows that, to know the role of \( X \)'s actual choices, for Dworkin, in determining whether or not \( N \) is just, we need to ask two further questions:

(A) What is the role of \( X \)'s choices in determining the conditions for \( X \) to be entitled to compensation?
(B) What is the role of \( X \)'s choices in determining whether or not \( X \) satisfies these conditions?

The answers to both questions are relative to a society: the answer to (A) is relative to a society because societies differ with respect to how many persons there are and the level of rationality or knowledge. The answer to (B) is relative to a society and also to the situation or event a policy covers (for instance, unemployment or sickness). It is reasonable to suppose that, in many societies, whether or not person \( X \) is entitled to compensation depends little on \( X \)'s choices or preferences, because the conditions depend very little on these and, in some situations that these conditions cover, entitlement to compensation is not conditional on \( X \)'s choices. However, in some societies, whether or not \( X \) meets these conditions may depend to a great extent on the choices \( X \) makes.

I will next address the second question:

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4Dworkin thinks that the average counterpart of this society's members would buy a policy that makes entitlement to compensation conditional on some of the claimant's actual choices: for instance, this policy denies unemployment benefits if there is evidence that the claimant turned down an offer of work after being fired (Dworkin (2000), pp 334-338).
(2) Does distributive justice require some sort of sensitivity to choices?

Intuitively, the answer to (2) is "yes". It is hard to substantiate this intuition. Dworkin tries to in as much as he argues that a state cannot treat its people with equal and sufficient respect and concern unless the state holds X responsible for at least some of the cost that X's choices turn out to have for X. However, it is unclear that respectful treatment, distributive justice and sensitivity to choices are conceptually related in this way. Admittedly, if the state always assumes the burden of my debts, this might not aid me in learning to act in ways that invite respect. However, I do not necessarily treat a friend disrespectfully if I assume the burden of a debt he accrued through his free choices. Indeed, such behavior can be a mark of respect. So why must the state treat me disrespectfully if it bales me out?

Alternatively, one might argue that there is a natural right to influence one's balance sheet through one's choices. But, first, it is difficult to establish any putative natural right as a real one. Second, this putative natural right is not a strong candidate, being neither an urgent need nor patently necessary for human dignity -- although I would feel that I had a right to influence my bank balance through my choices on discovering that I couldn't. Social justice does seem to require policies that enable me to influence my resource value by making particular choices.

Suppose that, at time t, Julian freely chooses to work hard whereas Rebecca freely chooses not to work, and that, as a result of these choices, Julian is much wealthier than Rebecca at t + 1. Most persons firmly believe that it would be unjust to eliminate
this inequality. Their intuitions support Choice Sensitivity, according to which the
distribution that exists at t + 1 cannot be just unless Julian is wealthier than Rebecca.
Choice Sensitivity is at a prima facie principle of distributive justice. The answer to (2) is
"yes".45

We can turn now to the third question:

(3) Does CS Actual require the right sort of sensitivity to choices?
I will argue that CS Actual does not: it is wrong both about the way in which actual
choices are relevant and the degree of relevance of actual choices. It is also wrong,
intuitively, about the relevance of the average counterpart’s choice (an intuition that I
will challenge but ultimately endorse in Chapter 3). Last, I will argue that we must reject
Dworkin’s reasons for claiming that the average counterpart’s choice determines the
conditions of entitlement to compensation that apply to each of us.

I will begin by arguing that Dworkin considers too many actual choices relevant
to whether X satisfies the conditions for entitlement to compensation that he thinks
apply to X.46 Suppose that Hannah is fired as a result of making an irresponsible and

45Other cases that do not directly support Choice Sensitivity nevertheless suggest that
responsibility for choices is a factor influencing the justice of a distribution. Suppose that two
persons need a liver transplant but only one liver is available. Suppose also that one person needs
it because of free choices she made in optimal conditions for deliberation and in full knowledge
of the possible consequences for addiction and disease, whereas the other simply had bad luck.
All other things being equal, most persons think that distributive justice requires us to give the
liver to the second person.
46Here, I will consider only whether CS Actual is right about which choices are relevant in the
context of an actual society. A fuller treatment of Dworkin’s Theory would also ask: first, whether
CS Hypothetical is right about which choices are relevant in the context of a hypothetical society,
and, second, whether CS Hypothetical and CS Actual each require the right degree of sensitivity
to choices.
irrational choice C* at work: a choice that she made as a result of receiving inadequate education and health care, and would not have made if raised in adequate conditions.

Suppose also that the policy the average counterpart buys includes Policy (2):

Policy (2) compensates person X if:
1. X loses X's job; and
2. X did not lose X's job because of making a choice C such that:
   X had reason to believe that X's making C would jeopardize X's continued employment.

It seems at least prima facie plausible that, in some societies, the average counterpart chooses this unemployment insurance policy. (I will argue that the average counterparts of some societies choose Policy (2) shortly.) As a result of Hannah's choice, she does not receive unemployment benefits. Thus, Dworkin is committed to holding that distributive justice forbids the mitigation of inequalities that arise as a result of C*.47

However, even though it seems appropriate to blame Hannah, it seems that she should receive at least some compensation, because in adequate circumstances, Hannah would meet the compensation conditions.48

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47 Policy (3), by contrast, holds that Hannah is entitled to compensation and so allows the mitigation of inequalities that arise as a result of C*.
48 Chapter 3 (Section 2) and Chapter 4 (Section 2.1) present other cases that show that basing entitlement to compensation on the policy that the average counterpart would buy makes distributions sensitive to preferences and choices that are arguably irrelevant to distributive justice.

My case and intuitions are based on T.M. Scanlon's work. He distinguishes two senses of responsibility. According to the substantive sense, to be responsible for one's action is to be not entitled to compensation for any resulting disadvantage. According to the attributive sense, to be responsible for an action is for an attribution of praise or blame to one to make sense. He thinks that it is sometimes just to compensate an agent for a disadvantage to her caused by her blameworthy action, if her action is caused by injustice (Scanlon (1998), pp 248-94). The sense with which I use the word responsibility in this paper is the substantive sense.
One might share my intuitions about Hannah’s case -- that, intuitively, she should receive at least some compensation -- yet deny it shows that Dworkin considers too many choices relevant to whether or not X satisfies the conditions for entitlement to compensation, for the following reason. Since the average counterpart is rational, it would buy a policy that does not make X’s entitlement to compensation depend on X’s choice C if C is insufficiently free because X makes C when constrained or C was determined by its causes (in Hannah’s case, her inadequate education). It would be a calamity, as well as an injustice, to be bankrupt as a result of making irrational choices, which one would not have made had one been educated adequately, and consequently to be denied compensation because of one’s choices. This is surely a paradigm calamity against which it would be rational to insure.

This reply’s proponent thinks Hannah’s story shows that Choice Sensitivity must be interpreted in terms of a restricted notion of choice. Either the set of relevant choices must exclude choices, such as Hannah’s, with an inadequate causal history, or choice must be understood as sufficiently free by definition, so that Hannah’s bad “choices” are not choices: if they appear choices, this is only because we are unaware of the causal history that determined them.

I agree that, for Choice Sensitivity to be plausible, a great deal must be built into the notion of choice. However, in response, Dworkin is committed to holding that the choices in terms of which Choice Sensitivity should be interpreted are those on which he thinks the tax-and-redistribution scheme must be based: the average counterpart’s choice (which determines the basic tax rate for each person and conditions for
entitlement to compensation) and any actual choices that these conditions mention.

(Recall that Dworkin interprets Choice Sensitivity, not by defining its constituent terms, but by describing means of creating distributions which, he argues, satisfy this principle.) I will next argue that there is a society Ū in which the average counterpart buys Policy (2), which does not compensate Hannah, rather than Policy (1) or Policy (3), which do compensate her.

Why does the average counterpart of Ū’s members buy Policy (2)? Ū’s members, let us suppose, are price-sensitive, risk-loving, leisure-loving, unscrupulous, impatient and jealous of their privacy. Ū’s members prefer Policy (2) to Policy (1): Policy (1), which compensates all persons upon being fired, is much more expensive than the other policies in Ū, since insurers in the suitable, initial situation realize that most persons in Ū will find excuses to be fired if they know that unemployment insurance awaits them. Further, Ū’s members are willing to take the risks associated with rejecting Policy (1).

Ū’s members prefer Policy (2) to Policy (3): Policy (3), which screens the causal history of claimants’ choices on a case-by-case basis, is much more expensive in Ū than a policy that does not need to, all other things being equal, because insurers predict that the cost of investigating claims will exceed the cost saved by not compensating illegitimate claimants. Moreover, Ū’s privacy-loving members are horrified by Policy (3) because it investigates a claimant’s background and besides, although cost is also a factor, they do not like to have to wait for compensation.

Therefore, the average counterpart of Ū buys Policy (2), and Hannah (whom I now stipulate to be a member of Ū) receives no compensation. But this is unjust. In sum:
Hannah’s case shows that Dworkin considers too many choices relevant to whether or not X satisfies the conditions for entitlement to compensation: he is wrong in considering actual choices determined by inadequate social conditions relevant.

Dworkin agrees with me that Hannah’s choices are irrelevant to distributive justice insofar as he claims that Hannah’s actual choices should not determine the conditions for entitlement to compensation. But he does not go far enough. I have argued that Hannah’s choice should not determine whether or not she satisfies these conditions: that an agent makes a choice solely as a result of injustice should not defeat her intuitively legitimate claim to compensation.

Should the average counterpart’s choices determine which actual inequalities are just? In Chapter 3, I will flesh out the following, intuitive argument that it should not. The thrust of the argument is that if the average counterpart’s choices determine which actual inequalities are just, a risk-averse person who is unlucky can receive too little compensation or social support if most persons in her society love taking risks. The average counterpart’s choice, on Dworkin’s Theory, has enormous economic significance for each of us, yet its preferences may differ enormously from ours. The policy that the average counterpart chooses may be quite different from the policies that we normally think of buying or would choose in a suitable, initial situation. As I will argue in Chapter 3, this not only unjust but also disrespectful to me, thus there is a tension between Dworkin’s view about compensation conditions and his fundamental assumption that the state must treat each person with sufficient and equal respect.
We may concede to Dworkin that basing the tax-and-redistribution scheme on the average counterpart’s choice is the best practical compromise given the state’s ignorance of each person’s hypothetical choices and the undesirability that it should attempt to discover these. Yet Dworkin does not claim that CS Actual is our best chance of achieving some degree of distributive justice. He is committed to claiming that CS Actual gives necessary and sufficient conditions for a distribution to be just.

The broader significance of my claim that the average counterpart’s choice does not determine the compensation conditions that apply to X is that we must reject Dworkin’s approach to developing and justifying a Theory, based as it is on an auction originally designed to achieve distributive justice in a hypothetical society. To be precise: I do not challenge his claim that the hypothetical auction achieves distributive justice in the hypothetical situation. Rather, I reject the tax-and-redistribution scheme he proposes that is inspired by the idea of the hypothetical auction. In the process of changing the auction into the tax-and-redistribution scheme, the relevant choices determining the entitlement conditions that apply to X cease to be, for Dworkin, the choices that X made or might have made, and become the average counterpart’s.

My argument allows that an actual institution based on a different hypothetical auction, or on the same auction but adapted otherwise in order to enable practical implementation, may yield an actual institution capable of achieving distributive justice. However, Dworkin’s institutions cannot, I have argued, achieve distributive justice and, insofar as they fail, they cast doubt on the viability of founding a Theory on the concept of a hypothetical auction.
Recall my fourth question:

(4) Do non-truth based reasons compel us to accept CS Actual?

In the rest of this section, I will argue that we should reject Dworkin’s two chief reasons for holding that the average counterpart’s choice determines the conditions for entitlement to compensation. Dworkin’s practicability reason is that he thinks a Theory must be practicable. Since a practicable Theory allows a state to bring about just distributions, it must be stated in terms of knowable facts. Facts about which policy X’s counterpart chooses are not knowable; at least, even if a state could know such facts in principle, it would not be feasible to decide X’s tax burden or entitlement to compensation with reference to these facts or desirable from the point of view of overall, social justice to try to discover them. However, Dworkin thinks, a society can know which policy the average counterpart would buy on the basis of revealed preferences and social conditions. He thus believes he has reason to state his Theory in terms of the average counterpart’s choices, rather than individual counterparts’.

Dworkin may also have a paternalistic reason to hold that the average counterpart’s choices should determine which actual inequalities are just. He clearly believes that some persons will not buy insurance if permitted not to and that the state is justified in making insurance mandatory. He also seems to think that the average counterpart always buys adequate coverage (although, as I argued in section 1.3, it does not always insure against every calamity). In any case, he obviously thinks that forcing
each person, in effect, to buy the average counterpart’s policy ensures that there is a social safety net.

However, even if Dworkin is right that there must be a safety net, basing fiscal and welfare policies on the average counterpart’s insurance choice does not guarantee that there is one. If a society’s members are extremely risk-loving, or insurance against some calamities is prohibitively expensive, implementing CS Actual may fail to guarantee much, if anything, in the way of a minimum income or social services. So if justice requires a social safety net worth its name, CS Actual does not satisfy the requirement.

Does practicability argue for considering the average counterpart’s choice relevant to distributive justice? I will argue that it does not: the best Theory need not, pace Dworkin, be practicable, since there is an unjust society that could not achieve distributive justice (as conceived by the best Theory).

Consider a society O, cut off from the rest of the world, in which Sufferers suffer from a particular medical condition that is agonizing and debilitating. No non-Sufferer faces the possibility of having a Sufferer child; the transmission of this condition is genetic and there is no interbreeding. The medical system of O delivers excellent medical care to all sick persons except Sufferers. O has medical technology that can significantly reduce Sufferers’ pain. However, the non-Sufferers in O are extraordinarily hardhearted: none of them can be bothered to design or implement policies necessary for delivering the appropriate medical care to Sufferers. Non-Sufferers could only be

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*Chapter 3 (Section 2) makes this point vividly.*
induced to design or implement such policies through means that violate the autonomy of non-Sufferers, for instance, by hypnosis: a society that adopted such means could not be just, all things considered. Sufferers are incapable of normal functioning, so they cannot help themselves. So no Sufferer gets the care she needs.

A plausible Theory requires at least some of O’s Sufferers to have access to the available medical technology for O to be just. O’s Sufferers cannot gain access to the medical technology they need, so O does not satisfy such a Theory; furthermore, O could not come to satisfy such a Theory. It is reasonable to suppose that, if a Theory is practicable, then every peaceful society that has reached a particular level of economic development can be made to satisfy it, if not immediately, then within a reasonable period of time. But, whichever Theory is correct, O cannot be made to satisfy it within a reasonable period. Thus, that O is conceivable shows that we must reject Dworkin’s assumption that a Theory must be practicable and thereby reject his practicability reason for holding that the average counterpart’s choice determines the entitlement conditions that apply to each of us.

One might object that Dworkin does not hold that a practicable Theory must apply even to remote hypothetical societies like O. In reply, Dworkin does not say to which societies a practicable Theory must apply: it is unclear which societies must be able to achieve distributive justice according to a particular Theory for that Theory to be practicable. It is even unclear whether he thinks that a practicable Theory must apply to all peaceful, actual, current societies that have reached a particular level of economic
development. But supposing we grant that he does, such actual, current societies include Sufferer societies.

Here is a current interpretation of the South African government’s late and wholly inadequate reaction to the HIV/AIDS epidemic. The South African government was warned well in advance and had scientific evidence proving the efficacy of ARVs in reducing HIV-related morbidity and mortality. However, although it could have established institutions for distributing ARVs to the economically disadvantaged, it failed to do so. Its professed reason is skepticism about the efficacy of ARVs and the ability of the uneducated to maintain the rigid schedule that ARVs require. However, a chief reason for the government’s inertia appears to be lack of concern. Presumably, so long as there is no adequate institution due to lack of concern, South African society is unjust and cannot be made just.

Even if one rejects my interpretation of the South African case, there are other cases that show that the actual world contains Sufferer societies. For instance, consider the world as a single society and think of the wholly inadequate international institutions for dealing with HIV/AIDS in Sub-Saharan Africa and the reasons why they are so inadequate.

Here is a second objection one might press against my claim that O’s conceivability shows that a Theory need not be practicable. This objection claims that a practicable Theory need not apply to O because O is in such a sorry state that distributive justice, as the best Theory understands it, is not an appropriate goal for O. Rather, O needs a theory of transitional justice that will govern it until this becomes an
appropriate goal. In reply, suppose that O resembles Italy as closely as possible given how I have described O. That is, O has a reasonably stable economy, and legal and educational systems that would not be unjust were it not for the abysmal treatment of Sufferers. Asthmatics (including asthmatic Sufferers) receive perfectly adequate treatment for their asthma. O cares tremendously about preserving its cultural heritage and has an excellent Ministry of Culture, although it does not care about the plight of Sufferers. Yet it is the best Theory that applies to Italy, rather than a theory of transitional justice; thus, it is reasonable to suppose, the same holds for O.

Admittedly, O differs from Italy in that, all things considered, O is unjust, whereas Italy is, all things considered, not unjust. However, the difference between O and Italy is slight: it is a difference about the incidence of a particular disease, part of the health service and a particular social attitude. If such a small difference makes it the case that a Theory applies to Italy but not to O, it is plausible to suppose that there are few or no societies that a Theory classes as unjust, because as soon as a society has a blatantly unjust institution, a theory of transitional justice applies to it instead of a theory of distributive justice. But this is absurd. It cannot be that changing one among many of a society’s institutions makes it the case that a Theory no longer applies. Therefore, neither of Dworkin’s reasons for claiming that the average counterpart’s choice should determine which distributions are just succeeds in establishing this claim.

If we accept the spirit of Dworkin’s Theory, we should endorse the Theory that he would presumably advance were he not concerned about practicability and paternalism. That is, these are the choices that determine whether an inequality between
person X and person Y is just: the choices that X and Y would each make in a suitable, initial situation about which policy to buy and possibly also other of X's and Y's actual or hypothetical choices, such as the choice to decline an offer of employment (if X or Y choose policies whose conditions mention these other choices). Taking this route satisfies a powerful intuition that I will substantiate in Chapter 3: should not my choices play a greater role than they do according to Dworkin in determining the conditions for entitlement to compensation that apply to me?

Conclusion

In this chapter, I have stated and evaluated Dworkin's Theory, arguing that it has a fundamental flaw: the Theory is wrong about the role of choice. In order to identify Dworkin's interpretation of Choice Sensitivity, I distinguished between two ways in which whether an inequality is just might depend on a particular choice for Dworkin: that choice might be a determinant, first, of the conditions for entitlement to compensation that apply to X or, second, of whether X satisfies these conditions. I argued that, according to Dworkin, these compensation conditions are determined by the average counterpart's choice, which in most societies depends to a negligible degree on X's preferences or choices. Moreover, depending on which policy the average counterpart chooses, whether X satisfies the compensation conditions may depend on X's actual choices or on X's hypothetical choices or on no choices at all.

I argued that fewer of X's actual choices are relevant to whether or not person X meets the conditions for entitlement to compensation than Dworkin thinks: choices that X makes as a result of inadequate social conditions are not relevant, but Dworkin is
committed to saying that they are, in contradiction to his considered view. Further, the average counterpart’s choice should not, intuitively, entirely determine the compensation conditions that apply to X: X’s preferences and choices should play a greater role, particularly if they differ greatly from the average counterpart’s preferences and choices. Consequently, Dworkin may be right insofar as a tax-and-redistribution scheme based on this choice may implement the highest feasible degree of distributive justice, but only in exceptional circumstances will this bring about distributive justice.

Also, I showed, practical concerns do not compel us to consider the average counterpart’s choice relevant. First, there are more reliable means to ensure that there is a viable social safety net, such as stipulating that there is one, and, second, the best Theory need not be practicable. A practicable Theory applies to all actual, current societies that are peaceful and reasonably prosperous, but some of these societies cannot meet the best Theory’s exacting conditions of distributive justice.

If we accept the spirit of Dworkin’s Theory, we should endorse the Theory that he would presumably advance were he unconcerned about practicability and paternalism. That is, the choices that determine whether an inequality between person X and person Y is just are the choices that X and Y would each make in a suitable, initial situation about which policy to buy, together with X’s and Y’s relevant actual or hypothetical choices (if X or Y choose policies whose conditions are couched in terms of the policyholder’s actual or hypothetical choices respectively). Taking this route satisfies an important intuition: should not my choices play a greater role than they do according
to Dworkin in determining the conditions for entitlement to compensation that apply to me?

It would not be easy to eliminate this error about the role of choice from Dworkin's Theory. He introduces the average counterpart's choice when modifying his account of what distributive justice is in the hypothetical scenario and how to achieve it, so as to present a practicable account of distributive justice for an actual society. To eliminate this error, Dworkin must either redesign the account for the hypothetical scenario, for instance, by basing it on a different hypothetical auction, or render this account practicable without relying on the concept of the average counterpart. Taking either option would entail large changes to the way in which Dworkin develops and motivates his Theory.
Chapter II: Choice Sensitivity and Dworkin’s Case against Rawls

1

In *Sovereign Virtue*, Ronald Dworkin argues that we should reject the theory of distributive justice (or *Theory*) that John Rawls proposes and that there is *prima facie* reason to accept Dworkin’s own *Theory*. The force of Dworkin’s argument is that his *Theory*, unlike that of Rawls, requires distributions to be “finely-tuned” to persons’ choices and endowments, requirements that Dworkin thinks any adequate *Theory* must include. Rawls’ *Theory* does not explicitly include these requirements and, in any case, Rawls holds that the principles of justice do not apply to *persons*, but rather to institutions that are designed to control inequalities between *groups of persons*.

In this chapter, I will argue that Dworkin’s argument neither refutes Rawls’ *Theory* nor gives us reason to prefer Dworkin’s. I will contend that Rawls’ *Theory* passes all the tests that Dworkin sets a *Theory* and his own *Theory* passes. I will argue that distributions which are just under Rawls’ *Theory* turn out to be more “finely-tuned” to choices and endowments than Dworkin thinks they might be. Moreover, I argue, distributions that Dworkin’s *Theory* considers just are less “finely-tuned” to choices and endowments than he suggests they might be. I will explain why Dworkin’s strategy of justification is misleading and show that it fails. I will also show that, although Dworkin’s and Rawls’ *Theories* differ in their implications concerning “fine-tuning”, these differences do not give us reason to favor Dworkin’s *Theory*. My case for claiming

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50The theories of social justice that I will consider are not concerned solely with distributive justice, but I will refer to them as *Theories*, for simplicity, as I will concentrate on their implications for distributive justice.
that Rawls passes all the tests that Dworkin both sets and himself passes closely resembles Norman Daniels’ argument (1993) that an objection of Amartya Sen’s (1982) does not refute Rawls’ Theory.\textsuperscript{51}

The force of Dworkin’s objections is that the distributions a Theory considers just must satisfy plausible interpretations of two particular requirements, but the distributions that Rawls’ Theory considers just do not. The requirements, prior to interpretation, are:

Choice Sensitivity: A distribution of resources is just only if it is sensitive to persons’ choices; and

Endowment Insensitivity: A distribution of resources is just only if it is insensitive to persons’ endowments.\textsuperscript{52}

Each principle expresses a necessary condition for a distribution to be just; other conditions may apply.

A person X’s endowment consists of features or capacities, the possession of which is beyond X’s control, which affect the rate at which X can acquire resources, such as congenital handicaps.\textsuperscript{53} So Endowment Insensitivity considers unjust inequalities caused by factors that persons cannot choose to change, factors such as inborn health and talents (this principle does not mention the health and talents that result from a person’s genes and her choices). Dworkin, therefore, thinks that justice requires the mitigation, if not

\textsuperscript{52}Dworkin (2000/1981), p. 89; see also Dworkin (2002, October), p. 287. The choices Dworkin thinks are relevant include the choices of how expensively to consume, how lucrative a profession to pursue and how hard to work, as well as the choice of whether or not to purchase insurance.
elimination, of inequalities due to differences in how marketable persons' endowments are.

Choice Sensitivity, as Dworkin explains it, implies that a just distribution must preserve, or at least not eliminate, any inequality between person X's and person Y's resource values caused by the fact that X and Y chose differently. Thus, Dworkin's Theory can permit -- and indeed require -- there to be particular differences between persons' resource values: inequalities that have arisen because persons chose differently. I will later use the interpretations, presented in Chapter 1, of each requirement to assess whether Dworkin's objections give us reason to prefer his Theory to Rawls'.

Before proceeding, I will indicate some ways in which the two Theories differ and introduce Rawls' Theory. Like Dworkin, Rawls thinks that whether a distribution of goods is just depends on the distribution of resources. However, Rawls and Dworkin disagree about which resources are relevant. According to Dworkin, the relevant resources in a society comprise all of its resources that may be privately owned. The resources that Rawls considers relevant (primary goods in his language) comprise income and wealth, the powers and prerogatives of office and positions of responsibility, and the social bases of self-respect.54 (Let us call the total value of person X's primary goods X's primary goods value, and similarly for every other type of goods.) Moreover, whereas Dworkin thinks that whether a distribution is just depends on particular persons' resource values, Rawls thinks that this depends on the institutions designed to control inequalities

54Rawls (1971, 1999), pp 64, 80; Rawls (1993), p. 181. Rawls assumes that an index of all the primary goods can be constructed, so that social positions can be ranked, without saying how to construct this index or weigh the advantages in the index. I will retain this assumption and also assume that each type of primary good has the same weight.
among the average resource values of groups of persons. This second difference is crucial for understanding Dworkin's objections to Rawls' Theory. A last difference between the Theories is that only Dworkin's explicitly requires a just distribution to satisfy Choice Sensitivity and Endowment Insensitivity. However, it may be that, as a matter of fact, distributions that Rawls' Theory deems just satisfy Choice Sensitivity and Endowment Insensitivity.

For Rawls, a society is just if and only if its institutions satisfy these two principles, of which the second has two parts:

(1) Equal Basic Liberties: Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all;
(2a) The Difference Principle: Social and economic inequalities must be to the greatest benefit of the least advantaged members of society;55 and
(2b) Fair Equality of Opportunity: Social and economic inequalities must be attached to offices and positions open to all under the condition that equally talented, equally motivated persons have similar chances of achieving socially desirable positions.

Several explanatory notes follow:

- Equal Basic Liberties requires each person to have the same basic liberties. It also requires equal opportunity to influence political outcomes. Rawls calls this requirement "Fair Value of Political Liberty". Fair Value of Political Liberty says

55Rawls (1971, 1999), p. 60; Freeman (2003), p. 48. When motivating his second principle, Rawls assumes that the only primary goods are income and wealth. To assess the force of Dworkin's objections, I will revoke this assumption: I will assume that any good that Rawls considers a primary good is a primary good.
that persons who are equally talented and equally able to influence political outcomes must have equal chances of doing so.56

- We should distinguish native or inborn talent from developed talent that comes from training or education. Fair Equality of Opportunity should be understood in terms of native talent. The motivation this principle mentions includes willingness to develop talent over time. Thus, Fair Equality of Opportunity requires a quadriplegic willing to develop her mathematical abilities to have the same chance of becoming a mathematics professor as an able-bodied person who is equally willing and naturally gifted. However, this principle does not require that someone who has never bothered to develop her natural talent for mathematics but at the age of forty decides to be a math professor should have the same chances to be a math professor as someone who has dedicated her life to develop her mathematical talent.

- Equal Basic Liberties takes “priority” over Fair Equality of Opportunity and Fair Equality of Opportunity takes “priority” over the Difference Principle. That is, in a just society, each person must have equal basic liberties and, in a society in which each person has equal basic liberties, equally talented, equally motivated persons must have the same chances of obtaining socially desirable positions. Further, of those distributions, the distribution that maximizes the expected benefit of the worst-off should be chosen.

Dworkin’s objections to Rawls’ Theory are directed chiefly against the Difference Principle. Rawls applies this principle to the institutions that control a society’s system of “social and economic inequalities”. What are these inequalities? Rawls divides the persons in a society into classes (or "social positions") according to their profession or educational level.\textsuperscript{57} Then, for each social position, he takes the average expected value of a person’s primary goods over the course of his or her lifetime. Suppose that, for two particular social positions, the average expected lifetime values of a person’s primary goods differ. A social and economic inequality holds between these two values.\textsuperscript{58} In the interest of simplicity, I will abbreviate the phrase \textit{lifetime expected primary goods value} to \textit{LEPG value}. According to Rawls, the Difference Principle states that the institutions controlling a society’s system of social and economic inequalities must produce a situation in which the average LEPG value of a person in the worst-off social position is as high as it can be in the long run.

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I will start my explanations of each of Dworkin’s objections by stating the objection in Dworkin’s own words. Here is Dworkin’s first objection:

\textsuperscript{57}Van Parijs, pp 214-15; \textit{A Theory of Justice}, p. 84 (the passage in the revised edition has been amended). Rawls suggests defining the worst-off social position as that of the unskilled worker, but does not endorse this suggestion because there are different types of unskilled worker and yet no principled way of picking out the relevant type.

\textsuperscript{58}My account of social and economic inequalities glosses over some scholarly debate and textual inconsistencies that are irrelevant to my argument. For instance, several Rawls scholars think the relevant inequalities are defined in terms of the value, rather than the expected value, of primary goods (see Daniels (1993) for a statement of this view). Further, Rawls defines social positions in conflicting ways (Van Parijs (2003), p. 213).
... The Difference Principle is not sufficiently finely-tuned in a variety of ways ... In particular, [it] seems insufficiently sensitive to the position of those with natural handicaps, physical or mental, who do not themselves constitute a worst-off group, because this is defined economically, and would not count as the representative or average member of any such group. Rawls calls attention to what he calls the principle of redress, which argues that compensation should be made to persons so handicapped... But he notes that the Difference Principle does not include the principle of redress, though it would tend in the same direction insofar as special training for the handicapped, for example, would work to the benefit of the economically worst-off class. But there is no reason to think that it would, at least in normal circumstances.59

Dworkin clearly thinks that justice requires the state to do more for disabled persons than simply to maximize the average LEPG value of the worst-off group. This group may contain some but, in likely conditions, not all disabled persons. Further, maximizing the average LEPG value of the worst-off group entails the same benefits for each disabled person in this group, irrespective of degree of disability. However, Dworkin does not precisely explain his requirement that a distribution should be "finely-tuned" to the position of disabled persons. I will explain this requirement in the light of his Theory and, for now, assume that the requirement is valid. Presumably, the Theory does not require a society to compensate every disabled person regardless of his or her LEPG value.60

60As explained in the first chapter, Dworkin defines a just distribution in terms of the average counterpart. Let person X's counterpart be rational, young and healthy, and ignorant of X's earning potential, but otherwise identical to X. For practical and other reasons, Dworkin thinks the state should assume that each person's counterpart would buy the same policy as the average counterpart: a being that is, in some sense, the average of all the persons' counterparts. Dworkin argues that the insurance policy the average counterpart would buy determines which compensation, if any, a person is entitled to.
Two principles I introduced in Chapter 1 offer differing explanations of
Dworkin’s requirement that a distribution should be “finely-tuned” to the position of
disabled persons:

Strong Endowment Insensitivity: An inequality $N$ between the resource value of
person $X$ and the resource value of person $Y$, where $N$ is entirely due to a
difference in how marketable $X$’s and $Y$’s endowments are, must be eliminated;
and

Weak Endowment Insensitivity: An inequality $N$ between the resource value of
person $X$ and the resource value of person $Y$, where $N$ is entirely due to a
difference in how marketable $X$’s and $Y$’s endowments are, must be mitigated,
but need not be eliminated.

The Disabled Objection is ineffective if a society that satisfies Rawls’ principles of justice
also satisfies Strong Endowment Insensitivity: whatever “fine-tuning” might be, it is
surely achieved if a society cancels whatever effect a person’s endowment has on her
resource value. In such a society, a quadriplegic is as wealthy as she would be if able-
bodied.

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Dworkin contends that the average counterpart insures against the outcomes, and only
the outcomes, it considers disastrous. The reason is that insurance is technically a “bad buy”: insurance is expensive relative to its expected value, as the insurer must cover the costs of fraud and administration as well as make a profit. The price of a policy that cancels the effect of one’s becoming blind (say) on one’s stock of resources would be prohibitively high and greater than the policy’s expected value. Yet not all situations in which one has fewer resources than one would if one were sighted are so calamitous that they must at all costs be avoided. So the average counterpart does not buy a policy that cancels the effect of one’s becoming blind (say) on one’s stock of resources. Therefore, the compensation one would receive if blinded does not make it the case that one’s level of resources is as high as it would have been had one remained sighted.

Dworkin reasons, further, that the average counterpart would insure to receive compensation only in outcomes that are disastrous and in which receiving compensation would significantly improve matters. The average counterpart therefore purchases a policy that compensates most disabled persons but does not compensate a fabulously wealthy person for losing a finger.
However, merely showing that a society that satisfies Rawls’ principles of justice also satisfies Weak Endowment Insensitivity does not nullify the Disabled Objection. A society might satisfy Weak Endowment Insensitivity by giving one thousand dollars to each able-bodied person and one cent to each disabled person, regardless of their degree of disability. However, the Disabled Objection surely requires a state to do more for a disabled person than for an able-bodied person and to do more for a severely disabled than for a mildly disabled person. Nonetheless, the Disabled Objection is ineffective if every society that satisfies Rawls’ Theory also, for the following reasons, satisfies Weak Endowment Insensitivity. First, the society does more for a disabled person than for an able-bodied person and does more for a severely disabled than for a mildly disabled person. Second, these actions aim at mitigating inequalities in a person’s ability to pursue his important interests.

Accordingly, I will add a third principle that explains Dworkin’s requirement that a distribution should be “finely-tuned” to the position of disabled persons:

**Priority to Disabled**: All other things being equal:
1. The state should do more for a disabled person than for an able-bodied person, with the end of mitigating inequalities in a person’s ability to pursue his interests; and
2. The state should do more for a more disabled person than for a less disabled person, with the end of mitigating inequalities in a person’s ability to pursue his interests.

Unlike Strong Endowment Insensitivity and Weak Endowment Insensitivity, Priority to Disabled requires the state assistance that a person receives to increase with that person’s degree of disability, regardless of that person’s social position. Hence Priority
to Disabled captures the person-by-person "fine-tuning" of resource values to differences, at each social position, in persons' endowments that Dworkin seems to have in mind. It would therefore silence that Disabled Objection to show that any distribution that satisfies Rawls' principles also satisfies Priority to Disabled.

I will argue that Dworkin's objection neither refutes Rawls' Theory nor gives reason to prefer Dworkin's, whether we interpret the Disabled Objection's claim that a distribution should be "finely-tuned" to the position of disabled persons' as Strong Endowment Insensitivity, Weak Endowment Insensitivity or Priority to Disabled. Two clarifications are needed before we begin. First, in A Theory of Justice, Rawls is aware of the Disabled Objection but does not address it; to make it easier to develop a Theory, he makes the simplifying assumption that no one has special needs. Second, in assessing what Dworkin's objections to Rawls' Theory imply about the relative attractiveness of Dworkin's and Rawls' Theories, I will consider Rawls' Theory not only as presented in A Theory of Justice, but also in the light of Rawls' other works. Let us interpret, first, Dworkin's claim that a distribution should be "finely-tuned" to the position of disabled persons as Strong Endowment Insensitivity. It is not obviously true that justice requires the satisfaction of Strong Endowment Insensitivity. So in the absence of argument for the claim that justice requires this, the Disabled Objection, interpreted in terms of Strong Endowment Insensitivity, gives no compelling reason to reject Rawls' Theory. Further, even if it is true that justice requires the satisfaction of Strong Endowment Insensitivity, an actual inequality that Dworkin
considers just need not satisfy this principle. In Chapter 1, I argued that Dworkin
endorses the following condition for an actual inequality to be just:

\textbf{CS Actual: An inequality N at time t between the value of person P’s resources and the value of person Q’s resources is just if and only if:}

\begin{quote}
If everyone had paid the state the price of the policy that the average counterpart would have bought and is compensated according to the conditions attached to that policy, then N would still exist.
\end{quote}

Justice does not, according to Dworkin, require a victim of bad luck to be compensated sufficiently to cancel the effect of this bad luck on her stock of resources, so Dworkin’s own Theory does not require a distribution to satisfy Strong Endowment Insensitivity.\textsuperscript{61}

It therefore cannot be a reason to prefer Dworkin’s Theory to Rawls’ that a society’s institutions can satisfy Rawls’ Theory without satisfying Strong Endowment Insensitivity.

Dworkin might reply that a just distribution must satisfy Strong Endowment Insensitivity in theory, but not in practice, for the following reason. The correct account of a just distribution must be satisfiable by an actual society. But no distribution can perfectly implement Strong Endowment Insensitivity in practice (at least, not without redistributing goods by means that would make the resulting distribution, on the whole, unjust).\textsuperscript{62} However, this is not a reply that Dworkin is entitled to make, because no


\textsuperscript{62}It is reasonable to suppose that Dworkin believes that, if it were possible, in practice, to implement distributions that satisfy Strong Endowment Insensitivity and there were no paternalistic considerations, just distributions should satisfy the principle. The hypothetical auction described in the previous chapter generates, according to him, only distributions that are just, and each of these distributions satisfies Strong Endowment Insensitivity. It is only when Dworkin turns his attention to giving a Theory that an actual society can satisfy that he denies a
distribution can perfectly implement Strong Endowment Insensitivity in practice, but, according to Dworkin, the correct account of a just distribution must be satisfiable by an actual society. Dworkin’s definitive account of a just inequality is given in terms of tax-and-redistribution scheme that is motivated by theoretical and practical considerations and generates distributions that do not satisfy Strong Endowment Insensitivity.  

Let us interpret, next, Dworkin’s claim as Weak Endowment Insensitivity or Priority to Disabled. (As these two principles are similar, I will consider them together.) Dworkin directs his objections at the Difference Principle. First, I will adapt Norman Daniels’ argument so that it shows that even if the Difference Principle does not require Weak Endowment Insensitivity or Priority to Disabled to be satisfied, Rawls’ whole Theory does: it includes Fair Equality of Opportunity and Equal Basic Liberties, each of which requires that both Weak Endowment Insensitivity and Priority to Disabled be satisfied. However, I reject this argument. Second, I will argue that Rawls’ Theory, with small adjustments, requires Weak Endowment Insensitivity or Part 1 of Priority to Disabled to be satisfied.

Let us dismiss Rawls’ assumption that there are no disabled persons. One might argue that Fair Equality of Opportunity requires Endowment Insensitivity and Priority to Disabled to be satisfied. Generally speaking, the more severe a person’s disability, the more the state must do on her behalf for her chances of attaining a particular socially

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 juste distribution need satisfy Strong Endowment Insensitivity. However, Dworkin thinks that the correct account of a just inequality is implementable.  
63 See also Cohen (2003, Summer), which expresses disagreement with Dworkin about whether a Theory must be implementable. In Chapter 1, I challenge Dworkin’s claim that the correct account of a just distribution must be implementable.  

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desirable position to be as good as the chances of a less severely disabled or able-bodied person. One might therefore conclude that Priority to Disabled is satisfied. As a result of the state's actions, the value of a person's resources is unlikely to be entirely determined by her endowment. So, one might conclude, Endowment Insensitivity is also satisfied.

Let us consider again the mathematically gifted quadriplegic who desires to be a math professor and would be willing to try to achieve her goal if only she had the means to pursue an education in math. Fair Equality of Opportunity requires her chances of becoming a math professor to be the same as those of an equally talented, equally motivated able-bodied person. For these persons' chances to be the same, the state must enable the quadriplegic to be able to use sophisticated motor devices. Admittedly, Fair Equality of Opportunity may not require the state to give the quadriplegic these devices, but it seems reasonable to understand a person's resource value in such a way that the quadriplegic's resource value increases if she has access to such devices, even if she does not own them.

One might object that although Fair Equality of Opportunity requires the state to attend to some interests of a disabled person, Priority to Disabled is not satisfied because Fair Equality of Opportunity does not require the state to attend to enough of a disabled person's important interests. For example, a disabled person might have a strong interest in fishing as a hobby, but enabling her to pursue this interest is not required in order to ensure that her professional chances are as good as those of able-bodied persons. But this objection is not conclusive, as Fair Equality of Opportunity covers the great majority of interests, if not all; almost every good in which we have an interest is
either a means to being a successful professional (such as being healthy) or an interest that somebody has reason to pursue as a profession. For instance, Fair Equality of Opportunity ensures that disabled persons who wish to be amateur painters are able to learn painting, as some persons who want to be professional painters may be disabled. Moreover, justice does not, intuitively, require the state to allow disabled persons to pursue all their interests, as in the case of able-bodied persons.

A more pressing worry is that Fair Equality of Opportunity might be satisfied in a society that does not enable disabled persons to gain an education as sound as that of able-bodied persons, yet implements an affirmative action policy that requires employers to hire disabled applicants with a weaker educational background over able-bodied persons with a stronger educational background. Such a society satisfies Weak Endowment Insensitivity. However, Priority to Disabled cannot be satisfied so easily, at least, not if the fact that a society satisfies Priority to Disabled silences the Disabled Objection: Priority to Disabled must require equal access to education. For this reason, although Fair Equality of Opportunity requires Weak Endowment Insensitivity to be satisfied, we cannot definitively conclude that it also requires Priority to Disabled to be satisfied.64

Further, I will next argue, although Equal Basic Liberties requires Weak Endowment Insensitivity and Priority to Disabled to be satisfied in some societies, Equal Basic Liberties does not require this in all. According to Rawls, the most extensive set of equal basic liberties includes political liberty (and its fair value), and political liberty

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64I owe this point to Casper Hare.
includes the liberty to cast an informed vote. It is plausible that a person’s ability to cast an informed vote should not be a function of her basic motor skills. Someone should not be regarded as unable to cast an informed vote if she cannot physically make it to school or to a polling station. Likewise, there should not be large inequalities in a person’s ability to cast an informed vote due to the fact that some persons live next to a polling station, whereas other persons live at an enormous distance from the closest one.

In some societies, every disabled person requires special assistance to cast an informed vote, such as assistance with schoolwork or registering their vote.\(^6\) In such a society, Equal Basic Liberties requires the state to assist every disabled person. Such assistance might involve giving disabled persons cash subsidies, learning technologies or motor devices, so Weak Endowment Insensitivity is satisfied. One might think that, all other things being equal, persons with greater disabilities are more likely to fall short of informed voting, and to a greater extent. In such societies, the state must do more for a severely disabled person. Thus, in such societies, Equal Basic Liberties also requires Priority to Disabled to be satisfied.

However, it is plausible that in some societies, not all disabled persons need assistance in order to vote. This line of reasoning therefore cannot show that these societies satisfy Weak Endowment Insensitivity or Priority to Disabled. Moreover, even if all disabled persons must be assisted, it may not take much to enable informed voting: for example, informed voting may be achieved in some societies simply by providing

\(^6\)As we will see, my case that Rawls’ Theory as a whole requires Weak Endowment Insensitivity and Priority to Disabled to be satisfied does not rest on the supposition that enabling informed voting requires special assistance in all societies.
transport to polling stations. In such societies, Equal Basic Liberties does not even ensure that Weak Endowment Insensitivity is satisfied, let alone Priority to Disabled; Equal Basic Liberties is powerless to silence the Disabled Objection as it should be understood. Hence, Equal Basic Liberties does not, in all societies, require satisfaction of Weak Endowment Insensitivity and Priority to Disabled. Nor, as we have seen, does Fair Equality of Opportunity require these principles to be satisfied in all societies.66

Recently, Rawls has suggested treating the Disabled Objection as a problem of “extension” to be solved at the legislative stage once the “first problem of justice” has been addressed: what should be the “political relation” in which we ought to stand to

66The argument that I proposed and subsequently rejected that the Disabled Objection does not refute Rawls’ Theory because Fair Equality of Opportunity and Equal Basic Liberties each require “fine-tuning” is strongly analogous to Daniels’ argument (1993) that an objection of Sen’s (1982) does not refute Rawls’ Theory. Daniels addresses an objection by Amartya Sen. According to both Sen’s objection and Dworkin’s Disabled Objection, Rawls’ Theory must be wrong that whether a society is just depends on the distribution of primary goods, because the Theory permits unjust inequalities in persons’ health status. A person’s health status, for Daniels, depends on the quality of health care she receives and whether or not she suffers from a preventable or curable medical condition. Sen objects that the goods relevant to distributive justice cannot be resources. A Theory that considers resources to be the relevant goods permits unjust inequalities in persons’ capabilities, because persons differ in the rate at which they convert resources into capabilities. Daniels’ reply includes the following: first, Rawls’ Theory does not permit unjust health inequalities because these preclude the satisfaction of each of Rawls’ principles. For example, Fair Value of Political Liberty applies to inequalities in political participation. Inequalities in health status cause inequalities in political participation, so Fair Value of Political Liberty limits inequalities in health status. Fair Equality of Opportunity prohibits inequalities in health status that seem intuitively unacceptable for two reasons: first, equally talented, equally motivated persons have equal chances of attaining socially desirable positions only if they have comparable health care and similar chances of suffering from a preventable disease. Also, Fair Equality of Opportunity requires persons to receive comparable education, and a person’s education level is strongly correlated with her state of health. Third, in Rawls (1971, 1999), Rawls applies the Difference Principle to inequalities in income and wealth. Such inequalities are correlated with inequalities in health status, so the Difference Principle limits inequalities in health status (Sen (1980); Sen (1982), pp 29-30; Sen (1984), p. 294; Sen (1987), pp 15-16, 22; and Daniels (1993), passim).
each other as members of a society? By exploring this suggestion, I will show that the Disabled Objection is ineffective.

Whether extending the Theory silences the Disabled Objection depends on what extending the Theory comprises; unfortunately, Rawls does not explain what he means by *extension*. If extending Rawls’ Theory comprises devising *ad hoc* provisions for disabled persons, then the Disabled Objection stands. If, however, extension comprises showing that plausible interpretations of the principles, together with particular facts about a society and a reasonable way of specifying the social positions, imply, or at least recommend, adequate provisions for disabled persons, then the objection fails.

Hereafter, *extension* (and its cognates) refers to the second option: showing that plausible interpretations of the principles, together with the facts and a reasonable specification of the social positions, imply, or at least recommend, adequate provisions for disabled persons. Assuming that an extension of the Theory need not be fully consonant with, but must be guided by, *A Theory of Justice*, I will show that there is an extension of Rawls’ Theory according to which the Theory requires Weak Endowment Insensitivity and Priority to Disabled to be satisfied. My method will be to propose and reject an extension then to modify it to achieve the desired result.

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68 Kenneth Arrow considers whether the problem can be solved by stipulating that health is a primary good. However, he denies that the problem can be solved this way, apparently because in order to implement the two principles, the worst-off position must be identifiable. But -- his objection continues -- if health is a primary good, the worst-off position cannot be identified: there is no principled way to construct an index whose value depends on all the different types of goods Rawls thinks matters to distributive justice and health (Arrow (1973), p. 253). I endorse Arrow’s objection.
Let us stipulate that being healthy enough in order to function is a primary good. This stipulation has intuitive plausibility and concurs with Rawls' Theory, which defines primary goods as "things that every rational man is presumed to want". Suppose we also give this good enough weight, relative to the other primary goods, that all disabled persons who, intuitively, should be compensated are in the least advantaged social position, without giving health so much weight that this position includes a slightly handicapped Bill Gates.

The Difference Principle now requires society to maximize the position of these disabled persons. Consequently, the resource values of disabled persons are not determined entirely by their endowments, so Priority to Disabled, Part 1 is satisfied. However, the Disabled Objection still stands, because Priority to Disabled, Part 2 need not be satisfied: the worst-off persons may be more or less severely disabled and yet receive the same treatment. Moreover, Weak Endowment Insensitivity need not be satisfied, because although the resource values of these disabled persons are not entirely determined by their endowments, the resource values of persons in other social positions might be. Therefore, merely stipulating that being healthy enough to function normally is a primary good, with appropriate relative weights of the primary goods, does not achieve the person-to-person "fine-tuning" of resource values to differences in endowment at each social position that Dworkin's Disabled Objection implicitly requires.

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I will next argue that stipulating that being healthy enough to function normally is a primary good and adopting a particular reading of the Difference Principle does silence the Disabled Objection. However, before proceeding, I will raise, and set aside, an objection to adding health to Rawls’ set of primary goods. The objection is that this addition makes it impossible to provide an ordinal ranking of persons’ LEPG values. However, to implement Rawls’ Theory, it must be possible to allocate persons to social positions and this can be achieved only if there is such a ranking.  

However, we can here ignore this objection. If it is fatal to Rawls’ Theory, it is reasonable to suppose that it is a fatal objection even if the only primary goods are the goods that Rawls considers primary; it is hard enough to provide a principled means of assigning a single LEPG value to each person based on the amount of income, wealth, powers and prerogatives of office, positions of responsibility and social bases of self-respect that she enjoys. The addition of a sixth primary good simply makes an impossible task even harder to execute.

I will next show that Part 2 of Priority to Disabled is satisfied, as well as Part 1 and Endowment Insensitivity, if we stipulate that being healthy enough in order to function normally is a primary good. Let us first distinguish between the following readings of the Difference Principle:

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70 This objection disagrees with the dominant interpretation, assumed earlier, of how Rawls assigns persons to social position.
The *egalitarian* reading of the Difference Principle requires society to maximize the lifetime expected value of the primary goods of a person in the worst-off social position and forbids any inequality between the expected values, for any two social positions, that does not maximize the worst-off social position; and

The *leximin* reading requires society to maximize the lifetime expected value of the primary goods of a person in the worst-off social position; then of the arrangements that maximize this, requires society to choose the arrangement that maximizes the lifetime expected value of a person in the worst-off social position-but-one, and so on.

Most persons assume that Rawls endorses the leximin reading, but there is textual support in *A Theory of Justice* for each reading.\(^71\)

The egalitarian reading of the Difference Principle counts fewer inequalities than the leximin reading as just if it is possible to change the extent of inequalities between social positions without affecting the worst-off social position. As Rawls points out, this possibility is conceivable and it also seems plausible that, in practice, changing the extent of inequalities does not always affect the worst-off social position.\(^72\) For instance, suppose the state grants the middle social position an income tax break, with the result that the average lifetime expected value of primary goods for that position increases and the average person in that position chooses to work harder than before. Suppose, further, that although there is now less tax revenue to redistribute to the worst-off position, which if nothing else changed would consequently worsen, there is no net

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\(^71\)Van Parijs distinguishes between, not the egalitarian and lexical readings, but the egalitarian and the *lexical* reading, which permits, but does not require society to maximize each social position in lexical order, starting with the worst-off social position. The lexical reading is weaker than the leximin (Van Parijs (2003), pp 205-8).

effect on the worst-off position. The reason is that the extra work by members of the middle class tends to raise the worst-off position, for example, by creating jobs for unskilled workers.

We can ensure that Endowment Insensitivity and Priority to Disabled are satisfied as follows. First, let us again stipulate that being healthy enough to function normally is a primary good. Second, let us give health enough weight, relative to the other primary goods, that if person A is intuitively worse off than person B, then A occupies a lower social position. Third, let us adopt the leximin reading of the Difference Principle that requires each position to be maximized in lexical order, giving the worst-off position the greatest priority.

I will next argue that Dworkin’s and Rawls’ Theories differ in some of their implications for how the state should treat disabled persons, but that these differences do not show that we should prefer Dworkin’s Theory to Rawls’. The first difference is that satisfying special needs is, for Dworkin, an end required for justice, but for Rawls, merely a means to ensuring his principles of justice are satisfied. Only Dworkin’s Theory includes a principle designed solely to provide for disabled persons. The second difference is that Rawls’ Theory does not require the state to give handicapped persons cash subsidies, whereas that Dworkin’s Theory might, since, in most societies, the average counterpart chooses a policy that gives handicapped persons cash subsidies. Rawls’ Theory allows the state to spend indirectly, say, on schools for disabled persons, if this is sufficient for the satisfaction of Rawls’ two principles.
If we accept these differences between these Theories, must we reject Rawls' in favor of Dworkin's? I think not. Of course, we must reject a Theory that considers just a prosperous society in which disabled persons cannot cast an informed vote. However, pace Dworkin, it is not obvious that a Theory is unacceptable if, like Rawls', it does not require the state to spend more on a well-off person with a slight disability than on an equally rich able-bodied person. Furthermore, that Rawls' Theory does not require direct payments to disabled persons does not seem to be a fatal objection so long as there is attention to a sufficient range of disabled persons' interests, not just their interest in being able to cast an informed vote. Lastly, it does not seem to be a serious objection to Rawls' Theory that it does not necessarily require extra spending. It is not obvious that disabled persons would be entitled to extra support, as Dworkin contends, if such support were not required to attend to a disabled person's important interests or maximize the worst-off social position.

Further, in some societies, Rawls' Theory ensures a higher degree of insensitivity to endowments than Dworkin's. The value of resources that Rawls' Theory requires the state to spend on the average disabled person who does not earn enough for Rawls' two principles to be satisfied depends on what it takes to satisfy Equal Basic Liberties, the Difference Principle and Fair Equality of Opportunity. This depends, in turn, on particular facts about the society, for example, on the LEPG value of the average disabled person who is not wealthy enough for these principles to be satisfied. A society in which the state must do a good deal for disabled persons in order to ensure Rawls' principles are satisfied is far less sensitive to endowments than Dworkin thinks. So
Dworkin both overestimates how sensitive to choices his Theory is and underestimates how sensitive to choices Rawls’ Theory is.

The amount that Dworkin’s Theory requires the state to spend also depends, for instance, on which insurance policy the average counterpart would choose. If the members of a society have a favorable attitude towards risk and their attitude is sufficiently rational and informed, then the average counterpart spends frugally on insurance against becoming disabled, and the state gives compensation only to badly disabled persons and little compensation at that. For example, amputees who function well enough to earn their livelihood may receive no compensation whatsoever. Thus a poor disabled person in a society whose members, on a rational basis, love taking risks receives more from the state (either directly or indirectly) in a society that minimally satisfies Rawls’ Theory than in a society that minimally satisfies Dworkin’s Theory.

To summarize: whether Dworkin’s first objection to Rawls’ Theory is interpreted in terms of Strong or Weak Endowment Insensitivity or Priority to Disabled, this objection does not refute Rawls’ Theory or support Dworkin’s. Satisfaction of Strong Endowment Insensitivity is not intuitively required by justice and even if it is, distributions that satisfy Dworkin’s own Theory may fail to satisfy this requirement. Dworkin’s Theory is more sensitive to endowments than Dworkin may think.

Justice requires satisfaction of Weak Endowment Insensitivity and Priority to Disabled, but a society that satisfies Rawls’ Theory also satisfies these principles if we specify the primary goods, their relative weights and the social positions appropriately, and adopt the leximin reading of the Difference Principle. The two Theories differ with
respect to the implications about how a just society must treat disabled persons, but these differences do not give us reason to prefer Dworkin’s Theory, because the implications of Rawls’ Theory are not unacceptable and the implications of Dworkin’s are not obviously requirements of justice. Last, a society that Rawls’ Theory deems just may guarantee a higher degree of insensitivity to endowments than a society that Dworkin’s Theory deems just.

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I will explain next the *Choice Objection* to the Difference Principle. Will Kymlicka’s version of this objection points out that the Difference Principle implies that, as a matter of justice, social and economic inequalities must be arranged so that together they maximize the advantage of the least advantaged persons in society *even if* the reason why they are the least advantaged is that, though they can work, they do not wish to. This objection rejects this implication as absurd: Rawls’ Theory gives leisure-taking members of the worst-off social position a share of goods that is unjustly large, given their choice of lifestyle.73

Dworkin’s point -- which is related to Kymlicka’s objection though not an objection itself -- is more general than Kymlicka’s objection, targeting the implications of Rawls’ Theory for all socio-economic classes, not merely the least advantaged. (For simplicity, I will refer to Dworkin’s point as *Dworkin’s version of the Choice Objection.*)

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73Kymlicka (1990), pp 72-75, cited in Schefller (2003, Winter), pp 11-12. Kymlicka does not claim that these leisure-takers are blameworthy (for this reason, I do not call them lazy), but simply that justice requires them to bear some of the consequences of their choice not to work. Kymlicka makes the Choice Objection in the course of arguing that Rawls’ Theory, which Kymlicka thinks includes *Choice Insensitivity*, is inconsistent.
Dworkin thinks that principles of justice should apply to the resource values of persons, whereas Rawls thinks these principles should apply to the resource values of groups of persons. But if the Difference Principle is applied to individuals, then, in Dworkin’s own words,

... [The Difference Principle] would fall before the argument that it is not an equal division of social resources when someone who consumes more of what others want nevertheless has as much left over as someone who consumes less; nor that someone who chooses to work at a more productive occupation, measured by what others want, should have no more resources in consequence than someone who prefers leisure.74

There are two possible readings of this passage. On the first reading, Dworkin thinks -- and objects to the fact -- that the Difference Principle, if applied to individuals, requires persons to have equal shares of resources regardless of their choice of how hard to work, how much to consume or how well-paid a profession to pursue. We can immediately rule out this reading because the Difference Principle permits some persons to have more resources than others, if this maximizes the expected benefit of the least advantaged members of society. On the second reading, which I will assume is correct, Dworkin objects that the Difference Principle, if applied to individuals, does not require the continued existence of inequalities that arise because persons make different choices. Dworkin thinks his Theory avoids this objection because his Theory includes Choice Sensitivity.75 Like the Disabled Objection, the Choice Objection rejects Rawls’ Theory on

75Timothy Hinton thinks that Rawls is not subject to the Choice Objection unless persons who enjoy relatively large amounts of leisure work for at least as many hours as there are in a normal working week, since Rawls assumes that everyone is willing to work at least this much. We must reject Hinton’s reply: either Rawls’ Theory cannot be satisfied and is therefore irrelevant to actual
the grounds that it fails to achieve the "fine-tuning" of a person's resource value to his individual situation -- in this case, the choices she made, rather than her endowment.

As with Endowment Insensitivity, there are two possible interpretations of Choice Sensitivity:

Strong Choice Sensitivity: An inequality N between the resource value of person X and the resource value of person Y, where N is entirely due to a difference in choices that X made and Y made, must not be mitigated; and

Weak Choice Sensitivity: An inequality N between the resource value of person X and the resource value of person Y, where N is entirely due to a difference in choices that X made and Y made, may be mitigated, but must not be eliminated.

Whether we interpret the two versions of the Choice Objection in terms of Strong or Weak Choice Sensitivity, the objection neither refutes the Difference Principle nor gives reason to prefer Dworkin's Theory to Rawls': Dworkin's Theory requires less sensitivity to choices than Dworkin suggests and Rawls' Theory permits more sensitivity to choices than Dworkin admits.

Let us interpret the Choice Objection, first, in terms of Strong Choice Sensitivity. It cannot be grounds to prefer Dworkin's Theory to Rawls' that Rawls' Theory does not require the satisfaction of Strong Choice Sensitivity, since Dworkin's own Theory does not. Consider an actual society whose inequalities satisfy CS Actual and, thus, that Dworkin deems just. Equally wealthy persons who both pay the highest tax rate include not only persons with highly marketable talents who do not work very hard, but also persons with relatively unmarketable talents who work extremely hard. Strong Choice

societies, since these do not satisfy Rawls' assumption, or Rawls must drop his assumption, in which case the Disabled Objection stands (Hinton (1996), pp 81-82).
Sensitivity is not satisfied as it implies that hard-working persons with unmarketable talents are entitled to retain more of their earnings than are leisure-takers with highly marketable talents, all other things being equal.

Dworkin may reply that all just distributions should satisfy Strong Choice Sensitivity in theory, but need not do so in practice. But as we saw with the Disabled Objection, Dworkin is not entitled to make this reply. Further, it is not obvious that justice requires the satisfaction of Strong Choice Sensitivity, so it must be established that justice requires this. Therefore, even if Dworkin's Theory implied Strong Choice Sensitivity, the Choice Objection, interpreted in terms of this principle, would not give a compelling reason to reject Rawls' Theory.

Let us next assume that the Choice Objection is couched in terms of Weak Choice Sensitivity. According to the Choice Objection, we must reject Rawls' Theory because it is incompatible with the view that justice requires persons to keep more or less of their resources depending on the choices they made, regardless of whether this is required to maximize the worst-off social position. But this view is controversial. Thus, the burden is on the proponents of the Choice Objection. So again, Dworkin's and Rawls' Theories differ in their implications, but the difference is not grounds to prefer Dworkin's Theory.

However, suppose we grant Dworkin that justice requires satisfaction of Weak Choice Insensitivity. I will argue that, assuming that persons reason and behave normally, the Difference Principle, interpreted in a particular way, requires Weak Choice Sensitivity to be satisfied. A caveat is needed here. A distribution satisfies Weak Choice Sensitivity only if each person's resource value satisfies Weak Choice Sensitivity,
whatever her social position. Some interpretations of Rawls' Theory, I will show, require the LEPG value of each occupant in a social position to depend on her choices for some, but not all, social positions. So when I say that the LEPG values in a particular social position satisfy Weak Choice Sensitivity, I do not imply that each LEPG value in the society satisfies this principle.

Rawls casually suggests countering the Choice Objection by treating leisure as a primary good. I will elaborate and defend this here. In short, Kymlicka's version of the Choice Objection does not refute Rawls' Theory when the Theory is extended by treating leisure as a primary good and giving leisure enough weight relative to the other primary goods, because leisure-takers have a higher LEPG value than hard workers and consequently do not occupy the worst-off social position. Thus Rawls' Theory does not require positions that leisure-takers occupy to be maximized. I will refine this extension and argue that it enables the Choice Objection to be countered successfully by rejecting objections to the claim that it does not.76

The first objection to my claim that this extension enables the Choice Objection to be countered successfully is that it is plausible that leisure-takers will be among a society's poorest persons because leisure-takers may have very little income and wealth, or the other primary goods.77 In response, the relative weight of primary goods should be adjusted once the particular facts about a society are known so that persons who take

76I will again ignore the objection that treating leisure as a primary good renders it impossible to rank persons' primary resource values, because if this objection is fatal to Rawls' Theory, it is fatal even if leisure is not a primary good.
77Timothy Hinton argues that Rawls should avoid this objection by counting health care as a primary good (Hinton (1996), pp 81-82).
relatively large quantities of leisure do not occupy the worst-off social position (unless intuitively they should, because, although they consume relatively large amounts of leisure, they are terribly deprived in other respects).

Second, treating leisure as a primary good is unfair to persons who do not work for health-related reasons. However, we can prevent such injustice whilst still treating leisure as a primary good. Let us distinguish between reasons for not working: leisure counts as a primary good only if the sole reason that a person does not work is that she does not want to. But the rationale for not working is of such a personal nature that it may not be obtainable without placing a person in a demeaning position. This would jeopardize equal status, which Dworkin and Rawls both maintain the members of a just society must have.

However, let us pick out the class of relevant leisure-takers -- those who are not entitled to special treatment -- as follows: leisure counts as a primary good for person X, say, only if X is not at leisure as a result of ill health. If there are sufficiently strong safeguards against health-based discrimination, gathering information about one's health status does not jeopardize equal standing. So although the more information needed to implement a just society, the lesser the extent to which a Theory is practicable, picking out the relevant class in this way does not pose an insurmountable obstacle to

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78Sick persons who would not wish not to work even if they are healthy will be “fortunate” in that a just society must maximize their advantage, but this seems intuitively acceptable.
implementing Rawls' Theory. Kymlicka's version of the Choice Objection, therefore, does not refute Rawls' Theory or support Dworkin's Theory.

However, treating leisure as a primary good does not refute Dworkin's version of the Choice Objection, as this requires Weak Endowment Insensitivity to be satisfied. Dworkin's version requires sensitivity to choices in each social position, whereas Kymlicka's version requires sensitivity to choices only in the worst-off social position. Therefore, refuting Dworkin's version also refutes Kymlicka's. I will next refute Dworkin's version; thereby, I will give another argument for rejecting Kymlicka's version.

As a matter of contingent fact, every society that satisfies a particular interpretation of the Difference Principle also satisfies Weak Choice Sensitivity. Recall these readings of the Difference Principle:

The *egalitarian* reading of the Difference Principle requires society to maximize the lifetime expected value of the primary goods of a person in the worst-off social position and forbids any inequality between the expected values, for any two social positions, that does not maximize the worst-off social position; and

The *leximin* reading requires society to maximize the lifetime expected value of the primary goods of a person in the worst-off social position; then of the arrangements that maximize this, requires society to choose the arrangement that maximizes the lifetime expected value of a person in the worst-off social position-but-one, and so on.

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79A *practicable* Theory, as defined in Chapter 1, is a Theory whose conditions for a society to be just are sufficiently weak that either some distribution satisfies them or the state can bring about a distribution that does. In addition, a practicable Theory is stated in terms of verifiable facts (for instance, facts about a person's income rather than facts about which insurance policy a person would buy in counterfactual conditions), allowing the state to verify whether or not a particular distribution is just.
I will first show that the egalitarian reading requires a distribution, as a matter of fact, to be sensitive to some, but not all, persons’ choices; hence, the egalitarian reading requires a distribution to satisfy Weak Choice Sensitivity. In some societies, it is possible to raise the worst-off social position by offering an *incentive*, which I here define as an assurance that if one becomes relatively well-off as a result of one’s choices, then the state will not eliminate the resulting inequality. Suppose that talented policy advisers in Society A will work productively enough to maximize the worst-off social position only if they are offered an incentive; the Difference Principle, according to the egalitarian reading, requires these policy advisers to be offered an incentive. The part of the distribution that comprises these policy advisers and their resource values satisfies Choice Sensitivity.

Which part of a distribution will satisfy Weak Choice Sensitivity will depend on certain facts about the particular society. For example, in Society B a large administrative class is needed to maximize the worst-off social position, but policy advisers are prepared to work with maximal productivity without incentives. In Society B, the portion of a distribution that comprises the members of this administrative class and their resource values satisfies Weak Choice Sensitivity, but not the portion of a distribution that comprises the policymakers and their resource values.

Human psychology being what it is, in *every* Western society incentives will be required in at least some social positions for the satisfaction of the Difference Principle (on the egalitarian reading). Only with an enormous change in the current Western ethos could such maximization be achieved without incentives of this sort. However, unless
social positions are described very broadly, it is not clear whether incentives will always be required in all social positions, but it seems plausible that they will. Thus it is very likely that, in every society and for all distributions in that society, some parts of the distribution will satisfy Weak Choice Sensitivity, and seems likely that the distribution as a whole will.

However, the leximin reading of the Difference Principle, in conjunction with particular norms of human psychology, implies Weak Choice Sensitivity. It is plausible that, in every society and for every Social Position P, it is possible both to maximize the social position below P (if there is one) and vary the average lifetime expectations of a person at P by means of incentives, for example, to work hard. At each social position, one can become relatively wealthy in a society that satisfies the leximin reading by working harder in response to these incentives. So the distribution as a whole satisfies Weak Choice Sensitivity.

In short summary: the egalitarian reading permits, in some societies, distributions that satisfy Weak Choice Sensitivity but not Strong Choice Sensitivity. Further, it is plausible that in every society, if the leximin reading is satisfied then so is Weak Choice Sensitivity. So we must reject both Kymlicka's and Dworkin's versions of the Choice Objection.

**Conclusion**

Dworkin argues that we should reject Rawls Theory and that there is a *prima facie* reason to accept Dworkin's own, on the ground that Dworkin's Theory, but not Rawls', meets a
necessary condition for a Theory to be plausible, namely, that the distributions the
Theory deems just satisfy both Choice Sensitivity and Endowment Insensitivity. In this
chapter, I have argued that we should reject this argument: the distributions that Rawls
considers just, as a matter of fact, satisfy these two principles, even though Rawls' principle of justice implies neither.

Recall the leximin reading of the Difference Principle, according to which each social position must be maximized, from the bottom position upwards. Thus interpreted, I argued, the Difference Principle, as a matter of practical necessity, requires not only Weak Choice Sensitivity to be satisfied but also Priority to Disabled. Weak Choice Sensitivity forbids the elimination of inequalities that are due to differences in choices. If it is public knowledge that the state does not eliminate such inequalities, the members of society know that, if they become relatively rich due to working hard, they will stay relatively rich (although the state may tax them at a higher rate than the poor).

Further, only if the state reduces the negative impact of my handicap, for instance, can I be assured the same basic liberties as everyone else and equally good opportunities as everyone with my motivation and raw talent. But mitigation of the negative impact is presumably correlated with the inequalities that arise because some (but not all) persons are handicapped. For instance, assuring equal basic liberties might require special education and equipment for disabled persons. The plausible result of providing such education and equipment is that inequalities arising because some (but not all) persons are handicapped are reduced. Thus, Weak Endowment Insensitivity is satisfied and, given that more severely handicapped people tend to need more
education and equipment, so is Priority to Disabled. I conclude that neither the Disabled Objection nor the Choice Objection harms Rawls’ Theory or gives any reason to prefer Dworkin’s Theory to Rawls’.

Where does Dworkin go wrong? First, he has been insufficiently imaginative about the consequences, in real life, of Rawls’ Theory: as I argued, the distributions that at least some interpretations of Rawls’ principle of justice deem just satisfy Weak Choice Sensitivity and Weak Endowment Insensitivity. Second, Dworkin’s method of argument is misleading and defective. He motivates and justifies his account of distributive justice in an actual society -- of what distributive justice consists of and how it can be achieved -- with abstract principles (Choice Sensitivity and Endowment Insensitivity) that admit of many interpretations. These abstract principles are naturally understood to express Strong Choice Sensitivity and Strong Endowment Insensitivity; until Dworkin (2002, October), these are the interpretations to which Dworkin’s critics thought he was himself committed.

Although Dworkin’s final proposal (the tax-and-distribution scheme) commits him to particular interpretations of these principles (Weak Choice Sensitivity and Weak Endowment Insensitivity), he uses the abstract principles to argue against Rawls. Implicit in my arguments against Dworkin in this chapter (and also in Chapter 4) is the thought that he is not entitled to use these abstract principles in arguing against Rawls: he can only use the interpretations to which he is himself committed, namely, Weak Choice Sensitivity and Weak Endowment Insensitivity.
Chapter III: Choice Sensitivity and Freedom

Shiffrin (2003) presents a novel argument against egalitarian theories of distributive justice. According to Shiffrin, these theories hold that distributive justice requires both that persons are equally free and that distributions of scarce goods are sensitive to persons' choices. However, she thinks, these requirements of equal freedom and of choice sensitivity are incompatible.

In Section 1, I argue that Shiffrin's argument refutes neither egalitarianism (as she understands it) nor Ronald Dworkin's egalitarian theory of distributive justice, the most influential version of the theory that she targets. Shiffrin attributes particular versions of the equal freedom and choice sensitivity requirements to egalitarian theories of distributive justice. I will argue that these versions are consistent and in any case, although Dworkin endorses a version of each requirement, his version of Choice Sensitivity is not the one that Shiffrin attributes to such theories.

I argue, in Section 2, that Shiffrin is right insofar as Dworkin's theory is deeply flawed in regard to equal freedom and sensitivity to choices. The flaw is not, however, that the requirements of equal freedom and sensitivity to choices are incompatible. Rather, the flaw is that Dworkin's theory does not include a particular version of the equal freedom requirement, according to which there must be equal freedom to choose a career. As a result, the requirement of choice sensitivity, as it should be understood by any egalitarian theory of distributive justice, can be satisfied only if this equal freedom requirement is also satisfied.
Shiffrin's argument targets egalitarian theories of distributive justice. A theory of distributive justice implies necessary and sufficient conditions for a distribution to be just. *Egalitarian* theories of distributive justice tell us:

1. which scarce goods must be distributed equally among members (resources, welfare or opportunities, for example); and
2. what an equal distribution comprises (thus egalitarian theories of distributive justice differ with respect to whether or not an equal distribution must be absolutely equal, for example).

Hereafter, *ETheory* is shorthand for *egalitarian theory of distributive justice*.\(^8^0\)

One kind of *ETheory* holds that an equal distribution of goods among persons consists of a distribution of relevant goods that is both insensitive to luck and sensitive to the persons’ choices. Since a distribution is perfectly just if and only if each inequality it contains is also just, these *ETheories* include the following principle:

**Choice Sensitivity:** A distribution of resources is just only if it is *sensitive* to persons’ *choices*.

Choice Sensitivity implies that a just distribution must not eliminate any inequality between person X’s and person Y’s resource values that was caused by the fact that X

\(^{8^0}\)The theories of social justice that I will consider are not concerned solely with distributive justice, but I will call them *Theories*, as I will concentrate on their implications for distributive justice.

Some *socio-political theories* also have some claim to be called egalitarian. Egalitarian socio-political theories conceive an equal society as a society whose members have the same social status. These theories typically have implications for the distribution of scarce goods -- for instance, equal status may preclude large socio-economic inequalities -- but distributive justice is not their fundamental concern. Proponents of socio-political egalitarianism include Timothy Hinton, John Rawls and Samuel Scheffler (Hinton (1996); Hinton (2001); Rawls (1971, 1999); Scheffler (2001)).
and Y chose differently. The phrase *is sensitive to* is a placeholder for the name of whichever relation is the relevant relation between an inequality N and the relevant choices. I have assumed that the relevant relation is the causal relation. Call the total value of person X's resources X's resource value.

ETheories also include the following principle as well as Choice Sensitivity:

**Luck Insensitivity:** A distribution of resources is just only if it is *insensitive to* Luck.\(^8\)

Luck Insensitivity considers unjust inequalities caused by factors that persons *cannot* choose to change, factors such as inborn health and talents (Luck Insensitivity does not mention the health and talents that result from a person's genes *and* her choices).

1.1

Shiffrin's argument targets ETheories that endorse both Choice Sensitivity and

**The Equal Freedom Principle:** Each person should have equal access to the conditions for meaningful freedom.\(^9\)

The Equal Freedom Principle requires schools, for example, to aid disabled students by providing things such as Braille signage and wheelchair ramps, because disabled persons without such facilities will have less access than able-bodied persons to secondary education, which they need in order to enjoy meaningful freedom. Shiffrin

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\(^9\)For an example of such a principle, see Dworkin (2000/1981), p. 89; Dworkin (2002, October), p. 287. Luck Insensitivity is a principle that Shiffrin believes all ETheories include. In the other chapters, I have called Dworkin's particular version of Luck Insensitivity Endowment Insensitivity. Although Shiffrin explicitly targets ETheories according to which the goods relevant to distributive justice are resources, her argument -- if successful -- refutes also ETheories according to which the relevant goods are welfare, capabilities or opportunities and which also endorse Choice Sensitivity and Freedom.
does not completely explain the Equal Freedom Principle. I will later explain it in more detail.

Shiffrin argues that Choice Sensitivity and the Equal Freedom Principle are incompatible. She assumes that proponents of ETtheories understand Choice Sensitivity as the following principle:

Strict Cost Internalization: If person X’s making choice C would disadvantage, or cause an event that disadvantages, person Y, and X≠Y, then:
1. X must refrain from making C; or
2. X must fully compensate Y for the disadvantage D.84

Full compensation means, roughly, raising Y to the level of well-being that Y would have enjoyed in D’s absence. In short, Strict Cost Internalization requires person X to ensure that no other person Y pays a cost as a result of the choices that X makes. For example, Strict Cost Internalization implies that if James develops lung cancer as a result of choosing to smoke, he must not allow his illness to disadvantage his health provider or its other clients. James must either not smoke, pay for his treatment himself or have paid sufficiently higher premiums than non-smokers, all other things being equal, to cover the higher cost of his medical care.85

Although Strict Cost Internalization requires person X to ensure that no other person Y pays a cost as a result of the choices that X makes, Luck Insensitivity

84This principle allows that there may be other circumstances in which X must compensate Y.
85Although Strict Cost Internalization presupposes that every disadvantage can be given a monetary value, a disadvantage need not consist of paying money. For example, Joe’s colleague pays a cost, as a result of inhaling Joe’s smoke, by becoming less healthy. Shiffrin does not say which class of choices or costs Equal Freedom Principle picks out, or how to gauge the cost of a choice to a person whom it affects adversely. For example, must X have reason to predict that X’s choice will disadvantage other persons and must Y’s views about what disadvantages him be reasonable?
sometimes requires \( Y \) to absorb some of the cost to \( Y \) of \( X \)'s choices. Suppose that James is diabetic and cannot afford insulin, and neither fact is caused by his choices. James developed diabetes as an infant, insulin is extremely expensive due to scarce supply and heavy demand, and James lacks the marketable talents to pay for the insulin he needs. Luck Insensitivity requires persons in better health to subsidize his insulin consumption.

The Equal Freedom Principle, Shiffrin argues, can be satisfied if and only if Strict Cost Internalization is not satisfied. *Accommodation* is her term for the practice of absorbing some of the cost of other persons' free choices; some cost absorption is needed to satisfy Luck Insensitivity, as we have just seen, but *accommodation* refers to cost absorption that is not required to satisfy Luck Insensitivity.\(^*\) She thinks, therefore, that the Equal Freedom Principle requires the presence of accommodation. I will present her arguments for this claim, but let me first motivate the alleged incompatibility.

Suppose that the choice to procreate is meaningful for Jane, and that she voluntarily makes this choice. Consequently, she needs a more flexible schedule for maternity. Suppose also that satisfying this need is costly for her colleagues: they now have less flexible work hours than they would have if Jane had not chosen as she did. Let us grant Shiffrin that Jane is freer if her colleagues accommodate her choice than if they do not. Shiffrin's distinctive claim is that the Equal Freedom Principle requires Jane's colleagues to accommodate her choice to procreate: the Equal Freedom Principle requires them, at the very least, to work at less convenient times for no extra pay.

Shiffrin does not explain why the Equal Freedom Principle requires this. I will next present three notes explaining how Shiffrin understands the Equal Freedom Principle:

1. The Equal Freedom Principle, unlike Choice Sensitivity and Luck Insensitivity, is not a component of egalitarianism. Still, according to Shiffrin, egalitarians think that their ETHeories are compatible with the Equal Freedom Principle and take this fact to support their ETHeories.

2. For Shiffrin, as for most other egalitarians, freedom is being able to make particular choices. (I will assume that by a choice, Shiffrin means an object of choice rather than an opportunity to choose or act of choosing: to have a choice is for there to be something that one can choose to get or do.) She does not say which choices are *meaningful*. However, as we will see, her arguments suggest she thinks that the set of choices that are meaningful varies from person to person.

3. For Shiffrin, equal access is unacceptably restricted -- and the Equal Freedom Principle violated -- in the following conditions. Suppose that there is exactly one choice that is meaningful for person X (C1) and there is exactly one choice that is meaningful for person Y (C2). Suppose, further, that the cost to X of making C1 is so high that X effectively cannot make C1: X has no effective, meaningful choices. Suppose, finally, that Y can afford the cost of making C2: Y does have an effective, meaningful choice. Presumably, Shiffrin’s claim about Jane is that

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87Shiffrin does not explain why Jane will have relatively restricted access to the conditions for meaningful freedom; presumably Shiffrin thinks this is because, without accommodation, it will be significantly more costly for Jane to procreate than for persons with more flexible schedules.

unless Jane’s colleagues accommodate her choice, Jane has fewer effective choices that are meaningful to her than her colleagues have effective choices that are meaningful to them.\textsuperscript{89}

The above notes suggest that we should hereafter understand the Equal Freedom Principle as follows:

The Interpreted Equal Freedom Principle: If E is person X’s set of effective meaningful choices and F is person Y’s set of effective meaningful choices, then there must be no significant inequality in how valuable E and F are to X and Y respectively.

I will next present Shiffrin’s arguments for the claim that if Strict Cost Internalization is satisfied, then the Equal Freedom Principle cannot be. One policy that protects non-smokers from paying the costs of smokers’ choices is a ban on smoking everywhere. Implementing this policy, let us grant, violates Freedom. But Shiffrin argues that Freedom is also violated by less coercive policies that ensure the satisfaction of Strict Cost Internalization.

Shiffrin’s \textit{Psychology-Based Argument} for her claim that Strict Cost Internalization and the Equal Freedom Principle are incompatible focuses on how agents experience policies that ensure that Strict Cost Internalization is satisfied. Consider a health insurance system, which I will call \textit{System}. System is transparent to the insurer’s clients

\textsuperscript{89}According to Timothy Hinton, providing equal access to the relevant goods is a matter of making sure that differences in luck -- for example, differences in social standing or health -- do not translate into differences in a person’s ability to take advantage of the opportunities society provides. Hinton thinks that a university must provide special facilities for disabled persons and not discriminate against disabled applicants because otherwise, disabled persons will have a more restricted set of choices than non-disabled persons (Hinton (1996), pp 163-204; see also see Cohen (1989), p. 916).
and charges each of its smoker clients a sum equal to the expected cost of treating her plus an appropriate margin. System accordingly charges smokers more than non-smokers. An insurer U that implements System asks client X, in X's initial health assessment, if X is a smoker. U also requests X to report to U if X ever starts to smoke and severely penalizes X if X's doctor discovers, in the course of treating X, that X misled U about X's smoking habits. Suppose that X's doctor can tell whether or not X smokes while treating X, without performing more tests than treating X requires. Shiffrin argues that implementing System is incompatible with the Equal Freedom Principle, for the following reasons.

Suppose that Caroline is a smoker who knows that System is active, that she is deliberating whether or not to continue smoking and that her reactions to System are typical of smokers. Shiffrin thinks that Caroline has such a negative reaction to System that the cost to her of choosing to smoke -- a choice that is meaningful to her -- is far higher than the cost to other persons of making the choices that are meaningful to them. But -- Shiffrin thinks -- the Equal Freedom Principle precludes this inequality. Firstly, Caroline knows that her insurer knows that she smokes, which -- according to Shiffrin -- can make Caroline feel "watched" or even "invaded." Secondly, System reminds Caroline that her smoking has a negative effect on others, which can make her feel constrained. Thirdly, Caroline may interpret System to mean that non-smokers disapprove of smoking, a fact that may distress her.

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Shiffrin (2003, Summer), p. 26. Shiffrin assumes that it costs more to treat the average smoker than the average non-smoker. This empirical fact is inessential to her argument, which can be run with different facts if, say, it costs more to treat the average non-smoker than the average smoker.
The Psychology-Based Argument suggests that, first, Shiffrin thinks the set of choices that is meaningful for differs for different persons and, second, the choices that are meaningful for a person, according to Shiffrin, include all those she is considering. If the first point is false, we cannot understand why Shiffrin thinks a smoker is less free than a non-smoker under System, since System applies to both people.

Shiffrin also has a Deliberation-Based Argument for the claim that the Equal Freedom Principle and Strict Cost Internalization are incompatible. She argues that the satisfaction of the Equal Freedom Principle requires accommodating others, because freedom depends on free deliberation which itself demands a practice of accommodation, and thus the rejection of Strict Cost Internalization.91 For Shiffrin, free deliberation takes into account only the "relevant reasons". Shiffrin does not give any systematic account of a relevant reason, but gives some examples of a relevant reason, for example, that not accommodating a certain choice will cause serious harm to the agent.92 She contends that unless persons take into account only the relevant reasons, they cannot be free under the Equal Freedom Principle. By "a practice of accommodating others", we must, I believe, understand Shiffrin to mean a widespread practice of willingly accommodating others of which most persons are aware. Otherwise, accommodation will not enable the psychology and deliberation that she thinks the Equal Freedom Principle requires.93

91 Shiffrin (2003, Summer), p. 32.
93 Shiffrin (2003, Summer), p. 36. Shiffrin also claims that taking into account the costs to one's colleagues, or any correlated psychological costs to oneself may "skew" one's deliberation or cause one to make less "authentic" choices (Shiffrin (2003, Summer), pp 29-30). Shiffrin also
One of Shiffrin’s examples concerns religious accommodation in the work-place. Suppose that Mohamed is a Muslim who works in America, where the work-day conflicts with Islamic prayer times. Shiffrin thinks that Mohamed’s deliberation about whether or not to pray is free only if he knows that his non-Muslim colleagues will willingly accommodate him if he decides to pray; only if he knows this can he decide to pray on the sole basis of the value he assigns to Islam. Otherwise, Mohamed will take into account the costs to his colleagues and any likely costs to himself that may arise if others refuse to accommodate his praying or accommodate it only grudgingly. Shiffrin thinks that Mohamed’s deliberation is not free if he takes these other factors into account.\(^4\)

An implication of Shiffrin's argument is that choice is not such an important determinant of whether a distribution is just, as proponents of ETheories believe.\(^5\) Brian argues in favor of accommodation. First, it fosters a sense of community, because accommodation is relationship-building, whereas the “policing” needed to ensure that Strict Cost Internalization is satisfied destroys relationships. Thus the benefits of accommodation flow to the accommodators (Shiffrin 2003, Summer), p. 35). Although this is sometimes true, accommodation can destroy a sense of community if, for example, it is unreasonable to expect me constantly to breathe in your smoke in the workplace. Second, Shiffrin argues, accommodation is sometimes the “decent thing” (Shiffrin 2003, Summer), p. 36).

\(^4\)Another of Shiffrin’s examples concerns health care. Consider an emergency room worker forced to implement Strict Cost Internalization when a person, known to be addicted to drugs because of his voluntary choices, arrives in urgent need of care. The health care worker must discount the addict’s needs to some, presumably substantial, degree because his need for care was caused by his free choice to take drugs. Such a health care worker, Shiffrin thinks, cannot deliberate freely. In the presence of accommodation, on the other hand, a health care worker can respond, instead, "directly" to his feelings of care and compassion.

\(^5\)It is unclear which egalitarian principle Shiffrin thinks proponents of ETheories should deny to resolve the tension between Choice Sensitivity and the Equal Freedom Principle, but she suggests two options: first, to interpret Choice Sensitivity in terms of a laxer Cost-Internalization principle compatible with some accommodation (Shiffrin 2003, Summer), p. 6); and second, to make the Equal Freedom Principle a constituent principle of egalitarianism, like Choice Sensitivity and Luck Insensitivity (the principle that requires a just inequality to be insensitive to luck). On the
Barry, Susan Hurley and Elizabeth Anderson have also argued on behalf of this claim. Others also, like Shiffrin, have argued that there is a tension between an egalitarian principle and Freedom: Luck-Insensitivity is incompatible with Freedom. But Shiffrin is the first to question the significance of choice to distributive justice by arguing that Choice Sensitivity and the Equal Freedom Principle are incompatible.\textsuperscript{96}

1.2

I will now argue that we should reject Shiffrin's argument that there is a deep problem with all ETheories that espouse the Equal Freedom Principle and Choice Sensitivity. In Section 1.2.1, I will argue that she fails to show that the Equal Freedom Principle and Choice Sensitivity, as she interprets them, are mutually incompatible. In Section 1.2.2, I will argue that, in any case, Dworkin's ETheory does not include Choice Sensitivity as she interprets it. I will also introduce Dworkin's ETheory in sufficient detail to enable me, in Section 2, to show that there is in fact a deep problem for Dworkin on account of his endorsing the Equal Freedom Principle and Choice Sensitivity, although not the problem that Shiffrin has in mind.

\textsuperscript{96}Shiffrin (2003, Summer), pp 2-3. Choice Sensitivity has received some press, but the standard objection is that Choice Sensitivity implies that if a person is badly off as a result of her voluntary choices, justice does not entitle her to compensation -- not even if she is \textit{very} badly off. Critics find this alleged implication unacceptable: they think that justice requires some sort of a safety net. Dworkin replies to this objection in Dworkin (2002, October). The thrust of his reply is that his ETheory requires a safety net. I present and evaluate this objection in Chapter 4, Section 2.1.
I will argue that we must reject both of Shiffrin's arguments for her claim that if Strict Cost Internalization is satisfied, then the Equal Freedom Principle cannot be. A premise of Shiffrin's Psychology-Based Argument is that a significant proportion of persons negatively experience each policy that is designed to ensure the satisfaction of Strict Cost Internalization. This premise is empirically false. I endorse Paula Casal's claim that some policies that ensure that smokers internalize the full costs of their choices to non-smokers increase some smokers' experience of freedom. I will next argue that Shiffrin's insurance pricing case substantiates Casal's claim.\(^{97}\)

It is plausible that some smokers feel freer to smoke if they pay higher health insurance premiums: smokers experience less resentment from non-smokers (and know that this is the case) and smokers feel less guilty about inconveniencing others.\(^{98}\) Further, it is plausible that many smokers do not find it invasive to be asked about their smoking habits by their insurer. Last, many smokers are unaware of cigarette taxes or do not regard these taxes as punitive.\(^{99}\) Admittedly, however, some smokers may feel less than free; those who do are not free, by Shiffrin's lights.\(^{100}\)

Second, even if all smokers whose insurers use System react to it negatively, the Equal Freedom Principle can still be satisfied because these persons' experiences are

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97 Shiffrin mentions Casal’s claim, which was made to Shiffrin in person (Shiffrin (2003, Summer), p. 27). Shiffrin does not discuss it.

98 Shiffrin notes this point in Shiffrin (2003, Summer), p. 27, n. 30. The example is mine.

99 I owe this point to Sally Haslanger. It is more plausible in the case of European cigarette taxes than American, since the tax burden differs between European countries much less than it differs among American states, and European cigarette taxes are not set punitively high, unlike cigarette taxes in some states, such as New York.

100 I owe this point to Joshua Cohen.
unreasonable. Consider an *ex hypothesi* just society. Suppose that because Arabella is insane, she feels coerced, beyond the extent that she can function, by having to disclose to the state the information it needs to collect a justifiable property tax. It is plausible that neither the effective restriction of Arabella’s choices makes the tax unjust nor her unreasonable reaction to it makes the tax unjust. It is also plausible that the negative psychological reactions Shiffrin thinks persons would have to System are unreasonable: a non-smoker must pay a significantly higher premium if non-smokers must subsidize smokers’ treatment, and implementing System is a minimally invasive means to ensure that a smoker pays the expected cost that the company incurs on her behalf. This case raises the question of which choices we should consider meaningful for a person.

Shiffrin’s Psychology-Based Argument rests on this presupposition:

**Presupposition:** For person X who is deliberating whether to smoke, the choices that are meaningful for X include the choice of whether or not to smoke.

Only if Shiffrin’s argument presupposes this can we explain her assumption that persons who are not deliberating whether to smoke are freer under System than persons who are. Nothing Shiffrin says suggests that she does not endorse the following, more general claim:

**General Presupposition:** The choices that are meaningful for person X include all the choices X deliberates about making.

But, I will now argue, the general presupposition is false: it is too permissive.

Suppose that the government implements a clean air policy justifiable by public reason. Suppose also that madman Michael wants to make it the case that it stinks
everywhere, desires to do nothing else, and is thinking about releasing a harmless but horribly smelly gas. This policy prohibits him from making a choice that is meaningful for him. Shiffrin does not claim that there are particular choices that are meaningful for a person regardless of his preferences, so we can assume that this choice is, for Michael, the only meaningful choice. If, for each person, the meaningful choices include all and only the choices he is considering, then there is now no choice he can make that is meaningful for him. Suppose that everyone except for Michael has some meaningful choice that he or she can effectively make. Shiffrin’s argument shows that the Equal Freedom Principle cannot be satisfied if the state implements this clean air policy. But this is absurd, because the choice Michael is considering is unreasonable and imposes a burden on third-parties. So the relevant choices for a person cannot include all the choices he is actually deliberating.

We must therefore reject both General Presupposition and the more moderate claim:

Counterfactual Claim: A choice C is meaningful for person X if and only if C is a relevant choice that, if X were fully rational, reflective and appraised of the relevant information, X would want it to be possible for X to make.\(^{101}\)

Even in such counterfactual conditions, some persons may want to murder, but whether one is free does not hinge on whether one can murder.

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\(^{101}\)Here are two clarifications of Counterfactual Claim. First, for this sentence to be plausible, the relevant information must exclude information about what C’s effects will be, although it includes information about which C’s effects might be and the probability that each of these effects will obtain. Second, the sentence contains “C is a relevant choice” rather than “C is a choice” because my meaningful choices, for example, exclude the choice to repeat the exam I have just taken now that I have seen the solutions, but whether I am free does not hinge on whether I can make that choice.
It is reasonable to suppose that a person can be free in a liberal society. So if whether a person is free depends on whether he can make the choices that are meaningful for him as Shiffrin thinks, then costs to third-parties must constrain which choices are meaningful for a person. For example, the choice to release smelly gas into the atmosphere cannot be meaningful for Michael. This being so, Shiffrin's Psychology-Based Argument fails to show that no policies that imply Strict Cost Internalization are compatible with the Equal Freedom Principle.

We must also reject Shiffrin's Deliberation-Based Argument, according to which the policies needed to implement Strict Cost Internalization are incompatible with the Equal Freedom Principle because they preclude free deliberation. She claims that her Deliberation-Based Argument differs from the Financial Hardship Argument for the claim that, under System, persons are not equally free. The Financial Hardship Argument's premise is that persons who cannot afford the higher price of a smoker's health insurance premium (for instance) and believe that it is overridingly important to be insured cannot choose to smoke, whereas richer people and people who care less about insurance can. The Financial Hardship Argument has some intuitive plausibility and is very plausible in the case of a choice that most persons consider crucially important, such as the choice to procreate. However, Shiffrin says that this is not her Deliberation-Based Argument.\(^{102}\)

I believe that any plausibility Shiffrin's Deliberation-Based Argument has derives from confusion with the second argument. Consider a case in which the costs of my

\(^{102}\)Shiffrin (2003, Summer), pp 28-29.
making a particular choice to other persons are high. If I smoke in the workplace, my colleagues are obliged to inhale my second-hand smoke. Suppose that this passive smoking poses a substantial cost to them. Intuitively, this cost to them is relevant to my deliberation. If I decide not to smoke in the workplace on account of this high cost to them and smoke instead when I am alone at home, I can still be free.

Admittedly, the examples Shiffrin gives do not involve such high costs and none involves physical harm to other persons.\textsuperscript{103} However, in the absence of a principled account of a relevant reason, the example just given is a counterexample to her Deliberation-Based Argument. Therefore, we must reject that argument.

1.2.2

To show that Shiffrin’s argument does not harm Dworkin’s ETheory, it suffices to show either that Dworkin’s ETheory does not include Strict Cost Internalization or that it does not include the Equal Freedom Principle. I will now show that his ETheory does not include Strict Cost Internalization.

In Chapter 1, I presented two sets of necessary and sufficient conditions that Dworkin endorses: conditions for an actual inequality to be just and conditions for inequalities in a particular hypothetical situation to be just. Here, I will draw on Chapter 1 to show that Dworkin does not endorse Strict Cost Internalization; to be precise, although there is some indication that he thinks Strict Cost Internalization must be satisfied in the hypothetical situation, he believes that Strict Cost Internalization must not be satisfied in an actual society.

\textsuperscript{103}Shiffrin (2003, Summer), pp 12, 14, 19, 21, 22.
In one passage about the hypothetical situation, Dworkin supposes that two sighted persons have an equal chance of becoming blind and know what this chance is, and that they can take out as much insurance as they want, at reasonable prices, against becoming blind. He also supposes that only one person buys insurance and that both persons subsequently go blind. Dworkin argues that his ETheory "...would not argue for redistribution from the person who had insured to the person who had not if, horribly, they were both blinded in the same accident". This suggests that Dworkin thinks one must bear the full cost, however large it turns out to be, of one’s choice of whether or not to buy insurance. So does Dworkin’s claim that, unless there is a paternalistic reason for requiring the parties to insure themselves, "...the situation cannot be different if the person who decided not to insure is the only one to be blinded. For once again the difference is the difference in option luck against the background of equal opportunity to insure or not".104

Dworkin does not mention whether there is a paternalistic reason for requiring the persons in the hypothetical situation to buy insurance, so the text does not determine whether he believes that situation must satisfy Strict Cost Internalization.105 However, Dworkin claims that an actual state should prevent persons from "making major mistakes they are very likely to regret, like not fitting and wearing seatbelts". In

\[\text{\footnotesize \cite{Dworkin2000}}\]

\textsuperscript{104}Dworkin (2000/1981), pp 66-67. According to Dworkin, "... option luck is a matter of how deliberate and calculated gambles turn out - whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined" (Dworkin (2000/1981), p. 73). I explain the phrase option luck in more detail in Chapter 1.1.

\textsuperscript{105}The reason for this omission is probably that he considers presenting the conditions for inequalities in the hypothetical situation to be merely a means to explaining and motivating his conditions for an actual inequality to be just.
particular, according to Dworkin, an actual state should make basic health insurance mandatory. Dworkin's claims do not in themselves tell us whether he thinks an actual society should satisfy Strict Cost Internalization, because they do not say how he thinks the state should divide any costs that persons' choices cause among everyone. To see whether he believes an actual society should satisfy Strict Cost Internalization, we need to examine the tax-and-redistribution scheme he thinks a just society must implement.106

Define a person X's counterpart as someone who is rational, young and healthy, and ignorant of X's earning potential, but otherwise shares X's intrinsic properties.107 The paternalistic policy that Dworkin thinks should be mandatory is the policy that the average counterpart would have bought if all the persons' counterparts had equal resources and equal opportunities to buy insurance on reasonable terms. Dworkin does not explain the concept of an average counterpart. If we are to take the idea of averaging in this case seriously, the attitudes of the average counterpart will be constrained by persons' actual rational and informed attitudes. For instance, if most persons are very risk averse and their attitudes to risk are rational and informed, the average counterpart will also be risk averse. Hereafter, it is the pronoun that I will sometimes use instead of the average counterpart.108

108The justification, in short, that Dworkin gives for stating his ETheory in terms of the policy the average counterpart would have bought consists of the following claims. First, an ETheory must be satisfyable in practice. Second, the state -- whose task it is to collect the premiums (as taxes) and allocate compensation (as welfare payments) -- does not know, and arguably could not know, which insurance policy a particular person's counterpart would buy. Third, the state can know which insurance policy the average counterpart would buy.
Dworkin endorses the following necessary and sufficient conditions for a real inequality to be just:

CS Actual: An inequality $N$ at time $t$ between the value of person $X$'s resources and the value of person $Y$'s resources is just if and only if:

If everyone paid the state the price of the policy that the average counterpart would buy and was compensated according to the conditions attached to that policy, then $N$ would still exist.

For example, suppose that the average counterpart would purchase a policy that yields $1000 upon going blind, and Rachel owns the policy that the average counterpart would have purchased. Then Rachel is entitled to $1000 if she becomes blind, and if she does not receive $1000, it is unjust that her resource value is lower than that of sighted persons. According to Dworkin, a just society must implement a tax-and-redistribution system that gives Rachel $1000.

The policy that the average counterpart would buy determines how the tax-and-redistribution system allocates resources. Dworkin argues that the average counterpart insures against the outcomes, and only the outcomes, it considers disastrous. Insurance is technically a "bad buy": it is expensive relative to its expected value, as the insurer must cover the costs of fraud and administration as well as make a profit. Dworkin thinks that the average counterpart buys unemployment insurance that does not compensate able-bodied claimants who are unwilling to work because such policies are cheaper than policies that compensate such claimants. The average counterpart reasons that a situation in which it is able but unwilling to work cannot be so calamitous that it must be avoided at all costs.
Suppose that Katie loses her job because she chooses to do no work and that she
is nevertheless still unwilling to work. Dworkin must say that Katie is not entitled to any
unemployment compensation, because of the choice that she has made. Thus Dworkin
must think that the choice not to work is a choice for which an agent must bear the
whole cost if she is made redundant: if she can work but chooses not to, she forgoes
salary and unemployment compensation.

Dworkin would be committed to Strict Cost Internalization if the only choice a
person could make were the choice of whether or not to work. However, Dworkin
thinks that the average counterpart would buy insurance that guarantees adequate
medical care, so his ETTheory does not say that someone who contracts lung cancer as a
result of making a free, initial choice to smoke, knowing the risk of addiction, and is
unable to pay for medical treatment should not receive medical treatment. One might
conclude that since Dworkin does not think that the choice of whether or not to smoke is
a choice for which one must bear however high a cost it incurs, Dworkin cannot be
committed to Strict Cost Internalization.

It might be objected that the fact Dworkin thinks smokers with cancer should
receive adequate medical care does not show that he is less than committed to Strict Cost
Internalization. When assessing whether Dworkin endorses Strict Cost Internalization,
the relevant choices the smoker makes are not only the initial choice to smoke (which,
we will assume is always freely made), but also the choice to buy health insurance.
Moreover, in an actual society that Dworkin considers just, everyone buys health
insurance in that they pay taxes and -- one might say -- to choose to pay taxes is the
same thing as to choose to buy the policy the average counterpart would buy. The choice to buy insurance mitigates the cost of smoking to the smoker. This mitigation is consistent with the claim that the smoker pays the entire cost of her choices: it is just that if one smokes while insured -- as do all smokers in a society that Dworkin considers just -- the cost of falling ill as a result of smoking is lower than if one smokes while uninsured.

I replied in Chapter 1.3 that we should not, in general, consider a person’s choice to pay taxes as identical to a choice to buy the policy that the average counterpart would buy, even if that person inhabits a society whose state strives to make all inequalities in that society satisfy Dworkin’s necessary and sufficient conditions for an actual inequality to be just. In short, some persons will be unaware of the rationale for the tax and others who are aware of the rationale choose to pay taxes only because they are compelled to do so by the state: they do not choose, by paying taxes, to buy whichever particular policy the state thinks the average counterpart would buy. If they make any choice at all under the threat of punishment for tax evasion, they make only the choice to pay taxes. The relevant choice a smoker (who freely chose to smoke, at least initially) makes cannot be, then, the choice to smoke together with the choice to buy health insurance. Dworkin thinks that if a smoker contracts cancer, she is entitled to adequate medical care, so he cannot endorse Strict Cost Internalization.

Even if we can consider a person’s choice to pay taxes as identical to a choice to buy the policy that the average counterpart would buy, there is still reason to believe that Dworkin rejects Strict Cost Internalization. First, Dworkin denies that smokers
should pay higher taxes than non-smokers. But it costs more to provide health care for
the average smoker than for the average non-smoker. Thus Dworkin requires non-
smokers to absorb part of the medical cost to smokers of smokers’ choices, a clear
violation of Strict Cost Internalization. Second, Dworkin thinks the tax should be
progressive: he believes the tax system would be unfair to the poor if it were not
progressive. Yet not everyone is rich as a result of good genetic luck; some rich persons
have unmarketable endowments but made their fortunes by working tremendously
hard. So he is committed to saying that Annabel, who pays the top tax rate as a result of
working hard (despite her relatively unmarketable talents) must pay the same cost as
Barbara, who pays the top tax rate as a result of her native talents (despite the fact she
worked little). Further, Dworkin is committed to saying that Annabel must subsidize
persons who are in lower tax brackets simply because they do not work.

Each of these two commitments implies that Dworkin cannot endorse Strict Cost
Internalization. Shiffrin’s argument for the alleged incompatibility between the Equal
Freedom Principle and Choice Sensitivity refutes Dworkin’s ETheory only if it includes
her interpretations of Choice Sensitivity, but Dworkin’s ETheory does not. Thus,
Shiffrin’s argument does not refute Dworkin’s ETheory.109

109 Annabel and Barbara both pay the top tax rate; the absolute value of their tax burdens may
differ. However, it is the tax rate that better represents the cost to each than the individual tax
burdens. In any case, the individual tax burdens will not differ greatly unless persons in the top
tax bracket have widely differing incomes.
110 That justice neither requires Strict Cost Internalization nor requires Equal Freedom Principle to
be satisfied is a plausible position. Suppose that, as a result of freely making some bad choices,
Joe is dying from a preventable, agonizing medical condition, lacks the financial resources to buy
the medical care he needs and lacks also the marketable talents needed to pay off the
considerable debt he will accrue if he takes out a loan. Surely justice does not require him to pay
In this section, I present an objection to Dworkin's ETheory and argue for a particular change in this ETheory that nullifies my objection. Like Shiffrin, I argue that the Equal Freedom Principle poses a deep problem for the egalitarian commitment to Choice Sensitivity. However, unlike Shiffrin, I do not argue that Choice Sensitivity and the Equal Freedom Principle are incompatible. Instead, I argue that just inequalities must have arisen in conditions that satisfy a particular equal freedom requirement concerning the availability of professional opportunities and that consequently the set of just inequalities is narrower than Dworkin thinks. CS Actual, as it stands, does not express a sufficient condition for an actual inequality to be just. Furthermore, Choice Sensitivity, as it should be understood, can be satisfied only if this equal freedom requirement is also satisfied.

This is the requirement of equal freedom:

The Minimal Equal Freedom Principle: Each person in a society must be able to choose among a range of professions.

Two notes on the Minimal Equal Freedom Principle follow:

1. The Minimal Equal Freedom Principle does not require each member of a reasonably prosperous society to be able to choose from the same range of professions or from equally good ranges of professions.
2. The Minimal Equal Freedom Principle does require each person to have a real choice of professions, professions that the person would be rational in choosing if she desired to pursue them. The Minimal Equal Freedom Principle is not satisfied if, for example, all professions except one involve high risks, risks too high for the least advantaged persons rationally to take.

The Minimal Equal Freedom Principle seems intuitively plausible.

Consider the following case. Juliet and Andrew live in society S, which has several million members. S's government implements a tax-and-redistribution system based on the policy that S's government has adequate reason to believe the average counterpart would buy. So Dworkin must say that each inequality in S satisfies CS Actual and is thus just. Juliet is risk averse by nature: she would be unusually averse to risk even in ideal conditions. Further, her present circumstances make it rational for her to be highly risk averse: she has no savings, but is a single mother of five with sick parents for whom to care. However, everyone else loves risks by nature and their present circumstances do not make it rational for them to moderate their appetite for risk: they all have savings and no dependents. Suppose that everyone's attitude to risk is as rational and informed as attitudes to risk can be in real life.\(^{111}\)

\(^{111}\)I assume that, since persons have different, rational attitudes to risk in real life, their attitudes may still differ in the conditions that Dworkin considers ideal: conditions in which each person is completely rational and knows how he or she wants to live. For instance, rational persons who want to have a family and maintain quality of life (homemakers) tend to be more risk averse than rational persons who want to lead an ascetic, solitary life (monks) when choosing insurance. It is plausible to suppose that, in Dworkin's ideal conditions, it will still be rational for the homemakers to be more risk averse than the monks when choosing insurance.
Suppose that there are only two professions in S, investment banking and garbage collecting:

1. Investment banking is a high risk and high return profession. The wage consists purely in commissions, it is very easy to lose one’s job and hard for a redundant investment banker to find a job in any profession, and there is neither redundancy benefit nor a pension.

2. Garbage collecting is a low risk and low return profession. Reasonably competent performance guarantees continued employment and a steady wage, and there are both redundancy benefits and pension.

A successful investment banker receives a salary considerably higher than a garbage collector.

Now consider what happens when Juliet and Andrew each choose which profession to pursue. I will argue that Andrew has a real choice but Juliet does not. Because the overwhelming majority of persons love risks, and each person’s attitude to risk is rational and informed, the average counterpart also loves risks. The fact that Juliet is risk averse admittedly makes the average counterpart love risks less than the average risk loving person. However, because the society is so large and Juliet is the only risk averse person, the difference between the average counterpart’s appetite for risk and the average person’s is negligible. The average counterpart, thus, spends little on insurance. In particular, the policy the average counterpart buys yields to the claimant, upon
redundancy, a meager sum that will just about support a small family for a short period of time. Furthermore, the policy offers a successful claimant neither job relocation nor training services, nor free preschool, nor free homecare for invalids. S’s welfare system is modeled on this policy’s terms of compensation, as Dworkin’s ET theory requires.

Nothing terrible will happen to Andrew if he fails as an investment banker; he can get by perfectly well on welfare. So Andrew’s conditions (objective and subjective) allow him to choose either investment-banking or garbage collecting. But Juliet does not have a real choice. Since she has no savings and turns out to have many dependents, it would be irrational for her to choose investment-banking.

Suppose now that Andrew becomes a successful investment banker, and that Juliet becomes a garbage collector, struggling hard for the rest of her life. Suppose that at time t when they are both old, an inequality N* exists between Andrew’s and Juliet’s resource values. CS Actual deems N* just because N* arose in a society in which everyone buys the policy chosen by the average counterpart and is compensated. However, N* is unjust, because Juliet did not have a real choice of professions. The Minimal Equal Freedom Principle is not satisfied.

Thus CS Actual does not give a sufficient condition for an inequality to be just:

CS Actual: An inequality N at time t between X’s resource value and Y’s resource value is just if and only if:

If everyone paid the state the price of the policy that the average counterpart would buy and was compensated according to the conditions attached to that policy, then N would still exist.

We must modify the sentence on the right-hand side of if and only if in CS Actual:
CS Actual-Freedom: An inequality \( N \) at time \( t \) between \( X \)'s resource value and \( Y \)'s resource value is just if and only if:

1. If everyone paid the state the price of the policy that the average counterpart would buy and were compensated according to the conditions attached to that policy, \( N \) would still exist; and
2. The Minimal Equal Freedom Principle: Each member of society must be able to choose among several professions.

CS Actual-Freedom must require the Minimal Equal Freedom Principle to be satisfied \textit{from the time \( N \) originates}, not just for Juliet to have a range of professions from which to choose at the end of her life. CS Actual-Freedom denies that \( N^* \) is just, in step with our intuition, because the Minimal Equal Freedom Principle is not satisfied. It is plausible to suppose that, in every society, the Minimal Equal Freedom Principle limits the set of just inequalities and, where preferences differ greatly, provides such a fierce constraint that the average counterpart's choices play a very minor role.\textsuperscript{112}

My Juliet-Andrew argument is analogous to a standard argument in democratic theory that is typically used to reject the view that any outcome of a democratic procedure is just.\textsuperscript{113} The argument shows that such outcomes can infringe a minority's civil rights such as the freedom of worship; for instance, the majority may vote democratically to ban Muslim services.\textsuperscript{114} Both arguments question the justice of imposing a majority opinion on a dissenting minority and conclude that a constraint on the majoritarian procedure is needed to achieve justice. The argument in democratic theory shows that the majority decision cannot always be imposed legitimately on the

\textsuperscript{112}Note also that the Minimal Equal Freedom Principle covertly introduces the notion that a just distribution must be sensitive to person \( X \)'s choices (conceived of as opportunities, rather than acts of choosing): sensitive, that is, to \( X \)'s having a sufficient \textit{range of choices}.

\textsuperscript{113}Alternatively: legitimate.

minority. My argument shows that -- pace Dworkin -- whether an inequality is just cannot be determined by the average counterpart's decision.

I do not mean to advance the extremist view that, for the average counterpart C adequately to represent person Y, C and Y must have the same attitudes to risk.\(^{115}\) My claim is much weaker: that the average counterpart’s preferences can differ so greatly from a particular person’s that which inequalities are just cannot be determined purely by the average counterpart’s choice. Therefore, for CS Actual to be plausible, the right-hand side of the statement must express the Minimal Equal Freedom Principle.

One might object to my Juliet-Andrew argument that in most real societies, the average counterpart’s preferences resemble the average person’s preferences more than, in my argument, the average counterpart’s preferences resemble Juliet’s. This objection is, of course, spurious: since CS Actual purports to give necessary and sufficient conditions for an inequality to be just, CS Actual must accommodate even such outré cases. Moreover, it seems overwhelmingly likely that in any large, multicultural society whose members live under widely differing material conditions, attitudes to risk will vary considerably. For instance, some cultures admire failed entrepreneurs more than successful shop assistants; the reverse is true of other cultures. Further, though my case focuses on the choice of profession, other choices are relevant to whether a distribution satisfies Choice Sensitivity, for instance, persons’ choices concerning how much of their

\(^{115}\)Analogous claims in democratic theory -- for instance, that unanimity is required for the legitimacy of a democratic procedure -- have their proponents, but are also misguided, though I will not explain why here.
disposable income to spend. We need not leave Cambridge, Massachusetts to find both
an ascetic monk and a compulsive shopper.

A stronger objection is that a proponent of CS Actual can accommodate the
intuition that N\(^*\) is not just by giving CS Actual a *multiple counterparts interpretation:* by
claiming that, for every society in which preferences differ widely, there must be more
than one average counterpart. In order to achieve distributive justice, the state must split
its subjects into groups in such a way that no one has a counterpart whose preferences
differ, on the whole, more than a specified amount from those of the average
counterpart relevant for one’s group. This appeal to multiple counterparts ensures that
no unjust inequality like N\(^*\) arises.

However, the multiple counterparts interpretation of CS Actual is unacceptable
by Dworkin’s own lights because it is not *practicable.*\(^{116}\) Even if it is possible, in theory, to
split the members of society into groups as I have suggested, in reality this is not
feasible. At least, this may be feasible, but a society that achieves distributive justice this
way cannot also achieve social justice, because the state cannot find out all that it needs

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\(^{116}\)In this dissertation’s Introduction, I defined a *practicable* Theory as a Theory whose conditions
for a society to be just are sufficiently weak that either some distribution satisfies them or the
state can bring about a distribution that satisfies them within a reasonable time-frame. In
addition, a practicable Theory is stated in terms of verifiable facts (for instance, facts about a
person’s income, rather than facts about which insurance policy a person would buy in
hypothetical conditions), allowing the state to verify whether or not a particular distribution is
just.

Some notions of practicability are more demanding than others, depending on the type of
societies that must be able to achieve distributive justice. According to a more demanding notion
of practicability, a Theory applies to a relatively wide and heterogeneous set of societies, a set
that includes societies that are not as advanced as ours today or differ widely from our society
today. All these societies must be able to achieve distributive justice, so the conditions for a
distribution to be just must be relatively weak. According to a less demanding notion of
practicability, only societies similar to ours today must be able to achieve distributive justice, so
the conditions for a distribution to be just can be relatively strong.
to know without violating its subjects’ right to privacy. However, the chief reason
Dworkin gives us for accepting CS Actual is that he thinks that the best ETheory must be
practicable. If he were to reject his belief about practicability, as I argued he should in
Chapter 1 (Section 2), he would presumably propose a more individualistic ETheory
according to which whether an inequality between person X and person Y is just
depends on the choices that X and Y made (or would have made in ideal conditions).
Suppose that the state’s hypothesis is that the average counterpart relevant for Joe
would be risk-neutral, despite Joe’s irrationally risky investment decisions. The state
must then try to ascertain which preferences Joe would have in adequate conditions.

In the course its investigations, the state will probably violate Joe’s privacy,
however careful it is to respect it, with the result that the state is not just, all things
considered. It is reasonable to suppose that the state will often guess incorrectly, leading
to distributive injustice. Even if the state guesses correctly about which policy each
person would choose in ideal conditions, it is likely to seem exceedingly unfair to Joe
when his unemployment compensation is much lower than that of his ex-colleague,
who, according to the state, would make a risk-averse choice. (Suppose that Joe
disagrees with the state in that he thinks that his ex-colleague would make a risky
choice.) It seems plausible to suppose that most societies contain a good proportion of
Joes, but a practicable ETheory must surely try to avoid situations in which many
members of society feel grossly abused. Practicability is the selling-point of CS Actual,
yet the “multiple counterparts” interpretation of CS Actual is impracticable (as is, by the
same token, the “multiple counterparts” interpretation of CS Actual-Freedom).
I will next argue that Dworkin's fundamental commitments about distributive justice support CS Actual-Freedom more than they support CS Actual. Dworkin considers the following principle an axiom of any plausible ET theory:

Equal Respect and Concern: The state must treat the members of society with a sufficient and equal degree of respect and concern.

Although this principle is not overtly about distributive justice, Dworkin argues that it places constraints on the extent and type of inequalities that a just distribution can contain. For instance, Dworkin's ET theory considers as unjust, and requires the reduction of, inequalities caused by the fact that some (but not all) persons are handicapped. His rationale, which I consider plausible, is that a state that does not reduce such inequalities treats the handicapped with an insufficient and lesser degree of respect and concern.

My contention is that Equal Respect and Concern commits Dworkin to holding that the state cannot treat Juliet with sufficient respect unless the state holds that just distributions must have arisen in conditions satisfying the Minimal Equal Freedom Principle. Equal Respect and Concern, according to Dworkin, necessitates an individualistic approach to distributive justice. As we saw in Chapter 2, the force of Dworkin's objections against Rawls is that Rawls' ET theory fails to tailor distributions to facts about individual persons and their individual situations. In particular, Dworkin thinks that treating persons with sufficient and equal respect requires them to have equal and fair chances to insure themselves against future bad luck. Dworkin considers it likely that different counterparts will buy different policies. The reason why he does not take the individualistic approach of holding that a person's relevant choices are those that his
or her own counterpart makes is that he thinks that an ETHeory must be practicable and that practicability requires adopting an averaging approach.

Juliet’s counterpart is highly risk averse (as is Juliet in real life) and buys a policy that is very different from the one that the average counterpart chooses to buy. However, the policy that the government compels her to buy does not, in practice, reflect her counterpart’s choice. Juliet would have insured herself against being at the lower end of $N^*$, yet the state does not aim to ensure that $N^*$ is mitigated; instead, the state considers $N^*$ just. Her risk aversion is lost in the process of averaging, stripping her of her individuality.

Yet Juliet’s risk aversion is, by Dworkin’s own lights, a morally relevant property, for two reasons. First, it strongly influences her counterpart’s choice of which type of policy to buy. Second, it is of enormous importance to Juliet’s life which distributions her society aims to preserve or mitigate. Her wealth, relative and absolute, largely determines the quality of healthcare and education that she receives, as well as her political power, self-respect and ability to pursue personal projects. Her predictions about future distributions determine her decisions between spending and saving. Offering Juliet a fair and equal chance to buy insurance, therefore, requires the state to take into account her risk aversion when deciding which inequalities involving her resource value are just and when setting her tax premium and the compensation conditions that apply to her.

By Dworkin’s own lights, then, CS Actual must be modified so that it considers as just only inequalities that arise in the presence of equal professional opportunities. CS
Actual-Freedom is still less individualistic than an ETheory according to which whether an inequality between person X and person Y is just depends on the choices that X and Y (or their own counterparts) made. However, CS Actual-Freedom offers Juliet some of the protection, at least, that she would have bought if given the chance.

I will next show, by similar reasoning, that Dworkin's fundamental commitments support the view that inequalities cannot satisfy Choice Sensitivity unless they have arisen in conditions satisfying the Minimal Equal Freedom Principle. I will start by explaining why he endorses Choice Sensitivity.

Although Dworkin thinks that a just state has some responsibilities that are instrumental to the success of citizens' lives, such as aiding handicapped persons, he also holds that treating persons respectfully requires the state to act in ways consonant with the thought that each person has a special responsibility for his or her own success. So he thinks that Equal Respect and Concern supports the following principle:

Special Responsibility: Each person has a special responsibility for how well his or her life goes.\textsuperscript{117}

According to Dworkin, Special Responsibility has implications for distributive justice. Suppose that, at time t, Julian freely chooses to work hard whereas Rebecca freely chooses not to work, and that, as a result of these choices, Julian is much wealthier than Rebecca at t + 1. Dworkin thinks that, if the state were to eliminate this inequality, it would act with insufficient respect in Rebecca's regard because it would treat her like a ward of the state, relieving her of any responsibility to make her life a success. Thus

\textsuperscript{117}Dworkin (2000), p. 5.
Dworkin thinks that Special Responsibility, and so Equal Respect and Concern, support Choice Sensitivity.

Clearly, for Dworkin, Choice Sensitivity is a substantial requirement of justice: it is a necessary condition that any just distribution must meet and it is a good thing if a distribution satisfies this condition. Since \( N^* \) is unjust, Choice Sensitivity must neither claim that \( N^* \) must be preserved, nor must it claim, disrespectfully to Juliet, that whether inequalities involving her resource value are just depends on the choices of some other being that does not share her preferences or represent her interests. Choice Sensitivity, therefore, must be interpreted in such a way that it can be satisfied only by inequalities that arose in conditions satisfying the Minimal Equal Freedom Principle.\(^{118}\)

Our intuitions, I submit, are in line with my conclusion that Dworkin’s fundamental commitments about distributive justice support CS Actual-Freedom more than they support CS Actual. It is more respectful to Juliet to deem \( N^* \) unjust and, accordingly, mitigate it, than not to do so. It is also more respectful to claim that whether inequalities involving her resource value are just depend on her own counterpart’s choices rather than on the choices of some being that is quite unlike her.

\(^{118}\)My argument against Dworkin’s particular interpretation of Choice Sensitivity resembles Brian Barry’s objection to Choice Sensitivity. Barry objects that Choice Sensitivity cannot justify the current material inequalities in our society because there is inequality of opportunity. My general point is that Choice Sensitivity cannot be satisfied unless persons are equally free (Barry (2003)). Barry’s objection does not refute Luck Egalitarianism: luck egalitarians consider an inequality just only if it is sensitive to choices \textit{and insensitive to luck}, and they believe luck insensitivity requires equality of opportunity. Barry’s objection is more fruitfully directed against politicians who argue against extensive redistribution.
Conclusion

In this chapter, I have argued that Shiffrin fails to show that ETtheories contain incompatible principles. Even if Choice Sensitivity and Equal Freedom Principle were incompatible, her argument would not refute Dworkin’s ETtheory, because he does not endorse the version of Choice Sensitivity that Shiffrin attributes to ETtheories. *Pace* Shiffrin, Dworkin neither thinks that a person’s actual choices determine the compensation conditions that apply to him nor does Dworkin think that justice forbids the mitigation of inequalities due to differences in choices. I also argued that Shiffrin is right insofar as Dworkin’s ETtheory is unacceptable for reasons pertaining to the requirements of equal freedom and sensitivity to choices. However, the problem is not that these requirements are incompatible, but that Dworkin needs to build a particular, equal freedom requirement into his accounts of a just distribution and of a choice sensitive distribution.

From the perspective of the entire dissertation, I am committed to claiming that CS Actual-Freedom is false. I argued, in Chapter 1, that we must reject CS Actual, because the average counterpart’s choice is irrelevant to determining the conditions for entitlement to compensation that apply to X. The only reason Dworkin proposes for accepting CS Actual rather than a more individualistic principle of distributive justice is that, of the principles he considers (CS Hypothetical and CS Actual), only CS Actual is practicable. However, I argued against Dworkin, the best Theory need not be practicable. Since CS Actual and CS Actual-Freedom differ merely in whether they require equal freedom to choose between professions, CS Actual-Freedom, like CS
Actual, holds that the average counterpart's choice plays a role in determining these compensation conditions.

Suppose, however, that we need a practicable Theory and, for this reason, accept that the average counterpart's choice is relevant to distributive justice. I concede that, if all or most of a society's inequalities satisfy CS Actual-Freedom, it may be that the society is as just as it can be or can be known to be. Whereas an implication of Chapter 1 is that Dworkin's Theory has a deep flaw -- the Theory is stated in terms of the wrong choices -- the flaw I identified in this chapter is eliminable, as I have shown, but it is nonetheless significant. To say the least, my Juliet-Andrew argument shows that Dworkin has overestimated the extent to which the average counterpart's choices determine the conditions of entitlement to compensation that apply to each member of society. My argument shows that we should reduce the potentially damaging role of the average counterpart's choice by adding constraints to Dworkin's Theory such as the Minimal Equal Freedom Principle. We may then decide to believe that CS Actual-Freedom gives the necessary and sufficient conditions for a distribution to be as just as a distribution can be or can be known to be in practice, even though CS Actual-Freedom is not, strictly speaking, true.

What else can we infer about the relevance of the average counterpart's choice from the Juliet-Andrew argument? My argument evinces how sophisticated a plausible account of a just or of a choice sensitive distribution must be and highlights both the frequency with which the egalitarian position is oversimplified and the danger of doing so. Shiffrin's objection simply glances off Dworkin's version of egalitarianism (and, I
believe, most versions), just like all the objections that target CS Critics, a common
misreading of Dworkin's Theory,\textsuperscript{119} and the sufficientarian objection that I will introduce
in Chapter 4.

\textsuperscript{119}In Chapter 1, Preliminaries, I introduced CS Critics, a principle which Dworkin's critics, prior
to Dworkin (2002, October), understood Dworkin (2000/1981) to imply:

CS Critics: An inequality $N$ between person $X$'s resource value and person $Y$'s resource
value is just if and only if:

1. $N$ was caused by some choice $X$ made; and
2. $N$ was caused by some choice $Y$ made.

According to CS Critics, whether $N$ is just is entirely determined by $X$'s choices and $Y$'s choices.
Chapter IV: How Dworkin Can Consistently Refute G.A. Cohen’s Theory

A theory of distributive justice (or *Theory*) is a theory that implies necessary and sufficient conditions for a distribution to be just. A Theory must say which goods are relevant: which are the goods whose assignment to persons determines whether a distribution is just. The relevant goods are all scarce, since, for instance, it is intuitively not unjust that you use more air than I do (your lung capacity is greater than mine) if I can have as much air as I want. Theories disagree about whether the relevant goods are, for instance, resources, welfare, capabilities or opportunities.

Ronald Dworkin argues that relevant goods are resources, not welfare.\(^{120}\) This chapter presents a problem for Dworkin: his Theory, which he calls *Equality of Resources*, is inconsistent with his argument against G.A. Cohen’s welfare-based Theory.\(^{121}\) The inconsistency is that Dworkin claims both that

1. A person \(X\) is entitled to compensation for being in a particular condition (for example, being quadriplegic) if and only if the average person \((Y)\), if given a fair chance to buy insurance against \(Y\)’s being in that condition, would buy such insurance; and

2. A person \(X\) is entitled to compensation for being in a particular condition only if \(X\) believes that \(X\)’s being in that condition constitutes a handicap for \(X\).

Broadly speaking, (1) is equivalent to Dworkin’s resource-based conditions for a distribution to be just and (2) is implied by two key premises in Dworkin’s refutation of Cohen’s welfare-based Theory. (1) and (2) are inconsistent: it is plausible to suppose that

\(^{120}\)Dworkin (2000/1981).

\(^{121}\)Cohen (1989, July); Cohen (1990). The theories of social justice that I will here consider are not concerned solely with distributive justice, but I will call them *Theories*, as I will concentrate on their implications for distributive justice.
the average person would insure against becoming quadriplegic if given a fair chance to
do so, but if X has idiosyncratic aims, it may be that X does not consider X’s being
quadriplegic a handicap. In this case, (1) says that X is entitled to compensation, but (2)
denies this.

I also pose a further problem: although Dworkin explicitly expresses (2), it seems
that a charitable interpretation of his Theory must deny that he endorses (2), since (2)
appears to express a welfare-based Theory that he explicitly rejects. I explain the
reasoning that leads Dworkin to endorse (2) and show that (2) is not equivalent to any
welfare-based Theory he rejects. The rest of this chapter presents a charitable
interpretation of Dworkin’s Theory. I argue that Dworkin should reject (2) in order to
make his Theory consistent. By providing an alternative refutation of Cohen’s Theory
that Dworkin could endorse, I show that Dworkin can reject (2) and still refute Cohen’s
Theory.

I give two further reasons why Dworkin should reject (2). First, Dworkin’s
reasoning about distributive justice suggests that he should reject (2). Dworkin argues
that a distribution is just only if it is sensitive to persons’ choices, but denies that justice
requires sensitivity to choices made as a result of deliberating in unjust circumstances.
However, (2), as I will show, implies that distributions should be sensitive even to
attitudes formed in unjust conditions. Second, I argue, Dworkin’s Theory must reject (2)
in order to survive two standard objections that focus on the fact that the Theory is
stated in terms of actual preferences.
I will proceed as follows. In Section 1, I will explain (1) and (2) (in Sections 1.1 and 1.2 respectively) and argue that they are inconsistent (in Section 1.3). Section 2 then discusses how to change Dworkin’s Theory to restore consistency and enhance, without compromising, its plausibility relative to rival Theories. In Section 2.1, I explain Dworkin’s motivations for asserting (1) and (2) and argue that he should reject (2). The question then arises how he can refute Cohen without it. In Section 2.2, I explain the role of (2) in Dworkin’s refutation and, in Section 2.3, offer an alternative refutation that Dworkin could assert.

1

1.1

I will first explain Dworkin’s account of a just distribution, since he thinks that it supports Entitlement Principle 1, which I will need in order to demonstrate the contradiction. In the second paragraph of this chapter, I sketched the contradiction using simplified versions of the principles that I will argue are inconsistent. (1), in the second paragraph of my chapter, is a simplified version of Entitlement Principle 1.

The question that Dworkin intends to answer is: which are the necessary and sufficient conditions for a distribution to be just? He thinks that an adequate answer must include plausible explanations of the following two principles:

Choice Sensitivity: A distribution of resources is just only if it is sensitive to persons’ choices; and
Endowment Insensitivity: A distribution of resources is just only if it is insensitive to persons' endowments.\textsuperscript{122}

Each principle expresses a necessary condition for a distribution to be just; other conditions may also apply.

A person X's \textit{endowment} consists of features or capacities, the possession of which is beyond X's control, which affect the rate at which X can acquire resources, such as congenital handicaps.\textsuperscript{123} So Endowment Insensitivity considers unjust inequalities caused by factors that persons cannot choose to change, factors such as inborn health and talents (this principle does not mention the health and talents that result from a person's genes \textit{and} her choices). Dworkin, therefore, thinks that justice prohibits, or at least requires the mitigation of, inequalities due to differences in how marketable persons' endowments are.\textsuperscript{124} Let X's \textit{resource value} be the total value of person X's resources.

Choice Sensitivity implies that a just distribution must not eliminate any inequality between person X's and person Y's resource values that was caused by the fact that X and Y made different choices: choices concerning how expensively to consume, how lucrative a profession to pursue or how hard to work, or the choice of whether or not to purchase insurance. Thus, Dworkin's Theory can permit -- and indeed require -- there to be particular differences between persons' resource values: inequalities that have arisen because persons chose differently.

\textsuperscript{124}Chapter 1 explains Choice Sensitivity and Endowment Insensitivity, and Dworkin's interpretations of their conjunction, in greater detail than is needed here.
Dworkin believes that the relevant choices to which a distribution should be sensitive cannot be actual choices, since there are unfair inequalities in persons' abilities to influence their future resource values: persons' levels of rationality, epistemic positions and resource values differ, and persons' abilities to buy reasonably priced insurance differ. The relevant choices, he concludes, must be hypothetical. Let person X's counterpart be rational, young and healthy, and ignorant of X's earning potential, but otherwise identical to X, and consider all the counterparts of a society's members. Broadly speaking, Dworkin defines a just distribution as a distribution that might have arisen from a situation in which these counterparts had equally valuable resources and equal opportunities to buy reasonably priced insurance against future bad luck.

Let \[<X, XRV>, <Y, YRV>, \ldots\] represent a distribution D of resources between persons X, Y and everyone else in the society. D is set containing a pair whose members are X and X's resource value, a pair whose members are Y and Y's resource value, and so on for each other person. Dworkin's preliminary account of a just distribution is:

**Just Distribution:** D is just at time \(t + u\) years if and only if D could have arisen from a situation S that satisfies the following conditions:

1. S takes place at \(t\);
2. The counterparts of X, Y and everyone else alive at \(t + u\) years are present in S;
3. The counterparts of X, Y and everyone else alive at \(t + u\) years had, at t, equally valuable bundles of transferable resources and equal opportunities to buy insurance in a free market against any bad luck that might befall him or her.\(^{125}\)

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\(^{125}\)Dworkin does not account for a just distribution so rigorously, but I believe that Just Distribution captures his intent in his 1981, 2000 and 2001 statements of his Theory (Dworkin (2000/1981), pp 107-8; see also pp 76-77, 93, 114, 123, 139); Dworkin (2000), chapter 9; Dworkin (2002, October)), pp 108, 111.
Here are five notes explaining Just Distribution or why it is not Dworkin’s definitive account of a just distribution:

1. The word *could* in Just Distribution expresses physical possibility: Just Distribution implies that if S exists in the set of possible worlds governed by the same laws as our world, then D exists in that set of worlds some time after S.

2. Call a situation S that satisfies the three conditions Just Distribution expresses a suitable initial situation. Dworkin thinks it unlikely that the huge inequalities in the US today could have arisen from a suitable initial situation. Assuming that they could not have, Just Distribution counts the present distribution in the US as unjust.

3. Dworkin thinks that for a society’s government to be legitimate, that government must achieve and maintain distributive justice. Thus he thinks that for the US state to be legitimate, it must make the current, unjust distribution just.

4. Dworkin thinks that a Theory must be implementable. But Just Distribution cannot be implemented: a state does not know, and probably could not discover, which insurance policy (if any) a particular person’s counterpart would have bought. Dworkin thinks the state should assume that each person’s counterpart would buy the same policy that the average counterpart would buy. So Dworkin’s belief that a Theory should be practicable leads him to consider the average
counterpart’s choice relevant to distributive justice, rather than a person’s choices or her counterpart’s choices.\textsuperscript{126}

Dworkin does not explain the concept of an average counterpart.

However, taking the idea of averaging in this case seriously entails that the persons’ actual rational and informed attitudes must constrain attitudes of the average counterpart. For instance, if most persons are very risk-averse and their attitudes to risk are rational and informed, the average counterpart will also be risk-averse. Although I doubt that the concept of the average counterpart is coherent, I will not pursue this issue here. Hereafter, it is the pronoun that I will sometimes use instead of the average counterpart.\textsuperscript{127}

5. Dworkin thinks that to make an unjust distribution just, the state must charge each person the price of the policy that the average counterpart would buy and give each person the compensation, if any, to which she would be entitled if she

\textsuperscript{126}A practicable Theory is a Theory whose conditions for a society to be just are sufficiently weak that either some distribution satisfies them or the state can bring about a distribution that does. In addition, a practicable Theory is stated in terms of verifiable facts (for instance, facts about a person’s income rather than facts about which insurance policy a person would buy in counterfactual conditions), allowing the state to verify whether or not a particular distribution is just. Some notions of practicability are more demanding than others, depending on the type of societies that must be able to achieve distributive justice.

According to a more demanding notion of practicability, a Theory applies to a relatively wide and heterogeneous set of societies, a set that includes societies that are not as advanced as ours today or differ widely from our society today. All these societies must be able to achieve distributive justice, so the conditions for a distribution to be just must be relatively weak. According to a less demanding notion of practicability, only societies similar to ours today must be able to achieve distributive justice, so the conditions for a distribution to be just can be relatively strong.

\textsuperscript{127}In Dworkin’s recent work, the policy that average counterpart would have purchased is replaced by the policy that it would be “prudent for most Americans to buy” (Dworkin (2000), p. 313). This change in Dworkin’s view shows that he is himself uncomfortable about the concept of the average counterpart.
owned that policy. Thus Dworkin is committed to this principle of entitlement to compensation:

Entitlement Principle 1: A person X is entitled to compensation C for being F if and only if:
The insurance policy P that the average counterpart would have bought in a suitable initial situation gives compensation C to an owner y of policy P if y is F.\footnote{Dworkin (2000/1981), pp 99-109; Dworkin (2002, October), pp 108, 111.}

The phrase is F is placeholder for a predicate, for instance, the predicate is quadriplegic. This principle is the more precise version of principle (1) given in the second paragraph of this chapter. Suppose that the average counterpart would have bought a policy that yields $1000 upon going blind and Rachel owns the policy that the average counterpart would have bought. Then Rachel is entitled to $1000 if she becomes blind. According to Dworkin, a just society must implement a tax-and-redistribution system that gives Rachel $1000 and, in general, must compensate persons according to Entitlement Principle 1.

6. Dworkin thinks that there is also a paternalistic reason for basing the tax-and-redistribution scheme on the policy that the average counterpart would buy: the state should prevent persons from making choices that may have serious consequences these persons are likely to regret, such as not buying health insurance.\footnote{Dworkin (2002, October), pp 112-13.} A society that Dworkin considers just has a fairly extensive tax-and-redistribution system, on the plausible assumption that the average counterpart is fairly risk-averse and so purchases a fairly generous insurance policy.
1.2

My aim in this section is to explain a second and third principle that I will need in order to demonstrate the inconsistency in 1.3. This conjunction plays the role of (2), which I used to outline, in the second paragraph of this chapter, why the inconsistency arises:

(2) A person $X$ is entitled to compensation for being in a particular condition only if $X$ believes that $X$’s being in that condition constitutes a handicap for $X$.

However, (2) glosses over some detail in the second and third principles. Here is the second principle:

Entitlement Principle 2: A person $X$ is entitled to compensation for being $F$ only if $X$ has reason to believe that $X$’s being $F$ is a handicap.

Entitlement Principle 2 expresses a necessary condition for a person to be entitled to compensation: there may be other conditions that apply. Any attitude that $X$ has about whether $X$’s being $F$ is a handicap concerns $X$ and the property of being $F$, irrespective of mode of presentation: what is relevant is that $X$ believes that being $F$ is a handicap for $X$, and not whether $X$ believes that being $F$ is a handicap for a $Y$ (who may turn out to be $X$). (This comment about attitudes holds also for the next principle that I will introduce.)

The third principle gives the conditions under which person $X$ has reason to believe that $X$’s being $F$ is a handicap:

Own Lights Reason: A person $X$ has reason to believe that $X$’s being $F$ is a handicap if and only if the following conditions are satisfied:
1. $X$’s being $F$ constitutes an obstacle, all things considered, to $X$’s living a particular life that $X$ believes to be a successful life for $X$ and desires to live; and
2. $X$ believes that $X$’s being $F$ constitutes an obstacle, all things considered, for $X$. 

159
The force of this principle is that Jane's being quadriplegic (for instance) must be a handicap by her own lights -- relative to her own values and attitudes -- for Jane to have reason to consider her being quadriplegic a handicap. Dworkin thinks condition 2 holds just in case X would be willing to undergo a costless procedure to become not F. Let an OL reason for X be a reason X has that satisfies Own Lights Reason. Hereafter, the phrase a life that X believes to be successful life for X and similar phrases pick out a particular life that X believes to be a successful life for X and desires to live.

To illustrate Entitlement Principle 2 and Own Lights Reason, suppose that Jane lives in a prosperous society O that Dworkin counts as distributively just. Suppose also that Jane is quadriplegic, suffering in penury, but that she does not consider her being quadriplegic a handicap for the following reason. The religion whose entire doctrine she endorsed before she unexpectedly became quadriplegic, and still endorses for the same reasons as before, include the following teaching. Only quadriplegics can live successful lives, not because being quadriplegic is a means to living a successful life, but because the experience of being quadriplegic is intrinsically valuable, and far more valuable than the experience of any non-quadriplegic. Suppose also that Jane wants to live a life rich in the experiences that only a quadriplegic, as a matter of fact, can have.

\[^{130}\text{Dworkin (2000/1981), pp 39, 82; Dworkin (2000), pp 289-90, 291-5, 303; Dworkin (2002, October), pp 107, 119, 138-40. In Dworkin (2002, October), Dworkin writes that he "claimed, in [Dworkin (2000/1981)], that an agent should in principle not be compensated... for some physical feature [that the agent] regards as an advantage rather than a handicap and would regret losing" (p. 138). Dworkin does not withdraw this claim, and since he uses it as a premise, it is reasonable to suppose that he still endorses it. See also "Equality of Resources [asserts that a particular deaf man is not entitled to compensation] ... only if [the deaf man] prefers being deaf and therefore would not submit to a costless and painless medical procedure -- a simple pill, if we can imagine such a thing -- that would give him hearing" (Dworkin (2002, October), p. 139).}\]
Thus Jane’s being quadriplegic is not an obstacle, all things considered, to her living a life that she considers successful and desires to live. Since Condition 1 in Own Lights Reason is not satisfied, Own Lights Reason implies that Jane does not have reason to consider her being quadriplegic a handicap and consequently, Entitlement Principle 2 (interpreted in view of Own Lights Reason) implies that she is not entitled to compensation for being quadriplegic. Although this seems, to many persons, an unacceptable implication, I will not here consider whether it gives a sufficient reason for rejecting Entitlement Principle 2 and Own Lights Reason.

1.3

Now that we have the three principles that Dworkin endorses -- Entitlement Principle 1, Entitlement Principle 2 and Own Lights Reason -- I will give my Satisfied Cripple Argument for the claim that they are inconsistent. Then, I will defend my argument by rebutting three objections.

Entitlement Principle 1 expresses the conditions Dworkin endorses for a distribution to be just. Entitlement Principle 2 and Own Lights Reason are, we will see, premises in Dworkin’s exchange with Cohen. Given current preferences in this society, it is plausible that the average counterpart would insure against being quadriplegic. Entitlement Principle 1 implies that Jane is entitled to compensation for being quadriplegic, because Jane owns the policy that the average counterpart would purchase and -- we assume -- the average counterpart in a suitable initial situation would insure against being quadriplegic. But, as we saw in the previous section, the conjunction of Entitlement Principle 2 and Own Lights Reason implies that Jane is not entitled to
compensation for being quadriplegic. Therefore, the three principles are inconsistent about whether or not Jane is entitled to compensation for being quadriplegic. Dworkin continues to endorse the principles simultaneously, and it is plausible to take his Theory as including his defenses of his conditions and his objections to rival Theories, so his Theory is inconsistent.

The inconsistency illuminates Dworkin’s strategy and the perils of taking it. He assumes vague principles that he then uses to develop, and finally justify, institutions to bring about distributive justice: first, institutions for a hypothetical society and, next, for an actual society. The source of the inconsistency is that he attempts to justify the institutions for an actual society with a principle that he has had to reject in rendering practicable the institutions he designs for achieving distributive justice in the hypothetical society.

I will next consider and reject three objections to the Satisfied Cripple Argument according to which my argument fails to show that the three principles are inconsistent.

1.3.1

The first objection denies that Dworkin really endorses the conjunction of Entitlement Principle 2 and Own Lights Reason, even though he expresses them, on the grounds that this conjunction appears to express a type of welfare-based Theory that he explicitly rejects. Let me explain and assess this objection.

Here are the two welfare-based Theories. Each Theory holds that welfare is the satisfaction of relevant preferences, where X’s relevant preferences, generally speaking, are X’s morally acceptable preferences about how X should live:
Relative Success: A person X is entitled to compensation if X experiences less preference satisfaction than person Y who is in the same society as X; and

Overall Success: A person X is entitled to compensation if:
1. X judges that X's life is successful to degree M;
2. There is person Y in the same society as X who judges that Y's life is successful to degree N; and
3. M < N.  

Each Theory resembles the conjunction of Entitlement Principle 2 and Own Lights Reason with respect to claiming that entitlement to compensation is contingent on having particular preferences concerning lifestyle. Suppose that, on account of Jane's eccentric preferences, she enjoys the highest possible degree of preference satisfaction and considers her life the greatest possible success. Then each Theory denies that she is entitled to compensation, as does the conjunction of Entitlement Principle 2 and Own Lights Reason.

Nevertheless, I will show, Relative Success and Overall Success are each incompatible with the conjunction of Entitlement Principle 2 and Own Lights Reason. Let us slightly change the story about Jane: suppose that Jane is unable to be a mathematician simply because her concentration is appalling (a problem wholly unrelated to her quadriplegia), but that she greatly desires to be a mathematician. For this reason, there is a fellow member of Jane's society who enjoys more preference satisfaction and ranks his life higher on the success scale than Jane ranks her life. The conjunction of Entitlement Principle 2 and Own Lights Reason still denies that Jane is entitled to compensation, because she does not consider her being quadriplegic a

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handicap. However, each of Relative Success and Overall Success holds that Jane is entitled to compensation, since she experiences a lower degree of preference satisfaction or ranks her life lower in terms of success than the other person ranks his life, respectively.

However, the conjunction of Entitlement Principle 2 and Own Lights Reason is so similar in spirit to Relative Success and Overall Success that I must explain what leads Dworkin to endorse this conjunction and both Theories, given that he asserts the former and denies the latter. I have already provided textual evidence that Dworkin endorses Entitlement Principle 2 and Own Lights Reason and denies both Relative Success and Overall Success. In 2.2, I will explain in detail why Dworkin endorses both Entitlement Principle 2 and Own Lights Reason. In short: Cohen claims that, intuitively, a gourmet who did not choose to acquire his expensive tastes but does not regret having them is entitled to compensation. Then Cohen argues that, since his own Theory is compatible with this claim but Dworkin’s is not, we must reject Dworkin’s Theory in favor of Cohen’s. Dworkin replies by claiming that an ethical Theory must preserve our important ethical beliefs and that Cohen’s assertion that this gourmet is entitled to compensation is unintuitive. According to Dworkin, we commonly believe Alleged Ethics:

Alleged Ethics: A person is entitled to compensation only for features of herself that she has reason to consider a handicap.132

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Entitlement Principle 2 and Own Lights Reason are intended to express the content of Alleged Ethics.

Note that Entitlement Principle 1 -- which expresses Dworkin's resource-based conditions -- is incompatible with Alleged Ethics, insofar as Entitlement Principle 1 asserts that Jane is entitled to compensation for being quadriplegic, but Alleged Ethics denies this. This incompatibility arises because the constraint that a Theory must preserve Alleged Ethics is a theoretical constraint, whereas Entitlement Principle 1 is motivated by practical and paternalistic considerations, not just theoretical. Thus, we can understand how Dworkin arrives at endorsing Entitlement Principle 1, and Entitlement Principle 2 and Own Lights Reason, and also how he is led to endorse this conjunction and reject welfare-based Theories.

1.3.2

The second objection says that the Satisfied Cripple Argument fails to show that these three principles are inconsistent, because it falsely assumes that the average counterpart would buy a policy that compensates any quadriplegic who owns it. This objection makes a claim that I will call Perspective:

Perspective: The average counterpart would buy a policy that compensates its owner for being F only if the owner has an OL reason to consider her being F a handicap.

There is no contradiction if Perspective is true. Entitlement Principle 1 does not imply that Jane is entitled to compensation for being quadriplegic, because Own Lights Reason implies that Jane does not have an OL reason to consider her being quadriplegic.
a handicap: her being quadriplegic does not constitute an obstacle, all things considered, to her living a life that she believes to be successful for her. But the inconsistency arises because -- I argued -- Entitlement Principle 1 implies that Jane is entitled to compensation, whereas Entitlement Principle 2 implies that Jane is not entitled to compensation.

To support Perspective, the proponent of this first objection might point out that in the US today, there is significant demand for Evidence Policies: accident policies that compensate a claimant only on receipt of sufficient evidence that the claimant is unable to perform activities important to his livelihood. It is plausible to explain why there is demand for Evidence Policies as follows. Evidence policies are cheaper than No Evidence Policies: accident policies that do not require the claimant to provide such evidence. Because it is easier to press a fraudulent claim against No Evidence Policies than against Evidence Policies, the former must compensate more persons than the latter, so the former have higher costs than the latter. It is rational not to buy a No Evidence Policy: in most cases in which one is F and really needs compensation for being F, it is easy enough to garner sufficient evidence that one has an OL reason to consider being F a handicap, thus would be entitled to compensation if one owned an Evidence Policy.133

Should we accept Perspective? I will argue that we should not. There are two important differences between the existing Evidence Policies described in the previous

133Dworkin (2000), pp 334-5. Dworkin also uses this sort of argument in Dworkin (2000/1981), pp 93-109. Dworkin thinks that the policy the average counterpart would buy does not compensate one automatically upon being fired, but imposes additional conditions for entitlement to compensation. For instance, he maintains that the average counterpart will buy unemployment insurance that makes entitlement to compensation conditional on willingness to work (Dworkin (2000), pp 334-8; Dworkin (2002, October), p. 114).
paragraph and a policy that compensates its owner for being F only if the owner has an OL reason to consider her being F a handicap.

1. The evidence required by Evidence Policies concerns the claimant's profession and state of health, but whether or not a person has an OL reason to consider her being F a handicap depends on her beliefs about which lives count as successful. Thus a policy that compensates its owner for being F only if the owner has an OL reason to consider her being F a handicap must require each claimant to disclose some of her beliefs about which lives are successful for her. It is plausible to suppose that such beliefs are often of a very personal nature (consider, for example, Jane's religious beliefs on which her view about which lives are successful is founded) -- certainly more personal than claims about one's profession or state of health. Prospective buyers of insurance are likely to find such intrusive policies extremely unattractive.

2. Unlike claims about a person's profession or state of health, claims about a person's views about which lives count as successful are often unverifiable. It would be extremely easy for Jane to claim, fraudulently, that she has an OL reason to consider her being quadriplegic a handicap, even though she has no such reason. (Even though she is perfectly happy being quadriplegic, she may try to get monetary compensation for being handicapped so that she can purchase art.) It is unlikely that the extra costs to the company of checking whether each claimant has the requisite OL reason -- even if it is left to the claimant to provide the relevant evidence -- will exceed the gains to the company. These two points
render it implausible that insurance companies would offer policies that make
compensation conditional on possessing the requisite OL reason. Since
Perspective is false, then, we need not accept the first objection's claim that the
Satisfied Cripple Argument is unsound.

1.3.3
The third objection challenges my interpretation of Dworkin's Theory. According to this
objection, the demonstration that these three principles are inconsistent fails because
there is no situation to which Dworkin intends all three to apply.

According to this objection, Equality of Resources comes in two forms. One form
-- the conjunction of Entitlement Principle 2 and Own Lights Reason -- assumes,
counterfactually, that everyone can buy insurance in fair conditions and there are no
paternalistic reasons for having a safety net. Even if a state wished to bring about
distributions that satisfy Entitlement Principle 2 and Own Lights Reason, it could not,
because this would require facts about particular persons (for example, their views
about which lives are successful) that the state could not know or seek to learn without
violating Dworkin's assumption that a state must treat persons with respect and, in
general, without intolerable intrusions of privacy. The other form of Equality of
Resources -- Entitlement Principle 1 -- is designed for a real society given that persons
lack the requisite opportunities; justice demands a social safety net, and practicability
and respect rule out deciding claims to compensation on a case-by-case basis. So
Dworkin must intend only Entitlement Principle 1 to apply to a real society.
My point is simply that Dworkin cannot have it both ways. He cannot both reject Cohen's Theory, on the basis of Entitlement Principle 2 and Own Lights Reason, for considering persons entitled to compensation for conditions they welcome, and endorse a principle -- Entitlement Principle 1 -- that does precisely that. He cannot both reject Cohen's Theory, on the basis that it fails to preserve particular ethical beliefs, and endorse a principle -- Entitlement Principle 1 -- that fails to preserve them. Dworkin might reply that the reason why his Theory can deem such compensation just but not Cohen's is that Cohen considers such compensation just in theory, whereas he (Dworkin) denies that it is just in theory, though he holds it just in practice. But this reply fails, since the necessary and sufficient conditions Dworkin proposes for an inequality to be just are shaped by both theoretical and practical concerns. Dworkin is entitled to distinguish between his theoretical and practical commitments only if these conditions are conditions for an inequality to be as just as is possible in practice. But Dworkin holds that an inequality that satisfies these conditions is just.

To summarize: I showed in 1.1 and 1.2 that Dworkin's Theory contains three principles, which I argued, in Section 1.3, imply an absurd conclusion: the conjunction of Entitlement Principle 2 and Own Lights Reason implies that Jane the quadriplegic is not entitled to compensation for being quadriplegic. Even if this conclusion is not absurd, the three principles are clearly inconsistent.

Why is Equality of Resources inconsistent? How should it be changed? Another question is whether the change weakens Dworkin's case for his Theory.
In Section 2.1, I diagnose the source of the inconsistency and argue for rejecting both Entitlement Principle 2 and Own Lights Reason. First, Own Lights Reason is false. Second, implementing these two principles would violate a principle that Dworkin takes as axiomatic: the state must treat its members with equal respect and concern. Third, Dworkin’s reply to the influential, though misguided, Sufficentarian Objection is effective only if he rejects these two principles. And fourth, rejecting them conforms to Dworkin’s intentions about how Choice Sensitivity and Endowment Insensitivity should be interpreted.

However, Entitlement Principle 2 and Own Lights Reason are premises in Dworkin’s only reply to an important objection that challenges his claim that the facts about distributive justice depend on the facts about resources.\(^{134}\) Can Dworkin refute this objection without these two principles? I answer this question in 2.2. My chapter concludes that Dworkin should reject Entitlement Principle 2 and Own Lights Reason in the light of my conclusions in Section 1 -- their conjunction is inconsistent with Entitlement Principle 1, which expresses his resource-based conditions for a distribution to be just.

2.1

According to Entitlement Principle 1, whether person X is entitled to compensation depends on facts about the average counterpart (facts about which policy the average counterpart would have bought). In contrast, according to Entitlement Principle 2 and Own Lights Reason, whether person X is entitled to compensation depends on facts

about the actual person X (facts about which lives X considers successful for X). This is the source of the difficulty. Since X may differ, as does Jane, from the average counterpart, these two types of facts -- facts about actual X and facts about the average counterpart -- may yield conflicting verdicts about X's entitlement to compensation.

By the same token, Equality of Resources will still be inconsistent if Entitlement Principle 1 is replaced with a principle that mentions facts that are about the average counterpart but are not about which policy it would buy. By the same token also, Equality of Resources will still be inconsistent if Entitlement Principle 2 or Own Lights Reason is replaced with a principle that mentions facts that are about X but are not about reasons that X might have or about how X wants to live.\(^{135}\) I will here pursue the question of which principle we should reject in order to make Equality of Resources consistent, setting aside the question of whether some other sort of substitution might work.

Should we reject Entitlement Principle 1? Recall Dworkin’s practical motivation for using facts about the average counterpart: facts about counterparts are used, because actual choices cannot be the ones that matter for distributive justice, and facts about the average counterpart are used, because the state cannot know and shouldn’t seek to discover which policy a particular person’s counterpart would buy. He also has a paternalistic motivation: forcing persons to buy the policy that the average counterpart

\(^{135}\)C. M. MacLeod has presented several refutations of Equality of Resources. Each is based on the fact that this Theory gives the conditions for a just distribution in terms of attitudes that persons actually have. The Satisfied Cripple Argument is the same as MacLeod’s in this respect, except that the Satisfied Cripple Argument focuses on persons’ attitudes about how they should live, whereas MacLeod’s focuses on attitudes to risk (MacLeod (1992)).
would buy creates, in effect, a social safety net, which Dworkin thinks there should be. Of course, Choice Sensitivity and Endowment Insensitivity could be implemented by a principle that does not mention facts about the average counterpart, as long as this principle has a suitable counterfactual component so that which distributions are just does not depend on preferences formed or choices made in unjust circumstances.

Whether Entitlement Principle 1 should be rejected depends on whether there is such a principle. But, in any case, there are several reasons to reject Own Lights Reason and Entitlement Principle 2.

First, Own Lights Reason is false:

Own Lights Reason: A person X has reason to believe that X's being F is a handicap if and only if the following conditions are satisfied:
1. X's being F constitutes an obstacle, all things considered, to X's living a particular life that X believes to be a successful life for X and desires to live;
2. X believes that X's being F constitutes an obstacle, all things considered, for X.

Suppose that, because Jane hates her brother, it is psychologically possible for her to lead a life she considers successful even if she thinks he is faring badly. Suppose also that he cannot lead a life successful by his lights because he spends his life looking after his sister, whereas he could if he did not look after her. (He does not find looking after her fulfilling, but feels obliged to.) Intuitively, even though she leads a life successful by her lights, she does have reason to consider herself handicapped, since her condition prevents her brother from leading a life that is successful by his lights. Own Lights Reason is incompatible with this intuition, because whether someone is entitled to compensation depends solely on her attitudes. I will not rest my case for rejecting Own
Light Reason on this argument; however, as some persons might think that it is Jane's brother who is handicapped, not she. Moreover, one might object that, if Jane is handicapped merely by dint of interfering in her brother's life, then by the same lights, a sadist is handicapped, but this is absurd.

Second, implementing Entitlement Principle 2 and Own Lights Reason would require persons to disclose what their concept of the good is to the government if they wish to claim compensation. Dworkin takes it as axiomatic that a state must treat each of its members with respect and concern. However, on the plausible assumption that information about a person's conception of the good is often of a highly personal nature, such a policy must be disrespectfully intrusive.\textsuperscript{136}

Third, Dworkin must reject Entitlement Principle 2 and Own Lights Reason for his reply to the classic Sufficientarian Objection to be effective. Sufficientarians consider it unjust if anyone has less than enough. Enough is a placeholder for a description of particular goods, for example, access to basic health care and a particular level of income. According to Sufficientarians, Equality of Resources is false because -- they think -- it allows, and may even require, persons to have less than enough, because it includes Choice Sensitivity. Suppose that Charles chooses not to buy medical insurance at time $t$, becomes blind at $t+1$ and is, consequently, desperately poor at $t+2$.

Sufficientarians allege (wrongly) that Equality of Resources implies that Charles is not

\textsuperscript{136}Jonathan Wolff has argued that there is a tension between the egalitarian ideals of fairness and respect. In order to implement fairness, an egalitarian state must know particular facts about persons, for example, how marketable their talents are, facts about which it would be disrespectful to inquire and which it could undermine an individual's self-respect to disclose (Wolff (1998, Spring)).
entitled to compensation for going blind, since otherwise the distributions at \( t + 1 \) and \( t + 2 \) would not be sensitive to Charles' choice against buying insurance. Then Sufficientarians reject this alleged implication as incompatible with justice.\(^{137}\)

Dworkin's reply is that Sufficientarians have misunderstood his Theory, which holds that whether or not a person is entitled to compensation is determined by Entitlement Principle 1: by the hypothetical choice of the average counterpart about which policy to buy, not by that person's choices of whether to buy insurance (he may never have had a fair chance to buy insurance). Entitlement Principle 1 deems Charles entitled to adequate compensation for going blind because, in a suitable initial situation, it is rational for the average counterpart to insure against going blind.\(^ {138}\)

The Satisfied Cripple Argument gives a viable reason, whereas the Sufficientarian Objection does not, for believing that Dworkin's Theory implies that Charles is not entitled to compensation for going blind. Dworkin's reply to the Sufficientarian Objection is ineffective unless he rejects Entitlement Principle 2 and Own Lights Reason, because the conjunction of these two principles implies that Charles is

\(^{137}\)Sufficientarians believe that because Equality of Resources implies Choice Sensitivity, Equality of Resources forbids the state to reduce inequalities caused by differences in persons' choices. In chapter 1, I showed that this interpretation of Choice Sensitivity is not Dworkin's. I owe the statement of Sufficientarianism in the text above to Andrew Williams. For the Sufficientarian Objection, see Elizabeth Anderson (1999); Appiah (2001, April 26); Arneson (2002); and Fleurbaey (2002, October), p. 90.

\(^{138}\)Dworkin also claims that there should be a tax-and-redistribution scheme that plays the role of mandatory insurance (Dworkin (2002, October), p. 114).
not entitled to compensation at \( t + 1 \), contradicting Entitlement Principle 1’s implication that he is entitled to compensation at \( t + 1 \).\footnote{One might argue that the conjunction of Entitlement Principle 2 and Own Lights Reason is sometimes preferable to Entitlement Principle 1. Suppose that Isabel lives in a society \( O \) that Dworkin counts as distributively just. Dworkin is committed to holding that \( O \)’s government must give each person \( X \) in \( O \) any compensation to which \( X \) would be entitled if \( X \) owned the policy that the average counterpart would buy. Suppose also that Isabel is sacked from her well-paid job. However, she considers being sacked a piece of extremely good fortune. She can afford to retire and she would much rather retire now: her job required her to work long hours in a stressful environment, whereas her personal philosophy says that one should lead a calm and leisurely life. In fact, she would refuse the chance to have her job back on fair terms. Let us make the reasonable assumption that the average counterpart would insure against being fired. Entitlement Principle 1 implies that Isabel is entitled to compensation for being fired, because \( O \) is just and the average counterpart would insure against being fired.

However, intuitively, Isabel is not entitled to compensation for being fired: she is not needy enough to be entitled to compensation, which is funded by tax revenue garnered from other persons’ resources. Entitlement Principle 1 is incompatible with the intuition that Isabel is not entitled to compensation. However, the conjunction of Entitlement Principle 2 and Own Lights Reason is compatible with this intuition: Own Lights Reason implies that Isabel does not have reason to regard her being fired a handicap. Since she does not have reason to regard her being fired a handicap, Entitlement Principle 2 implies that she is not entitled to compensation for being fired. One might conclude that Dworkin should retain Entitlement Principle 2 and Own Lights Reason, instead of Entitlement Condition 1.

However, I will next argue, Entitlement Principle 1 can accommodate the intuition that Isabel is not entitled to compensation for being fired. It seems plausible that the insurance policy that the average counterpart would buy would give redundancy insurance only to persons who are both in need and willing to work (call this policy Conditional Policy), but Isabel meets neither condition. The average counterpart would buy Conditional Policy, for the following reasons. Conditional Policy covers all disastrous outcomes, including being fired while in need. Further, Conditional Policy is cheaper, it is plausible to suppose, than policies that give redundancy compensation to any claimant. This objection brings out how much Dworkin must build into insurance policies for his Theory to accommodate our intuitions about distributive justice.}
attitudes, irrespective of whether they are, as a result of social injustice, insufficiently rational, reflective or informed. For instance, a cripple might believe, as a result of being brainwashed, that her being crippled is not a handicap for her. Because of her attitude, this conjunction implies that she is not entitled to compensation for being crippled.

Thus, by Dworkin's own lights, he must reject this conjunction.

In sum: there are compelling reasons for Dworkin to reject Entitlement Principle 2 and Own Lights Reason. But there is a problem: if he does, his wider case for his Theory is *prima facie* weakened: Entitlement Principle 2 and Own Lights Reason are premises in his refutation of Cohen's objection to Dworkin's resource-based Theory. Without these premises, Dworkin has no refutation, but he has nevertheless an important interest in defeating this objection. Can he refute this objection if he denies one or both of these two principles? In the next two sections, I argue that he can.

2.2

In this section, I explain Cohen's objection to Equality of Resources and Dworkin's reply, and why I think Dworkin can defend his Theory without Entitlement Principle 2 and Own Lights Reason.

2.2.1

Cohen endorses Equal Access to Advantage:

Equal Access to Advantage: A distribution is just if and only if it was caused by a situation in which the level of advantage that each adult person has or had at the beginning of his or her adult life is equal.
Advantage, as Cohen uses the term, refers to several types of goods; we can here assume that the only form of advantage is preference satisfaction.\textsuperscript{140} Providing equal access to advantage is a matter of ensuring that persons are equally able to satisfy whichever preferences they have, even though, at the beginning of their adult lives, some persons are wealthier, or have more marketable talents, than others. Thus Cohen is committed to compensating Paul for having a particular personality feature if this is required to ensure that each person is equally able to satisfy his preferences, even if Paul has no reason to believe that he is less fortunate, all things considered, than anyone who lacks this personality feature but is otherwise identical to him.

2.2.2

Cohen's objection to Dworkin's Theory (Equality of Resources) is as follows. Consider Paul, who cannot help hating fishing (a relatively inexpensive hobby) and loving photography (a relatively costly hobby and one that Paul cannot afford to pursue). Cohen stipulates that Paul does not reject his taste, although Paul regrets the fact that photography is so costly, and that Paul will feel frustrated, at least for some time, if he cannot satisfy his taste.\textsuperscript{141} Fred, on the other hand, prefers fishing to photography, and as such, is more efficient at converting resources into welfare than Paul. If they start with

\textsuperscript{140}Advantage includes welfare and resources. Cohen leaves the reference of advantage partly unspecified to allow for the discovery of other forms of advantage (Cohen (1989, July), pp 916-17).

\textsuperscript{141}Cohen does not spell out the sense in which Paul's taste is "involuntary". Let us understand a voluntary taste to be a taste that the subject chose to acquire or to retain, or could make choices so as to lose or acquire the taste with reasonable chances of success. Since Paul's taste is involuntary, then, it cannot result from such choices.
the same level of resources, as Dworkin contends they should, Paul will not be able to achieve as high a level of preference satisfaction as Fred, all other things being equal.

Cohen argues that Dworkin’s Theory is false, for the following reason. It is intuitively true -- Cohen baldly claims -- that Paul should receive more resources than Fred. Yet Paul’s taste is a feature of his personality he does not regret having and Dworkin claims that a person is not entitled to compensation for any feature of his personality, unless he regrets having it. (This claim is implied by Entitlement Principle 1, given that it would be irrational to insure, for instance, against being lazy: such a policy would be prohibitively expensive and the compensation low).\(^\text{142}\) Cohen also concludes that there is a prima facie reason to accept his own Theory, Equal Access to Advantage, since it accommodates this intuition. Since Paul has more expensive tastes than Fred, Paul is less able to satisfy his preferences than Fred is able to satisfy his, so Equal Access to Advantage grants Paul more resources than Fred.

2.2.3

As I explained in 1.3.1, the thrust of Dworkin’s reply is that, for it to be plausible that Paul is entitled to compensation for loving photography, his loving photography must be a handicap for him, but it is not.\(^\text{143}\) Dworkin claims that each premise of the following argument is intuitively true: First, if Paul is a normal person -- which Dworkin stipulates Paul is -- Paul does not consider it a handicap to love photography, because he does not


\(^{143}\) Elsewhere, Dworkin allows that some tastes are compensation-worthy, but only those that are handicaps (Dworkin (2000/1981), p. 82). Norman Daniels agrees with Dworkin that person X, who has a taste that is a handicap, is entitled to something, but holds that X is only entitled to therapy to help X get rid of that taste (Daniels (1990, Fall), p. 289).
believe that his loving photography is an obstacle, all things considered, to his living a life that he believes is successful for him and would not be prepared to cease loving photography if he could. In general, one does not believe that the features of one's personality (features of oneself that one does not reject) are obstacles, all things considered, to one's living a life that one believes successful for oneself. Second, Paul can sincerely request compensation for his loving photography only if he does consider his loving photography an obstacle, all things considered, to his living a life that he believes is successful for him. In general, one can sincerely request compensation only for things one considers handicaps or obstacles in relation to one's goals.

Therefore, Dworkin reasons, Paul cannot coherently request compensation for his taste for photography. In general, we cannot sincerely seek compensation for features of our personalities.\textsuperscript{144} But Paul is entitled to compensation only if he can sincerely ask for it: compensation must make sense from the recipient's point of view. So Paul is not entitled to compensation and because he isn't, the reply concludes, Cohen's objection poses no threat to Equality of Resources and gives no reason to accept Cohen's Theory.

Dworkin's reply to Cohen uses Entitlement Principle 2 and Own Lights Reason, in that together these claim that one is entitled to compensation for something only if one considers that thing an obstacle, all things considered, to one's living a life that one believes successful for oneself. Dworkin's reply inserts an intermediate step that motivates Entitlement Principle 2 and Own Lights Reason: one is entitled to

compensation for something only if one can sincerely ask for compensation for that thing and 
one can sincerely ask for compensation for that thing only if one considers that thing an 
obstacle, all things considered, to one’s living a life that one believes successful for 
one self.

Can Dworkin rebut Cohen’s objection and response without using Entitlement 
Principle 2 and Own Lights Reason? Dworkin can: I will argue that it is not the case that, 
intuitively, Paul is entitled to more resources than Fred, whether the object of 
compensation is Paul’s loving photography or the fact that, in the circumstances, his 
taste is relatively expensive to satisfy. If my contention is correct, then Cohen’s objection 
and reply pose no threat to Equality of Resources and give no reason to accept Cohen’s 
Theory because neither the objection nor the reply give an intuition that Cohen’s Theory 
but not Dworkin’s can accommodate. First, I will argue for my claim by appealing to the 
notion of entitlement. Then, I will attempt to explain away Cohen’s intuition that Paul is 
entitled to compensation. Last, I will show that Dworkin can himself give this argument 
to refute Cohen’s objection.

It is intuitively true that whether or not we have the following three entitlements, 
they are ordered with respect to strength and the first entitlement is the strongest:

1. An entitlement to have enough nutrition and health care to survive;
2. An entitlement to have opportunities to learn photography and 
opportunities to use communal photographic equipment; and 
3. An entitlement to have resources with which to purchase photographic 
equipment of one’s own.
In order to take seriously the notion of entitlement, we must say that a person who is entitled to a thing $Z$ has a claim against the government to be provided with $Z$. But it is absurd that Paul should have a claim against the government to be provided with a greater share of resources merely by dint of possessing a relatively expensive taste that he did not deliberately acquire, as distinct from possessing a need.

Let a non-derivative need be a need that does not derive from a desire. For instance, we have a non-derivative need for enough nutrition to survive. Even if, in a fit of depression, we did not desire enough nutrition to survive, we would still need this. It is implausible that we have a claim against the government to be provided with things that we need only because we desire them. The government meets the claims made against it with tax revenues. That a particular person $X$ has a desire that does not correspond to a non-derivative need does not give the government a sufficiently weighty reason to coerce other persons into giving up their resources so that $X$’s desire can be satisfied. The government would be unfair to persons if it coerced them to give up their resources for such a reason. Paul lacks a non-derivative need to have resources with which to purchase photographic equipment of his own: he needs these things only because he desires them. We must therefore deny that he has the third entitlement.

Cohen might respond that, by Dworkin’s lights, an ethical theory must accommodate our important intuitions; intuitively, Paul is entitled to resources with which to purchase photographic equipment of his own even if there is a sound theoretical argument for the claim that Paul is not. However, first, every step of my argument is driven by intuition. The force of my argument is simply that we must reject
Cohen's intuition if we take the relevant facts about the source of compensation into account: if we broaden our perspective from Paul to the other persons who must, according to Cohen, give their resources to Paul. Indeed, we must assert that, intuitively, Paul is not entitled to compensation. Second, even if only photography will make Fred happy, the correct response -- as Norman Daniels points out -- is that he is entitled only to therapy to enable him to deal with his disappointment.  

We can explain away why one might be inclined to say that Paul is entitled to compensation: the intuition is not that Paul has entitlement 3, but that, in a reasonably prosperous society in which sufficient numbers of persons are interested in doing photography, Paul has entitlement 2. Paul must live in a fairly wealthy society for it to be remotely plausible that he has entitlement 3. Thus we must reject Cohen's objection to Equality of Resources and deny that it gives reason to accept Equal Access to Advantage.

I will next show that Dworkin can himself use my argument that Fred is not entitled to compensation. Admittedly, Dworkin's Theory does not distinguish derivative from non-derivative needs. However, there seems to be no positive reason for denying that Dworkin can. Moreover, there is a Dworkinian move that he can make: to make the same cut in terms of the distinction between events against which it is rational to insure and events against which it is not. It is disastrous not to be able to satisfy one's non-derivative needs. Thus, it is rational to buy a policy that ensures that one can always satisfy one's non-derivative needs, even though insurance is technically a "bad buy": it

145Daniels (1990, Fall).
is more expensive than its expected value. Therefore, the average counterpart buys such a policy and a society that is just by Dworkin’s lights redistributes goods to ensure that each person can satisfy his non-derivative needs. However, it is not so disastrous not to be able to satisfy one’s derivative needs to the point that it is rational to buy a policy that ensures that one can always satisfy them. It would be particularly irrational to buy such a policy given that it will presumably be prohibitively expensive and yield little compensation. Therefore, the average counterpart does not purchase such a policy and a society that is just by Dworkin’s lights does not redistribute goods to ensure that each person can satisfy their non-derivative needs. However, suppose one denies that Paul has a non-derivative need for opportunities to pursue an education in photography and use photographic equipment. Still, Dworkin thinks that, for a distribution to be sensitive to the relevant choices, persons must have particular important liberties. Therefore, Dworkin could present my argument even though he does not use its concepts.

I have argued in this section that Dworkin should resolve the inconsistency in his Theory and eliminate his Theory’s absurd implication by rejecting Entitlement Principle 2 and Own Lights Reason. I have also argued that he can still refute Cohen without these principles by distinguishing between levels of entitlement.

Conclusion

Like Chapter 3 but unlike Chapter 1, this chapter raises a problem for Dworkin that is soluble — although the solution in this chapter is more complex than that in Chapter 3 because resolving the inconsistency simply by rejecting Entitlement Principle 2 and Own

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Lights Reason exposes Dworkin's Theory to assault from a rival Theory. Why should an inconsistency that can be eliminated from Dworkin's Theory without weakening its standing relative to its rival interest us?

The inconsistency illuminates Dworkin's strategy and the perils of taking it, just like the failure of Dworkin's argument against Rawls (see Chapter 2). Dworkin assumes vague principles that he then uses to develop, and finally justify, institutions to bring about distributive justice: initially, institutions for a hypothetical society and, then, for an actual society. The source of the inconsistency is that he attempts to defend his account of distributive justice for an actual society with a principle that he must reject in rendering practicable his account of distributive justice in his hypothetical society, namely, the conjunction of Entitlement Principle 2 and Own Lights Reason: as he himself recognizes, it is simply not feasible for an actual state to find out whether Jane satisfies Entitlement Principle 2 and Own Lights Reason in its attempt to determine whether or not she is entitled to compensation.
Conclusions of the Dissertation

In this dissertation, I endorse the views that a plausible Theory must include Choice Sensitivity and that the choices falling under Choice Sensitivity include hypothetical choices. However, I reject a particular account of distributive justice based on Choice Sensitivity --Ronald Dworkin’s account -- and a particular interpretation of Choice Sensitivity in terms of hypothetical choices, namely, Dworkin’s interpretation.

Having shown that Dworkin’s critics have overestimated the role of actual choices in his Theory, I argue that we should reject his views about which hypothetical choices fall under Choice Sensitivity and the roles of hypothetical, and actual, choices in determining whether a distribution is just. I argue that we should distinguish between the conditions of entitlement to compensation that apply to person X and whether or not X meets these conditions. A particular choice may fall under Choice Sensitivity insofar as this choice plays a role in determining these conditions, but may play no role in determining whether X meets them. Similarly, a particular choice may fall under Choice Sensitivity insofar as it plays a role in determining whether X meets the compensation conditions, but may be irrelevant to determining the conditions themselves.

I show that, according to Dworkin, the choice of the average counterpart almost entirely determines the conditions for entitlement to compensation that apply to each member X of society. Furthermore, I argue that these conditions depend hardly at all, in the general case, on X’s preferences, since the average counterpart’s choice depends to a negligible degree on X’s choice except in the unlikely event that X is a member of a small, conformist society whose citizens are rational. Depending on the policy the
average counterpart chooses, I show, whether X meets the conditions for entitlement to 
compensation may depend also on X's hypothetical choices or on X's choices or on no 
choices at all. It is plausible to suppose that societies differ with respect to which of X's 
choices, if any, determine whether X satisfies the compensation conditions for that 
society.

I reject Dworkin's reasons for holding that, for each society, the average 
counterpart's choices determine the conditions for entitlement to compensation that 
apply to X. He thinks that a Theory must be practicable, that is to say, it should be 
possible to make a society's distributions just within a reasonable space of time and to 
verify whether a particular distribution is just. His chief reason for deeming the average 
counterpart's choice relevant is that doing so enables his Theory to be practicable. 
Dworkin thinks that if the Theory he gives for an actual society were the same as the 
Theory he gives for the hypothetical society then the Theory would be impracticable, for 
the following reason. The sort of auction that Dworkin thinks achieves distributive 
justice in his hypothetical society cannot be held in practice and the necessary and 
sufficient conditions for a hypothetical distribution to be just (which Dworkin leaves 
implicit but I make explicit) are stated in terms of unverifiable facts about particular 
counterparts' choices. To enable practicability, he couches the necessary and sufficient 
conditions (CS Actual) in terms of facts he considers verifiable about the average 
counterpart's choices and bases his tax-and-redistribution scheme on the average 
counterpart's choice too.
I also argue that Dworkin gives us no reason to consider the average counterpart's choice relevant. Dworkin thinks that there must be a safety net, but I show that this is much more reliably provided by stipulating one into existence than by relying on the average counterpart's choice. Another of Dworkin's reasons is his belief that a Theory must be practicable. This belief is false. To prove this, I use the weakest notion of practicability that it is reasonable to suppose Dworkin uses, according to which the only societies in which it must be possible to achieve distributive justice within a reasonable time-frame are actual, current societies that have reached economic prosperity and stability. I argue that there are societies of this description that cannot achieve distributive justice within a reasonable time-frame and conclude that a Theory need not be practicable.

Furthermore, I argue, the average counterpart's choice does not, intuitively, determine the conditions of entitlement to compensation that apply to each of us. These conditions have a massive impact on our lives, yet on Dworkin's account, we generally have negligible influence on what these conditions are. Also, suppose that I am extremely risk-averse and everyone else in my large society is risk-loving, as a result of which there is little in the way of social services. Suppose also that there is only one low-risk career option. It follows that I have no real choice of careers whereas others do, violating an equal freedom principle governing the choice of careers. I argue that, to prevent such violations, Dworkin must incorporate such a principle into his interpretation of Choice Sensitivity and also into his necessary and sufficient conditions for a distribution to be just.
Summing up, I do not challenge the relevance of hypothetical choices to distributive justice. Unlike Scanlon, I do not challenge the relevance of hypothetical choices made by rational, purely self-interested beings ignorant of their social position. I do not challenge Dworkin’s account of distributive justice for a hypothetical society either. Nor do I reject all accounts of distributive justice for an actual society according to which the choices that a particular person X would make in the original position determine the conditions for X to be entitled to compensation.\textsuperscript{147} Rather, I reject Dworkin’s reasons for stating his account for an actual society in terms of a particular hypothetical choice -- the average counterpart’s choice -- and I argue that this account is false. I argue that other hypothetical choices may play a role in determining both the conditions for entitlement to compensation that apply to X and whether X meets them. I then lay aside my concerns about Dworkin’s interpretation of Choice Sensitivity, assume my new interpretation of ER and reassess ER relative to rival Theories and in the light of some objections. I argue that my interpretation of Dworkin’s Theory renders it more plausible in some respects and in other respects less plausible than it previously seemed. I also point to two problems for Dworkin rooted in his practice of justifying his final account of distributive justice for an actual society in terms of the vague principles of which he claims this account is the best interpretation: first, his Theory is inconsistent and, second, his \textit{prima facie} plausible argument against Rawls, on closer inspection, is not plausible at all.

\textsuperscript{147}This is not an account that Dworkin endorses.
I show that ER can withstand some important objections widely considered fatal to it: for instance, Seana Shiffrin's objection that there is a tension between the egalitarian commitments to choice-sensitive distributions, on the one hand, and equal freedom, on the other.\footnote{Shiffrin (2003).} Shiffrin's objection does not harm ER, I argue, because Dworkin does not endorse the version of Choice Sensitivity that Shiffrin attributes to egalitarians: a version that prohibits the reduction of inequalities due to differences in actual choices. However, I argue, Shiffrin is correct insofar as there is a related problem, which I have already explained: Dworkin needs to build a particular, equal freedom principle into his accounts of Choice Sensitivity and of a just, actual distribution, yielding CS Actual-Freedom:

CS Actual-Freedom: An inequality $N$ at time $t$ between $X$'s resource value and $Y$'s resource value is just if and only if:

1. If everyone paid the state the price of the policy that the average counterpart would buy and were compensated according to the conditions attached to that policy, $N$ would still exist; and
2. The Minimal Equal Freedom Principle: Each member of society must be able to choose among several professions.

From the perspective of the entire dissertation, I am committed to claiming that CS Actual-Freedom is false. I argued, in Chapter 1, that we must reject CS Actual, because the average counterpart's choice is irrelevant to determining the conditions for entitlement to compensation that apply to $X$. The only reason Dworkin proposes for accepting CS Actual rather than a more individualistic principle of distributive justice is that, of the principles he considers (CS Hypothetical and CS Actual), only CS Actual is
practicable. However, I argued, pace Dworkin, the best Theory does not need to be practicable. Since CS Actual and CS Actual-Freedom differ merely in whether they require equal freedom to choose between professions, CS Actual-Freedom, like CS Actual, holds that the average counterpart’s choice plays a role in determining these compensation conditions.

Suppose, however, that we need a practicable Theory and, for this reason, accept that the average counterpart’s choice is relevant to distributive justice. I concede that, if all or most of a society’s inequalities satisfy CS Actual-Freedom, it may be that the society is as just as it can be or can be known to be. Whereas an implication of Chapter 1 is that Dworkin’s Theory has a deep flaw -- the Theory is stated in terms of the wrong choices -- the flaw I identify in Chapter 3 is eliminable, as I show, but it is nonetheless significant. To say the least, my Juliet-Andrew argument shows that Dworkin has overestimated the extent to which the average counterpart’s choices determine the conditions of entitlement to compensation that apply to each member of society. My argument shows that we should reduce the potentially damaging role of the average counterpart’s choice by adding constraints to Dworkin’s Theory such as the Minimal Equal Freedom Principle. We may then accept that CS Actual-Freedom is not, strictly speaking, true, but gives the necessary and sufficient conditions for a distribution to be as just as a distribution can be or can be known to be in practice.
I argue, in Chapter 2, that we must reject Dworkin's *prima facie* plausible argument that his Theory is more attractive than Rawls'. Dworkin argues that his Theory, but not Rawls', meets a necessary condition for a Theory to be plausible, namely, that the distributions the Theory deems just must satisfy Choice Sensitivity and Endowment Insensitivity. I contend that Rawls' Theory passes all the tests that Dworkin sets a Theory and his own Theory passes, even though Rawls' principle of justice implies neither Choice Sensitivity nor Endowment Insensitivity.

I argue that Rawls' Theory requires each person's basic liberties to be protected and requires equally motivated, equally talented persons to have equal chances of success in their professional lives. These requirements cannot be satisfied, I contend, unless the state gives special aid to handicapped people, thereby bringing about distributions that are insensitive to endowments. Further, Rawls' Theory requires each social position to be maximized, from the bottom position upwards, and this can be accomplished in the long run, I argue, only if distributions are sensitive to choices.

In Chapter 4, I point to an inconsistency in Dworkin's account of a just distribution and show that it can be resolved without leaving Dworkin's Theory vulnerable to attack by a prominent rival Theory. Why should an inconsistency that turns out to be inessential to ER interest us? The inconsistency illuminates Dworkin's strategy and the perils of taking it. Dworkin assumes Equal Respect and Concern and then interprets Equal Respect and Concern in terms of less vague principles, which he uses to develop, and finally justify, institutions for bringing about distributive justice:

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initially, institutions for a hypothetical society and, next, for an actual society. The
source of the inconsistency is that he attempts to justify the conditions for entitlement to
compensation that he proposes for an actual society (Entitlement Condition 1) with a
principle that he has had to drop from his account of distributive justice in rendering
practicable the institutions he designs for achieving distributive justice in the
hypothetical society (the conjunction of Entitlement Condition 2 and Own Lights
Reason).

This problem concerning justificatory strategy is also, I contend, at the root of the
failure of Dworkin's argument against Rawls. Although Dworkin's final proposal (the
tax-and-distribution scheme) commits him to an interpretation of Choice Sensitivity that
allows the partial reduction of inequalities due to differences in choices, he uses an
uninterpreted version of Choice Sensitivity to argue against Rawls, which is naturally
understood as forbidding the partial reduction of such inequalities. Dworkin's argument
loses its 

\textit{prima facie} plausibility once we run it in terms of the interpretation to which his
tax-and-redistribution scheme commits him: Weak Choice Sensitivity, which allows the
reduction of such inequalities. I argue that, although Rawls' Theory does not imply
Weak Choice Sensitivity or Weak Endowment Insensitivity, distributions that this
Theory considers just, as a matter of fact, satisfy these principles.
Bibliography


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