

## How to Include the Severely Disabled in a Contractarian Theory of Justice\*

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A SUFFICIENTLY nuanced theory of distributive justice should be able to accomplish the following two theoretical tasks: it should provide grounds for meeting the needs of people who are not able to contribute to the production of the goods necessary to sustain them; and it should provide grounds for adequately compensating those who do contribute to the production of such goods. The first task suggests a basis for distribution that is independent of contribution; it rests perhaps on a moral ideal requiring that the basic needs of all individuals be met. The second task suggests a basis for distribution that is in some way connected to contribution. It rests, perhaps, upon an ideal of reciprocity according to which one is owed a share of the social goods she helps create, all things being equal.

The theory of John Rawls—now the standard-bearer for accounts of justice—contains an idealizing assumption that was largely, though not completely, overlooked until underscored in a recent book by Eva Kittay.<sup>1</sup> This assumption—which I will call “the fully cooperating assumption”—states that all citizens will be regarded, for the purposes of Rawls’s theory, as physically and mentally competent and hence able to participate fully in schemes of cooperation.<sup>2</sup> Rawls’s

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<sup>1</sup>Eva Kittay, *Love’s Labor: Essays on Women, Equality and Dependency* (New York: Routledge, 1999). See also Martha Nussbaum, “Rawls and feminism,” *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003), pp. 488–520 at pp. 511–14; *Frontiers of Justice: Disability, Nationality, Species Membership*, ch. 2 (Tanner Lectures in Human Values, originally presented at Australian National University, Canberra, November 12–14, 2000); and “The future of feminist liberalism,” *Varieties of Feminist Liberalism*, ed. Amy R. Baehr (Totowa, N.J.: Rowman and Littlefield, 2004), pp. 103–32. See also Andrews Reath, “Comments on Martha Nussbaum’s ‘Justice for the mentally disabled,’” paper presented at the Pacific APA convention, March 2003.

<sup>2</sup>Prior to the publication of Kittay’s book, this assumption was discussed by: Ruth Anna Putnam, “Why not a feminist theory of justice?” *Women, Culture and Development: A Study of Human*

reliance on this idealization has led some to conclude that his account is not capable of handling the justice claims of non-participating individuals.<sup>3</sup> I propose to show that Rawls's theory, suitably modified, can, in fact, handle many of these claims. The resulting account is in the spirit of Rawls, in that it retains all the rudiments of his view, but it differs in a number of ways from his own approach.<sup>4</sup>

I begin by explaining who the non-cooperating are. What are the characteristics of the members of society whose claims to justice are not addressed by Rawls's theory because of the fully cooperating assumption? Next, I determine exactly which problem of distributive justice is set aside by the fully cooperating assumption. Though Rawls treats the fully cooperating assumption as setting aside only the problem of healthcare, especially for those with unusual medical needs, it is clear that a broader issue of distributive justice is deferred. That is the question of what is owed in terms of *all* social goods to the non-cooperating. I then consider a solution to the broader problem that naturally presents itself: if Rawls's objective is to avoid the question of healthcare, why not simply drop the fully cooperating assumption and stipulate that the question of healthcare be postponed? I reject this proposal on the ground that without

*Capabilities*, ed. Martha Nussbaum and Jonathon Glover (Oxford: Clarendon Press, 1995), pp. 298–331; Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), pp. 41–54 and *Justice as Impartiality* (Oxford: Clarendon Press, 1995), pp. 28–51; Alan Gibbard in his review of Barry, “Constructing justice,” *Philosophy and Public Affairs*, 20 (1991), 264–79 at pp. 271–3; Allen Buchanan, “Justice as reciprocity versus subject-centered justice,” *Philosophy and Public Affairs*, 19 (1990), 227–52 at p. 230, n. 6; and Rex Martin, “Poverty and welfare in Rawls's theory of justice: on the just response to needs,” *Economic Justice*, ed. Kenneth Kipnis (Totowa, N.J.: Rowman and Allenheld, 1985), pp. 161–75.

<sup>3</sup>Eva Kittay argues that the fully cooperating assumption also renders Rawls's theory incapable of handling the justice claims of participating individuals who are charged with the care of those not able to participate. For another discussion of the ability of Rawls's theory to accommodate the special status of those with disabilities, see Harry Brighouse, “Can justice as fairness accommodate the disabled?” *Social Theory and Practice*, 27 (2001), 537–60.

<sup>4</sup>I have used the term “contractarian” to describe Rawls's theory of justice. This label conflicts with a distinction Stephen Darwall has recently made between “contractarian” and “contractualist” theories. According to the former type of view, principles of justice are the outcome of a bargain made by *de facto* equals which makes each of them better off than they would be at the “no-agreement point.” The theories of Hobbes and Gauthier, Darwall says, are representative of this type of view. Contractualist theories regard principles as the outcome of the deliberations of moral equals occupying an idealized perspective that allows only morally relevant factors to influence the choice of principles. Rawls's account, Darwall says, falls into this category. My reservation about Darwall's distinction is as follows: the term “contractualist” was introduced by T.M. Scanlon to describe a kind of *moral* theory based upon reasonable agreement. Rawls's account is a theory of *justice* designed to justify principles governing *basic social institutions*. It is not, as Scanlon's is, a theory designed to justify or explain *right actions*. Perhaps it is useful to preserve the “contractarian”/“contractualist” distinction to mark the difference between theories of justice and moral theories based upon agreement. I discuss the difference between these two types of theories in “Hypothetical consent and justification,” *Journal of Philosophy*, 97 (2000), 313–34. See Stephen Darwall, ed., *Contractarianism/Contractualism* (Oxford: Blackwell Publishing, 2003) and T.M. Scanlon, “Contractualism and utilitarianism,” *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982), pp. 103–28. See also, Gary Watson, “Some considerations in favor of contractualism,” *Rational Commitment and Morality*, ed. Christopher Morris and Jules Coleman (Cambridge: Cambridge University Press, 1998), pp. 168–85. Watson uses “contractualism” to include both contractarian and contractualist views on Darwall's schema.

the fully cooperating assumption, the difference principle is insensitive to both need and the fact of contribution and is therefore less attractive. Next I propose an alternative answer to the question of distributive justice for the non-cooperating, which draws on Rawls's scattered remarks about a guaranteed social minimum. I conclude by considering and rebutting three possible objections to my proposal.

## I. THE PROBLEM OF DISTRIBUTION TO NON-PARTICIPANTS

### A. THE FULLY COOPERATING ASSUMPTION

Rawls's writings contain a number of statements of the fully cooperating assumption. Here is a representative example:

Since we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have all the capacities that enable them to be cooperating members of society. This is done to achieve a clear and uncluttered view of what, for us [philosophers?], is the fundamental question of political justice: namely, what is 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?

By taking this as the fundamental question we do not mean to say, of course, that no one ever suffers from illness and accident; such misfortunes are to be expected in the ordinary course of life, and provision for these contingencies must be made. But, given our aim, I put aside for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense. Thus, while we begin with an idea of the person implicit in the public political culture, we idealize and simplify this idea in various ways in order to focus first on the main question.<sup>5</sup>

Before examining the ideas contained in this passage, I will explain who the non-cooperating are, for Rawls is unclear on this topic. He sometimes equates persons with the fully cooperating. For example, he says,

[s]ince our account of justice as fairness begins with the idea that society is to be conceived as a fair system of cooperation over time between generations, we adopt a conception of the person to go with this idea. . . . Thus we say that a *person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.*<sup>6</sup>

<sup>5</sup>Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 20 (hereafter "PL"). See also, John Rawls, "Kantian constructivism in moral theory," *Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), pp. 303–58 at p. 332 (hereafter "CP"). Rawls has been consistent on this matter after the publication of the original edition of *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) (hereafter "TJ"). See *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999), pp. 83–4 (henceforth "TJ, revised"); "A Kantian conception of equality," *CP*, pp. 254–66 at p. 259; "Justice as fairness: political not metaphysical," *CP*, pp. 388–410 at p. 398; and *PL*, p. 272, n.10 and p. 183.

<sup>6</sup>Rawls, *PL*, p. 18, my emphasis.

So persons, citizens and the fully cooperating seem to be, for Rawls, the same individuals. Yet he is explicit that the attributes definitive of persons (as persons are to be understood for the purposes of justice as fairness)<sup>7</sup> are cognitive capabilities. Persons, Rawls says, have two moral powers: the capacity for a sense of justice and the capacity for a conception of the good. This account of persons, along with the equation of persons with the fully cooperating, seems to entail that having the mental capacities constitutive of personhood is sufficient for qualifying as fully cooperating. Indeed, Rawls says,

The next step is to take the two moral powers as the necessary and sufficient condition for being counted a full and equal member of society in questions of political justice. Those who can take part in social cooperation over a complete life . . . are regarded as equal citizens.<sup>8</sup>

Though this passage indicates that the two moral powers are sufficient for being fully cooperating, Rawls's statements of the fully cooperating assumption assert that those who are severely physically disabled or who are mentally disabled in a way that does not compromise their moral powers, are not fully cooperating. He says, "I have assumed . . . that while citizens do not have equal capacities, they do have, at least to the essential minimum, the moral, intellectual *and physical capabilities* that enable them to be fully cooperating members of society over a complete life."<sup>9</sup>

The text is not definitive on the issue of whether only the claims of human non-persons are set aside by the fully cooperating assumption or whether also the claims of severely impaired persons are set aside. Recent critics of Rawls have interpreted him as deferring the issue of justice for both severely impaired persons and human non-persons. The problem of distributive justice, however, is different for each of these groups. The reason is that the principal normative idea underlying hypothetical consent theory asserts that principles of justice are legitimate only if they can be justified to those who are able and required to abide by those principles. To the extent that all and only persons are capable of being justified to—that is capable of comprehending reasons for acting one way or another—non-persons are not owed a justification for principles of justice. The fact that human non-persons are not owed a justification for principles of justice, however, does not entail that they have no claims of justice. As Rawls says, "I take it as obvious, and accepted as common sense, that we have a duty towards all human beings however severely handicapped."<sup>10</sup> We can see, though, that the exclusion of the issue of distributive justice for human non-persons is a

<sup>7</sup>The idea of the person for the purpose of e.g. assigning *moral* rights to life, care, respect and so on may be quite different from the idea of the person for the purpose of assigning the rights and responsibilities of *citizenship*. Rawls's ideal of the person is designed only for this latter purpose.

<sup>8</sup>Rawls, *PL*, p. 302.

<sup>9</sup>*Ibid.*, p. 183.

<sup>10</sup>John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), p. 176, n. 59 (hereafter "*JF*"). Unfortunately Rawls's does not tell us whether these are duties of *justice*.

problem rooted in the structure of hypothetical consent theory, as it is explicitly designed to justify principles to *persons*.

Non-cooperating individuals who possess the two moral powers of personhood are, given the *structure* of Rawls's theory, owed a justification for principles of justice to which they will presumably be subject as sufficiently cognizant members of society. It follows that Rawls's introduction of the fully cooperating assumption creates a tension in his account. If all persons are owed a justification for principles of justice, then it would seem that Rawls has no ground for omitting from his theory the claims of justice held by non-cooperating persons.

For the purposes of my discussion, the non-cooperating will include both impaired persons and human non-persons. I will also regard the non-cooperating as adults, but not the able-bodied and sound of mind elderly, who would, but for their impairments, be willing to participate in a scheme of social cooperation and their inability to do so is absolute (in a sense to be specified below).

I confine my discussion to non-cooperating adults because both children and the elderly, when not permanently disabled, will be or have been capable of engaging in social cooperation. So, when Rawls identifies the fully cooperating as those who are "associated together throughout a complete life" he is taking into account the normal life cycle of humans and presumably means to include unimpaired children who *will* participate in social cooperation and unimpaired elderly adults who *have* participated in social cooperation.<sup>11</sup> So, Rawls's assumption that all citizens are fully cooperating does not set aside the issue of distribution to children and the elderly.

Disability activists have made it abundantly clear that whether a disability is a handicap is often a matter of a society's willingness to accommodate those with unusual needs.<sup>12</sup> Citizens using wheelchairs are not handicapped if buildings have elevators and ramps and if buses have lifts and if tables are placed sufficiently far apart in restaurants, and so on. Hence, those using wheelchairs, if not fully cooperating, are so only in a relative sense. These are not the sorts of individuals, I take it, whom Rawls wishes to idealize out of his theory. He is concerned, I believe, to set aside cases of disability that are in a certain sense absolute: they render persons unable to cooperate given a society's particular level of technological advancement, even if that society is committed to making accommodations for the disabled. Currently, people with severe brain or spinal cord injuries whose motor or communication skills are severely limited might fall into this category.<sup>13</sup> Such individuals cannot participate in society in the usual way, in spite of such accommodations as ramps, Braille reading materials, sign

<sup>11</sup>This is especially clear in his discussion of healthcare in *JF*, pp. 173–5.

<sup>12</sup>See Stephen R. Smith, "Distorted ideals: the 'problem of dependency' and the mythology of independent living," *Social Theory and Practice*, 27 (2001), 579–98 at pp. 586–7. This view is termed the "social model" of disability as contrasted with the "medical model."

<sup>13</sup>For a touching account of life with an adult child who suffered a severe brain injury that destroyed her short-term memory, see Karen Brennan, *Being With Rachel* (New York: Norton, 2002).

language interpreters, specially equipped computers, flexible work schedules and so on.<sup>14</sup>

Furthermore, just as the capacity to contribute to a scheme of cooperation is often relative to particular social arrangements and hence often a matter of convention, what counts as a contribution is also largely a matter of convention. For example, an unconscious person, whom we might take as a paradigm case of a non-contributor, might be seen in certain legal systems as contributing through the acts of a trustee. So, in considering the issue of justice for the non-cooperating, we must acknowledge that we are following to some extent certain existing conventions regarding what counts as engaging in social cooperation.<sup>15</sup>

## B. HEALTHCARE AND DISTRIBUTIVE JUSTICE FOR THE NON-COOPERATING

Now that we know whom the fully cooperating assumption idealizes away, we can examine the philosophical implications of this idealization. Let me begin by discussing why Rawls introduces the fully cooperating assumption. The assumption seems especially puzzling given Rawls's commitment to the idea that people's natural abilities are arbitrary from a moral point of view and should not, therefore, be permitted, by the principles governing the basic structure of society, to be converted into material advantage or disadvantage, except where the presence of such advantages benefits everyone, especially the least well off. As Brian Barry puts the point,

If we start with the basic ideas [that natural endowments, social circumstances and good fortune are morally arbitrary] as the underpinnings of the difference principle, it must seem quite bizarre to claim that people who enjoy less than rude health (mental and physical), and especially those afflicted with a disease that gives rise to "unusual and costly medical requirements," create peculiar difficulties for a theory of justice. Such conditions are, we might think, the paradigm of the kind of undeserved misfortune whose translation into actual disadvantage Rawls describes as arbitrary from a moral point of view.<sup>16</sup>

As far as textual interpretation is concerned, it appears that Rawls has a simple and straightforward reason for introducing the fully cooperating assumption. He wants to avoid the issue of the distribution of healthcare. We can see that this is Rawls's aim by the fact that he identifies the problem of justice for the non-cooperating with the problem of distributing healthcare. Where the following passage suggests that Rawls's wishes to set aside the problem of distributing social goods generally to the non-cooperating, the context suggests that he is really concerned about the problem of distributing healthcare to both cooperating and non-cooperating citizens:

<sup>14</sup>There is a question of to what extent this inability is a consequence of employers having the right to define work. See Iris Marion Young, "Disability and the definition of work," *Americans with Disabilities*, ed. Leslie Francis and Anita Silvers (New York: Routledge, 2000), pp. 169–73.

<sup>15</sup>Thanks to Elijah Millgram for this point.

<sup>16</sup>Barry, *Theories of Justice*, pp. 244–5. Barry's allusion to "unusual and costly medical requirements" refers to *CP*, p. 332.

[S]ince we have assumed . . . that persons are normal and fully cooperating members of society over a complete life, and so have the requisite capacities for assuming that role, there is the question of what is owed to those who fail to meet this condition, either temporarily (from illness and accident) or permanently, all of which covers a variety of cases.<sup>17</sup>

In the paragraph that follows this quote, Rawls says that he is confident that justice as fairness can provide an answer to *part* of this question—the problem of providing for normal healthcare. The other part of the question that justice as fairness may not be able to answer, Rawls implies, is the problem of healthcare for those whose medical needs lie outside of the normal range.

So Rawls seems to reason as follows. He first identifies the question of what is owed to those who fail to meet the fully cooperating assumption as an issue to be set aside at the initial stage of his theory. He then identifies as central to this problem the issue of healthcare for the fully cooperating. And *then* he tells us that if this problem can be solved we may or may not be able to construct the solution to the problem of healthcare for the non-cooperating.<sup>18</sup> This way of reasoning from the general issue of the non-cooperating to the issue of healthcare is consistent with one of Rawls's earliest statements of the fully cooperating assumption, in the revised edition of *A Theory of Justice*, where he says, "I shall assume that everyone has physical needs and psychological capacities within the normal range, so that the questions of healthcare and mental capacity do not arise. . . . Thus the difference principle," he continues, "is to apply to citizens engaged in social cooperation."<sup>19</sup>

Rawls appears to think, then, that the issue of the non-cooperating has two parts: the problem of normal healthcare for the *temporarily* non-cooperating and the problem of special healthcare for the *permanently* non-cooperating. He apparently does *not* think that there is a general problem of distributive justice for the non-cooperating, beyond the provision of healthcare, that he does not cover in his theory. Whenever he introduces the fully cooperating assumption it is to avoid the problems of normal and special healthcare at the initial stage.<sup>20</sup>

<sup>17</sup>PL, p. 21.

<sup>18</sup>Rawls says, "Perhaps the social resources to be devoted to the normal health and medical needs of . . . citizens can be decided at the legislative stage in the light of existing social conditions and reasonable expectations of the frequency of illness and accident." He continues, "If a solution can be worked out for this case, then it may be possible to extend it to the hard cases[.]" namely the cases of the special medical and health needs of the non-participating; see Rawls, "Social unity and primary goods," CP, p. 368. See also JF, pp. 172–3 and PL, 184. Here Rawls endorses Norman Daniels's expansion of his view developed in *Just Health Care* (Cambridge: Cambridge University Press, 1985), ch. 3. Daniels's approach treats healthcare as an issue of equality of opportunity. His approach, then, assumes that the healthcare provided will be for those capable of taking advantage of social opportunities (p. 43).

<sup>19</sup>TJ, revised, pp. 83–4.

<sup>20</sup>There are complications I am sidestepping here. For instance, Rawls states that the fully cooperating assumption is not only necessary to *avoid* the problem of healthcare at the initial stage, but is also necessary to *solve* the problem of healthcare at the legislative stage. This idea conflicts with the solution to the problem of distributive justice for the non-cooperating that I propose below. See JF, p. 174.

It is fairly obvious, though, that the fully cooperating assumption does not simply postpone the issue of healthcare. It brackets *all* issues of distribution to the non-cooperating. This follows simply from the fact that if all citizens are imagined as fully cooperating, then the parties in the original position represent only the fully cooperating. So the parties, though they do not know the sex, or race, or values, or talents of those whom they represent, *do* know that whomever they represent is not so physically disabled or mentally impaired that she or he cannot participate in social practices and institutions. Moreover, as Rawls explicitly states, only the relatively able-bodied and mentally and cognitively normal are subject to the difference principle—the principle chosen in the original position for distributing income and wealth. The absence of representation of non-contributors in the original position entails that non-contributors are not included in the deliberations concerning the design of the basic structure of society, and the assertion that the difference principle applies only to contributors entails that non-contributors are not included in the economic institutions making up the basic structure.

Rawls does not say whether or not the equal liberty principle and the equal opportunity principle apply to the non-cooperating. I am assuming that the first of these does, although this raises a number of problems for Rawls's theory that I will set aside.<sup>21</sup> I assume that the second does not, which again raises a number of issues.<sup>22</sup> For the purposes of this paper I will confine my discussion to the issue of distributing wealth and income to the non-cooperating, which Rawls neglects to address, first, by omitting the non-cooperating from the original position and exempting them from the difference principle and, second, by failing to acknowledge that the fully cooperating assumption sets aside not only the problem of distributing healthcare to the permanently and temporarily non-cooperating, but also sets aside the problem of distributing material goods generally to the non-cooperating.

Suppose we were to modify Rawls's theory in the most obvious way to make it capable of addressing the problem of distribution for the non-cooperating. Suppose we were to simply drop the fully cooperating assumption. This modification would be compatible with Rawls's desire to defer the problems of *healthcare provision*: we can postpone the issue of healthcare for both cooperating and non-cooperating citizens and address, at the initial stage, the issue of distributing wealth and income to all citizens, both cooperating and non-cooperating. Moreover, including the non-cooperating in the original position would seem to be warranted by Rawls's concern, underscored by Barry, to justify

<sup>21</sup>One problem is that the liberal principle of legitimacy seems to be violated. Because they are not represented in the original position, if the non-cooperating are subject to the equal liberty principle, they are subject to a principle that has not been shown to be justifiable to them.

<sup>22</sup>My speculation is based solely on my puzzlement over how the principle of equal opportunity can apply to the non-cooperating, since they, by definition, are not able to take advantage of the opportunities created by social cooperation.

principles of justice that ignore contingencies such as native ability. No doubt this proposal would require a number of rather significant modifications of Rawls's theory—for instance, the identification of social positions on purely economic criteria and the account of primary social goods as the all purpose means needed by fully cooperating citizens to pursue their ends. But perhaps these changes could be made. There is a deep problem, though, with including the non-cooperating in the original position.

### C. IMPARTIALITY, CONTRIBUTION AND NEED

This problem can be explicated by looking at the purpose of the impartiality condition in Rawls theory, which is expressed through the idea of the veil of ignorance. The veil of ignorance ensures that the original position represents an impartial point of view, understood as a point of view that eliminates the influence of morally irrelevant factors in deliberations about principles of justice. So, it conceals from the deliberators such things as their values and talents, their race, sex, psychological propensities and social position. These factors are morally irrelevant in the sense that they are illegitimate grounds for claims on social goods. The fact that one is tall enough to slam dunk, for instance, or an atheist, does not count (all things equal) as a legitimate reason for being owed a particular share of the social product. As Barry would have it, the same point holds for being disabled. This fact about persons should surely be concealed, he implies, by the veil of ignorance. But, the fully cooperating assumption ensures that this fact is *not* concealed: the parties know that they all represent fully cooperating individuals. Why is *this* contingency *not* concealed from the parties and hence *not* treated as morally irrelevant?

Perhaps the answer is that whether one is a contributor or whether one has unusual needs is a relevant fact about her for the purposes of justifying principles of justice. That is, one's being a contributor is a legitimate reason for being owed a particular share of the social product. And, one's being a non-contributor and simply having needs, especially unusual needs, is also a reason for being owed a particular share of the social product. Therefore, whether or not one is fully cooperating is *not* the kind of thing that should be concealed by the veil of ignorance—it is not morally arbitrary in the relevant sense.

Here is another way to see the point. Suppose Rawls did not impose the fully cooperating assumption. Then the parties in the original position would represent both cooperating and non-cooperating citizens. (Though, of course, no party would know which type of citizen she or the other parties represent.) Suppose, further, that the parties, in the absence of the fully cooperating assumption, would choose the difference principle. After all, it is largely due to their unawareness of their abilities, which no doubt includes their ability to cooperate, that leads the parties to the difference principle. So, the absence of the fully cooperating assumption would not alter the deliberations of the parties

and hence would not affect the results of those deliberations, one of which is the adoption of the difference principle. Hence, without the fully cooperating assumption, the difference principle would distribute goods to citizens completely independent of their participation in the production of goods and independent of any unusual needs. The difference principle would be insensitive not only to one's natural talents and values—things it should be insensitive to—but also to participation and need. Hence, without the fully cooperating assumption, the difference principle would ignore features of persons that are arguably morally relevant to their claims on social goods. This result could surely be regarded as a defect of the principle.

We can see, then, that the fully cooperating assumption allows Rawls to avoid this defect. By ensuring that everyone to whom the difference principle distributes benefits has helped create those benefits and is not burdened with unusual needs, the fully cooperating assumption ensures that all citizens share the same kind of claim on social goods, namely a claim resting on their participating in the scheme of cooperation that produced those goods. Indeed, Rawls claims that having the ability to be a fully cooperating member of society is morally relevant to one's claim to justice in justice as fairness. He says,

[I]n establishing the fair terms of social cooperation (in the case of the basic structure) the only relevant feature of persons is their possessing the moral powers (to the sufficient minimum degree) and *having the normal capacities to be a cooperating member of society over a complete life*. Features relating to social position, native endowment, and historical accident, as well as to the content of persons' determinate conceptions of the good, are irrelevant, politically speaking, and hence placed behind the veil of ignorance.<sup>23</sup>

## II. MEETING THE NEEDS OF THE NON-COOPERATING: A PROPOSED SOLUTION

We can view the problem of distributive justice for the non-cooperating that Rawls avoids as the problem of how to reconcile social policies recognizing claims of need with the difference principle, which, due to the fully cooperating assumption, recognizes only the claims of contributors.<sup>24</sup> An adequate proposal for reconciliation, within a Rawlsian framework, is subject to two constraints. First, the proposal must be consistent with the overall approach of contractarianism, which is to support principles of justice by showing that those principles can be justified to the individuals who will be subject to them. It follows that the policies adopted to address the claims of the non-cooperating must be justifiable to those individuals. The second constraint is that the proposal

<sup>23</sup>*PL*, p. 79, my emphasis.

<sup>24</sup>The difference principle does not fail to recognize need-based claims because of its content; it does so because the social position of the least advantaged to which it refers is occupied by full contributors.

should be consistent with Rawls's view about a guaranteed social minimum, because Rawls believes that claims of need, among other things, should be addressed by means of a guaranteed social minimum.<sup>25</sup> Since the claims of non-participants are claims of need, their claims should be met, on Rawls's account, under the auspices of the social minimum. As my proposal for amending Rawls's theory is a modification of his account of the guaranteed social minimum, I will preface my proposal with an explication of this account. Then I will offer my proposal and explain how it meets the demand that principles of justice be justifiable to those who are subject to them.

The social minimum, for Rawls, refers to the funds collected through transfers (income or consumption taxes) that are necessary to e.g., sustain an active and productive work force, rear and educate children, provide for the retired, establish a national defense, ensure savings for future generations, provide healthcare for the fully cooperating and meet the basic needs of all (fully cooperating) citizens.<sup>26</sup> Concerning the last of these functions, Rawls makes two claims. First, he says that the provision of a social minimum for meeting citizens' basic needs is a "constitutional essential."<sup>27</sup> Second, he says that the extent of the *general* social minimum—the funds collected for *all* publicly provided goods, including the minimum for meeting citizens' basic needs—must be decided in accordance with the demands of the difference principle.

A constitutional essential is, for Rawls, either a rule that specifies the structure and powers of government or one that specifies the rights and liberties of citizenship that must be respected by legislative majorities, for example, the right to vote.<sup>28</sup> The specific shape of these rules is decided at the constitutional stage of the theory, subject to the constraints provided by the content of the first principle of justice adopted in the original position—the equal liberty principle. Principles of distributive justice are *not* classed constitutional essentials. Though they are adopted in general form in the original position, they are applied at the legislative stage, subject to the limits set down by the constitution. So, the difference principle and the principle of fair opportunity are not enshrined in the constitution. However, certain elements of distributive justice must be constitutionally guaranteed in order to preserve people's basic freedoms or to secure the fair value of the political liberties. Among these is the social minimum designed to cover the basic needs of all citizens.

<sup>25</sup>Discussion of the idea of a social minimum dedicated to meeting need-based claims is in *TJ*, pp. 276–7; discussion of the social minimum and savings for future generations is in *TJ*, pp. 284–93 and discussion of the social minimum as it relates to "normal" healthcare and other public goods is in *JF*, pp. 173–4. Rawls uses the term "social minimum" to refer both to funds allocated to meet basic needs and to public funds generally, regardless of their purpose. I will use "social minimum" to refer to those public funds allocated for basic needs and "general social minimum" to refer to public funds generally. See also Jeremy Waldron, "John Rawls and the social minimum," *Journal of Applied Philosophy*, 3 (1986), 21–33.

<sup>26</sup>*JF*, pp. 173–4. I take it that healthcare does not count as a basic need, as it is treated separately by Rawls.

<sup>27</sup>*PL*, p. 225.

<sup>28</sup>The idea of a constitutional essential is discussed in *PL*, pp. 227–30.

Though this social minimum is constitutionally required, it is limited by the application of the difference principle at the legislative stage. The general social minimum is to be set at the point that maximizes the expectations of the least advantaged group of fully cooperating citizens.<sup>29</sup> If further taxation to increase the general social minimum were to interfere with economic efficiency so much that the prospects of the least advantaged declined, then further provision for public goods would be prohibited. The portions of the general social minimum to be used for various goods—national defense, public education, and the like—are to be decided, Rawls says, at the legislative stage. Ideal legislators must balance the demands for various goods given the knowledge available to them about the specific natural and social circumstances of their society.<sup>30</sup>

My proposal is to retain the fully cooperating assumption in the original position but to drop it at the constitutional stage of the theory. Ideal constitutional conventioners should imagine that they might be disabled in a way that prevents them from participating in a scheme of cooperation and should fashion the constitutional provision for the social minimum with this possibility in mind. The minimum would, in this case, presumably be as high and as comprehensive as possible, within the constraints imposed by the difference principle, and would cover all the claims of need had by the non-cooperating in the areas of shelter, food, clothing, transportation, utilities and the like. The social minimum would be as high and as comprehensive as possible within the constraints imposed by the difference principle because the parties to the hypothetical constitutional convention would want to guarantee their well-being in case they should turn out to be dependent upon the social minimum. They would engage in the same sort of maximin reasoning that leads the parties in the original position to the difference principle; that is, they would want the largest possible distribution for the least well-off, who are *here*, those dependent upon the guaranteed social minimum.

Abandoning the fully cooperating assumption at the second stage of Rawls's theory forestalls the problem with the difference principle, discussed above, that is created by eliminating the fully cooperating assumption altogether. In the absence of the fully cooperating assumption, recall, the difference principle would distribute benefits to all members of society regardless of the nature of their claim upon those goods and would be unresponsive to the different contours of those claims. A consequence of invoking the fully cooperating assumption is to guarantee that members of society have similar claims on a share of socially produced goods, namely one that is influenced by their engaging in social cooperation. The fully cooperating assumption, therefore, contrives to make the difference principle responsive to that sort of claim and only that sort

<sup>29</sup>*TJ*, p. 285. See, *JF*, p. 173 for discussion of how the difference principle limits how much can be provided for normal healthcare. See also, *TJ*, pp. 277–8 for discussion of how the difference principle limits how much can be provided to meet the needs of fully cooperating citizens.

<sup>30</sup>*JF*, p. 173.

of claim by limiting the application of the difference principle to individuals who possess that sort of claim. As long as the fully cooperating assumption is in place in the initial stage of Rawls's theory, the scope of the difference principle is limited to the fully cooperating.<sup>31</sup> The terms of cooperation are set (at first) for all and only those who engage in cooperation. By dropping the fully cooperating assumption at the *next* stage, the question of what is owed to the non-cooperating can be addressed without affecting the limitation in scope the fully cooperating assumption affords to the difference principle.

In this way, the difference principle can stand as a principle of distribution that compensates the fully cooperating for their contributions to the production of social goods; it stands as a principle of reciprocity ensuring that, in Rawls words, "all who are engaged in social cooperation and who do their part as the rules and procedures require, are to benefit in an appropriate way as assessed by a suitable benchmark of equality."<sup>32</sup> At the same time, removing the fully cooperating assumption at the constitutional stage allows for the adoption of a comprehensive social minimum that is compatible with the norm of reciprocity mandating adequate compensation to full contributors.

This proposal of invoking the fully cooperating assumption in the original position and then removing it at the constitutional stage fulfills the liberal condition of legitimacy, which states that governing principles are legitimate only if they are justifiable to those subject to them. Contractarian approaches to justice, recall, maintain that principles are justifiable just in case they would have been chosen, under suitably impartial conditions, by those subject to them. The liberal criterion of legitimacy entails that policy provisions for non-cooperating persons must be ones that such persons would have chosen under suitably impartial circumstances. It follows that non-cooperating persons must be represented in the ideal circumstances of deliberation if policies pertaining to them are to be legitimate. Dispensing with the fully cooperating assumption at the constitutional stage of Rawls's theory, where the primary policy for providing

<sup>31</sup>Notice that this allows my view to avoid the bottomless pit problem discussed by Kenneth Arrow, who is concerned that the difference principle "implies that any benefit, no matter how small, to the worst off member of society, will outweigh any loss to the better off individual provided it does not reduce the second below the level of the first." It follows, he says, that "there can easily exist medical procedures which serve to keep people barely alive but with little satisfaction and which are yet so expensive as to reduce the rest of the population to poverty"; Kenneth J. Arrow, "Some ordinalist-utilitarian notes on Rawls's theory of justice," *Journal of Philosophy*, 70 (1973), 245–63 at p. 251. See also, Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978), pp. 120, 126. In response to Arrow, Rawls invokes the fully cooperating assumption; see *JF*, pp. 168–73; *PL*, pp. 182–186. In other words, Rawls simply assumes that no citizens have unusual needs of the sort Arrow identifies. My modification of Rawls retains the fully cooperating assumption at the initial stage of his view, where the difference principle is adopted, and assumes, with Rawls, that the difference principle applies only to fully cooperating citizens. Furthermore, the extent of resources allocated to the non-cooperating is, on my account, limited by the application of the difference principle to fully cooperating citizens. So, those citizens are ensured a fair share of social goods, which cannot be encroached upon by extreme need, under normal circumstances. Thanks to an anonymous referee for this journal for forcing me to clarify this issue.

<sup>32</sup>*PL*, p. 16.

for the non-cooperating is established, ensures that non-cooperating persons are represented in the deliberations concerning that policy. Insofar as ideal deliberators, at that point, must imagine that they could be non-participants, non-participants are represented. Insofar as those ideal deliberators would choose a constitutionally guaranteed social minimum, that policy is shown to be justifiable to the non-participating. In short, my proposal meets the liberal principle of legitimacy by allowing that the terms of cooperation for participating citizens are determined by representatives of those citizens (in the original position) and that the policies for meeting the needs of the non-cooperating, who are dependent upon the goods produced by participants, are determined by representatives of *those* citizens.

Some representatives in the constitutional stage will represent (though they will not know they represent) individuals who do not qualify as persons in Rawls's sense. They will represent individuals who lack the two moral powers. In this case, the ideal deliberators serve as trustees for such individuals.<sup>33</sup> So long as the policies for addressing the needs of the non-cooperating are adopted by representatives of the non-cooperating, whether those representatives turn out to have represented persons or non-persons, those policies are justifiable to those non-cooperating individuals who are owed a justification. So, those policies are legitimate by the lights of hypothetical consent theory.

### III. OBJECTIONS

#### A. BASIC NEEDS AND HEALTHCARE NEEDS

My proposal does not address the issue of healthcare. One might think that this is a problem for my approach, since the basic needs of disabled individuals to be covered by the guaranteed social minimum often *include* expensive medications, therapies or medical technologies. For example, in order to experience a minimal level of comfort and safety, a disabled person might rely upon an assistance dog, or specially prepared foods, or daily physical therapy. But this connection between basic needs and healthcare is not confined to the non-cooperating. The basic needs of fully cooperating citizens are also intertwined with their healthcare needs. Corrective lenses are a basic need for people with extremely poor but correctable vision, an appendectomy is a basic need for someone with appendicitis, and costly medication is a basic need for someone with severe gastro-esophageal reflux disease. And this is not to mention the healthcare requirements of pregnant women if they are to have healthy children free of birth defects. If overlooking the connection between basic needs

<sup>33</sup>I owe this idea to Christine Hartley, *Justice for All: Constructing an Inclusive Contractualism*, Ph.D. thesis. University of Michigan. 2005. For a different approach to including people with cognitive impairments in Rawls's theory, see Sophia Isako Wong, *Rawlsian Contractualism and Cognitive Disabilities*, Ph.D. thesis. Columbia University, in progress. Thanks to both authors for fruitful email discussion on the issue of Rawls and disability.

and healthcare needs is a problem, it is not a problem for my proposal but a problem for Rawls's approach, due to his separating basic needs and healthcare needs. For the purposes of this paper I assume with Rawls that some sort of workable distinction between basic needs—needs for food, clothing and shelter—and healthcare needs can be sustained.

## B. THE MORAL RELEVANCE OF CONTRIBUTION AND NEED

One might object that my proposal goes against the spirit of Rawls's approach, for he is normally interpreted as opposed to the idea of rewarding contribution. As we saw above, he regards as morally arbitrary differences in people's talents and so he maintains that citizens do not have a desert based claim on what they are able to create, through the use of their talents, in a scheme of cooperation. As a consequence, he holds that the unequal distribution of citizens' abilities should be regarded as a collective asset. The difference principle is designed to treat this distribution as a collective asset and is justified, in part, on this ground.<sup>34</sup> Furthermore, Rawls maintains that a society cannot justly index compensation to contribution because the extent of one's contribution can be assessed only by reference to a particular comprehensive doctrine. There is no shared set of ends, Rawls says, by which one's contribution can be measured.<sup>35</sup>

In spite of the prominence of these themes in Rawls, some of his remarks indicate that he regards the fact of whether or not one contributes to a cooperative scheme as morally relevant. First, Rawls is clear that he wishes to distinguish between those who fall above and those who fall below the minimum level of ability that allows them to participate in society. He explains that this distinction permits him to avoid assessing differences in the capabilities of citizens within the normal range—a task he thinks would be, even in theory, impossible.<sup>36</sup> He states furthermore that the distinction is central to the justifiability of his principles of justice. He says, "This rather simple distinction between the two cases—of differences above and below the minimum essentials—is an example of the kind of distinction that is, I believe, vital to any political conception that has some chance of being the focus of an overlapping consensus in a democratic regime. Our aim is to avoid difficulties, simplifying when simplification is possible and to keep in touch with common sense."<sup>37</sup>

Why Rawls thinks that overlapping consensus can be achieved only if we distinguish between fully cooperating and non-cooperating individuals is not immediately obvious. He appears to think that achieving overlapping consensus on an issue requires that that issue be fairly straightforward—"uncluttered," as it were, with the complications raised by unusual cases. So, he seems to think

<sup>34</sup>*TJ*, pp. 101, 179.

<sup>35</sup>*PL*, p. 276.

<sup>36</sup>*JF*, p. 175.

<sup>37</sup>*Ibid.*

that all could agree to principles of justice for those working together in a scheme of cooperation but that it would be difficult for all to agree to principles of justice if they were to govern both the relations among cooperators and the relations between cooperators and non-cooperators. Such principles would perhaps be too complex to garner consensus. It follows that we must regard the fact of participation as a relevant feature of persons for political purposes.

A second factor suggesting that Rawls considers the fact of contribution morally relevant is the distinction he draws between distributive justice and what he calls “allocative justice.” In comparing his own approach, founded on pure procedural justice, with utilitarianism, which, he claims, is founded on “allocative justice,” he says the following:

In pure procedural justice . . . distributions of advantages are not appraised in the first instance by confronting a stock of benefits available with given desires and needs of known individuals. The allotment of the items produced takes place in accordance with the public system of rules, and this system determines what is produced, how much is produced, and by what means. *It also determines legitimate claims the honoring of which yields the resulting distribution.* Thus in this kind of procedural justice, the correctness of the distribution is founded on the correctness of the scheme of cooperation from which it arises and on answering the claims of individuals engaged in it. A distribution cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations. . . .

By contrast, allocative justice applies when a given collection of goods is to be divided among definite individuals with known desires and needs. *The collection to be allotted is not the product of these individuals, nor do they stand in existing cooperative relations. Since there are no prior claims on the things to be distributed,* it is natural to share them out according to desires and needs, or even to maximize the net balance of satisfaction. Justice becomes a kind of efficiency, unless equality is preferred. Suitably generalized, the allocative conception leads to the classical utilitarian view.<sup>38</sup>

I think it is fair to treat these comments as a critique of utilitarianism and not simply a point of contrast with Rawls’s own view. A problem with utilitarianism, according to these remarks, is that it fails to recognize that in human affairs benefits and burdens are inevitably socially produced and that the process of social production generates claims on those benefits (and generates responsibilities for those burdens). Utilitarianism, in other words, fails to acknowledge that because social goods are *social* goods, one’s having contributed to their existence may give one a claim on a share of them, independent of preference, desire or need. Because Rawls obviously regards its sensitivity to contribution as an advantage of his view and appears to think that this sensitivity is compatible with the idea that people’s abilities are morally arbitrary, my application of his theory to the problem of the non-cooperating is consistent with his general approach.

<sup>38</sup>TJ, pp. 88–9, my emphasis. See also JF, p. 50.

It is tempting to interpret Rawls's complaint about utilitarianism here as a complaint about the utilitarian's non-conventionalist ground for claims of justice. For the utilitarian, an individual has standing, from the point of view of justice, so long as she is capable of feeling pleasure and pain or of having her preferences frustrated or satisfied. The ground of her claim to justice is rooted in a capacity she has. We could read Rawls's here as advocating a conventionalist account of justice. The claims of justice, on this reading, are, for Rawls, given by the rules of justice agreed upon by those to be governed by the rules. There are no claims of justice outside of what the agreed upon rules recognize as legitimate claims.<sup>39</sup> If this interpretation of the passage is correct, then Rawls is not worried about the utilitarian overlooking the fact of participation as legitimately influencing one's claim to a share of the cooperative surplus. Instead, he is worried about the utilitarian's putting forth any ground for a claim on part of the cooperative surplus that is not determined by principles of justice.

But this interpretation cannot be right because Rawls's himself identifies a set of capacities as grounding people's claims to justice, namely the capacity for a sense of justice and the capacity for a conception of the good. Individuals with these capacities are owed justice, on Rawls's account, independent of what conception of justice is adopted. Furthermore, the principles of justice endorsed by Rawls are designed to be responsive to those capacities just as the principle of utility is designed to be responsive to people's capacity for happiness or preference satisfaction. So it is reasonable to interpret Rawls in the passage under consideration as arguing that it matters to people's claims on a share of goods that those goods are, as he says, "the product of those individuals."

Not only does Rawls believe that the fact of participation is morally relevant, he also thinks, as we saw above, that need is morally relevant to people's claims on a share of the social pie. If Rawls envisions, in a just society, institutions designed to meet claims of need, then he must regard need as relevant to the justification of principles of justice. A theory that does not recognize need as morally relevant would not contain provisions designed to address claims of need.

### C. DESIGNING THE BASIC STRUCTURE

A consequence of meeting the claims of the non-participating at the constitutional stage and fine-tuning those claims at the legislative stage is that the shape and reach of those claims will be limited by the difference principle, which dictates the distribution of primary social goods to participants. Even though policies for addressing the needs of the non-cooperating are chosen by

<sup>39</sup>Rawls's endorsement of Hume's account of the circumstances of justice might suggest this reading. See *TJ*, pp. 126–30. See also, David Gauthier, "David Hume, contractarian," *Philosophical Review*, 88 (1979), 3–38.

those who represent them, on my proposal, the policy options available at the later stages are bounded by the theory of justice chosen by representatives of fully cooperating individuals at the initial stage. One might regard this procedure as objectionable because the non-cooperating do not participate in initial decisions about the design of the basic structure and their decisions about their prospects are constrained by the terms of cooperation already set by representatives of the fully cooperating.

There are two considerations that should deflect this objection. First, there is a practical concern. Non-cooperators depend on the surplus created by cooperators. In order to construct policies for dividing goods among non-cooperators, the nature and extent of the surplus created in a scheme of cooperation must be able to be estimated. In other words, the means by which the ideal of reciprocity is to be embodied and the effects of the resulting principles on the cooperative surplus must be known in order to make reasonable decisions about institutional provisions for the non-cooperating. So, the issue of distribution to the non-cooperating must be settled after the issue of distribution to the cooperating.

Second, there is a methodological reprieve. Rawls says the following about questions that are set aside at the initial stage of his theory: “[H]ow we [eventually] answer them may require us to revise answers already reached. This back and forth procedure is to be expected.”<sup>40</sup> So, once we face the issue of distribution to the non-cooperating, we may find that we must revise principles previously adopted for distribution to the fully cooperating. For instance, if the cooperative surplus produced by an economy governed by the difference principle were so small that adequate care for the disabled could not be provided, the difference principle might have to be reassessed. Perhaps an alternative principle exemplifying the ideal of reciprocity could be fashioned—one that would produce a larger surplus from which to draw to meet people’s needs. Or, perhaps the notion of reciprocity, as Rawls understands it, would have to be changed or even abandoned. The point is that nothing is set in stone. The principles decided at the initial stage are provisional. So, the “back and forth procedure” that Rawls endorses ensures that the requirements of the non-cooperating will, in the end, influence the content of the principles decided at the initial stage.

#### IV. CONCLUSION

I have argued that Rawls’s theory of distributive justice can be modified to take account of what is admittedly an unhappy exclusion—the issue of distributive justice for the severely disabled who cannot engage in social cooperation in the usual way. I have defended a design of the basic structure that recognizes both

<sup>40</sup>*PL*, p. 20.

the fact of contribution and need as legitimate considerations in determining people's claims on social goods. And I have defended a procedure for justifying the principles creating this design that meets a central requirement of liberalism, which is that such principles be justifiable to citizens. I hope to have shown that Rawls's neglect of the question of the non-cooperating does not provide reason to abandon his approach to distributive justice.

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