

AN INCOMPLETE INCLUSION OF NON-COOPERATORS INTO A RAWLSIAN THEORY OF JUSTICE

Abstract: Over the past decade, John Rawls’s theory of justice has been criticized for being unable to address the needs of disabled individuals or non-cooperators – because he employs the “fully cooperating assumption”. In response, philosophers sympathetic to Rawls’s project have extended his theory to meet these criticisms. My aim is to critically assess one such extension, by Cynthia Stark, which is one of the few extensions which is sensitive to Rawls’s reasons for employing the assumption initially. Stark proposes that we drop Rawls’s assumption in the constitutional stage (of his four-stage hypothetical sequence), and address the needs of non-cooperators via the provisions of the social minimum. The deliberative parties, knowing that they could be non-cooperators, would ensure that the social minimum is as high and as comprehensive as possible. I defend Stark’s proposal against criticisms by Sophia Wong, Christie Hartley, and Elizabeth Edenberg and Marilyn Friedman – during which I also briefly assess their projects. Nevertheless, I argue that Stark’s proposal is crucially incomplete. Her formulation of the social minimum lacks accompanying criteria with which the adequacy of the provisions for non-cooperators may be assessed. Moreover, it seems unlikely that such criteria may be found, given pluralism about conceptions of the good. Thus, despite initial appearances, Stark’s proposal does not fully address the needs of non-cooperators. My discussions clarify how the issue of adequacy (of provisions) is crucial, and must likewise be addressed by other Rawlsian extensions. I conclude by considering two additional payoffs of this clarity.

1 Introduction

John Rawls describes the “fundamental question of political justice” as working out “the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life” (1993, 20). The latter, “fully cooperating assumption” is an idealizing assumption. Rawls’s intention is to work through the simpler, ideal case – where citizens are healthy and fully cooperating – and leave open whether his theory is extendable to address non-ideal cases. His account of justice, worked out only for persons thus described, is therefore provisional and open to revisions. Even so, the fully cooperating assumption has received sustained criticism over the past decade, with many philosophers regarding it as a stumbling block for Rawls’s theory in accounting for why and how we should distribute resources to address the justice claims of non-cooperators of society – the impaired or disabled – rather than dismissing their concerns as irrelevant to justice.¹ However, the discussions have been far

¹ Notable works are by Eva Kittay (1999) and Martha Nussbaum (2003; 2007).

from clear. Several critics appear to neglect the provisional nature of Rawls's project. Rawls does not see his project as giving a final account of justice, and allows for his theory to shift in accordance with our considered judgements² – which have changed considerably since Rawls's time, to include more reasonable attitudes towards the disabled. Pointing to problematic elements (such as the fully cooperating assumption) within Rawls's theory is successful only in showing that Rawls may have failed to account for our considered judgements about the disabled within his theory – and therefore that his theory, *as it stands*, offers insufficient grounds to address the justice claims of non-cooperators. However, it is insufficient to establish the crucial claim that his theory cannot be *extended* to account for justice for the disabled. Rawlsian philosophers have recognized this,³ and have supplemented creative, albeit piecemeal, extensions. Beyond this, and more generally, a major debate continues about whether any theory of justice can coherently address the non-standard justice claims of disabled citizens.

According to Rawls's critics, the fully cooperating assumption commits him to the unpalatable conclusion that disabled individuals, who are not cooperating members, are not citizens. Thus, he dismisses the concerns of such individuals as lying outside the fundamental concerns of justice. Rawlsian philosophers have devised various modifications of Rawls's theory to meet this criticism. Some, such as Henry Richardson (2006), begin by assuming the correctness of these criticisms, and propose eliminating the fully cooperating assumption altogether. This alters the initial situation in which the hypothetical parties deliberate about principles of justice. The needs of non-cooperators are present from the start, and have to be taken into account. The principles which subsequently emerge are thus fundamentally sensitive to these needs, rather than supplemented in an *ad hoc* fashion. Others, like Christie Hartley, instead argue for broadening the concept of cooperation. This relaxes the requirement of who counts as a cooperating citizen, and thus locates space within Rawls's theory to address the needs of many disabled individuals (2009a; 2009b).⁴ There are also those, like Samuel Freeman, who deem as adequate the theoretical mechanisms that Rawls provides. The general argument is that non-cooperators' claims to the social good are saliently different from those of cooperating citizens. Thus, the issue of distributive justice for non-cooperators should be considered at a different level from that for cooperating citizens – beginning from Rawls's discussions of natural duties or human rights (2006).

The debates about whether Rawls's theory contains sufficient resources to ground distributive justice for disabled citizens have gone on for more than a decade, and

² See Burton Dreben (2003) for a thorough discussion of the relationship between Rawls's theory and our considered judgments

³ This recognition, concerning non-cooperators, is put forward explicitly by Adam Cureton (2008).

⁴ In a similar vein, Cureton (2008) argues that we can relax the cooperating assumption, such that the parties behind the veil of ignorance know that they are choosing principles for a society that includes non-cooperators. Other Rawlsian extensions involve modifying other concepts, such as Lawrence Becker's (2005) arguments for broadening the concept of reciprocity employed within the framework.

I do not wish to add to the interpretive disagreements.⁵ In this paper, I consider the natural subsequent question of how well one of these Rawlsian extensions, by Cynthia Stark (2007), fares in providing guidance for accounting for non-cooperators' needs.⁶ I will not further justify my focus on Stark's extension, beyond noting that it is one of the few extensions which connects well with, and is meticulously responsive to, Rawls's emphasis on an explicit order of priority among different and, at times, competing considerations of justice.

I first reconstruct Stark's proposal to drop the fully cooperating assumption at the constitutional stage of Rawls's four-stage hypothetical sequence, and address the needs of non-cooperators via a social minimum that is as high and comprehensive as possible. The social minimum already exists within Rawls's account, serving as a "safety net" of sorts in addressing the needs of the disadvantaged. Stark's contribution consists in extending its scope to include non-cooperators. I then defend and qualify Stark's proposal in response to criticisms made by Sophia Wong (2009), Christie Hartley (2011), and Elizabeth Edenberg and Marilyn Friedman (2013). While Stark's central proposal survives these criticisms, I argue that it is nevertheless crucially incomplete. In the third section, I argue that her extension of the social minimum lacks accompanying criteria with which we can assess the adequacy of its provisions for non-cooperators. Rawls's original criteria – tied to the aims of fully cooperating members of society – are unavailable to Stark upon her extension. Thus, despite initial appearances, her proposal does not fully account for the needs of non-cooperators. My goals are modest – only to point out the salience of the missing criteria of adequacy to Stark's modification of Rawls's theory, and its resistance to easy resolution. I conclude by briefly considering two payoffs that emerge from my discussions.

2 Cynthia Stark's Extension

2.1 Cynthia Stark's Proposal

Like many Rawlsian philosophers, Cynthia Stark does not contest the claim that we should have an account of justice for the disabled, which explains how to meet their needs in relation to those of cooperators. Her extension of Rawls's theory thus begins from our wanting to account for non-cooperators, and is a way of specifying our obligations to them within Rawls's framework. The central question, then, is not *why* we should account for non-cooperators' needs, but *how* we should do so. It is in light of this initial motivation, that challenges to provide grounds for why we should account for non-cooperators are confused.⁷

⁵ There is nevertheless a need for a critical analysis that "makes order" among the numerous (and at times, competing) extensions of Rawls's theory that aim to account for disabled citizens.

⁶ In line with Rawls's project, these extensions assume away several complications present in the real world, such as those arising from non-compliance, illegitimate senses of entitlement, envy, or the like. In assessing these extensions, I keep to this commitment, while acknowledging that much has been said about the refusal of such "ideal theorizing" to face up to, and account for, the complications of our "non-ideal" world. See Kittay (2009) and Anca Gheaus (2009) for recent discussions of this evasion specific to considerations of disability.

⁷ A similar point is made by Rawls in his rejection of a Hobbesian framing of the fundamental political issue as concerning whether to engage in, or withdraw from, social cooperation. He

On Stark's account, non-cooperators are severely disabled individuals whose disabilities are 'in a certain sense absolute' (2007, 131). They cannot cooperate, even if the societies they live in commit to enabling them to do so. In our context, they comprise (but are not limited to) individuals with severe, un-ameliorable physical or cognitive limitations – for instance, from severe brain or spinal cord injuries, to dementia. Taking their (non-)cooperation status as key, Stark includes within this group 'both impaired persons and human non-persons' (2007, 131). A note: rather than adopt Stark's terminology, I refer to these groups of individuals as those with the relevant cognitive capacities, and those lacking them – which makes clearer the distinction between them.⁸ While Stark recognizes that the issue of distributive justice is different for these groups, she nevertheless chooses to group them together. We see later (in Section 3) how doing so leads to problems with her project of extension.

Stark's concern is with addressing the basic needs of non-cooperators, leaving aside healthcare needs. Basic needs are material in nature, such as "needs for food, clothing and shelter" (2007, 141). To address them, Stark proposes dropping the fully cooperating assumption at the constitutional stage – the second of Rawls's four-stage hypothetical sequence.⁹ The veil of ignorance is partially lifted, and the parties are tasked with crafting a constitution that realizes, and is limited by, the demands of the two principles of justice chosen in the original position. This includes specifying the constitutional essentials, one of which governs the social minimum (Rawls 1993, 230). The social minimum is part of the transfer branch, which transfers resources collected via transfers (such as taxes) to address citizens' needs (Rawls 1999, 252). It only "takes needs into account", and "guarantees a certain level of well-being" which is not tied to market forces (Rawls 1999, 244). Insofar as the social minimum addresses needs, it appears well-placed to meet the needs of non-cooperators. In dropping the fully cooperating assumption, the parties represent cooperators and non-cooperators. They know that they may be 'disabled in a way that prevents them from participating in a scheme of cooperation' (Stark 2007, 138). Taking this into account, they opt for a Starkian social minimum which accounts for both cooperators and non-cooperators, and which would be "as high and as comprehensive as possible, within the constraints imposed by the difference principle".¹⁰ Thus, they seek to "guarantee their well-being in case they should turn out to be dependent on the social minimum" (Stark 2007, 138). This coheres well with the parties' risk-averse strategy in the original position, of wanting to ensure maximally good conditions in case they turn out, upon the lifting of the veil, to be part of the least advantaged members in society.

responds that the parties begin from the recognition that they are *already* within society – and the task is to settle on principles to govern its institutions. See (Rawls 1993, 277).

⁸ For those who resist this construal, read all occurrences of the term as referring to the "two moral powers" Rawls describes (1999, xii).

⁹ Rawls's comments on the four-stage sequence may be found at (1993, 397-399; and 1999, 171-176).

¹⁰ This formulation is the same as that provided by Rawls. The difference lies in Stark's extending the scope of the social minimum.

Stark rejects dropping the fully cooperating assumption at the original position. Her first argument is that cooperation is a morally relevant fact, which cannot be hidden from the parties in the original position. It is unlike the morally irrelevant facts – such as race or religion – which Rawls excludes (Stark 2007, 135). Here, Stark appeals to Rawls’s description that cooperation is a relevant feature, in considering how to organize the basic structure of our society (Rawls 1993, 79). This is the element of Rawls’s theory that Stark opts to hold fixed, in her project of extension.¹¹

Stark suggests that there is another way to understand why we ought to keep the fully-cooperating assumption in the original position. Suppose the assumption were absent in the original position. The parties, being unaware of their abilities, and being risk-averse, would choose a principle that best protects their interests. In this way, their deliberation is not altered and they would choose the difference principle. This results in the principle becoming insensitive to cooperation and need. It would “distribute goods to citizens completely independent of their participation in the production of goods and independent of unusual needs” (Stark 2007, 136). The result, Stark claims, would be a defective difference principle.

The suggestion is implausible that the parties’ deliberation is unaltered and they will still choose the difference principle, unmodified in other ways, after dropping the fully cooperating assumption in the original position. This ignores crucial aspects of Rawls’s theoretical set-up. On Rawls’s account, the modelling of the initial choice situation, including the veil of ignorance, is dependent on our considered judgments about what is morally relevant from the perspective of justice (Rawls 2001, 80-88). So, the information obscured by the veil are those the parties judge as morally irrelevant – such as race or religion. There are several implications. First, given that Stark describes the parties as regarding the fact of cooperation to be morally relevant, they would reject a choice situation in which they would be unaware of it in their deliberations about principles of justice. They would refuse to be put under such a veil in the first place. To see this point another way: what would be their motivation for doing that? They would know, even before the principles are chosen, that the results will not be sensitive to the relevant fact of cooperation. Second, if the parties were nevertheless forced under the veil, they would instead choose a different distributive principle – rather than the difference principle. Within the broader context of the method of reflective equilibrium (which Stark and Rawls rely on), a change in the initial choice situation (the original position) has implications for the deliberations of the parties, and the principles subsequently chosen. In the absence of the fully cooperating assumption, the parties will choose another principle that still manages to account for the morally relevant feature of cooperation. Contrary to Stark, their deliberation *will* be altered. The parties’ deliberations does not result in a defective distributive principle, but a different one.¹² Nevertheless, given that the overall success of her proposal does not hinge on this suggestion, I do not pursue it further. I instead extract the general point that there will be serious

¹¹ Stark develops this view further in a subsequent paper (2009).

¹² Henry Richardson (2006) sketches out the possible implications (concerning the deliberations and choices of principles) of different modifications to the initial choice situation.

complications in dropping the fully cooperating assumption at the original position – which suffices for moving forward with our discussions.

Stark argues that her proposal “fulfills the liberal condition of legitimacy, which states that governing principles are legitimate only if they are justifiable to those subject to them” (2007, 139). The parties deliberating on the social minimum “must imagine” that they could be non-cooperators, and thus represent both cooperators and non-cooperators. The deliberations about, and choice of, principles are carried out impartially, and would be sensitive to considerations arising from the needs of both cooperators and non-cooperators. Stark recognizes the difficulties of describing the decisions as justifiable to non-cooperators lacking cognitive capacities, but argues that insofar as they are nevertheless represented by parties (who serve as their trustees), the decisions are justifiable. This appears to tie in well with Rawls’s description of the parties, when they recognize that they may lack (or possess to an inadequate level) the relevant cognitive capacities to advance their own interests. In those cases, other people are authorized to make decisions on their behalf (Rawls 1999, 218-219). This treatment, however, is too quick. It neglects to mention that this kind of decision-making is narrowly described in Rawls’s account. For Rawls,

“As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position. We try to get for him the things he presumably wants whatever else he wants” (1999, 219).

This constraint on surrogate decision-making is to be “guided by the principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods” (1999, 219-220). We leave aside the obvious remark that we do not have any account of the permanent aims and preferences of non-cooperators, and that primary goods may be poor means to address their needs. The crucial difficulty lies in the caveat that the decisions have to be made from the standpoint of the original position. For Rawls, this procedure is uncomplicated. In the original position, the parties want, among other things, fair principles that enable them to be fully cooperating members of society, and advance their conceptions of the good. These interests persist through all the four hypothetical stages, and are not disrupted even by misfortunes. After all, they *are* fully cooperating members of society over a complete life – and it is definitive of such members that they have these interests. While cognizant of the possibility of misfortune, the parties nevertheless know that whatever befalls them, they are not disabled to the point that they lose this interest permanently. Deciding on what they need in misfortune from the perspective of the original position, stays faithful to their overall interests. The task is then to address and ameliorate the disabling effects of misfortune, such that they can again advance their conceptions of the good.

This uncomplicated strategy is unavailable to Stark, given that she drops the fully cooperating assumption only in the constitutional stage, and not in the original position. The parties in the original position do not (yet) know that they could represent non-cooperators. From their perspective, they represent only fully cooperating members of society. Their interests are in choosing fair principles of

justice that enables them to be fully-cooperating members of society, and advance their conceptions of the good. However, these do not readily apply (if at all) to non-cooperators lacking cognitive capacities. With Rawls's constraint in place, Stark's proposal that the trustees deliberate on behalf of non-cooperators means that their decisions are bound to be inappropriate, or lead to inadequate provisions for them. This threatens Stark's claim concerning the legitimacy of the decisions for all non-cooperators.

In view of these considerations, Stark has to drop Rawls's constraint on decision-making. Thus, the trustees will be described as deliberating for non-cooperators lacking cognitive capacities, without doing so from the perspective of the original position. This frees them to consider policies that appropriately address the needs of non-cooperators lacking cognitive capacities. This would mark a hitherto hidden (yet required) departure from Rawls's framework. However, since the project is not about remaining filial to Rawls, but rather to extend his theory to include non-cooperators, doing so appears unproblematic at this point.¹³

In the following sub-sections, I discuss three main criticisms of Stark's extension, raised by Sophia Wong (2009), Christie Hartley (2011), and Elizabeth Edenberg and Marilyn Friedman (2013). Respectively, they contest Stark's definition of non-cooperators, her conception of cooperation, and her treatment of the issue of legitimacy for non-cooperators lacking cognitive capacities. I further clarify Stark's proposal through the discussions, and argue that it survives these serious problems.

2.2 Defining Non-Cooperators

Sophia Wong argues that implicit within Stark's proposal is the assumption that people can be neatly separated, into cooperators and non-cooperators (2009, 387). While at first sight such an assumption may appear plausible, it becomes problematic once we broaden our view to consider the entire life cycles of citizens. Wong argues that

“It is unclear whether individuals who start out as nondisabled children and subsequently become disabled adults thus count as cooperating or noncooperating. A similar problem exists for adults who have contributed to social cooperation during part of their lives but then become impaired through dementia or degeneration at the end of their lives. Are they to be counted as cooperating for the first part of their lives but not the second part?” (388)

Wong suggests we avoid the puzzle of drawing a line between citizens, by acknowledging that they are all located somewhere along a developmental pathway between fully-cooperating and non-cooperating (388). The cheap response to Wong is to re-iterate the fact that the formulation which Rawls and Stark employ refers to “fully cooperating *over a complete life*”. Just by this formulation alone, we can say indeed that those who are disabled mid-way are not

¹³ I further this discussion in Section 2.4

fully cooperating over a complete life. So, while a person may be healthy and fully cooperating at some point in time (cooperation here being assessed synchronically), that person may not be so over a complete life (assessed diachronically). One could bite the bullet and claim that these citizens are to be counted as cooperating for the first part, but not the second part – but subsequently add that once we consider their lives as a whole, they are not fully cooperating.

Wong's criticism may be sharpened. We may understand it as being motivated by the worry that Stark's distinction is too coarse. There is a salient difference between a person who becomes permanently disabled, and another who is congenitally disabled – despite both being non-cooperators over a complete life. The former has a claim on the social good, given his prior contribution, which the latter lacks. There is a pathway through which his justice claims may be grounded. The Starkian social minimum's narrow focus on needs appears to obscure this difference. However, while the difference is crucial for the normative grounding of these citizens' claim to a portion of the social good, they leave open the issue of what principle or mechanism is required to address their needs. Citizens' different entitlements to the social goods is a separate issue from how their needs are to be addressed. Insofar as their needs are the same, they should be addressed in the same way. Addressing one's paraplegia (upon accident) is, in terms of needs, the same as addressing another's congenital paraplegia – assuming the disabilities manifest similarly. We do not think that the needs of the former should be addressed differently because he or she used to contribute to the social good. From the perspective of the (application and execution of the) social minimum, that is an irrelevant consideration. Here, the Starkian social minimum's focus on needs does not conflate the grounds with the mechanism. Thus, we should not be too worried about the narrow focus on needs, without regard to the fact of contribution.

2.3 An Overly-Narrow Conception of Cooperation

Christie Hartley argues that Stark's proposal employs an overly-narrow view of cooperation. In considering what – and thus, who – counts as cooperating, we should not merely think about the social goods produced. Contrary to Stark, cooperation involves more than contributing to the social product or the economy (Hartley 2011, 127). The core idea of cooperation involves individuals working together with others toward a common end. Focusing on these relational aspects of cooperation reveals that disabled individuals in fact partake in, and sustain relationships, with the non-disabled in many fruitful ways. While many disabled individuals are unable to take on full-time jobs, they may “cooperatively contribute to society by performing household work that is crucial to the family” (Hartley 2009a, 148), or via voting or taking part in policy discussions (Hartley 2009b, 27). These activities do not produce tangible goods that can be distributed, but should count as cooperation too. Stark's understanding of cooperation, focused on the “production of social goods” (Stark 2007, 139), is thus too narrow because it discounts some disabled individuals as cooperators on the basis of their non-production of these goods. It would lead to a more general neglect of the many different and indirect ways of cooperation.

Broadening the conception of cooperation coheres with the parties' motivations in the hypothetical stages. Under a veil of ignorance, they know neither their potential abilities, nor society's stance towards people of varying abilities. Yet their decision is final, and they must be prepared to live with the principles they choose; there is no second chance (Rawls 1999, 153). Under these strains of commitment, they do not settle on principles with consequences they cannot accept, and avoid those with consequences that they can adhere to only with great difficulty. The uncertainty involved, coupled with the gravity of the choice situation, lead the parties to adopt a risk-averse strategy. In our context, this risk-averseness motivates the parties to ensure that all who cooperate receive their fair share of benefits, regardless of the nature of their cooperation. They would include as broad an account of cooperation as possible, for fear that upon the lifting of the veil of ignorance they find themselves in situations where the kinds of cooperation they make are not recognized, and that they consequently are excluded from the scheme of benefits which other citizens receive. This would threaten their interests in becoming fully cooperating members of society, and to pursue their conceptions of the good.

Moreover, the parties *could* not adopt a narrow view of cooperation, even if they wanted to. Rawls argues that “from the standpoint of society as a whole vis-à-vis any one member, there is no set of agreed ends by reference to which the potential social contributions of an individual could be assessed” (Rawls 1993, 276). These goals are present only for associations and organizations with clearly delineated purposes – on the basis of which certain activities can be discounted or excluded. Given this, the parties cannot rule out social activities in advance as non-cooperative – which is equivalent to them adopting a broad view of cooperation.¹⁴

It may now appear that the parties actually have no basis for adopting a conception of cooperation that excludes *anyone* at all. In fact, Hartley goes some way in this direction. In developing her alternative extension of Rawls's theory, she grounds the inclusion of disabled individuals in Rawls's theory via their capacities for engagement. These involve “the ability to recognize others as responsive, animate beings and the ability to communicate one's recognition of this to them” (Hartley 2009a, 149). In accordance with her understanding of cooperation, Hartley construes these capacities broadly. So, even individuals with severe cognitive disabilities are described as possessing the capacities, and thus able to make cooperative contributions to society. For Hartley, “almost all human beings have the capacity for engagement” (2011, 128). She claims it is a “virtue of [her] view that it suggests we have duties of justice to some nonhuman animals” (2009a, 159).

However, we must resist over-extending the conception of cooperation. Adopting this extreme position buys inclusiveness at the price of feasibility. The issue is not only about finding normative grounds for the inclusion of non-cooperators in a theory of justice, but locating a mechanism within the theory to specify how their

¹⁴ This view may be inspired by Lawrence Becker's (2005) arguments for resisting four kinds of over-simplifications when the parties consider how to construe the conception of reciprocity.

needs would be addressed. Whereas Rawls avoids discussing the issue of non-cooperators, Stark modifies the social minimum to address these needs. On Hartley's account, what *could serve* as the relevant mechanism to address the needs of disabled individuals and animals? And how would their needs be weighed against those of fully-cooperating citizens? As it stands, one of the hurdles to fully including disabled individuals, or non-cooperators, into Rawls's theory of justice is the subsequent complications to identifying the least advantaged member of society. Rawls resolves this easily, due to his narrowing of the scope of his theory to cover only fully cooperating members of society. Hence, income and wealth are useful as proxies for determining the least advantaged members of society. But because disabled individuals have significantly different needs, income and wealth become much less useful. A disabled individual may be worse-off than a fully-cooperating citizen, even though she may have more income and wealth (Nussbaum 2002). These complications are compounded when we attempt to include animals into Rawls's theory of justice.

Broadening the conception of cooperation to this extent would also go far beyond our ordinary understanding of what it involves. While our rejection cannot lie simply in its un-intuitiveness, its being so imposes a greater burden of proof on Hartley. Specifically, she has to show why we are wrong in holding on to a narrower conception of cooperation that excludes animals, taking into account the work that a narrower conception does for us. Among other things, a narrower conception partly accounts for our sense of fairness, in excluding free-riders who do not contribute to the common good (Stark 2009). Hartley's account disrupts this picture. Free-riders cannot be easily excluded, insofar as they have capacities for engagement. Further explanations have to be supplemented to address this problem, which does not at the same time exclude non-cooperators (and animals). Without these explanations, or even the reassurance that the complications may be coherently resolved, we have good reason to reserve our judgment that such an extreme broadening is a virtue. These are not intractable difficulties, but they depend crucially on what mechanism Hartley develops to render her extension plausible.

Leaving aside Hartley's positive account of how the conception of cooperation should be broadened, what we can instead learn from her criticisms of Stark is that the conception of cooperation has to be broadened to include as many disabled individuals as is plausible. On this point, Stark has to concede to Hartley.¹⁵ This means that many of those non-cooperators who possess the relevant cognitive capacities, may, upon the broadening of the conception of cooperation, be regarded as cooperators – albeit with diminished capacities.¹⁶ While this qualification succeeds in thinning the numbers of disabled citizens whose needs are not met via Rawls's main distributive principles for cooperators, there are still individuals unaccounted for. These are non-cooperators lacking cognitive capacities, and who will never be able to participate in cooperative

¹⁵ I revisit this in Section 3.

¹⁶ Though some may still not be, given the society's resources and level of advancement, including that of its medical technologies.

relationships, however broadly we may *plausibly* construe the conception of cooperation. Stark's proposal of the social minimum is still needed to account for these individuals who cannot be brought into the main folds of Rawls's theory (and be recipients of the social goods distributed by the difference principle) via broadening the conception of cooperation.

Does this concession imply that the severity of our concerns about the justice claims of non-cooperators (lacking cognitive capacities) is radically reduced? Only if we equate the severity of an issue with the number of people affected by it. That we may end up with a very small class of individuals considered non-cooperating, does not mean that the problem of lacking a mechanism to address their needs is not severe. It remains the task of a theory of justice, which seeks to be complete, to give an account of how to address the needs of these individuals who live among and are dependent on us, but who are unable to partake in cooperative relationships with us.

2.4 Legitimacy and Justifiability

Earlier, I suggested that Stark may drop Rawls's constraint on decision-making for those lacking cognitive capacities. In doing so, she avoids the obvious inappropriateness of decisions made under Rawls's constraint to non-cooperators, and renders it more likely that the policies will be justifiable to them. Elizabeth Edenberg and Marilyn Friedman argue that this view is mistaken. According to them, liberal theory – with its focus on legitimacy via justifiability to the governed – invariably excludes non-cooperators lacking cognitive capacities.¹⁷ A complete liberal theory, then, “should have something to say about whether political principles are legitimate for those persons who are subject to them but who cannot reflect on or consent to them” (Edenberg and Friedman 2013, 347).

More specifically, they argue that Stark's proposal “seems to reduce severely cognitively disabled persons to a second-class status in at least two ways” (351).¹⁸ The first is that the needs of the non-cooperators are deferred to the constitutional stage, rather than being included in the original position.¹⁹ By the time the parties get to the constitutional stage, the principles are already chosen without the non-cooperators' involvement. These principles centrally apply to cooperators, and moreover *constrains* the decisions made about non-cooperators. This situation relegates the latter to the status of second-class citizens, deemed inferior to cooperators (351). Edenberg and Friedman argue that we should not exclude non-cooperators from the original position, for we can formulate basic political principles that are general enough that they “allow for contingent variations” in the goods that are to be distributed to cooperators and non-cooperators alike (Edenberg and Friedman 2013, 351-2). In this way, the application of the

¹⁷ Edenberg and Friedman's focus is on "non-consenters". But they define the group as unified in their lack of cognitive capacities — corresponding to non-cooperators lacking cognitive capacities.

¹⁸ I will not discuss Edenberg and Friedman's argument that Hartley also faces the same problem.

¹⁹ A variant of this problem was raised much earlier, by Eva Kittay (1999, 75-114).

difference principle “does not require ignoring non-cooperators at the first stage of the Original Position” (351-352).²⁰

Edenberg and Friedman's argument is supported by their interpretation of the difference principle as “appropriately responding to certain kinds of needs, namely, those needs of the citizen that can be indexed by the primary goods” (352-253). What they neglect to mention, however, is that these “needs” are narrowly described in terms of the hypothetical parties’ (and hence the citizens’) interests in being fully cooperating members of society, and to pursue their conceptions of the good. Rawls introduces the conception of primary goods with the intention of addressing the “practical political problem” of identifying what is essential to all citizens to pursue their conceptions of the good most effectively, whatever they may turn out to be (1993, 180; 1999, 125). He writes (on the page immediately after the phrase which Edenberg and Marilyn quote) that “we suppose that all citizens have a rational plan of life [i.e. conception of the good] that requires for its fulfilment roughly the same kind of primary goods.” (1993, 180-181). Correspondingly, the parties are concerned with these “needs” only to the extent that they contribute to furthering their conceptions of the good (Rawls 1993, 180). These “needs” are distinct from what Rawls terms “basic needs”, which refer to the needs required for normal functioning (Rawls 1993, 7) – and which are instead more relevant to what Edenberg and Friedman intend for non-cooperators.

Thus, it is only by a stretch that we can think of the difference principle as addressing needs in a way that is appropriate for non-cooperators lacking cognitive capacities. Such individuals have little (if any) need for these all-purpose means in order to pursue their (non-existent) conceptions of the good. This is not to say that such an extension cannot be done. Edenberg and Friedman may discard the narrow conception of primary goods, thereby extending the difference principle. While this includes non-cooperators in the deliberations from the start, it remains to be seen how it may avoid the problems that Stark was concerned to avoid; about the insensitivity of the difference principle to the morally relevant fact of contribution, or concerning the definition of the least advantaged. The current point is that they need to provide support for their assumption that we can easily or unproblematically extend the principle through which citizens’ narrowly-defined “needs” are met, to non-cooperators.

Edenberg and Friedman’s second criticism of Stark pertains to how the “ideal deliberators serve as representatives, or trustees, for the non-cooperators” (Edenberg and Friedman 2013, 354). The problem does not lie simplistically in the situation of fully rational deliberating parties representing those lacking cognitive capacities. Here, the assumption of the ideal rationality of the parties simply delineates the features that we think people should have (or approximate)

²⁰ I leave aside the simple rejoinder available to Stark — drawing from my earlier discussion of Hartley — that including non-cooperators into the scope of the difference principle complicates the distribution because non-cooperators will always be the least advantaged members of society, and the difference principle gives *strict priority* to the least advantaged. Stark clearly recognizes this, in her statement that her proposal avoids the “bottomless pit” problem raised by Kenneth Arrow (1973). See (Stark 2007, 139, footnote 31).

if they are to make good decisions about principles of justice. Rather, Edenberg and Friedman point to what they regard as the “more serious problem with the system of trusteeship” (357), which is that the trustees’ decisions are still inaccessible to non-cooperators lacking cognitive capacities. There is “no sense in which principles could be justifiable to the [non-cooperators lacking cognitive capacities] because they are the persons who, by definition, cannot understand or choose among political principles” (358). Non-cooperators lacking cognitive capacities therefore occupy “a status that seems second-class” (355).

Edenberg and Friedman’s discussion about consent and legitimacy is especially salient for partial cooperators with the relevant cognitive capacities (in view of Stark’s concession to Hartley; Section 2.2). Even till now, they receive inadequate recognition for their capacities for engagement and cooperation in society. Thus, we would want to ensure that the principles of justice and social minimum are designed with their needs in mind and be made justifiable to them.

However, Edenberg and Friedman’s worry appears misplaced in the case of non-cooperators lacking capacities.²¹ The issue of legitimacy becomes a pressing problem only if we assume that we need to respond to their justice claims (assuming we ascribe some to them, based solely on their basic needs) in the same way as it does to those parties and citizens who have the capacities to understand and consent to the principles chosen. Yet we cannot do so. It is a fact that some profoundly disabled non-cooperators lack the cognitive capacities to comprehend decisions concerning principles of justice. It is also a fact that these individuals are profoundly dependent on others to make decisions for them – not just in the political domain, but also in many (or all) matters pertaining to everyday living. Here, the problem does not seem to be one in which we erroneously adopt a theoretical grounding for a particular arrangement of basic institutions (qua the criterion of legitimacy), which in turn unnecessarily prejudices against non-cooperators in a way which we can resolve with further social reform. Rather, what we are facing appears to be more an issue of a difficult (feature of our) reality – that non-cooperators are the kinds of beings which they are – which requires different resources to account for and address.

Of course, we have to make sure that the inclusion of non-cooperators (via the choice of principles) is legitimate. But a more careful look reveals that this sense of legitimacy is indirect and ascriptive – referring instead to what cooperators would regard as legitimate for the non-cooperators. The evaluation of legitimacy does not turn on the capacities of non-cooperators to understand or consent to the principles. In view of this, we may say that it is only if we take the same yardstick of evaluating legitimacy as applying to all, regardless of their capacities to consent, that non-cooperators are second class in a problematic way. While this does not obviate Edenberg and Friedman’s objection, it takes away much of its sting. In the meantime, we may fare better by directing our attention to thinking about whether our provisions for such non-cooperators are adequate.

3 Missing criteria of adequacy

²¹ A point clued-in by their overly-frequent use of the qualifier “seems to”.

While Stark's central proposal survives the criticisms levelled by Wong, Hartley, and Edenberg and Friedman, it is nevertheless crucially incomplete. In what follows, I explain how her extension of the social minimum lacks accompanying criteria with which we can assess the adequacy of its provisions for non-cooperators, and why it is a problem. The implication is that Stark's proposal does not fully address the needs of non-cooperators.

Stark is right that the social minimum, as Rawls formulates it, provides for the basic needs of citizens (Rawls 1993, 228). However, she neglects to mention that these needs are defined in a goal-oriented manner, corresponding to Rawls's description of the interests of citizens (in our earlier discussions of Edenberg and Friedman). For Rawls, the basic needs of citizens are to be met "insofar as their being met is necessary for citizens to understand and be able fruitfully to exercise" their rights and liberties (1993, 7). Thus, basic needs are important so that citizens "can take part in political and social life" (166). The social minimum does not simply address the basic needs of citizens, but also the issue of their healthcare. Rawls writes that "an assured provision of health care at a certain level (calculated by estimated cost) is included as part of that [social] minimum" (Rawls 2001, 173; my italics). Healthcare needs are included within the social minimum because, like basic needs, they constitute the "general means necessary to underwrite fair equality of opportunity and our capacity to take advantage of our basic rights and liberties, and thus to be normal and fully cooperating members of society over a complete life" (2001, 174; my italics).²²

We see that therefore the provisions of the social minimum are goal-oriented. They are to ensure that citizens are enabled to fruitfully exercise their rights and liberties, and be fully cooperating members of society. These contribute to the further aim of citizens to pursue their conceptions of the good, whatever they may be. Taken together, these constitute for us criteria, with which we can assess whether the provisions for cooperating citizens are adequate. The provisions are adequate just insofar as citizens are enabled to (i) fruitfully exercise their rights and liberties, be (ii) fully cooperating members of society, and (iii) able to pursue their conceptions of the good. The criteria establish a line below which we do not go, in providing for the needs of citizens. Despite its name, the provisions of the

²² Thus, the complete specification of the social minimum at the legislative stage has to include what is due to citizens in terms of *both* basic and healthcare needs. This complicates Stark's insistence that her proposal concerning the social minimum does not address healthcare needs (Stark 2007, 140), insofar as Rawls also separates his discussions of basic and healthcare needs. While Stark is right that Rawls separates them, she misunderstands the nature of their separation. Rawls separates basic needs and healthcare needs due to their relevance in answering two different questions within two stages of his four-stage hypothetical sequence. Basic needs are important to protect citizens' basic rights and liberties, and are discussed in the constitutional stage (Rawls 1993, 166, 227-8). Healthcare needs protect citizens' fair equality of opportunity, and are discussed in the legislative stage (here, Rawls adopts Norman Daniels's (1981) proposals on the matter). However, they are both incorporated into the social minimum. Since this is a minor point, I do not pursue it further.

social minimum do not stop at the barest or lowest level of adequacy. After meeting the criteria of adequacy, the social minimum is to be maximized up to the point where any further increase would violate the difference principle.²³ The difference principle constrains the social minimum – the latter cannot be so high that “the prospects of the least advantaged in the present generation are no longer improved but begin to decline” (Rawls 1999, 252).

However, Stark’s social minimum is not accompanied by criteria of adequacy. Without them, the formulation that the social minimum will be “as high and as comprehensive as possible” is merely formal, and appears empty of content. After all, the formulation is only a specification of how far to maximize the provisions of the social minimum *after* the criteria of adequacy are met. Presenting the formulation without the criteria thus obscures the crucial issue of whether the provisions are adequate for citizens. From another angle: that a high and comprehensive social minimum can nevertheless be criticized for inadequately addressing the needs of citizens, clues us in to the fact that the salient issue concerns its adequacy.

While Stark does not provide any criteria, they may be supplemented for cooperators with diminished capacities (who were initially described by Stark as non-cooperators). From our discussions of Hartley, we understand these individuals as cooperators. Subsequently, it is open for us to apply a slightly-modified variant of the criteria of adequacy for full-cooperators to their claims on the social good. For them, the provisions of the social minimum are adequate just in case they enable them to fruitfully exercise their rights and liberties, be cooperating members of society, and to pursue their conceptions of the good.

Some clarifications are needed concerning the modifications, implicit in my formulation, to Rawls’s criteria of adequacy. The first is that despite being cooperators, these individuals still have diminished capacities compared to those whom Rawls describes as fully cooperating. On Rawls’s picture, the parties deciding on the social minimum want to guarantee their basic needs so that they may further their aims (Rawls 1993, 7). This is possible only on the assumption that they possess the relevant (cognitive, but also possibly physical) capacities. What is required is to ensure that they have the necessary material means to pursue their aims. This picture is disrupted by Stark’s proposal to drop the fully-cooperating assumption at the constitutional stage.²⁴ For her, the relevant capacities cannot be assumed as fully present for all those whom the parties represent, especially not for non-cooperators and those with diminished

²³ This requires for the society to have surplus resources such that the social minimum can be maximized beyond the criterion of adequacy. I leave aside the complication of societies which lack such surpluses.

²⁴ I assume that Stark does not deviate from Rawls in terms of the separation of functions across the four stages. This assumption is grounded by her not indicating any further modifications beyond dropping the fully cooperating assumption at the constitutional stage.

capacities. In addition to material deprivation, under-developed or impaired capacities also disrupt citizens' pursuit of their aims. In formulating the social minimum in the absence of the fully cooperating assumption, the interests of the parties thus naturally extend to addressing these capacities, beyond only material needs. Addressing these capacities is, among other things, also to address healthcare needs. Thus, the social minimum now addresses such healthcare needs of cooperators with diminished capacities, to enable them to fruitfully exercise their rights and liberties, be cooperating members of society, and pursue their conceptions of the good.

Second, consistent with the formal constraint given by Rawls and Stark, the provisions given to address their diminished capacities are as high and as comprehensive as possible, within the constraints of the difference principle. Third, given their starting set of diminished capacities, these individuals are unlikely to be full cooperators in Rawls's sense. However, this does not mean that we can be content for them to incompletely cooperate and participate in social life. The earlier clarification already indicates that the level of provisions given is tied to the formal constraint. The comparison here is rather that despite our efforts, the capacities of these individuals are still likely to be lower compared to full cooperators. This is likely because existing (medical) technologies are insufficiently advanced to restore such individuals' capacities, such that they function at levels similar to full cooperators. Unfortunate as it is, there is little we can do in such cases but to continue our search for better technologies.²⁵

However, Rawls's criteria is almost entirely inappropriate for non-cooperators lacking cognitive capacities. Even if we assume, as Stark does, that Rawls's first principle covering rights and liberties apply to non-cooperators (Stark 2007, 134) – and therefore that provisions must be adequate for them to secure their rights and liberties (even if they may never be able to exercise them) – two other criteria remain inapplicable. It is implausible to say that the provisions for non-cooperators are adequate just in case they are enabled to be cooperating members of society, and to pursue their conceptions of the good. The implausibility is motivated by two main considerations. First, non-cooperators just cannot be enabled to be cooperating members of society. This is not simply a matter of definition, but the fact that there are individuals in society who are so profoundly

²⁵ I leave aside the case where the existing technologies can restore cooperators with diminished capacities to this level, but doing so would violate the difference principle. In such cases, it is unclear whether not doing so could still be regarded as fulfilling the criteria of adequacy for these individuals. I suspect many of us will be uncomfortable with an answer in the affirmative – because while we would in some sense fail these individuals, the plausibility and neatness of the priority of the difference principle over the criteria of adequacy for the social minimum are too alluring to let go of. In this case, as Stark very briefly suggests, we may well have to substantially revise the difference principle, or our ideal of reciprocity that motivates it (Stark 2007, 144). Whether this can be done will depend on whether we can show that the revised principle or ideal "flow from" our considered judgments about justice, in the way which Rawls's framework requires. Unfortunately, I cannot take these brief remarks further.

disabled that there is no sense to be made of their becoming fully cooperating members of society, however broadly we construe the idea of cooperation and however much society commits to enabling them to be so. Correspondingly, we do not describe them as having conceptions of the good the pursuits of which we need to protect – and where we do, it is instead a matter of ascription. Second, attempting to apply the criteria to non-cooperators risks mis-specifying our obligations to them. If anything, our obligations to provide for their basic and healthcare needs are *not* so that they can be cooperating members of society and pursue their conceptions of the good. Nor did our initial motivations to provide for their needs arise because we somehow saw that they were unable to pursue their conceptions of the good. An account that explains the adequacy of our provisions to non-cooperators in this way thus addresses their claims with the wrong currency. This is why, as I gestured to earlier (in Section 2.1), Stark makes a mistake when she puts non-cooperators (with and lacking capacities) together in the same group. The criteria of adequacy are not, and cannot be, the same for these groups.²⁶

An obvious difficulty with specifying criteria of adequacy for non-cooperators, within the hypothetical stages, is that our understanding of what constitutes care for them varies greatly. It depends, among other things, on the kinds of disability involved, treatment options and costs, burdens to caregivers, and importantly, caregivers' conception of the good. These render it highly unlikely that general criteria of adequacy, applicable to all non-cooperators, can be agreed to within the hypothetical stages where the parties are unaware of the conceptions of the good in play in their society. Moreover, even if they were, it is similarly unlikely that general criteria may be formulated from the different, and at times conflicting, conceptions of the good. Consider what is adequate for a non-cooperator in a persistent vegetative state. Even a “thin” criterion which guarantees good health or basic human needs may be over-demanding, as it may commit us to expending resources till his or her body gives way despite medical intervention. It may also give us unreasonable answers in cases such as anencephaly, or when non-cooperators with profound mental disabilities develop terminal illnesses such as cancer. Yet a “thicker” criterion, such as that proposed by Norman Cantor (2005) on protecting the intrinsic human dignity of non-cooperators, is amenable only to some conceptions of the good – to the exclusion and disagreement of others. If anything, the messy and unsettled debates concerning the appropriate surrogate decisions for non-cooperators tell us that we lack such criteria, and may be unlikely to stumble upon them soon.²⁷

Sophia Wong recognizes the pressing problem of the lack of criteria of adequacy, but suggests that we “commit ourselves to some account of interest, however provisional or well founded, and endeavor to speak on behalf of the voiceless”,

²⁶ I believe this is in line with Sophia Wong's resistance to Stark's definition of non-cooperators; though Wong locates the difficulty elsewhere, and in a way that Stark can easily respond to.

²⁷ I discuss this issue more thoroughly in a forthcoming manuscript [TITLE REMOVED].

and describes this commitment as possibly “err[ing] on the side of being overinclusive” (Wong 2009, 396-397). However, the difficulty here is not that we may not construct and commit to such an account or criteria (for that may be easily done), but that we may not do so while claiming to take seriously the challenges posed by the depth and extent of pluralism in current societies. Stipulating general criteria would be exclusive, rather than over-inclusive. I believe these considerations, taken together, may be what motivate Rawls’s cryptic remark that an overlapping consensus can be achieved only if we distinguish between cooperators and non-cooperators (Rawls 2001, 175-176). A general criterion invoking or relying exclusively on a specific conception of the good cannot be the object of overlapping consensus among individuals with different conceptions of the good – insofar as the consensus requires the endorsement of individuals from the point of views of their different conceptions (Rawls 1993, 134).²⁸

Perhaps the problem lies in Stark’s assumption that the deliberative parties directly represent non-cooperators lacking cognitive capacities. An option which appears to avoid the problem of missing criteria might be found in removing non-cooperators from the initial choice situation, as Rawls does. Thus, we may re-interpret Stark’s brief remark that the parties “serve as trustees” for non-cooperators (2007, 140). Instead of directly representing non-cooperators, they represent trustees or guardians of non-cooperators. Rather than having to specify general criteria for non-cooperators, we leave the assessments of the adequacy of their care to their guardians. So the social minimum does not directly address the needs of non-cooperators, but does so indirectly via their guardians. This acknowledges the variability of care and allows for a whole range of decisions concerning care for non-cooperators, while avoiding the difficulties of formulating general criteria for all of them. This does not commit us to the extreme position of denying that non-cooperators have interests and needs that we should account for and address.

Such a proposal need not run into the obvious problems that critics have identified as plaguing Rawls’s theory. First, it does not commit us to describing the parties in the hypothetical stages as having benevolent motivations towards each other – which Rawls rejects due to it unnecessarily complicating the decision procedure (Rawls 1999, 129). On this account, benevolent motivations are not directed to other parties within the original position, but instead to non-cooperators who are non-parties. These motivations are “vertical”, between the parties and their wards (who do not feature directly in the interactions between parties, and whose identities and disabilities are unknown to the parties), rather than “lateral” between parties. Insofar as the deliberations in the initial choice situation are still

²⁸ Stark offers a brief alternative explanation - centring on the unclutteredness of the considerations (2007, 141-142). See Knoll, Snyder, and Şimşek (eds., forthcoming) for a collection of essays discussing the plausibility of conceiving of justice beyond Rawls’s idea of consensus.

made between *parties* who are mutually disinterested with respect to one another, we do not risk the unnecessary complications that Rawls is concerned to avoid.

The proposal also need not complicate the identification of the least advantaged member of society, which we earlier discussed. The usefulness of the proxies of income and wealth in determining the least advantaged is preserved – for we do not include non-cooperators directly, but consider only guardians who are cooperating citizens. The case can be plausibly made that the guardians of non-cooperators qualify as among the least advantaged members of society. Families and guardians of non-cooperators incur high costs in their provision of care. The most obvious lies in devoting time and resources that could have been used to advance their own self-directed interests and goals. These resources go towards providing healthcare, assistive devices or special diets for the disabled – which do not come cheap. In comparison with other individuals who possess similar amounts of resources, these guardians have less for themselves. The impact of care goes beyond material resources. Guardians also deal with higher stress levels and fewer opportunities for employment. And even then, many needs of their wards may remain unmet. They may continue to live in conditions bordering on poverty or indignity – which further contributes to the burdens of their guardians. These are what Jonathan Wolff and Anver de-Shalit have termed “corrosive disadvantages” – disadvantages that yield further disadvantages (2007, 10). This also coheres well with Rawls’ definition of the least advantaged – “persons whose families and class origins are more disadvantaged than others ... and whose fortune and luck in the course of life turn out to be less happy” (Rawls 1999, 83). Rawls’s focus on the least advantaged (1999, 13) can then be brought in to ensure that guardians can advance their own interests while caring for non-cooperators. In deliberating on and choosing principles that best protect the least advantaged members, the parties in the original position will, in effect, be addressing the unhappy circumstances of turning out to be guardians of the disabled. On this proposal the needs of non-cooperators would then be met indirectly.

Yet this proposal does not truly obviate the need for criteria of adequacy. Consider what we would say to guardians who choose expensive and unusual treatment options for their wards, claiming that it is part of their understanding of care. We would not, in having adopted such a proposal, simply agree to any demand made on behalf of non-cooperators. Otherwise, we end up with a variant of the “bottomless pit” problem, where disproportionate amounts of resources are channeled away for seemingly marginal benefits (Arrow 1973). Or consider what we would say to guardians who lock their wards in small cages, and satisfy only their bodily needs. What would ground our rejection of such choices – if not some criteria which determines if the needs of non-cooperators are adequately met, and which also situates their claims against the legitimate claims of other citizens in society? Only with such criteria can we say that some guardians want too much, while others are not doing enough. It is in this way the guardianship proposal only

appears to have avoided the need for criteria, while actually requiring it to be complete and plausible²⁹.

We are now in a better position to understand why, from Rawls's perspective, the fully cooperating assumption is required to solve the problem of healthcare at the legislative stage (via the social minimum). Stark recognizes that her proposal conflicts with Rawls's brief remarks on the issue, but chooses to sidestep them (2007, 133 fn 20). Rawls claims that the conception of citizens as fully cooperating members of society over a complete life

“enables us to do two things: first, to estimate the urgency of different kinds of medical care, and second, to specify the relative priority of claims of medical care and public health generally with respect to other social needs and requirements” (Rawls 2001, 174).

For Rawls, medical care is most urgent when it is required to enable citizens to resume their lives as cooperators. This applies to cooperators who temporarily lose capacities (as with injuries or illnesses), or to cooperators with diminished capacities from the start. The crucial idea is that since they are cooperators – and therefore criteria can be provided for the adequacy of the provisions of the social minimum – their claims to the social good can be weighed against the claims of other full cooperators. The parties can make use of information available at the legislative stage – including those concerning the levels of resources and advancement of their society – to specify what counts as adequate provisions for cooperators (including those with diminished capacities). This gives content to the criteria of adequacy, which is, up to this point, generally formulated. Moreover, it allows for what counts as adequate – cooperators being able to fruitfully exercise their rights and liberties, be cooperating members of society, and pursue their conceptions of the good – to vary across different contexts. Any increase in the provisions of the social minimum beyond meeting the criteria of adequacy will be constrained by the difference principle, which situates their needs-based claims in relation to other areas of social spending.

The situation is complicated for non-cooperators. We lack criteria assessing the adequacy of the provisions of the social minimum for them. Insofar as medical care for non-cooperators is not for the purpose of enabling them to “resume” their lives cooperators, it is difficult to specify how their needs could nevertheless be urgent in relation to those of cooperators. The further problem is that even with information available at the legislative stage, the parties are unable to specify what counts as adequate. Unlike the earlier case, there is not even a general criterion which they can substantiate. Moreover, in light of our earlier considerations, the parties are unlikely to stipulate general criteria, knowing that the adequacy of care varies in accordance with different conceptions of the good.

²⁹ It may also not be possible to systematize these inchoate responses about specific cases into a general account which could be the object of an overlapping consensus.

Lacking such criteria, the parties are unable to specify the relative weight of non-cooperators' claims in relation to those of cooperators', and to other social needs.

The implication is that while Stark's social minimum may address the needs of cooperators with diminished capacities (after further modifications), it cannot yet do so for non-cooperators lacking capacities. Lacking criteria of adequacy for non-cooperators, the parties within her modified constitutional stage cannot determine if the provisions for non-cooperators are adequate, nor are they able to weigh their claims against those of cooperators. Thus, her proposal is crucially incomplete, and does not (yet) include non-cooperators within Rawls's framework.

4 Conclusion

I have discussed Stark's proposal to address the basic needs of non-cooperators – by dropping Rawls's fully cooperating assumption at the constitutional stage, and modifying the social minimum such that it would be as high and as comprehensive as possible. I defended her central proposal against criticisms by Sophia Wong, Christie Hartley, and Elizabeth Edenberg and Marilyn Friedman. In response to Wong's worry about Stark's definition of non-cooperators, I argued that the Starkian social minimum's focus on needs is appropriate. That individuals may have different entitlements to the social good on the basis of their prior contribution, is a separate issue from what provisions are required to address their needs. I then argued that Stark needs to concede to Hartley's complaint that her understanding of cooperation is overly-narrow. Instead of grouping individuals with and without cognitive capacities together as non-cooperators, Stark should instead regard only the latter group as non-cooperators. While this narrows the membership of who counts as non-cooperators, there remains individuals in society who are non-cooperators – and for whom an account of how we should address their needs should be provided. In contrast to Hartley's account, Stark's account is potentially more inclusive, for it may include *all*, rather than almost all disabled citizens. Edenberg and Friedman raise the concern that non-cooperators are relegated to second-class status because they are represented by trustees in the constitutional stage, rather than directly in the original position. I argued that they have not plausibly defended their position of including non-cooperators from the start, given the numerous difficulties of doing so. Moreover, while their criticism is apt in the case of cooperators with diminished capacities, it appears overblown in the case of non-cooperators.

Even though Stark's central proposal survives these criticisms, I argued that the Starkian social minimum is empty if it is not accompanied by criteria with which we can assess the adequacy of its provisions. While the criteria may be supplemented for cooperators with diminished capacities (after further modifications), they remain lacking for non-cooperators. Without these criteria, her account cannot determine if the provisions for non-cooperators are adequate, nor is she able to weigh their claims against those of cooperating citizens in

society. In pointing to a mechanism within Rawls's framework without explaining how that mechanism would adequately provide for non-cooperators, her account is thus crucially incomplete. I then briefly considered a strategy appearing to side-step the need to provide criteria of adequacy for non-cooperators – by positing that only their trustees or guardians are the direct subject of the provisions of the social minimum – and argued that it does not truly obviate the need for criteria.

Our conclusions are not entirely bleak. Stark has argued convincingly that the social minimum may be the appropriate mechanism to address the needs of all, rather than almost all, non-cooperators. Through my discussions, I have argued that the key to doing so within her (and thus Rawls's) framework lies in providing criteria with which we can assess the adequacy of the social minimum's provisions. Though I have not argued for it here, other Rawlsian extensions which do not provide such criteria will also be crucially incomplete – focusing narrowly on the normative grounds for including non-cooperators, without considering whether the mechanisms present would adequately address their needs. A complete extension would also include an account of how the claims of non-cooperators are to be met, and balanced alongside those of cooperating citizens. Hopefully this prompts a re-examination of the sometimes superficial modifications which have been proffered as conclusive responses to disability-related criticisms of Rawls' theory of justice.

That we currently lack such criteria should not daunt us. Instead, the clarification that what we need is but one last piece to solve the puzzle offers us two payoffs. The first is that we need not think that including non-cooperators would require us to depart so radically from Rawls's core idea of the social contract, that there would be no point working within the framework or trying to salvage it (Nussbaum 2007, 123). Our discussions of Stark's proposal have revealed that the inclusion of non-cooperators may be done while keeping most of Rawls's core ideas intact – only one final step remains. The second payoff is that it frees Rawlsian philosophers to learn from the rich and sensitive work of philosophers such as Eva Kittay or Martha Nussbaum (Kittay 1999; Nussbaum 2007), rather than simplistically understand their work as mere story-telling about the lives of individuals with disabilities, or as incompatible with Rawls's project. From their insights may be derived a set of criteria of adequacy which could be the object of the parties' agreement in the deliberative scenario, and of an overlapping consensus among citizens in a pluralistic society. We are released from the insistence that the incorporation of non-cooperators within Rawls's theory of justice requires only Rawlsian elements. With this clarity, we may be better prepared to see how some of these purportedly non-Rawlsian insights, concerning care for non-cooperators, may contribute to our eventual formulation of just the criteria we need for our Rawlsian endeavors.

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