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ARTICLES



DISCUSSIONS




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# CAUSATION, STATISTICAL EVIDENCE, AND TOXIC TORTS

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In this paper, I present a puzzle about how courts react to statistical evidence. The basic puzzle is that while some types of statistical evidence are considered insufficient to establish causation, other types of statistical evidence are considered sufficient. While the types of statistical evidence that are cyonsidered insufficient to establish causation have received significant scholarly attention, much less attention has been paid to the types of statistical evidence that courts consider sufficient.[1] The latter types of statistical evidence are especially prominent in toxic tort cases, which makes such cases a natural springboard for exploring solutions to the puzzle.

This paper proceeds in three stages. First, I set out what I take to be the basic intuitive puzzle, as well as some prominent views on why establishing causation on the basis of certain types of statistical evidence is problematic. To follow, I discuss in some detail the nature of toxic tort cases and how statistical evidence is generally utilized to establish causation. To close, I show how prominent accounts are unable to address this puzzle about the reaction of courts to different types of statistical evidence, and I put forward a tentative solution that both aligns with bedrock legal principles and is supported by philosophical argument.

## 1. THE PUZZLE OF STATISTICAL EVIDENCE

Let us start with an example that is often used to illustrate the problem with statistical evidence:

> *Blue Bus*: There are two bus companies in town, the Blue Bus Company and the Grey Bus Company. One day, an out-of-control bus injures Sal.

1 For influential discussions of the insufficiency of statistical evidence (and related) questions, see Tribe, "Trial by Mathematics"; Cohen, *The Probable and the Provable*; Brook, "Inevitable Errors"; Thomson, "Remarks on Causation and Liability"; Posner, "An Economic Approach to the Law of Evidence"; and Redmayne, "Exploring the Proof Paradoxes." A notable exception to the lack of discussion of the sufficiency of statistical evidence is Hawthorne et. al, "Statistical Evidence and Incentives in the Law."

> Sal, who saw that it was a bus that caused his injuries, brings a claim for damages. To establish that it is more likely than not that the Blue Bus Company caused Sal's injuries, Sal points out that the Blue Bus Company owns and operates 80 percent of the buses on local bus routes. The Blue Bus Company concedes that the bus that hit Sal was being operated negligently; however, it contests that the evidence presented by Sal is sufficient to establish that it is more likely than not that the Blue Bus Company caused his injury. Since the Blue Bus Company concedes the question of negligence, the only issue that the judge must rule on to establish liability is whether the evidence is sufficient to establish that it is more likely than not that the Blue Bus Company caused Sal's injuries. The judge concludes that the evidence presented by Sal is sufficient to establish the likelihood of causation and thus that the Blue Bus Company is liable for damages.[2]

Most people have the intuition that holding the Blue Bus Company liable in this case is somehow inappropriate. This is *prima facie* puzzling since, to meet the preponderance of evidence burden with respect to causation, one needs only to establish that it is more likely than not that the defendant caused the plaintiff's injuries. As such, if the judge concludes that in light of the evidence presented, it is more likely than not that a bus from the Blue Bus Company hit Sal, then it is not clear what would stand in the way of a finding of liability.

Many scholars are tempted to say that a finding of liability in Blue Bus is inappropriate because the statistical evidence presented is insufficient to establish the likelihood of causation. They contrast such evidence with what they call *individualized* or *particular* evidence, such as eyewitness testimony. For instance, if an eyewitness testified that the bus that hit Sal was blue, most agree that this would be sufficient to establish the likelihood of causation, even if eyewitnesses sometimes make mistakes in identifying the color of buses. The intuitive difference between statistical and individualized evidence seems to be preserved even if, given the Blue Bus Company's market share and the rate of errors in eyewitness testimony, the likelihood that it caused injury in each case is the same.

Before putting forward some more specific proposals as to the supposed problem with the type of statistical evidence presented in Blue Bus, a nearby case is worth considering:

> *Blue Lung*: For over twenty years, the Nuclear Dump Company has been illegally emitting a specific type of toxic fume that is known to cause a

2 The first application of the Blue Bus scenario to the statistical evidence issue was in Thomson, "Liability and Individualized Evidence." It is based on the fact pattern of *Smith v. Rapid Transit Inc.*, 317 Mass 469 (Mass 1945).

> rare disease called blue lung. After contracting blue lung, nearby resident Maria sues the Nuclear Dump Company in civil court. Maria's doctor testifies that in her professional opinion, it is very likely that Maria contracted blue lung as a result of inhaling the specific type of toxic fume that the Nuclear Dump Company emits and incredibly unlikely that she contracted it in an unrelated manner. The Nuclear Dump Company concedes that it negligently emitted toxic fumes but contests the sufficiency of Maria's evidence to establish that toxic fumes caused Maria's illness. The judge in the case finds Maria's evidence sufficient to establish that it was more likely than not that emissions caused her illness and, since the Nuclear Dump Company already conceded its negligence, finds it liable for damages.

While finding the Blue Bus Company liable for damages seems inappropriate, the case against Nuclear Dump Company is in many respects stronger. At a minimum, as we will see below, courts certainly treat such cases differently. For now, however, it is simply worth noting that insofar as we think that there is a relevant difference between these cases, then we will have a puzzle on our hands. This is because, at least *prima facie*, the evidence used to establish the likelihood of causation in both Blue Bus and Blue Lung is purely statistical.

With these cases in mind, let us take a look at some more specific proposals as to the problem with purely statistical evidence. While this list is not exhaustive, it is meant to provide a basic idea of the diversity of proposals that have been put forward in this regard.[3] Regardless of which of these proposals we adopt, it will be the case that in the context of toxic torts, non-individualized, purely statistical evidence ought to be insufficient to establish that it is more likely than not that the defendant's product caused the plaintiff's injuries.

> *Causal Account*: Purely statistical evidence is problematic because it lacks the appropriate causal link to the proposition for which it is taken to be evidence.[4]

> *Sensitive Account*: Purely statistical evidence is problematic because a belief in liability based on such evidence will not track the truth of the matter. In particular, if someone other than the defendant were liable,

3 For discussion of a slightly expanded list, see Enoch and Fisher, "Sense and Sensitivity," 565–71.

4 This causal account is based on the view put forward in Thomson, "Remarks on Causation and Liability" and "Liability and Individualized Evidence." A similarly causal view is put forward by Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof."

> the juror or judge (most probably) would still have formed the belief that the defendant was liable.[5]
>
> *Normal Account*: Purely statistical evidence is problematic because it does not provide normic support for the truth of the proposition for which it is taken to be evidence. In particular, the statistical evidence does not make it the case that the falsity of the proposition would require more explanation than its truth.[6]

The plan for the rest of the paper is as follows. First, in section 2, I discuss in some detail how courts handle the evidence used to establish the likelihood of causation in toxic tort cases. To follow, in section 3, I argue that none of the above accounts can satisfactorily account for such cases. To close, in section 4, I put forward my own tentative proposal as to why courts treat these cases differently that both aligns with fundamental legal principles and is on solid moral and epistemological ground.

## 2. TOXIC TORTS

In this section, I provide a basic discussion of toxic torts and a more detailed discussion of one way in which a plaintiff can establish that it is more likely than not that the defendant's product caused the plaintiff's injuries. While this is not the only way in which a plaintiff can establish the likelihood of causation, it is the simplest illustration of how statistical evidence is put to use in this area of the law.

One helpful way of thinking about toxic torts is put forward by Bert Black and David Lilienfield, who define toxic tort cases as follows:

> Toxic tort cases [are] those in which the plaintiff seeks compensation for harm allegedly caused by exposure to a substance that increases the risk of contracting a serious disease, but does not cause an immediately apparent response. These cases generally involve a period of latency or incubation prior to the onset of the disease. In most cases the increased risk of the disease does not diminish or dissipate, even with the cessation of exposure.[7]

5 This sensitive account is based on the view put forward by Enoch et al, "Statistical Evidence, Sensitivity, and the Legal Value of Knowledge"; Enoch and Fisher, "Sense and Sensitivity"; and Enoch and Spectre, "Sensitivity, Safety, and the Law."

6 This normal account is based on the view put forward by Smith, "When Does Evidence Suffice for Conviction?"

7 Black and Lilienfield, "Epidemiologic Proof in Toxic Tort Litigation," 732.

Well-known examples of toxic tort cases include claims of harms after exposure to asbestos, Agent Orange, insecticides, hazardous wastes, and lead paint.

In a toxic tort case, a plaintiff must establish both the defendant's negligence and her own damages.[8] Probably the most challenging, controversial, and contested element in any toxic tort case, however, is causation.[9] Even from our simple description of toxic torts above, some of these challenges should be apparent. In particular, exposure to harmful chemicals may result in harm and injuries decades later, and in almost all cases, exposure simply increases an individual's risk of suffering injuries, as opposed to ensuring that such harms will obtain. This is in addition to the fact that quite often, the chemicals being put into use are not fully understood by scientists in the field. Ora Fred Harris Jr. expounds on this problem quite eloquently:

> A common, generally accurate, evaluation of humankind's understanding of the behavior of hazardous or toxic wastes and the effect of exposure on humans points to a vast amount of scientific uncertainty. … Thus, a plaintiff attempting to establish that exposure to a particular substance has in fact caused his or her injury may face a dubious court or jury because of the lack of scientific certainty. Moreover, because this "new" tort injury can have a latency period of up to as many as twenty to thirty years, it may be, as a practical matter, virtually impossible to establish the requisite causal relationship between an exposure that may have taken place many decades ago and a recently manifested injury now claimed to be the consequence of that exposure. Not only does this long latency period stymie the toxic or hazardous exposure victim's ability to isolate the alleged substance that precipitated the injury, it also diminishes the chances of identifying the responsible parties.[10]

Faced with these complex issues, courts have developed a nuanced approach to causation in toxic tort cases. In order for a plaintiff's claim to be successful, she must establish both general and specific causation.[11] Conceptually speaking, in a case in which it is alleged at trial that an *F* caused a *G*, the question of general causation is "Can an *F* cause a *G*?"—which the plaintiff must prove is

8 For an excellent discussion of these elements of the plaintiff's case, see Roisman et. al, "Preserving Justice."

9 For more on causation in tort law, as well as issues that arise in difficult cases, see Wright, "Causation in Tort Law." For a discussion focused on causation in toxic tort litigation, see Conway-Jones, "Factual Causation in Toxic Tort Litigation."

10 Harris, "Toxic Tort Litigation and the Causation Element," 912.

11 For a helpful discussion of this distinction, see Gold, "The 'Reshapement' of the False Negative Asymmetry in Toxic Tort Causation," 1511.

more likely than not; and the question of specific causation is "Did an *F* cause this particular *G*?"—where the same burden of proof applies. To take an example outside of the toxic tort context, if it is alleged that a mosquito bite caused a seizure, the question of general causation is "Can a mosquito bite cause a seizure?" while the question of specific causation is "Did a mosquito bite cause this particular seizure?"

Returning to the context of toxic torts, in order to establish general causation, the plaintiff must establish that the chemical or substance in question can cause the sort of harm that the plaintiff suffered in the population at large—or at least in a subgroup of the population to which the plaintiff belongs.[12] In order to establish specific causation, the plaintiff must establish that the chemical or substance in question actually caused the harm that the plaintiff suffered. The burden of proof with respect to both the general and specific causation tests is a preponderance of evidence. This means that in order to prevail at trial, the plaintiff must establish that it is more likely than not that the defendant's product can cause the harm the plaintiff suffered in the general population and that it more likely than not caused the plaintiff's actual harm.

Notice that these questions are not independent. First, establishing general causation is necessary for establishing specific causation. In other words, unless it is more likely than not that an *F* can cause a *G*, then it will not be more likely than not that an *F* caused a particular *G*. Some courts have explicitly noted this, writing that testimony on specific causation "is unnecessary" if general causation cannot be established.[13] In addition, establishing specific causation is sufficient for establishing general causation. That is, if it is more likely than not that a particular *F* caused a particular *G*, then it is more likely than not than an *F* can cause a *G*. Some courts have explicitly noted this as well, writing that although the plaintiff must establish both general and specific causation, the court's "ultimate focus" is on specific causation.[14] With this in mind, if evidence presented establishes specific causation, then the court's relevant inquiry will be answered.

Let us take a look at the general and specific causation requirements in turn. One relatively straightforward manner in which a plaintiff can establish general causation is by showing that exposure to the defendant's product at

12 On the history of the distinction between specific and general evidence, see Gold, "The 'Reshapement' of the False Negative Asymmetry in Toxic Tort Causation," 1513. For arguments against this distinction, at least in determinations of standing, see "Causation in Environmental Law."

13 *Dunn v. Sandoz Pharmaceuticals Corp.*, 275 F. Supp. 2d 672, 676 (M.D.N.C. 2003).

14 *Henricksen v. ConocoPhillips Co.*, 605 F. Supp 2s 1123, 1176 (E.D. Wash 2009).

least doubles people's risk of harm.[15] This doubling of risk is often described as people exposed to the chemical having a "relative risk" of greater than 2. While not without controversy, some courts have explicitly connected their choice of a relative risk of greater than 2 to the fact that the applicable burden of proof is a preponderance of evidence.[16] Simply put, if being exposed to a chemical more than doubles people's risk of suffering a particular harm, and an individual suffers that harm after being exposed to that chemical, then it is "more likely than not" that individuals exposed to that chemical will be harmed. An example of a court explicitly embracing such reasoning is the Texas Supreme Court in *Merrell Dow v. Havner*:

> Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who did take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were responsible for any given occurrence of the disease since it occurs in six out of 1,000 individuals anyway. . . . However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be statistically more likely than not that a given individual's disease was caused by the drug.[17]

The court in *Havner* recognized that such reasoning is controversial. In particular, it recognized that drawing such a simple link between epidemiological findings and the legal burden of proof may be overly simplistic.[18] Even if the relationship between epidemiological findings and a burden of proof might not be one to one, however, the court concluded that "there is a rational basis for relating the requirement that there be more than a 'doubling of the risk' to our no evidence standard of review and to the more likely than not burden of proof."[19]

Even if the defendant concedes that the relative risk of its chemical to people is greater than 2, which would establish general causation, there remains the question of whether the chemical actually caused the plaintiff's injuries, which

15 For a thorough discussion of how different types of epidemiological studies can be utilized to prove both general and specific causation, including that people's relative risk is greater than 2, see Beecher-Monas, *Evaluating Scientific Evidence*, ch. 4.

16 Note that my claim is not that a relative risk greater than 2 is necessary to establish general causation, simply that it is sufficient.

17 *Merrell Dow Pharmaceuticals Inc. v. Havner*, 953 S.W. 2d 706, 717 (Tex. 1997). Reaffirmed in *Merck & Co., Inc. v. Garza*, 347 S.W. 3d 256 (Tex. 2011). See also *Cagle v. Cooper Companies (In re Silicone Gel Breast Implants Prod. Liab. Litig.)*, 318 F. Supp. 2d 879, 892 (C.D. Cal. 2004).

18 For an insightful critique along these lines, see Gold, "Causation in Toxic Torts"; and Kaye, "Apples and Oranges."

19 *Merrell Dow v. Havner*, 717.

is the question of specific causation.[20] In order to establish the claim that more likely than not, the chemical actually did harm the plaintiff, the plaintiff must rule out other plausible causes of her injuries. To take a classic example, while exposure to asbestos can increase a plaintiff's risk of lung cancer, recovery will be complicated if the plaintiff is also a heavy smoker.[21] Given the prolonged latency periods of many harmful chemicals, as well as the complex etiology of many diseases such as cancer, ruling out other plausible causes of a plaintiff's injuries is generally a central part of establishing specific causation.[22]

In order to address other plausible causes of her injuries, thus establishing specific causation, the plaintiff generally provides a "differential diagnosis" or, more accurately described, a "differential etiology."[23] In short, a differential etiology is "a patient-specific process of elimination that medical practitioners use to identify the 'most likely' cause of a set of signs and symptoms from a list of possible causes."[24] Differential etiology is often analogized to differential diagnosis because while the latter involves narrowing down to one likely ailment for purposes of providing care, the former involves narrowing down to one likely cause of the patient's ailment for purposes of establishing liability. As Ronald E. Gots puts it, "differential diagnosis is a quest for a diagnosis: what is wrong with the patient internally. It is not, inherently, a search for the ultimate cause (critical to liability) of that disease process or disorder."[25]

For our purposes, there are two important things to note about differential etiology. First, the goal of differential etiology is to examine and eliminate (or significantly decrease the likelihood) of other plausible causes of the plaintiff's injury, as opposed to putting forward any sort of story (causal or otherwise) that links the defendant's activity to the plaintiff's injuries. This is important because by eliminating other potential causes of the plaintiff's injury, the

20 There are of course a number of ways that the defendant might challenge the plaintiff's claim that the epidemiological studies presented demonstrate a relative risk of at least 2. I put these aside for the present discussion.

21 For more discussion of the difficulties associated with asbestos litigation, see White, "Asbestos and the Future of Mass Torts."

22 For a case in which a defendant was granted summary judgment in light of a failure to establish specific causation in this manner, see *Lennon v. Norfolk & W. Ry. Co.*, 123 F. Supp. 2d 1143, 1154 (N.D. Ind. 2000).

23 For an excellent discussion of how differential etiology is handled by the courts, see Sanders and Machal-Fulks, "The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases"; and Sloboda, "Differential Diagnosis or Distortion."

24 *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1413 (D. Or. 1996).

25 Gots, "From Symptoms to Liability," 25. For further commentary on certain mistakes that courts make in handling epidemiological evidence in particular and scientific evidence more generally, see Bryant and Reinert, "The Legal System's Use of Epidemiology."

likelihood that the defendant caused the injury will increase, but this is only via indirect argument. As the Texas Supreme Court put this point:

> There can be many possible "causes," indeed, an infinite number of circumstances can cause an injury. But a possible cause only becomes "probable" when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action.[26]

The second, related point is that differential etiology is meant to examine other *plausible* causes of the plaintiff's injury.[27] As such, by its very nature, it will not examine unlikely sources of injury, thus leaving entirely open the possibility that the plaintiff's injuries were caused in a rare or extraordinary manner. The fact that such fanciful causal possibilities need not be explored further underscores my earlier point that at root, the goal of differential etiology is simply to make the defendant's liability for the plaintiff's injuries more likely.

Let us sum up. In order for a plaintiff to establish that a defendant's product caused her injuries, she must establish both general and specific causation. In order for a plaintiff to establish both general and specific causation, she can demonstrate both a relative risk to people of at least 2 and, via differential etiology, that other plausible causes of her injuries are unlikely. With this in mind, we can now revisit the accounts put forward in section 1 to see how they apply to the evidence that is commonly put forward to establish the likelihood of causation in toxic tort cases.

## 3. Specific Causation and Statistical Evidence

In this section, I discuss how the three accounts of the problematic nature of statistical evidence discussed in section 1 would categorize the evidence used to establish the likelihood of causation in toxic tort cases. What I will show is that regardless of which of these accounts we favor, the evidence that suffices to establish the likelihood of causation in toxic tort cases will be considered problematic. In particular, I argue that evidence that suffices to establish general causation is purely statistical, and, perhaps even more importantly, evidence that suffices to establish specific causation is purely statistical. The latter claim is even more important because, as discussed above, evidence used to establish specific causation is *ipso facto* evidence that is used to establish general

26 *Parker v. Employers Mutual Liability Insurance Co. of Wisconsin*, 440 W. 23 43, 47 (Tex. 1969).

27 For instance, in *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 551–52 (W.D. Pa. 2003), the court held that the plaintiff must rule out alternatives that the defendant shows to be plausible. But see *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1473 (D.V.I. 1994).

causation, so evidence used to establish general causation cannot have a property that evidence used to establish specific causation lacks.

As discussed above, plaintiffs can establish that it is more likely than not that the defendant's product caused their injuries in toxic tort cases by both showing that the defendant's product increased their relative risk by a factor of two (general causation) and that other plausible causes of the plaintiff's injuries were absent (specific causation). There should be little doubt that only statistical evidence is necessary to establish general causation. In order to show that the defendant increased the plaintiff's relative risk by a factor of two, the plaintiff must provide epidemiological studies showing that individuals who are exposed to the relevant chemicals or substances tend to suffer injuries similar to the plaintiff at double the rate of those who are not.[28] A showing that a chemical or substance increases the risk of a particular injury is patently statistical. As such, any scholar who finds statistical evidence problematic is likely to find relative risk findings problematic.

Even if evidence used to establish general causation were not statistical, if evidence used to establish specific causation were statistical, this would suffice to show that evidence used to establish causation is statistical. With this in mind. a question that is more important to consider is whether differential etiology testimony, or testimony with respect to specific causation, is purely statistical. If differential etiology testimony is in fact purely statistical, then a court's treatment of such evidence will present a *prima facie* challenge to those who believe that statistical evidence ought to be insufficient to establish the likelihood of causation.

To put my cards on the table, I think that differential etiology testimony is purely statistical. If I am right, then if we think that it is problematic to use purely statistical evidence to establish the likelihood of causation, we are likely to think it is similarly problematic to use differential etiology testimony in this manner. After all, as pointed out above, the doctor offering differential etiology testimony is not directly arguing that the defendant's activities caused the plaintiff's injury; instead, the doctor is testifying with respect to the likelihood of other plausible causes. As such, the doctor is not seeking to conclusively establish that the defendant's activities did in fact cause the plaintiff's injuries; instead, at least as differential etiology analyses are commonly thought of, the doctor is casting doubt on alternative explanations of the plaintiff's injuries.

28 As a reviewer has helpfully noted, additional analysis is necessary to move from epidemiological studies to causation. For further discussion, see Federal Judicial Center, *Reference Manual on Scientific Evidence*, 601. For our purposes, all that is important is that even with this additional analysis, only statistical evidence is necessary to establish both general and specific causation.

It is worth examining each of the accounts of the problem with statistical evidence put forward in section 1 to see why exactly each would consider differential etiology testimony to be as problematic as the statistical evidence presented in Blue Bus. Let us start with Judith Thomson's influential causal account.

> *Causal Account*: Purely statistical evidence is problematic because it lacks the appropriate causal link to the proposition for which it is taken to be evidence.

As Thomson spells out her view, in order for a piece of evidence to be individualized, or for it to be proper grounds for establishing the likelihood of causation, there must be some feature of the defendant's (putative) causing of harm that plays a causal role in the generation of that piece of evidence.[29] For Thomson, such individualized evidence "(putatively) guarantees the defendant's guilt," and, as such, the jury can be "sure beyond a reasonable doubt that there are facts available to it which guarantee that the defendant is guilty."[30]

There is one sense in which we might consider differential etiology testimony as "caused" by the defendant's actions, at least if the defendant actually is liable for the plaintiff's injuries. This is because the differential etiology testimony is caused by (in the sense of based on) the plaintiff's injuries, so if the defendant caused the plaintiff's injuries, then the defendant caused the differential etiology testimony. At the same time, if we dig a little deeper, we see that differential etiology testimony does not satisfy Thomson's requirements for individualized evidence. As stated above, according to Thomson, in order for us to possess individualized evidence that a particular defendant is guilty, there must be a feature that distinguishes the defendant from other possible causes of the plaintiff's injuries that can be assigned the appropriate causal role in producing the evidence. However, there is no unique or contrastive feature of the defendant's emissions in toxic torts cases that play a causal role in the differential etiology testimony. Even if the defendant had not caused the plaintiff's injuries, the differential testimony based on those injuries would be the same, namely, that the most likely cause was the defendant. As such, differential etiology evidence fails to be individualized in the manner Thomson favors.

29 For more discussion, see Thomson, "Liability and Individualized Evidence," 205.

30 Thomson, "Liability and Individualized Evidence, 214–15. A reviewer has questioned Thomson's account on the grounds that if no other buses were on the road, this would not be "caused" by the plaintiff but would surely not be simply statistical. On this point, I think Thomson has the right view. If there are no buses from the Grey Bus Company on the road, for instance, this increases the likelihood that a bus from the Blue Bus Company caused the accident. However, this evidence would be problematic in the same way that Thomson claims that market share evidence alone is.

Next, let us examine the view put forward by David Enoch and others:

> *Sensitive Account*: Purely statistical evidence is problematic because a belief in liability based on such evidence will not track the truth of the matter. In particular, if someone other than the defendant were liable, the juror or judge (most probably) would still have formed the belief that the defendant was.

Enoch et al. claim that if we establish the likelihood of causation based on purely statistical evidence, then it will be pure luck when our verdicts are correct. This is because statistical evidence will be available both when the defendant caused the plaintiff's injuries and when someone or something else did. In Blue Bus, for instance, evidence as to the Blue Bus Company's market share is available in cases in which it is responsible for the plaintiff's injuries as well as those in which the Grey Bus Company is responsible. As such, if a judge or juror reaches a conclusion about the likelihood of causation based on market share evidence, this conclusion will not track the truth of whether the defendant caused the plaintiff's injuries.[31] Enoch et. al contrast conclusions based on statistical evidence with those based on evidence such as eyewitness testimony. For instance, the testimony of an eyewitness who claims to have seen a bus from the Blue Bus Company hit the plaintiff would presumably not be available if the Grey Bus Company was responsible.[32] Thus, a conclusion with respect to the likelihood of causation based on eyewitness testimony would more successfully track the truth of whether the defendant actually caused the plaintiff's injuries.[33]

31 Note that this analysis applies only if we hold fixed the occurrence of the accident in our evaluation of the relevant counterfactual. If we do not hold fixed the accident's occurrence, then a belief in liability based on market share will be sensitive to the defendant's liability. This is because had the defendant not caused the plaintiff's injuries, most probably no one else would have, and if no one else caused the injuries, then the judge or juror would not have formed the belief in liability.

32 I say "presumably" because a witness may be mistaken.

33 Even this would be undermined if, for instance, the belief is formed on the basis of testimony from an eyewitness who, though telling the truth, would have lied in order to indemnify the defendant regardless. (For instance, see Smith, "When Does Evidence Suffice for Conviction?" 1202.) That said, we might think it particularly problematic if not only was it the case that our beliefs about liability did not track the truth of the matter, but we knew this to be the case ahead of time. Thomson ("Liability and Individualized Evidence") offers a similar line of reasoning on this point. In addition, it is worth noting that the Sensitivity Account does allow for certain types of evidence that we might think of as probabilistic. For instance, if traces of a fingerprint found at the crime scene are consistent with the defendant's, an expert might testify as to the likelihood of someone else having left those same traces. A judgment of guilt based on such evidence would be sensitive to

For reasons quite similar to those discussed above, beliefs formed on the basis of differential etiology testimony will not be sensitive to whether the defendant's product caused the plaintiff's injuries. Differential etiology testimony simply establishes that the defendant's activities were the most likely cause of the plaintiff's injuries; such testimony would still be offered, for instance, if one of the incredibly unlikely causes was actual. As such, if it is inappropriate to reach a conclusion about the likelihood of causation if such a conclusion would lack this sort of counterfactually sensitivity, we will be committed to the claim that the manner in which courts establish the likelihood of causation in toxic tort cases is problematic.[34]

To close this section, let us examine the view put forward by Martin Smith.

> *Normal Account*: Purely statistical evidence is problematic because it does not provide normic support for the truth of the proposition for which it is taken to be evidence. In particular, the statistical evidence does not make it the case that the falsity of the proposition would require more explanation than its truth.

Smith spells out the problematic nature of purely statistical evidence by pointing out that even with such evidence, we would not require any additional explanation if the proposition turned out to be false. To take a concrete example, if all but one ticket in a thousand-ticket lottery were green, then it would statistically be unlikely for a nongreen ticket to win. However, a green ticket winning would not need more explanation than a nongreen ticket winning; after all, some ticket was going to win, and the winning ticket would either be

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the defendant's guilt just as long as, had the defendant not committed the crime, traces of a fingerprint consistent with his would most probably not be found at the crime scene.

34 An anonymous reviewer wondered whether a variant of the sensitivity account might be more successful in this regard. They pointed out that differential etiology testimony might not have even been offered at trial if other causes (such as the plaintiff's own behavior or exposure to a product other than the defendant's) were clearly responsible for the plaintiff's illness. In this way, the very presence of difference etiology testimony at trial entails a certain likelihood that the defendant's product was liable. Even if we accept that the very presence of such testimony entails a certain likelihood that the defendant's product was liable for the plaintiff's injuries, it seems that such an approach does not address the Blue Bus problem. In fact, such an approach seems to fall prey to the same logic of the Blue Bus problem, which is that a certain likelihood of defendant liability is insufficient for a judgment. In response, one might point out that DNA evidence can suffice for a finding of liability, and a finding on this basis is surely better than a finding based on market share evidence. As I discuss in more detail below, however, those who have worries about statistical evidence can surely have worries about DNA evidence as well, and we would insist that, in some fundamental sense, such evidence fails to be an appropriate basis for conviction.

green or not.[35] Smith draws a direct analogy between such lottery cases and the use of statistical evidence in the courtroom. If a plaintiff simply establishes that it is highly likely that the defendant caused the plaintiff's injuries, this is insufficient because if the defendant did not cause the injuries, this would require no additional explanation. This is unlike a case in which, for instance, an eyewitness claims to have seen the defendant commit the crime: with such eyewitness testimony, not only is it unlikely that the defendant is innocent, it is also true that if the defendant actually is innocent, the eyewitness' testimony would need further explanation.

Regardless of what we think of the details of Smith's account, if we adopt it, we will consider a court's treatment of statistical evidence in toxic tort cases to be problematic. This is because the evidence presented in such trials simply tells us the frequency with which we can expect activities such as the defendant's to cause injuries such as the plaintiff's. Differential etiology testimony tells us nothing about which causal pathways would require more or less explanation. In fact, even if the plaintiff succeeds in establishing specific causation, the jury will have no reason to think that any particular cause of the patient's injuries is more or less normal than any other.

Given the above discussion, it seems hopeless to attempt to rule out the type of statistical evidence in Blue Bus on general epistemological grounds but allow for the type of statistical evidence presented in toxic tort cases.[36] Whatever our judgments are about toxic tort cases, they are relatively straightforward instances in which the court allows statistical evidence to establish the likely causal link between the defendant's product and the plaintiff's injuries. Instead of attempting to tease out some epistemological distinction with respect to the evidence presented, it is much more worthwhile to think about why it might be the case, both from a legal and philosophical perspective, that the courts handle the statistical evidence in Blue Bus and toxic tort cases so differently. It is to this task that I now turn.

35 In some sense of the word, drawing a green ticket in the lottery might be abnormal, in the sense of unexpected. However, this is not the sense that Smith is drawing on in developing his account, which focuses on what events would require more or less explanation.

36 Another option suggested by a reviewer is to focus on "case specificity," with the thought being that the evidence presented in differential etiology is specific to the plaintiff in a way that market share evidence is not. While I am open to this possibility, the primary difficulty is that at least at first glance, evidence in the Blue Bus case is case specific. For instance, we must know where the accident take place to establish that it is the bus from the Blue Bus Company that dominates the market in that location, and we must know that the accident was caused by a bus to get the inquiry off the ground.

## 4. BACK TO THE PUZZLE

At this point, I hope to have made the contours of the puzzle with statistical evidence and toxic torts clear. As stated at the outset of the paper, the basic puzzle is that while courts do not allow for the establishment of causation based on the type of statistical evidence presented in Blue Bus, they do allow for the establishment of causation based on the type of statistical evidence presented in toxic tort cases. In this section, I will first discuss why I think courts treat these types of statistical evidence differently and the legal justification for doing so. To follow, I will put forward some philosophical considerations in favor of the courts' approach.

In Blue Bus, the statistical evidence presented was that the Blue Bus Company operates 80 percent of local bus routes; as a general matter, courts consider this type of evidence insufficient to establish the likelihood of causation. In toxic tort cases, experts provide statistical evidence that the defendant's product is the likely cause of the plaintiff's injuries; as a general matter, this is considered sufficient to establish the likelihood of causation.[37] A legal distinction that we can put to use here is the distinction between direct and indirect (or circumstantial) evidence. As is commonly put in legal texts, direct evidence "proves a fact without an inference or presumption and which in itself, if true, establishes that fact."[38] Indirect evidence, on the other hand, is "evidence from which the fact-finder can infer whether the acts in dispute existed or did not exist."[39] Applying this distinction to the puzzle under discussion, the statistical evidence in toxic tort cases is direct, while the statistical evidence in Blue Bus is indirect.

Before saying more, it is worth being clear that the distinction between direct and indirect evidence is primarily a legal (as opposed to epistemological) one. While I think this legal distinction has important epistemological implications—at least in legal epistemology—it may be one that is most useful in thinking about particular court practices as opposed to, for instance, the proper justification of doxastic attitudes. Since the question I am interested in answering in this paper is why courts treat testimony in toxic tort cases differently than other types of statistical evidence, it is natural to root the discussion in the rules and traditions of the courts.

To see how the distinction between direct and indirect evidence relates to our puzzle, it is helpful to start with the broad distinction between what sort of

37 The language of specific causation is generally reserved for toxic torts; however, we might naturally say that the evidence presented in Blue Bus is insufficient to establish specific causation.

38 Bergman and Hollander, *Wharton's Criminal Evidence*, 1:8, quoting Montana Code Annotated, § 26-1-102(4) (1995).

39 Bergman and Hollander, *Wharton's Criminal Evidence*, 1:8.

determinations jurors are permitted to make "on their own"—by which I mean on the basis of their own judgment even if no evidence was formally admitted through trial procedures—and determinations that jurors are not permitted to make in this manner.[40] Two types of determinations that jurors are permitted to make on their own are as follows: (1) determinations of witness credibility and (2) determinations based on common knowledge of how the world works:

1. As a general matter, jurors can determine on their own whether a particular witness is being truthful. For instance, if a witness provides an alibi for the defendant, jurors can decide whether they think the witness is being honest or deceptive.
2. As a general matter, jurors can make certain inferences based on common knowledge of how the world works. For instance, expert testimony is not necessary to establish, as Mansfield puts it, "that the sun rises in the east or that a bullet fired into the brain will cause serious harm or death."[41] Of course, exactly what constitutes common knowledge of how the world works is contestable. At the same time, what is clear is that once the sort of information necessary for a finding of liability is far enough outside of common knowledge of how the world works, expert testimony or other formally introduced evidence is necessary.

For our purposes, one important example of 2 (i.e., a determination that jurors are not permitted to make on their own) is a determination that the exposure to the defendant's product caused (for instance) mesothelioma.[42] If no evidence was presented at trial that supported the claim that the defendant's product caused mesothelioma, jurors could not simply decide, based on their own personal understanding of the world, that the product caused this illness and the defendant was thus liable for medical expenses. This would remain true even if the defendant's product did cause mesothelioma and the juror—perhaps based on her own background research—knew this to be true.

The primary reason that we do not want jurors determining on their own that the defendant's product caused mesothelioma is that such a process does not allow the defendant appropriate opportunity for rebuttal. This is particularly troubling in criminal cases in which defendants have a constitutional right

40 For discussion, see Kirgis, "The Problem of the Expert Juror"; and Mansfield, "Jury Notice." See also McCormick, *Handbook on the Law of Evidence*; and Wigmore, *Evidence in Trials at Common Law*.

41 Mansfield, "Jury Notice," 395.

42 Another example of 2 is the judgment of whether an expert's methods are reliable; this gatekeeping function of keeping "junk science" out of the courtroom is played by judges. For discussion, see *Federal Rules of Evidence*, 702.

to be confronted by the evidence against them. Even in civil trials, however, allowing juries to make this sort of determination "on their own" is incredibly problematic, if for no other reason than juries' determinations on these matters cannot be vetted and challenged in the manner that expert testimony is.

With this distinction in mind, we can turn to the difference between direct and indirect statistical evidence. The term 'direct statistical evidence' is helpful in addressing our puzzle because such evidence speaks directly to the question that the court is attempting to answer, namely, whether it is more likely than not that the defendant's product caused the plaintiff's injuries. Otherwise put, on the basis of direct statistical evidence, jurors are permitted to decide whether it is more likely than not that the defendant's product caused the plaintiff's injuries. More specifically, jurors can reach this determination on the basis of 1 (e.g., the credibility of the individual providing expert testimony and perhaps of the plaintiff).[43] In contrast, I would argue that jurors ought not be permitted to determine the defendant's liability on the basis of indirect statistical evidence. Indirect statistical evidence about the Blue Bus Company's market share does not establish that it is more likely than not that the Blue Bus Company caused the plaintiff's injuries. In addition, to get from that statistic to a conclusion regarding the Blue Bus Company's liability, jurors would need to do more than draw on 2 (i.e., common knowledge of how the world works). Instead, they would need to take their own private epistemic journeys to arrive at that conclusion. For instance, to move from the premise that the Blue Bus Company runs 80 percent of the local bus routes to the conclusion that it is more likely than not that the Blue Bus Company caused the defendant's injuries, the jury must assume, *inter alia*, that the Blue Bus Company runs buses on the route where the accident was caused, that the accident was not caused by an out-of-town bus, and that the Blue Bus Company does not provide far superior training to its drivers than other bus companies.[44] While each of these claims may be true and may even be known, they ought not be left to jury members to determine on their own.

43 As a reviewer has helpfully noted, the jurors will have to find the plaintiff's testimony credible insofar as the plaintiff's testimony is necessary to establish the range of possible causes of their ailment. Additional determinations, including based on 2 (common knowledge of how the world works), will likely also be necessary in a civil trial. The point here stands insofar as this determination in a toxic tort trial, unlike the relevantly similar determination in a Blue Bus–type trial, will not stray from determinations that are permitted for jurors.

44 The possibility of an out-of-town bus worried the court in *Smith v. Rapid Transit* itself. Of course, if the Blue Bus Company provided far superior training, then the likelihood that it, as opposed to another bus company, caused the accident would be much lower.

As mentioned above, if the plaintiff does not formally present evidence to support the claims that are necessary for a juror's private epistemic journey from indirect statistical evidence to a conclusion about the likelihood of causation, allowing for such a conclusion would conflict with important legal principles. In particular, allowing for such private epistemic journeys conflicts with what Paul F. Kirgis calls the "fundamental principle of the Anglo-American adjudicative system . . . that cases must be decided based solely on evidence formally admitted through trial procedures."[45] If a juror takes a private epistemic journey from a piece of indirect statistical evidence to a conclusion about the probability of causation, this will not allow a defendant the appropriate opportunity to subject the assumptions of the journey to cross-examination or rebuttal.[46] (This is similar to the requirement, in the criminal context, that prosecutors present a "theory of the case" as to where, how, when, and why the defendant supposedly committed the crime of which she is accused.) Such a private epistemic journey is unnecessary when it comes to direct statistical evidence, however, as direct evidence answers a question posed by the court. More specifically, when an expert testifies that a defendant's product is the likely cause of the defendant's injuries, the defendant has the opportunity to challenge this testimony. In addition, the expert has been vetted according to the applicable rules of evidence. In this way, while the epistemic journey of jurors is inaccessible and likely lacking in expert judgment—the epistemic journey of experts has been vetted and is open to direct challenge.[47]

Not only does a court's disparate treatment of direct and indirect statistical evidence align with bedrock legal principle; it is also on solid epistemological and moral ground. This is because it is much more reasonable for a juror to reach a conclusion about the likelihood of causation on the basis of direct statistical evidence than it is to do so on the basis of indirect statistical evidence. In Blue Bus, even though the plaintiff presents uncontested evidence that the Blue Bus Company operates 80 percent of the buses in the area, there are at least two distinct reasons for which jurors should hesitate to reach a conclusion about the likelihood of causation on that basis. First, even if a juror knows that the Blue Bus Company operates 80 percent of buses in the area, she might only be

45 Kirgis, "The Problem of the Expert Juror," 493.

46 For discussion, see *Halverson v. Anderson*, 513 P. 2d 827, at 830 (Wash 1973).

47 This is also why it is acceptable for an expert to testify on the basis of statistical evidence even though it would be unacceptable for jurors to reach conclusions on their own based on that same evidence. In other words, experts can answer questions posed by the court on the basis of statistical evidence because (1) their methods are vetted and (2) they are subject to cross-examination and rebuttal. I thank an anonymous reviewer for pressing me to address this point.

.7 confident that a bus caused the plaintiff's injuries. This is not only a problem in this particular example—as the juror will not think it more likely than not that the Blue Bus Company is liable—but also a more general one, as courts may want to avoid forcing jurors to integrate a variety of different statistics in reaching verdicts.[48] Second, we should expect the plaintiff to select evidence that is most favorable to her case. As such, the fact that the plaintiff presents evidence that the Blue Bus Company owns 80 percent of the buses in the area strongly suggests that the likelihood of causation is much lower. One can safely assume that if the plaintiff gathered any stronger evidence, she would have presented it, and if she gathered any weaker evidence, she would have withheld it. With this in mind, when the plaintiff presents evidence regarding the Blue Bus Company's market share, a judge or juror should simply think of it as the best that the plaintiff could come with to establish the likelihood of causation.[49]

Direct statistical evidence differs from indirect statistical evidence in this regard because it answers a question posed by the court, namely, whether it is more likely than not that the defendant caused the plaintiff's injuries. Since this feature of the court is established and known ahead of time, there is no risk that statistics that speak to this question will be cherry-picked among amongst other possibilities. In addition, since no inferences are necessary between direct statistical evidence and the likelihood of causation, direct statistical evidence that is trustworthy provides a decisive answer to the question under consideration. With this in mind, although as a general matter, expert testimony can provide jurors with either indirect or direct statistical evidence, we can think of experts who offer direct statistical evidence as eyewitnesses to the likelihood that the defendant's product caused the plaintiff's injuries.

Another, perhaps more controversial way of stating this argument is in terms of what sort of evidence would enable jurors to know, conditional on admissible evidence, that it is more likely than not that the defendant caused the plaintiff's injuries. For this sort of account, we can look to Sarah Moss, who argues that "statistical evidence suffices to prove causation just in case the factfinder knows that causation is more than .5 likely."[50] My slight modification would be to work with the proposition that on the basis of admissible evidence, it is more likely than not that the defendant caused the plaintiff's injuries. For the reasons listed above, it is not easy for a factfinder to come to know that on

48 This concern is raised by Tribe, who thinks that a focus on this sort of math distracts jurists from more important questions about justice ("Trial by Mathematics").

49 For related discussion, see Posner, "An Economic Approach to the Law of Evidence," 1509. For a more expansive treatment of this issue with statistical evidence, see Allen and Pardo, "The Problematic Value of Mathematical Models of Evidence."

50 Moss, "Knowledge and Legal Proof," 26.

the basis of admissible evidence, it is more likely than not that the Blue Bus Company caused the plaintiff's injuries on the basis of its market share because the factfinder should leave open the possibility that other admissible evidence undermines the plaintiff's case. However, if a doctor provides testimony that in her professional opinion, it is more likely than not that the defendant's product caused the plaintiff's injuries, jurors would be in a much better position to have the knowledge necessary for a judgment of causation.

One question we might ask at this point is whether, based on proof of general causation, an expert might testify as to specific causation. I have three responses here. First, the simplest response is that to the extent that findings of liability are allowed without (nontestimonial) evidence of specific causation, they ought not be.[51] This is because evidence of general causation alone simply does not answer one of the two questions the court is attempting to answer, namely whether it is more likely than not that the defendant's product caused the plaintiff's injuries. This is problematic from a legal perspective because in order for a juror to reach a conclusion about specific causation based on evidence about general causation, she must take a private epistemic journey that includes assumptions that are unsupported by evidence formally presented by the plaintiff and thus difficult for the defendant to contest.

From a moral and epistemological perspective, it does not seem reasonable for a juror to reach a conclusion about the likelihood of specific causation without (nontestimonial) evidence of specific causation, just as it does not seem reasonable for a juror to reach a conclusion about the likelihood that a bus from the Blue Bus Company caused the plaintiff's injuries based on the Blue Bus Company's market share (even if an "expert" testified that, given that market share, it is likely that a bus from the Blue Bus Company caused the accident). More specifically, there is no reason to think that knowledge of 1 would bring with it knowledge of 2:

1. Given all reasonably available evidence, it is more likely than not that the defendant's product causes injuries such as those suffered by the plaintiff.
2. Given all reasonably available evidence, it is more likely than not that the defendant's product caused the plaintiff's injuries.

51 This is similar to the point that sometimes courts do allow for simply statistical evidence to ground judgments of liability. If this is true—and *Kaminsky v. Hertz*, 288 N.W. 2d 426 (Mich. Ct. App., 1980) is often cited in support—then those who oppose statistical evidence serving this role will also oppose what the court did in this particular case. A similar point can be made about convictions based solely on DNA evidence.

In contrast, when evidence is presented that speaks to specific causation, the defendant has appropriate opportunity for rebuttal, and it is reasonable for a juror to conclude that on the basis of admissible evidence, it is more likely than not that the defendant's product caused the plaintiff's injuries (and perhaps even easier for her to know this).

This is not my only response to the supposed practice by the courts, however. The second point I would make is that there is little consensus among courts when it comes to the weight to be given to testimony about general and specific causation. As Russelyn Carruth and Bernard Goldstein put it, "even courts enunciating similar rules using the same words do not always mean the same thing."[52] Given the confused manner of courts in speaking about this question, in particular their failure to clearly distinguish requirements for specific causation from requirements for general causation, it is difficult to reach any judgment with regards to whether testimony based on evidence about general causation actually suffices to establish specific causation.[53]

This leads to my third point, which is that the cases that are most often cited in support of the claim that testimony based on evidence about general causation can suffice to establish specific causation often to not employ such reasoning in reaching judgments. For instance, a footnote in *Allison v. McGhan Medical* states that a relative risk of greater than 2 "permit[s] an inference that the plaintiff's disease was more likely than not caused by the agent."[54] However, the expert testimony presented in that case did not meet this level of relative risk, so such testimony was not used to establish specific causation. A similar analysis applies to *Daubert v. Merrell Dow Pharmaceuticals*, in which the court stated that "for an epidemiological study to show causation under a preponderance standard, the relative risk … will, at a minimum, have to exceed 2."[55] Again, however, the expert testimony provided failed to meet this standard, so this case is not an instance of testimony based on general causation sufficing to establish specific causation.[56]

52 Carruth and Goldstein, "Relative Risk Greater Than Two in Proof of Causation in Toxic Tort Litigation," 203.

53 Carruth and Goldstein, "Relative Risk Greater than Two in Proof of Causation in Toxic Tort Litigation," 204.

54 *Allison v. McGhan Medical Corporation*, 184 F.3d 1300, 1315 (11th Cir. 1999).

55 *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1321 (9th Cir. 1995).

56 Without belaboring the point, I would say the same about *Ambrosini v. Labarraque*, 101 F.3d 129 (DC Cir. 1996).

Perhaps the case that is most often put forward as showing that general causation suffices to establish specific causation is *Manko v. United States*.[57] In *Manko*, just as in *Allison* and *Daubert*, the court stated that "a relative risk greater than 2 means that the disease more likely than not was caused by the event."[58] However, the court in *Manko* then proceeded to perform an analysis of specific causation, though somewhat confusedly continuing to use the language of relative risk. In particular, the court wrote that our calculation of relative risk "must be adjusted to accommodate the possibility that the plaintiff's antecedent illness caused his [illness]."[59] In this way, even in *Manko*, it is simply not the case that testimony based on evidence about general causation sufficed, on its own, to establish that the defendant's product caused the plaintiff's disease.[60]

To be clear, the fact that many courts seem to suggest that testimony based on evidence about general causation can suffice to establish specific causation is troubling. At the same time, given how difficult it is to glean a clear message from these opinions, I am willing to wait until such reasoning is used in finding a defendant liable before concluding that courts in fact are willing to find defendants liable without any evidence of specific causation whatsoever.

One last possible solution to the above puzzle that is worth considering is whether courts are more likely to allow statistical evidence to prove causation when negligence has already been established. This certainly would align with a certain sentiment that if, for instance, a corporation has negligently emitted toxic waste, we are not that upset if they are found liable simply because it is more likely than not that its emissions have caused others harm. While this has intuitive plausibility, there are a number of reasons to think that it is not actual practice. First and perhaps most importantly, if the plaintiff cannot provide sufficient evidence of causation, then a court may never even reach the question of negligence. In fact, this is what happened in the original court case that inspired Blue Bus: the statistical evidence with respect to the defendant's bus ownership was insufficient to establish causation, so the question of negligence was never decided. Another reason to doubt that this is common practice is the range of cases in which the plaintiff needed only to establish causation in

57 For discussion, see Moss, "Knowledge and Legal Proof," 25; and Green and Powers, *Restatement (Third) of Torts*, § 28 c (4). The Restatement also has a list of other cases that are worth examining in this regard.

58 *Manko v. United States*, 636 F. Supp. 1419, 1434 (W. D. Mo. 1986).

59 *Manko v. United States*, 1437.

60 *Manko v. United States*, 1437: "Because a viral illness can cause [the plaintiff's injuries] and because plaintiff had a viral illness [before exposure to the defendant's product], this relative risk must be adjusted to accommodate the possibility that the plaintiff's antecedent illness caused [his injuries]."

order for the defendant to be liable for damages. This is most common in cases involving strict liability, such as with certain instances of the use of asbestos and the government's distribution of vaccines.[61]

According to my view, courts are more justified in considering direct statistical evidence sufficient to establish the likelihood of causation than indirect statistical evidence.[62] While I think this is the best explanation of court rulings in such cases, an alternate story we might tell here is that, given the unique factors present, toxic torts are simply anomalous. For instance, some might argue that because of the significant public interest in holding polluters liable for their emissions, courts relax their regular requirements for the establishment of causation. This "special exception" view is much less appealing, however, once we examine the wide range of cases in which direct statistical evidence is deemed sufficient for establishing the likelihood of causation.

Since *Smith v. Rapid Transit*—the case that inspired the original Blue Bus hypothetical—is most often cited as a paradigmatic instance in which statistical evidence was considered insufficient for establishing the likelihood of causation, it is instructive to look at contemporaneous case law for evidence in favor of my view.[63] As we will see, contemporaneous case law supports my view that while courts do not consider indirect statistical evidence sufficient to establish causation, they often consider direct statistical evidence to be sufficient.

As was the case with toxic torts, direct statistical evidence is most often offered by medical experts in order to establish the most likely cause of the plaintiff's injuries. Examples in which the direct statistical evidence provided by medical experts sufficed to establish the likelihood of causation include *Marlow*

61 See *In re Joint E. So Dist. Asbestos Lit.*, 827 F. Supp. 1014 (S.D.N.Y. 1993); and *Manko v. United States*, respectively, which both involve strict liability (liability without negligence).

62 For what it is worth, I take Richard Wright's argument in "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof" as supportive of my second point (without sufficient attention to the first). In part, he writes:

> A judgment on what actually happened on a particular occasion is a judgment on which causal generalization and its underlying causal law was instantiated on the particular occasion. [Evidence on specific causation] connects a possibly applicable causal generalization to the particular occasion by instantiating the abstract elements in the causal generalization, thereby converting the abstract generalization into an instantiated generalization. Without such [evidence], there is no basis for applying the causal generalization to the particular occasion. (1051)

To be clear, I am not claiming that no amount of indirect evidence suffices for a judgment of civil liability. Instead, I am simply pointing to a distinction between expert testimony and market share statistics to explain their differential treatment by the courts.

63 For one example of *Smith v. Rapid Transit* being used in this manner, see Smith, "When Does Evidence Suffice for Conviction?"

*v. Dike*, in which liability was upheld on the basis of a doctor's testimony that the defendant's negligence was "the probable cause" of the plaintiff's injuries, and *Rash v. Albert*, in which the establishment of causation was upheld partly on the basis of medical testimony that, while other causes were also possible, the defendant's negligence "probably" caused the plaintiff's injuries.[64] A variety of Massachusetts workers' compensation claims from that time also support my view: in these cases, causation was established on the basis of expert testimony that it was more likely than not that the plaintiffs' injuries were ones that the defendants caused.[65] Lastly, in certain cases, the courts explicitly adopted the language of direct statistical reasoning to establish the likelihood of causation, such as when, in *O'Connor v. Griff*, the court held that, based on the evidence presented, an expert "might properly conclude" that "it was reasonably probable" that the defendant's negligence caused the plaintiff's injuries.[66]

Before closing, it is worth noting that although there is strong theoretical reason to prefer direct statistical evidence to indirect statistical evidence, there are at least three additional factors that will limit the extent to which direct statistical evidence is introduced at trial. First, experts cost money, so claims with little to no monetary damages are unlikely to involve competing experts. Second, in a variety of cases, individuals with the relevant expertise might not be widely available. For instance, while there might be a number of experts that can testify about fingerprint matches and cancer etiology, there may be none that can testify about more obscure matters such as whether Kantians are less likely to commit fraud than utilitarians. Third, regardless of whether an individual professes to be an expert on a particular matter, judges play a gatekeeping role in determining who can actually testify at trial. While the standards applied in particular courts will vary, commonly considered factors include the reliability of the expert's techniques, whether such techniques have

64 *Marlow v. Dike*, 168 N.E. 154 (Mass 1929); and *Rash v. Albert*, 271 Mass 247 (1930).

65 See for instance, *Blanchard's Case*, 277 Mass 413 (1956); *Geagan's Case*, 301 Mass 319 (1938); and *Cooper's Case*, 271 Mass 38 (1930).

66 *O'Connor v. Griff*, 307 Mass 120 (1940). Another precursor to toxic torts cases can be seen in *Sullivan v. Boston Elevated Railway*, 71 N.E. 90 (Mass 1904). See also *Comeau v. Beck*, 64 N.E. 2nd 436 (Mass. 1946), in which a doctor's testimony that the plaintiff's injury could have been caused by the defendant's negligence, alongside the plaintiff's good health prior to the accident, was sufficient for a finding of liability. In its basic structure, such a case mirrors the requirement of general causation, which is met by the doctor's testimony, as well as specific causation, which the jury is allowed to infer due to the simultaneity of the accident and the injury. I hope to explore this parallel in much more detail in future work.

been peer-reviewed and whether the technique or theory has general acceptance within the scientific or professional community.[67]

In light of these factors, we should expect to see expert testimony regarding direct statistical evidence much more often in toxic tort cases than in cases like Blue Bus. First, toxic torts cases often involve large sums of money, so experts will be worth investing in. Second, there are a range of scientists, doctors, and public health professionals with expertise regarding toxic substances and their impact on human health and well-being. Third, as a corollary to the second, there is widespread acceptance of certain methodologies and theories, as well as peer-reviewed journals publishing on such questions, that can assuage a judge's concerns that she may be admitting so-called junk science into the courtroom. Neither of these may be true with respect to experts who wish to testify on the likelihood that a particular bus company caused a particular sort of injury or property damage. While such testimony is certainly possible in any civil suit (subject to applicable rules of evidence regarding expert testimony), there are certain areas of the law, such as toxic torts, where we should expect it to be relatively commonplace.

## 5. Conclusion

In this paper, I have presented a puzzle about how courts react to purely statistical evidence and my own tentative approach to solving it. The basic puzzle is that while certain types of statistical evidence are not considered sufficient to establish the likelihood of causation, there are other types, such as those commonly put to use in toxic tort cases, that are considered sufficient. While a number of attempts have been made to explain why statistical evidence is insufficient to establish causation, few have attempted to square this claim with the range of cases in which this practice is common.

Through an examination of toxic torts, I have shown that it is untenable to claim that as a general matter, courts consider statistical evidence insufficient to establish causation. I have put forward a view according to which it is more justified to establish causation on the basis of direct statistical evidence than indirect statistical evidence. This is both because defendants have appropriate opportunity to rebut conclusions based on direct statistical evidence and because it is more reasonable to reach a conclusion about the likelihood of causation on the basis of direct statistical evidence. I have discussed case law that suggests that direct statistical evidence is sufficient to establish the

67 These factors are taken from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). For an accessible primer on the admissibility of expert testimony, see Cappellino, "*Daubert* vs. *Frye*."

likelihood of causation in a variety of contexts outside of toxic torts. This case law makes it even harder to sustain the sort of view defended by others according to which courts have a general aversion to using statistical evidence to establish the likelihood of causation. In place of such a simplistic view, I have argued, we should adopt one according to which the treatment of statistical evidence by courts is much more nuanced and multifaceted.

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# CONTRACTUALISM AND COMPENSATION FOR RISK IMPOSITIONS

*Richard Endörfer*

MANY ORDINARY, everyday activities we engage in create risks for others. When we take a car to work, there is always a small risk that the brakes malfunction and we cause an accident; when we use electronic appliances, there is always a small risk of a short circuit resulting in a fire; and so on. In this article, I am interested in the question of what Scanlonian contractualism can tell us about what we owe to those who foreseeably suffer severe harms that result from risky yet highly socially beneficial activities through no fault of their own. As I will argue in what follows, the answer depends directly on what risk-sensitive version of contractualism we subscribe to.

Over the past two decades, two camps of contractualist approaches to risk imposition have emerged: *ex ante* contractualism and *ex post* contractualism. The approaches primarily diverge on their view of the correct temporal perspective from which we ought to assess whether a risk imposition is wrong. The former insists that the correct temporal perspective is *before* the expected results of a risk imposition materialize; the latter insists that the correct temporal perspective is *after* the expected results would have materialized if the risk were permitted. My main point in this article is that *ex ante* contractualism suffers a significant drawback: it lacks the resources to explain why those who suffer from large-scale risk impositions resulting from socially beneficial activities must be compensated appropriately.

Very few authors have so far explicitly discussed the issue of compensation for risk impositions from a contractualist perspective. Compensation is typically mentioned only in passing as a crucial element of contractualist justification in some of the most important contributions to the contractualist risk debate.[1] This is regrettable because even though many of the everyday activities we pursue foreseeably result in grave harm to others, requiring us to give up on

1 For example, Scanlon states explicitly that compensation might be an important factor in some cases but that he takes "no stand" on the matter ("Reply to Serena Olsaretti," 487); he has not since that article either, to the best of my knowledge. See also Lenman, "Contractualism and Risk Imposition," 121n40; and Kumar, "Risking and Wronging," 49. Kumar explicitly mentions compensation as an important factor in justifying risk impositions. I

them would be extremely costly and is intuitively implausible. Straightforward prohibition is hence often not a defensible option. Instead, a compromise must be established. Requiring compensation for the harms that result from highly beneficial social activities is likely to play an immensely important role in producing such a compromise.

A rare exception in the contractualist literature that explicitly discusses compensation for harms resulting from risk impositions is from Yunmeng Cai.[2] Cai defends a compensation principle that requires that "a risk must be imposed with the guarantee that victims of risk materialization will be compensated in such a way that the harm they suffer is reasonably reduced."[3] I argue here that something like Cai's compensation principle is indeed required if we permit social activities that impose risks onto others. However, I also argue that *ex ante* contractualism lacks the resources to motivate such a principle in many relevant cases.

In this article, I am primarily interested in risky yet routine activities. These activities are pursued by a large number of people, carry fairly low risk of resulting in significant harm for each individual but affect a large number of people, and are intuitively permissible.[4] In particular, I focus on cases that Johann Frick refers to as "competitive at the *ex ante* stage."[5] In the simplest version of such cases, there are two wholly distinct groups affected by a risky social practice: one group that receives all the benefits and another that receives no benefits and is only exposed to risk.[6] I focus on these cases because even though they *prima facie* misrepresent how the benefits and burdens of socially risky activities are distributed over a population in the world we inhabit, many of the relevant real-world cases in fact include two wholly distinct groups: one of (*ex ante*) net beneficiaries and one of (*ex ante*) net losers. It is in these cases that the need for mutual justification is particularly evident, precisely because there is a group that is expected to become net losers due to a change in the status quo. Any plausible approach to contractualism should be able to tell us

return to Kumar's view in section II below. For a discussion of compensation and standard contractualism, see Alm, "Contractualism, Reciprocity, Compensation."

2 Cai, "Just Social Risk Imposition and the Demand for Fair Risk Sharing."

3 Cai, "Just Social Risk Imposition and the Demand for Fair Risk Sharing," 270.

4 The cases I am interested in are very similar to Frick's social risk cases. See Frick, "Contractualism and Social Risk," 178. The important difference is that I focus on routine cases, while Frick focusses on one-off, large-scale risk impositions.

5 Frick, "Contractualism and Social Risk," 213.

6 This entails that we cannot decompose the relevant cases into individual gambles with homogenous risks attached, as Frick does in the discussion of his mass vaccination cases in "Contractualism and Social Risk," 187.

under which conditions mutual justification of such socially risky yet beneficial activities is possible.

The article is structured as follows: in section I, I introduce both the standard version of contractualism and its two main risk-sensitive variants, *ex ante* contractualism and *ex post* contractualism. Section II is dedicated to illustrating the role of compensation in these approaches. I explain here how both *ex ante* and *ex post* contractualism can require compensation in a broad sense to feature in principles that permit risky social practices. In section III, I move on to my main argument regarding *ex ante* contractualism, which is that the approach cannot deliver the intuitive conclusion that those who foreseeably suffer harm due to risky activities are owed compensation for the harm they actually suffer, rather than merely compensation discounted by the unlikelihood of suffering harm. I call this result the *callousness objection*. In this section, I also discuss a number of responses to the callousness objection. Section IV explains why the callousness objection can be avoided by proponents of *ex post* contractualism and illustrates why *ex post* contractualism is less prohibitive than typically assumed by its critics, both in cases when compensation is feasible, as well as in cases in which it is not.

## I

Scanlonian contractualism (which from here on, I will refer to simply as *contractualism*) is a theory that tells us under which conditions we can consider actions as wrong (and, vice versa, as right). Scanlon's original criterion of wrongfulness is given as follows:

> An action is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject.[7]

The notion of reasonable rejection is of particular importance here. Two constraints on the notion of reasonable rejection are important: the *individualist restriction* and the *greater burden principle*. According to contractualists, an action is wrong if any single individual can reject it for personal reasons, i.e., "reasons that are . . . tied to the well-being, claims, or status of individuals in [a] particular position."[8] Rahul Kumar explains that personal reasons for rejection can be grounded in two distinct types of considerations: first, instrumental considerations, which concern "a respect in which an individual stands to be benefited or burdened as a result of an activity being permitted"; and second,

7 Scanlon, *What We Owe to Each Other*, 153.

8 Scanlon, *What We Owe to Each Other*, 219.

intrinsic considerations, which concern "the significance of a certain type of conduct being permitted, quite apart from either the possible consequences of the permission being exercised or other indirect consequences of it."[9] Much of this article is primarily concerned with instrumental considerations, but I will return to this distinction in section IV.

The fact that only personal reasons can be appealed to within the contractualist framework is also known as the *individualist restriction*.[10] Contractualists, however, do not directly take personal reasons of actual people into consideration. Rather, they appeal to "standpoints," i.e., abstractions referring to "the reasons that persons in certain circumstances normally have for caring about or wanting certain things," including such things as bodily integrity, the freedom to pursue personal relationships, and avoiding discrimination.[11] Only personal reasons relevant to a particular standpoint are taken into consideration.

Contractualists also subscribe to the *greater burden principle*, which states that "it would be unreasonable . . . to reject a principle because it imposed a burden on you when every alternative principle would impose much greater burdens on others."[12] The individualist restriction and the greater burden principle together determine whether a principle can or cannot be reasonably rejected.

To see how, consider a simple case under certainty in which we could kill Bob to spare ten million people some slight discomfort. The contractualist invites us to compare a general principle that would permit us to kill Bob ("anyone is permitted to kill a person if the alternative is that a large number of people suffer slight discomfort") against a principle that would prohibit us from doing so ("no one is permitted to kill a person if the alternative is that a large number of people suffer slight discomfort"). Someone sharing Bob's standpoint clearly has a very strong reason to reject the former; but someone sharing the standpoint of a person who could be spared slight discomfort has a very weak reason against the latter. However, according to the individualist restriction, we are not permitted to aggregate the reasons for rejection by all those in slight discomfort—only personal reasons given by standpoints that represent single individuals but not groups of individuals are taken into consideration. Thus, the greater burden principle ultimately yields that the strongest personal reason for rejecting a principle permitting us to kill Bob is much weightier (death) than the strongest personal reason for rejecting a principle that would prohibit us from doing so (avoiding slight discomfort). It is thus wrong to kill Bob.

9 Kumar, "Risking and Wronging," 36–37.

10 Frick, "Contractualism and Social Risk," 221.

11 Kumar, "Contractualism and the Roots of Responsibility," 256.

12 Scanlon, "Contractualism and Utilitarianism," 111.

If contractualism were able to tell us only whether a course of action is wrong given that we know the consequences resulting from the action, the theory would be of little practical relevance. As Barbara Fried notes, "in the real world, no conduct, judged *ex ante*, is certain to harm others."[13] In order to adjust for this shortcoming, contractualists have developed two risk-sensitive variations of contractualism: *ex ante* contractualism and *ex post* contractualism. The difference between these two accounts boils down to which temporal standpoint they take to be relevant for assessing a principle. To see how these approaches operate, consider the following case.

> *Air Travel*: Traveling by airplane generates large mobility benefits for those able and willing to take advantage. However, there is an unavoidable yet small risk that every once in a while, parts of airplanes loosen midflight and cause severe injuries to those living beneath the flight paths. While the risk is small, our expectation is that some people will suffer severe injuries from falling airplane debris. Can the people at risk reasonably reject a principle that permits air travel in light of these risks?[14]

For simplicity, let us assume that beneficiaries of air travel and those at risk are two wholly distinct groups. Over the course of their lifetimes, beneficiaries of air travel merely stand to benefit from the permission of air travel, while those at risk (call them "victims") merely stand to lose from the permission of air travel. The case is thus competitive at the *ex ante* stage. The interests of beneficiaries and victims are at odds from the start.

How should we decide in this case? This depends on which temporal standpoint we take to be the correct one. On the one hand, if we take the standpoints into account that victims and beneficiaries occupy *before* air travel is permitted, we have reason to conclude that victims occupying this *ex ante* standpoint cannot reasonably reject air travel. They cannot do so because the burden imposed onto each of them amounts to only a very remote risk of severe injury. Most of us accept such small burdens every day in our lives—for example, when we drive our bikes to work through car traffic or when we sit across the table from clumsy people using cutlery. If we believe the correct standpoint for victims to voice their complaint against air travel is *ex ante*, we mean that the relevant kind of burden is the burden each of them faces *before the expected outcome materializes*. Thus, we should discount the burden of severe injury by the unlikelihood with which it will materialize—this is the *ex ante burden*. The discounted burden of severe harm, however, is easily outweighed by the certain

13 Fried, "Can Contractualism Save Us from Aggregation?" 50.

14 This case is borrowed from Ashford, "The Demandingness of Scanlon's Contractualism."

burden of foregoing the benefits of air travel that prospective passengers would have to accept if air travel were prohibited. Those contractualists who take the *ex ante* standpoint to be the correct one defend *ex ante* contractualism. *Ex ante* contractualism states that air travel ought to be permitted.[15]

On the other hand, if we take the standpoints into account that victims and beneficiaries occupy *after* air travel would be permitted, we will conclude that victims can reasonably reject air travel. This is so because even if we do not know precisely who or how many people will be injured if we permit air travel, we know that it is overwhelmingly likely that *someone* will occupy the standpoint of a person who is severely injured in the future. Proponents of *ex post* contractualism take the *ex post* perspective to be correct, i.e., the temporal perspective *after the expected outcome has materialized* and someone will have been injured by airplane debris. (Note that *ex post* in this case refers not to the temporal state of affairs that obtains after the *actual* outcome of permitting air travel occurs but rather to the *counterfactual* state of affairs that obtains after the expected outcome occurs!) From this perspective, there is no reason to discount this burden, since we expect with high confidence even before any planes are permitted to fly that someone will suffer those injuries—the undiscounted burden of injury that is to be expected is the *ex post burden*. If the correct perspective is *ex post*, then at least one as of yet unidentified person is very likely to bear a burden that outweighs any of the beneficiaries' burdens if air travel is prohibited. Whoever this person will turn out to be can reasonably reject a principle permitting air travel. As Sophia Reibetanz puts it,

> As long as we know that acceptance of a principle will affect someone in a certain way, we should assign that person a complaint that is based on the full magnitude of the harm or benefit, even if we cannot identify the person in advance.[16]

Contractualists who take the *ex post* standpoint to be the correct one defend *ex post* contractualism. *Ex post* contractualism states that air travel ought to be prohibited.[17]

But the result obtained from following *ex post* contractualism is counterintuitive. As Kumar explains, insofar as "the economic and personal opportunities made available to individuals by commercial aviation are ones individuals

15 See James, "Contractualism's (Not So) Slippery Slope"; Frick, "Contractualism and Social Risk"; Kumar, "Risking and Wronging"; and Cai, "Just Social Risk Imposition and the Demand for Fair Risk Sharing."

16 Reibetanz, "Contractualism and Aggregation," 304.

17 See Reibetanz, "Contractualism and Aggregation"; Rüger, "On *Ex Ante* Contractualism"; and Suikkanen, "*Ex Ante* and *Ex Post* Contractualism."

have good reasons to want, there are grounds for in some way permitting the activity's pursuit."[18] Intuitively, we do not wrong others (or contribute to wronging others) because we impose risks of harm onto them when flying above them to our vacation destination.[19] The more general worry here is, as Elizabeth Ashford points out, that many of the ordinary social activities we pursue entail remote risks of severe harm. She thus concludes that *ex post* contractualism would be overly prohibitive: "Avoiding all behavior that involved any risk of harm, however remote, to those who did not stand to be benefited by the form of behavior would be extremely burdensome."[20]

While I generally agree with Ashford's verdict, it is worth refining her point somewhat. Promoters of *ex post* contractualism need not be worried about all nonzero, "however remote" risks. Rather, the point of *ex post* contractualism is that if certain social risks impact very large populations, severe harm is the *foreseeable* result. Any plausible version of *ex post* contractualism will not be concerned with regard to minute risks that fall below the threshold of foreseeability because below this threshold there is insufficient reason to believe that any person will eventually suffer harm. We can hence be a bit more precise about the threshold of foreseeability above which *ex post* contractualism becomes more prohibitive than *ex ante* contractualism: I posit that a particular harm is foreseeable if it is an expected outcome of the permission of a particular type of conduct. In the simplest case in which the relevant risk is homogenously distributed over the affected population, a harm is expected if each member of a population of $n$ faces a probability of roughly $1/n$ of suffering that harm. Put another way, a harm is foreseeable if the probability of at least one person suffering the harm is near one. If a harm is foreseeable, this means that given the evidence available at the time, it is expected that at least one person will suffer severe harm.[21] Still, if we were to follow *ex post* contractualism, many of the everyday activities we undertake, including air travel, would have to be prohibited because the benefits they yield to the many pale in comparison to the foreseeable burdens they impose on the few. All else equal, if we can expect

18 Kumar, "Risking and Wronging," 49.

19 At least at first glance, what makes traveling by plane wrong is not the risk of falling airplane debris but the fact that we produce emissions and thereby promote global warming.

20 Ashford, "The Demandingness of Scanlon's Contractualism," 298. James makes a similar point when he states that "complaints of death will always carry the day" under *ex post* contractualism ("Contractualism's (Not So) Slippery Slope," 272).

21 However, when no instance of harm is foreseeable in this sense, even *ex post* contractualism might permit us to discount the relevant burdens or benefits by their unlikelihood of occurring. How exactly we should discount in these cases is a matter of debate. For suggestions, see, for example, Reibetanz, "Contractualism and Aggregation"; Otsuka, "Risking Life and Limb"; and Horton, "Aggregation, Complaints, and Risk."

even one case of severe injury resulting from the permission of a socially beneficial activity, the activity must be prohibited.

*Ex post* contractualism thus seems fatally prohibitive, which is typically taken as an argument in favor of *ex ante* contractualism. (I return to this point later in section IV.) However, as I argue in the following sections, *ex ante* contractualism faces problems of its own. In the next section, I set up the discussion of these problems by illustrating how both *ex ante* and *ex post* contractualism motivate compensation for risky social practices that result in foreseeable harms.

## II

Assume that we permit air travel. Consider now the case of an Amish farmer hit by airplane debris:

> *Air Travel (Jeb)*: Jeb is an Amish farmer who lives under a heavily used flight path. One day when he is out tilling his field, he is hit by a piece of airplane debris that has dislodged during a flight, and he sustains such severe injuries that he loses his left arm. Even though it happens seldomly that someone is injured due to falling airplane debris, it was foreseeable that someone would sooner or later suffer an injury comparable to Jeb's. This is so because the risk to each person living below a flight path (but unable to enjoy the benefits of air travel) of being hit by airplane debris over the course of her lifetime is one in a million, and ten million people are situated as such.[22]

The question at the heart of this article is what we owe Jeb once the risk from falling airplane debris materializes for him. I assume here that Jeb could not have anticipated that the debris would hit him, and there was no way for Jeb to evade the debris in time; he had no choice in whether he would be injured or not.[23] The central question now is: What do we owe Jeb once he is severely injured?

Let us consider this question first from the perspective of *ex ante* contractualism. In his discussion of the case, Kumar defends the result that air travel ought to be permitted according to *ex ante* contractualism as follows:

22 This case is borrowed from Kumar, "Risking and Wronging."

23 In *Moral Dimensions*, Scanlon argues that whether Jeb made a choice to be subjected to the risk of falling airplane debris will typically impact what we owe Jeb only insofar as his choice could have made it more likely that he would suffer harm (206). For further discussion, see Scanlon, *What We Owe to Each Other*, "Reply to Zofia Stemplowska," and "Reply to Serena Olsaretti"; Voorhoeve, "Scanlon on Substantive Responsibility"; and Williams, "Liberty, Liability, and Contractualism."

> The risk of harm that will be imposed on individuals by the activity is an important reason for objecting to it being permitted. But that concern is plausibly addressed by any principle permitting commercial aviation that, first, mandates certain standards of due care regulating the operation of commercial flights and, second, *invests any person who ends up being harmed as a result of the eventuation of the imposed risk with a claim to compensation*.[24]

Two points are noteworthy here. First, it is self-evident that Kumar does not mean to imply that by permitting air travel, we have *wronged* Jeb and therefore owe him compensation. According to *ex ante* contractualism, Jeb is not wronged because air travel is permitted. Kumar thus uses the term 'compensation' not in the narrow sense according to which duties of compensation arise if and only if a previous, related wrongdoing occurred.[25] Instead, what Kumar seems to refer to with the term is simply *whatever (presumably material) benefit we owe someone like Jeb if they eventually suffer harm due to a risky social practice*.[26] In what follows, I will discuss compensation in this broad sense, unless otherwise specified.

Second, the principle that Kumar believes to be justifiable even to Jeb is not a principle that would simply permit us to engage in air travel if the discounted burden of someone sharing Jeb's standpoint is outweighed by the full burden of someone who stands to forego the benefits of air travel. Instead, Kumar proposes that the principle that is ultimately justifiable to each will be a principle that also includes due care and compensation. This is puzzling, since it follows straightforwardly from *ex ante* contractualism that even if neither due care nor compensation can be provided, the permission of air travel is still justifiable to each. Why does Kumar maintain that air travel is most plausibly justifiable to each conditional upon due care and compensation? As Cai points out, the reason why someone like Jeb is owed both due care and compensation arguably follows from the fact that for any principle permitting a risky yet beneficial social practice, it is true that "when a similar benefit could be achieved with a lower level of risk, it is reasonably rejectable if the risk is not reduced to this level."[27]

24 Kumar, "Risking and Wronging," 49 (emphasis added).

25 For a seminal discussion of such cases, see Thomson, "Rights and Compensation."

26 Beyond compensation, we might also owe someone sharing Jeb's standpoint other things. For example, we might have a duty to apologize to Jeb or to demonstrate an otherwise appropriate attitude towards his plight. See, e.g., Hayenhjelm, "Compensation as Moral Repair and as Moral Justification for Risks."

27 Cai, "Just Social Risk Imposition and the Demand for Fair Risk Sharing," 269.

On the *ex ante* view, risk matters because it affects Jeb's *ex ante* prospect. We can reduce the impact of risk on Jeb's *ex ante* prospect in two ways: either we reduce the probability of harm, or we reduce the magnitude of harm that materializes once someone is harmed. The former can be achieved via precautionary measures (such as thorough inspections of airplanes before takeoff and redirection of flight paths), while the latter can be achieved via compensation. Assume that we have already exhausted all precautionary measures such that the probability of an accident is as low as it can possibly be. We are now facing a choice between the following three principles (which, by assumption, have roughly the same social costs attached):

1. Prohibit air travel.
2. Permit air travel without compensation.
3. Permit air travel with compensation for those living beneath flightpaths.

We have already seen that according to *ex ante* contractualism, principle 1 can be rejected in favor of 2. But from what has been stated above, it is also clear that if 3 is feasible, Jeb could reasonably reject 2 on the grounds that it yields a worse *ex ante* prospect for him than 3. All else equal, proponents of *ex ante* contractualism could argue that those at risk can generally reject principles that refuse compensation in favor of principles that offer compensation simply because compensation improves their *ex ante* prospect while also securing the benefit of risky social practices for others.

A similar line of reasoning applies to *ex post* contractualism, albeit with a caveat. It is clear that compensation improves not only the *ex ante* prospects of those at risk but also the *ex post* burdens of those who will eventually be harmed by a risky social practice.[28] Thus, if compensation is available, *ex post* contractualism will also generally favor principle 3. However, this result obtains only if whomever will be harmed receives sufficient compensation to ensure that their *ex post* burden is outweighed by the burden of those who would forego the benefits of air travel if we were to prohibit the practice—otherwise, the greater burden principle will entail that air travel ought to remain prohibited. Without sufficient compensation, 1 hence remains the principle justifiable to each. In

28 Additionally, it might be the case that Jeb is owed compensation in the narrow sense because he has been wronged according to *ex post* contractualism if air travel is permitted simpliciter. However, as I argue below, previous wrongdoing is not necessary for proponents of *ex post* contractualism to motivate why Jeb is owed compensation in the broad sense. In this article, I focus primarily on how *ex ante* and *ex post* contractualism motivate compensation in the broad sense. For a discussion of contractualism and compensation in the narrow sense, see Alm, "Contractualism, Reciprocity, Compensation."

the simplest case, what someone sharing Jeb's standpoint is hence owed is "full" compensation, which fully rectifies the harm she has suffered.[29]

The canonical formulation of full compensation is by Robert Nozick:

> Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person *X* for person *Y*'s action *A* if *X* is no worse off receiving it, *Y* having done *A*, than *X* would have been without receiving it if *Y* had not done *A*.[30]

According to *ex post* contractualism, only the person who will suffer harm has a reason to reject air travel. Hence, only once a person has been harmed does she have a claim to compensation. I refer to compensation provided to a person conditional upon her actually suffering harm as *ex post compensation*.

Two points are worth expanding on here. First, as explained in section 1, *ex post* contractualism is standardly considered overly prohibitive because any miniscule risk leading to foreseeable, severe harm could serve as a decisive veto against an otherwise highly beneficial risky social practice. But once we allow for compensation to have an impact on *ex post* burdens, the veto is valid only insofar as no or insufficient *ex post* compensation is provided. All else equal, we can thus pursue even highly risky socially beneficial practices, insofar as the expected harms resulting from them are appropriately compensated. All else equal, a principle permitting people to travel by airplane could not be reasonably rejected by someone sharing Jeb's *ex post* standpoint if this person is provided with *ex post* compensation.[31]

Second, *ex post* contractualism will standardly require high amounts of compensation (close to full compensation) for those who suffer severe harm in order to shift the result of the greater burden principle such that a socially risky practice can be justifiable to all. To reach ahead a bit, the main argument I present in the next section states that proponents of *ex ante* contractualism will standardly lack the resources to explain why high *ex post* compensation is required in order to render socially risky practices like air travel justifiable to each.

29 Alm, "Contractualism, Reciprocity, Compensation" also covers more complex cases for standard contractualism in which full compensation is not necessarily required.

30 Nozick, *Anarchy, State, and Utopia*, 57.

31 The idea that compensation can render otherwise morally problematic risk-imposing conduct permissible has often been proposed in rights-based approaches to risk ethics (albeit with varying success). For such proposals, see, for example, Nozick, *Anarchy, State, and Utopia*, ch. 4; and more recently, McCarthy, "Rights, Explanation, and Risks." For a critical discussion of McCarthy's proposal, see Holm, "A Right Against Risk-Imposition and the Problem of Paralysis."

In sum, both *ex ante* and *ex post* contractualism can explain why someone sharing Jeb's standpoint ought to receive compensation, insofar as compensation is available. This is simply because compensation can improve both *ex ante* prospects and *ex post* burdens and thereby render permitting a risky social practice justifiable to each on *ex ante* and *ex post* contractualism, respectively. Finally, it is worth pointing out that if *ex post* compensation is available (and insofar as the provision of *ex post* compensation does not entail any significant burdens on individuals other than Jeb—for example, because *ex post* compensation is extremely costly), it seems intuitively plausible that Jeb should receive high *ex post* compensation. In what follows, I move on to arguing that proponents of *ex ante* contractualism cannot motivate this plausible result on their account.

## III

Consider the Air Travel scenario again. Assume that we have to decide on a principle that settles how much compensation those under the flight paths of airplanes are owed. We have two principles available:

> *Ex Post Compensation*: Every person harmed by falling airplane debris receives $500,000. Persons at risk of being hit by airplane debris (with a probability of one in a million) who are not harmed receive nothing. $500,000 is the required amount to fully rectify the harm to those who will be hit by airplane debris.
>
> *Ex Ante Compensation*: Every person at risk of being hit by airplane debris receives $0.50, the equivalent of full *ex post* compensation discounted by the unlikelihood of harm. Persons actually harmed by airplane debris received nothing more.[32]

*Ex post* compensation has an insurance-like payoff structure: if harm occurs, a large amount of money will be provided to those harmed.[33] If no harm occurs, no money will be provided. Contrarily, *ex ante* compensation is best thought

32 The distinction between *ex ante* and *ex post* compensation is commonplace in economics as well as philosophy of torts. See, for example, Wittman, "Prior Regulation Versus Post Liability"; Shavell, "Liability for Harm Versus Regulation of Safety"; and Robinson, "Probabilistic Causation and Compensation for Tortious Risk." For one of the few contributions discussing *ex ante* and *ex post* compensation in risk ethics, see McCarthy, "Liability and Risk."

33 To be precise, *ex post* compensation has the payoff structure of third-party insurance, where the policyholder paying the risk premium is someone other than the person who receives funds from the insurance pool. Not much hangs on whether *ex post* compensation is equivalent to third- or first-party insurance. What matters for our purposes is merely the payoff structure, which is equivalent in both cases.

of as unconditional compensation for the mere risk imposition rather than full compensation for the harm that eventually ensues. *Ex post* compensation seems to be the correct principle: it is implausible that we can simply provide Jeb with *ex ante* compensation of $0.50 and claim that we owe him nothing more after he is hit by airplane debris.

However, *ex ante* contractualism cannot endorse this principle because the expected value yielded by *ex ante* compensation and *ex post* compensation is equal: under both principles, it amounts to $0.50 for each individual at risk. There is no reason for any person represented by a rational, risk-neutral *ex ante* standpoint to reject one principle in favor of the other. Worse yet, any comparatively small increase in *ex ante* compensation (say from $0.50 to $1) would lead rational, risk-neutral agents to choose *ex ante* over *ex post* compensation. Thus, because *ex ante* contractualism assesses whether a principle can be rejected only from *ex ante* standpoints, *ex ante* contractualism is committed to the claim that no one can reasonably reject *ex ante* in favor of *ex post* compensation. But even if Jeb chose *ex ante* compensation before he knew he would end up harmed, we have good reason to consider *ex post* compensation the only principle justifiable to each: it would be callous to argue that once he receives *ex ante* compensation, we owe Jeb nothing more when he becomes the victim of severe harm. Because *ex ante* contractualism considers benefits and burdens from the *ex ante* perspective, *ex ante* contractualism cannot avoid this result. Call this the *callousness in compensation objection* against *ex ante* contractualism (for short, the *callousness objection*).[34]

An obvious response that proponents of *ex ante* contractualism could provide against the callousness objection is that beyond duties of compensation, we also have duties of aid towards someone like Jeb. These duties persist even when no one has been wronged, as is the case for Jeb according to *ex ante* contractualism.[35] Kumar makes a similar point when he writes the following about a case similar to Jeb's:

> I may still have a claim on others for assistance because we have a general duty to aid one another when we can do so at little cost to ourselves. But I can't claim that I am owed assistance because I've been wronged and am entitled to some form of compensation.[36]

34 The term 'callousness objection' is inspired by so-called harshness objections launched against luck egalitarianism, which draw on similar intuitions as my arguments here. See, for example, Fleurbaey, "Equal Opportunity or Equal Social Outcome?"; Anderson, "What Is the Point of Equality?"; and Segall, *Health, Luck, and Justice*.

35 Of course, proponents of *ex post* contractualism will insist that Jeb is wronged without a guarantee to *ex post* compensation. Under *ex post* contractualism, the plane that ultimately injured Jeb would have never been permitted to take off in the first place.

36 Kumar, "Contractualism and the Roots of Responsibility," 252.

If you find Jeb out in his field with his arm cut off, you have a duty to aid him to stop the bleeding and to transport him to the nearest emergency room, and so on. The role of compensation, i.e., improving the *ex ante* prospect of those at risk, is here supplemented by aid. The callousness objection is hence *prima facie* avoided. The underlying principle as it applies to the cases under consideration here could be formulated as follows:

> *Aid*: Those who can provide assistance at low cost to those who have suffered severe harm due to the permission of a risky social practice have a duty to do so.[37]

The problem with this response is that it forces *ex ante* contractualism into a dilemma: either the duty to aid is equally generous as *ex post* compensation (Jeb would be roughly as well-off with receiving aid as he would be receiving $500,000), or it is not.

The first horn entails that proponents of *ex ante* contractualism can no longer maintain that *ex post* contractualism is implausibly prohibitive in comparison. This is so because proponents of *ex post* contractualism could claim that a generous duty to aid would guarantee that Jeb's *ex post* burden would be offset just as much as it would be under *ex post* compensation. Given such a generous duty to aid, even proponents of *ex post* contractualism would agree that air travel ought to be permitted. If the decisive reason to promote *ex ante* contractualism over *ex post* contractualism is that *ex post* contractualism is standardly far more prohibitive than *ex ante* contractualism, a generous duty to aid will undermine this reason.

However, the proponent of *ex ante* contractualism could insist that our duty to aid might be far more limited, which leads us to the second horn of the dilemma. Even if we have a duty to aid, it is by no means clear that this duty is so exhaustive as to provide someone like Jeb with aid to the tune of $500,000. The duty to aid might require us to drive Jeb to the nearest hospital to receive emergency medical assistance, but it does not require us to offset his loss of income-generating capacity or to provide him with a functional prosthesis, and so on. If a duty to aid is limited in this manner, it will not lower the relevant *ex post* burdens sufficiently to permit air travel under *ex post* contractualism; the upshot is that proponents of *ex post* contractualism must again conclude that air travel is impermissible.[38]

37 In *What We Owe to Each Other*, Scanlon argues in favor of a similar principle, which he refers to as the *rescue principle* (224).

38 For a discussion of the extent to which we owe others aid according to contractualism, see, for example, Wenar, "What We Owe to Distant Others"; and Gilabert, "Contractualism and Poverty Relief."

But if our duty to aid is limited in this manner, then *ex ante* contractualism is arguably again under threat of the callousness objection. The point here is that by assumption, *ex post* compensation could easily be provided to Jeb—we could provide him with $500,000 at low cost to anyone else. Yet by offering Jeb mere emergency assistance, he is left far worse-off than he could have been. A contractualist account that requires us to limit what we can do for Jeb to mere emergency assistance, especially when we could do much more for him at a low cost to ourselves, is callous.

In conclusion, on the one hand, a duty to aid cannot make those who are harmed as well-off as they would be under full compensation; otherwise, proponents of *ex ante* contractualism must give up on an important advantage of their account over *ex post* contractualism, namely, that the former is less prohibitive. This is so because if there is a generous duty to aid, risky social practices like air travel would also be permitted under *ex post* contractualism. On the other hand, if duties of assistance only incrementally improve the condition of those who suffer harm, insisting that someone who shares Jeb's fate is owed nothing more than emergency aid would be callous.

An argument in favor of providing *ex post* compensation under *ex ante* contractualism comes from fear. As Cai argues, "The guarantee of compensation would help to reduce fear and anxiety for all those who are subject to the risk in question."[39] The point here is that *ex ante* compensation can be rejected in favor of *ex post* compensation by any person at risk because each of them would fear becoming an uncompensated victim like Jeb under *ex ante* compensation. Only if *ex post* compensation is guaranteed is this fear overcome.[40]

The problem with this response is that it is implausible to believe that this fear could be sufficient to tip the balance in favor of *ex post* compensation. After all, the risk of becoming an uncompensated victim under *ex ante* compensation is dependent on the risk of being harmed in the first place. As has been established, this risk is miniscule. We all routinely live with miniscule risks of suffering severe harm without being overwhelmed by crippling fear of becoming uncompensated victims—so why should we assume that those living under flight paths are much different from us? In any case, the response from fear does not show that a rational agent would prefer *ex post* over *ex ante*

39 Cai, "Just Social Risk Imposition and the Demand for Fair Risk Sharing," 269.

40 For a similar point, see Alm, "Contractualism, Reciprocity, Compensation," 14. However, there is a kind of fear that can be appropriately addressed by neither *ex ante* nor *ex post* compensation, namely the fear of being harmed *despite* receiving full *ex post* compensation. Nozick calls this "free-floating fear" in *Anarchy, State, and Utopia* (68). I bracket the issue of free-floating fear because even if full compensation is provided, free-floating fear will by definition persist.

compensation. Rather, it merely shows that there is an additional burden we impose onto everyone at risk, i.e., the fear of becoming an uncompensated victim. We could simply offer to top off *ex ante* compensation with a small additional *ex ante* payment to offset this fear. There is hence no reason to insist on *ex post* compensation, at least not from the *ex ante* perspective of a rational agent. Hence, even if we take fear into account, *ex ante* contractualism again fails to explain why *ex ante* compensation cannot reasonably be rejected. The callousness objection stands.

A related response comes from risk aversion. Perhaps assuming risk neutrality mischaracterizes what those at risk have good reason to want. Instead, we should take into account that people are often risk averse. This should be reflected in the standpoints we take to be relevant. Persons occupying these standpoints would not accept a minor *ex ante* compensatory payment now if it meant foregoing a larger *ex post* payment in case they suffer harm. Therefore, they will have reason to reject a principle providing them with *ex ante* rather than *ex post* compensation.

I doubt this response succeeds in all relevant cases. First, if the risk of harm to each is sufficiently small, and risk aversion among those affected is within a normal range, we can again offer a small additional payment on top of *ex ante* compensation, which would tip the balance against *ex post* compensation. After all, a person within the normal range of risk aversion would at some point accept a lower but unconditional *ex ante* payment (for example, $10,000) over a higher but conditional *ex post* payment (in our case, $500,000, conditional upon ending up harmed). If the payment is sufficiently high, accepting it is the rational, *ex ante* payoff-maximizing move.

But the proponent of *ex ante* contractualism could object that while none of those at risk could reasonably reject *ex ante* compensation plus an additional payment for risk aversion, such an *ex ante* compensatory scheme (providing everyone at risk with $10,000 and nothing more even if harm ensues) would in many cases be far more expensive than *ex post* compensation. Thus, while those at risk have no reason to reject *ex ante* compensation plus additional payment for risk aversion, those who fund the compensatory scheme could reject *ex ante* compensation in favor of *ex post* compensation. In other words, if we care primarily about addressing the risk aversion of those at risk, *ex post* compensation is simply more cost efficient.

There are three issues with this response. First, the fact that *ex post* compensation is less costly to those who shoulder the burden of compensation is not likely to make a decisive difference in favor of *ex post* compensation. Due to the individualist restriction, the comparatively higher aggregate cost of *ex ante* compensation itself gives us no reason to reject *ex ante* in favor of *ex post*

compensation. What matters is only how high the burden is to each individual contributing to the compensatory effort. If we assume that the compensatory burden is distributed among a large number of individuals (which we can safely assume in the cases I focus on), it might often turn out that none of them will be significantly burdened by paying their small share of the aggregate difference in cost between *ex ante* and *ex post* compensation. Second, *ex post* compensation is at best efficient in expectation, but in some cases, it could turn out that we underestimated how many people will be severely harmed. In such cases, it might turn out that *ex ante* compensation would have been the less costly scheme. Third, it is not even necessarily the case that *ex post* compensation is less costly in expectation. Whether this is the case depends on various qualifications: How many people are at risk? How high is *ex post* compensation? Which amount of *ex ante* compensation would make those at risk indifferent between receiving *ex ante* or *ex post* compensation? And so on. The claim that *ex post* compensation is necessarily (or even only in all relevant cases) more cost efficient in expectation than *ex ante* compensation is not tenable. The upshot here is that if proponents of *ex ante* contractualism cannot robustly reject *ex ante* compensation in favor of *ex post* compensation in all relevant cases, the callousness objection stands.

A final response states that the choice I present between *ex ante* and *ex post* compensation is artificial. We could simply provide both *ex ante* and *ex post* compensation (The cost of doing so for each individual would be only marginally greater than merely providing one or the other.) and thus avoid the callousness objection. The resulting principle could be stated as follows:

> *Risk and Harm (RH) Compensation*: Every person living under a flight path receives $0.50. Additionally, every person injured by falling airplane debris receives $500,000.

At first sight, this objection successfully addresses the claim that *ex ante* contractualism is overly harsh towards persons like Jeb: in RH Compensation, Jeb receives $500,000.50. However, the problem is that we could again offer someone sharing Jeb's *ex ante* standpoint a slightly higher *ex ante* payment to forgo any *ex post* compensation. Consider the following principle:

> *Ex Ante Times Two*: Every person living under a flight path receives $1. Any person injured by falling airplane debris receives nothing.

*Ex Ante* Times Two has precisely the same expected *ex ante* payoff as RH Compensation. A risk-neutral individual would have no reason *ex ante* to reject one in favor of the other. We are again back to where our discussion of *ex ante* and *ex post* compensation began. The only difference is that Jeb now receives $1

instead of $0.50. The conclusion that *ex ante* contractualism cannot deliver any decisive reason in favor of *ex post* insurance stands.

I conclude that none of the responses to the callousness objection discussed in this section succeed. The response from aid either threatens to undermine one of *ex ante* contractualism's most distinctive advantages over *ex post* contractualism—namely, that the latter is far more prohibitive than the former (if generous aid must be provided)—or fails to avoid the callousness objection (if only limited aid must be provided). The responses from fear, risk aversion, and combined *ex ante* and *ex post* compensation all suffer from the fact that rational agents will *ex ante* accept comparatively small additional yet unconditional *ex ante* payments and therefore reject conditional *ex post* compensation. The burden of proof that the callousness objection can be overcome thus remains with the proponent of *ex ante* contractualism. The central theme here is that because *ex ante* contractualism is committed to the idea that what matters with regard to compensation is its effect on the *ex ante* prospect of an agent, *ex ante* contractualism is unable to explain the intuitively plausible verdict that compensation primarily ought to serve to lower the *ex post* burden of those at risk.

## IV

The callousness objection arises for *ex ante* contractualism primarily because of the account's exclusive focus on *ex ante* prospects. A straightforward way to avoid the objection is hence to shift focus to *ex post* burdens and embrace *ex post* contractualism. As I argued earlier, *ex post* contractualism can make sense of the idea that *ex post* compensation is required in order to alleviate the *ex post* burdens of prospective (but yet unidentified) victims. If this is done, the assessment of the greater burden principle in the relevant cases will reveal that permitting the risky social practice alongside *ex post* compensation is the justifiable principle. In what follows, I sketch out a full picture of *ex post* contractualism that accounts for both cases in which *ex post* compensation is feasible and cases in which it is not. The upshot here is that *ex post* contractualism is generally not as demanding as is often assumed by its critics.

To begin with, I have already explained why *ex post* contractualism is commonly taken to be an implausibly prohibitive view: many of the risky, everyday practices we pursue are expected to impose severe harms onto a few people over the course of their lifetimes, but the benefits others receive from pursuing these activities are typically taken to be of comparatively less moral weight to the individual beneficiary. The picture that results is that any reasonable expectation of someone suffering severe harm due to risky social practices will constitute a veto against the principled permission of such practices. Since

many (if not a majority) of the practices we pursue in the world we inhabit seem to result in severe harm to some few individuals, *ex post* contractualism would judge that they are not justifiable to the as of yet unidentified victims and should thus be prohibited. However, once we introduce the possibility that these unidentified victims could be compensated for the harm that they will suffer, the picture changes: as long as they receive sufficient *ex post* compensation, any risky social practice is permissible. Whatever *ex post* burden is initially imposed onto them will then be rectified. Victims hence assume a standpoint that no longer characterizes the weightiest *ex post* burden. Instead, the weightiest *ex post* burden is borne by those who would have to forego the significant benefits of a risky social practice such as air travel. Even according to *ex post* contractualism, the only course of action that is justifiable to each in such cases is to permit the risky practice.

While this picture of *ex post* contractualism sounds promising, it is incomplete. There are important cases in which we should not permit some to compensate others for the harms they imposed on others as a result of risky conduct. There are also cases in which compensation is not possible, either because it is too expensive or because the harms resulting from a risky practice will turn out to be incompensable.

Let me begin with the first set of cases. Consider a principle that would allow persons to aim a six-chambered gun loaded with five rounds at anyone else's legs, pull the trigger once, and then provide *ex post* compensation to their victims if a bullet is discharged. Even if the resulting harms would be fully rectified, such behavior is clearly wrong. Both *ex ante* and *ex post* contractualism can explain why: the behavior would be reasonably rejected by those who stand to be harmed for *intrinsic* (rather than purely instrumental) considerations. Examples of conduct that can reasonably rejected because of intrinsic considerations include stigmatizing, discriminating, unfair, or autonomy-threatening conduct.[41] Both proponents of *ex ante* contractualism and of *ex post* contractualism will agree that even if *ex post* compensation (in the broad sense that does not require previous wrongdoing) is provided, a principle permitting conduct that is rejected due to intrinsic considerations cannot be justifiable to each, irrespective of the magnitude of risks involved. Intrinsic considerations thus prevent compensation from becoming "nothing but a price attached to the pursuit of one's own ends, a toll one must pay in order to get on with it, a fee that frees one from the obligation of consulting others."[42] Risky social conduct that is wrong due to intrinsic considerations cannot be justifiable to each on

41 Kumar, "Risking and Wronging," 39.

42 Railton, *Locke, Stock, and Peril*, 215.

any plausible account of *ex post* contractualism, even if *ex post* compensation is provided.

The second point concerns cases in which *ex post* compensation is very expensive. This can happen in cases in which the burden of compensation is shouldered by very few, cases in which very many stand to suffer severe harm, cases in which harms affecting individual persons are in principle compensable but only at a very high cost, and so on. The point here is that according to *ex post* contractualism, a principle permitting risky social practices conditional upon the provision of *ex post* compensation can be rejected not only by those who stand to suffer harm but also by those who stand to shoulder the burden of compensation. If compensation is too expensive, this means that those who owe compensation also have a weighty reason to prefer prohibition to permission with compensation. Generally speaking, in cases in which compensation is excessively expensive in this sense, *ex post* contractualism will tend to judge that the practice in question ought to be prohibited.

Finally, there are cases in which the relevant harms can in principle not be compensated, i.e., are incompensable; death is such a harm. In these cases, *ex post* contractualism *prima facie* falls back on its supposedly excessively prohibitive position. However, it is worth spelling out the relevant implications fully. First, as I stated earlier, not every nonzero, positive probability of incompensable harm suffices for proponents of *ex post* contractualism to embrace the conclusion that a risky social practice ought to be prohibited. Rather, prohibition will be the principle justifiable to each only if the probability that someone will suffer incompensable harm is reasonably close to one.[43] Below this threshold, even proponents of *ex post* contractualism might endorse diverse proposals for discounting the relevant burdens by their unlikelihood of materializing.[44]

Second, even in cases in which incompensable harms might result from a risky social practice, proponents of *ex post* contractualism can insist that under specific conditions, any purported veto against a risky social practice can still be outweighed. To see this, consider Aaron James's example of exempting ambulances from ordinary traffic rules:

> Most of us find it acceptable to exempt ambulances from normal traffic rules. We find this acceptable despite the fact that we all thereby face increased risks of injury or death by ambulance accident, because each of us stands a good chance of needing expedited passage to a hospital at some point. The acceptability argument *need not cite the fact that overall*

43 We might of course still find considerable disagreement among proponents of *ex post* contractualism on how close to one this probability ought to be.

44 See note 21 above.

> *deaths are minimized* when ambulances are exempted from normal traffic rules or that overall welfare is improved but only each person's own *ex ante* advantage.[45]

*Ex ante* prospects (as emphasized by James) matter primarily from the *ex ante* perspective and are thus primarily relevant to proponents of *ex ante* contractualism. Overall (expected) deaths matter primarily from the *ex post* perspective and are thus primarily relevant to proponents of *ex post* contractualism. But the fact that the acceptability argument "need not cite the fact that overall deaths are minimized" does in no way entail that a minimization of overall deaths is not a plausible reason for why ambulances are exempt from normal traffic rules. Consider the alternative: if it turned out that permitting ambulances to speed through traffic was expected to take more human lives than it saved, we surely ought to reconsider whether we should permit the practice.

Furthermore, it seems appropriate to permit ambulances to disregard normal traffic rules only in case of emergency. It is implausible that ambulances should be permitted to run red lights in order to deliver someone medicine for a cold. The comparability of the relevant harms under permission and prohibition, respectively, is of central importance in these cases: when harms resulting from permission are comparable to harms resulting from prohibition, and more people are expected to suffer such comparable harms under prohibition than under permission, promoters of *ex post* contractualism can rely on so-called tie-breaker arguments in order to explain why permission is justifiable to each.[46] For illustration, assume that we expect one person to die by being run over by an ambulance, but we expect two people to die if ambulances are required to obey normal traffic rules. The weightiest burdens under prohibition and permission of ambulance speeding balance each other out (death), and thus, the greater burden principle on its own provides no conclusive judgment regarding which principle should be adopted. However, if we were to prohibit ambulances from speeding, we effectively ignore the second person's weighty reason against prohibiting ambulances from disregarding traffic rules. This person could insist that her life has not been "given the same moral significance as anyone else's in this situation."[47] We could thus argue that this second person's prospective *ex post* burden provides us with a tie-breaking personal reason to opt for permission instead of prohibition.[48] Generally speaking, even in cases

45 James, "Contractualism's (Not So) Slippery Slope," 272 (emphasis added).

46 Scanlon, *What We Owe to Each Other*, 232.

47 Scanlon, *What We Owe to Each Other*, 232.

48 It is worth pointing out that tie-breaker arguments are not unanimously endorsed among contractualists. For discussion, see Otsuka, "Scanlon and the Claims of the Many Versus

in which harms resulting from risky social practices are expected to result in incompensable harm, proponents of *ex post* contractualism can insist that such practices ought to be permitted if they will lead to an overall lower number of expected burdens of comparable moral weight.

But what about cases in which the relevant incompensable harms are not comparable? Consider Jeb's case again. Assume that Jeb would not simply lose his arm if hit by falling airplane debris; rather, he would die. Assume also that none of the beneficiaries of air travel would bear a burden comparable to Jeb's if air travel was prohibited. Here, *ex post* contractualism can no longer rely on tie-breaker arguments. Thus, in the absence of special justification, *ex post* contractualism states that air travel ought to be prohibited. Again, *ex post* contractualism emerges as a demanding view.

However, allow me to defend the demandingness of *ex post* contractualism on a final note. As Ashford points out, "any plausible moral theory must hold that there are some situations in which agents face extreme moral demands."[49] Demandingness in itself is not a reason for rejecting a theory of wrongness; rather, it urges us to thoroughly motivate the demandingness of the theory. A view that is extremely demanding on us due to the fact that it requires us not to promote, contribute, or permit foreseeable harm seems to me to be well motivated. Perhaps the correct lesson to draw from *ex post* contractualism is that unless we can compensate people *ex post*, perhaps we should not draw flight paths over residential areas (especially not over areas occupied by those too poor or unwilling to benefit from air travel); and perhaps we should not propose speed regulations that are almost certain to take some lives; and perhaps we should provide building permits only if sufficient precautionary measures are in place to ensure that we cannot expect any construction workers to die from accidents on site; and so on. One essential difference between *ex ante* and *ex post* contractualism hence comes down to how many precautions were taken before we can securely state that we have "done enough" to protect others from harm.[50] If we cannot ensure that no one can be *expected* to die, become paralyzed, severely traumatized, or else in the relevant cases, we ought not pursue the practice in question. Some might find the resulting degree of precautionary discretion unacceptable. However, it should be stated explicitly that the alternative entails that we are generally permitted to place others in situations that we foresee to result in irreversible harm to them if this means that we can secure goods of comparatively minor moral significance for ourselves.

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the One"; and Kumar, "Contractualism on Saving the Many."

49 Ashford, "The Demandingness of Scanlon's Contractualism," 274.

50 Scanlon, *What We Owe to Each Other*, 237.

I believe this to be a callous conclusion to embrace for any nonaggregative, nonconsequentialist theory.

## V

In this article, I have discussed what compensation we owe those who foreseeably suffer harm due to risky social practices. I have argued that both *ex post* and *ex ante* contractualism can explain why compensation might be justified in many cases, but ultimately *ex ante* contractualism cannot explain why we ought to provide those who foreseeably suffer harm due to risky social practices with *ex post* rather than *ex ante* compensation. I call this the *callousness objection*. *Ex ante* contractualism is unlikely to avoid the objection primarily because *ex ante* contractualism insists on assessing principles for compensation from the *ex ante* perspective. I have discussed a number of possible responses and concluded that none of them are successful. Finally, I have argued that the callousness objection can be avoided by embracing *ex post* contractualism. I have sketched out how *ex post* contractualism deals with a number of cases of routine risky social practices in which compensation is feasible, as well as cases in which it is not. I conclude that even though *ex post* contractualism still emerges as a demanding contractualist view, it is far less prohibitive than usually assumed by its critics in most cases, and its demandingness in the remaining cases is generally well motivated.[51]

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# IS IT MORALLY PERMISSIBLE FOR PARENTS TO ATTEMPT TO CONVINCE THEIR CHILDREN OF THEIR COMPREHENSIVE VIEWS?

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INFLUENTIAL liberal accounts of family ethics are highly critical of the idea that parents have a right to intentionally shape their children's values. They diverge from commonsense views in denying that parents may deliberately try to influence which conception of the good their children eventually endorse. Matthew Clayton argues that respect for children's independence *qua* future adults demands that parents remain neutral towards different comprehensive views.[1] If it is permissible, for example, for a parent to send their child to a religious school, this must be for reasons other than that the parent's own religion is taught there and they want the child to follow that religion. For example, it may be permissible for the parent to select a religious school because it happens to be located close by.[2] Adam Swift, in turn, maintains that parents may transmit their religious views to their children only to the extent that this is necessary for the parent-child relationship to flourish.[3] So, for example, if a committedly atheist parent will not feel understood without their child's being aware of their outlook, the parent may share these beliefs with their child—which could very well lead to the child's adopting these beliefs too. But the parent should not intentionally try to influence their child to become an atheist simply because they themselves believe atheism to be correct.[4] On both Clayton's and Swift's views, parents are morally required to exclude from consideration that they themselves endorse a specific comprehensive doctrine when making decisions that might influence their children's values. I call this the *exclusion condition* and the accounts supporting it *exclusion views*.

Exclusion views contrast with commonsense views regarding parents' rights to shape their children's values. Many parents believe that they have a

1 Clayton, *Justice and Legitimacy in Upbringing*, "Debate," and *Independence for Children*.

2 Clayton, *Independence for Children*, ch. 2.

3 Swift, "Parents' Rights, Children's Religion."

4 Swift, "Parents' Rights, Children's Religion," 47.

moral right to shape their children's conception of the good—maybe even a moral duty to do so (i.e., a duty to teach their children what are, in their view, the *correct* views and values). Many people believe that it is morally permissible for parents to make their children join their religious affiliation. But more than religion is at stake here.[5] Certain forms of environmentalism, feminism, or views of sexuality also fall within the scope of comprehensive doctrines. It would be surprising if it were morally impermissible for parents to teach such conceptions of the good to their children. To be sure, commonsense views of what parents can permissibly do could be misguided. Still, the contrast raises some questions. Either we need to alter our current parenting practices to conform to the demands of morality, or some of the influential liberal accounts of the parent-child relationship are mistaken on this question.

This article seeks to advance the debate on parents' rights to deliberately influence their children's values, in two steps. First, it shows that the challenge to commonsense views from exclusion views such as Clayton's or Swift's has not yet been met. Responses to Clayton tend to misconstrue the challenge he raises against the commonsense view, as they fail to grasp that the exclusion view mainly concerns parents' *attitudes*. According to exclusion views, the attitude that many parents have in shaping their children's values (i.e., imparting values that one believes to be correct because one believes them to be correct)—and that common sense assumes to be morally permissible—is wrong. Swift's view, in turn, has sometimes been interpreted as laxer than it really is, and as a result, the challenge to intentional parental value shaping by his account has not been recognized in the literature, so far as I am aware.[6]

Second, this article advances a new understanding of how we should understand children's independence—an understanding that is compatible with the moral permissibility of trying to convince one's children of one's comprehensive views, obviating the liberal theorists' exclusion view. Developing this new account requires opening up the "black box" of the morality of engaging in discourse with interlocutors who are not (yet) fully rational. Once we do so, I argue, we will see that trying to convince one's child of one's comprehensive views is distinct from attempting to set their ends for them. The former is morally permissible, while the latter is not. In section 3, I offer the following interpretation of what respecting their children's independence requires of parents: parents must encourage reflection, be truthful in their arguments, show respect

5 While Swift's 2020 paper focuses on religious views (including atheism), the logic underlying his position can be extended to values that are nonreligious in nature.

6 Swift, "Parents' Rights, Children's Religion." Note that I am not applying the label 'exclusion view' to the position defended in Brighouse's and Swift's co-authored monograph *Family Values*.

for views differing from their own, refrain from instrumentalizing their children, and avoid threats of sanctions. These are *process conditions* for admissible parental value shaping. In addition, morality also demands that parents allow significant outside influences on their children's value development. These must be influences over which they do not have control (section 4). These are *background conditions* for permissible parental value shaping. While on my account, parents have a limited moral right to deliberately influence their children's values, they may not shield them from other influences—on the contrary, they must ensure the presence of such influences—and they must not attempt to control which values their children end up adopting. By doing so, parents will cultivate an appropriate attitude of respect towards their children's independence. In sum, the view developed here is more restrictive than the commonsense view, while allowing for more parental influence than exclusion views.

## 1. PRELIMINARIES

Let me cover some preliminaries. First, the parental right at stake here is a *moral* right. Whether it would be legitimate for the state to enforce it is a separate question I do not address in this paper. For example, it might be that parents have no moral right to try to convince their children of their own comprehensive views, but that the state should not interfere with parents who try to do so anyway. The state cannot check parents' motivations in many cases, and trying to do so would likely be overly intrusive. This is compatible with the view that parents are overstepping their moral rights in trying to shape their children's values when they try to convince them of their own comprehensive doctrines. For the most part, the discussion that follows assumes the current legal regulation of parenthood as a given, diverging briefly from this assumption in section 4.[7]

Second, this paper focuses specifically on the moral permissibility of parents' endeavoring to shape their children's values to conform to their own *because they believe these to be the correct values to live by.* This is a standard motivation for many parents. A key feature of the commonsense view (as I understand it) is that it validates this motivation as a morally permissible ground for parental value shaping. That said, the debate on parents' rights has sometimes turned to different motivations. For example, a parent's intentions may be for the child to share a set of core values with their parent in order to foster an intimate relationship.[8] Thus, not all value shaping necessarily stems from a parent's holding

7 The details of legal regulations regarding parenthood differ among countries, but no country that I know of denies parents the right to deliberately influence their children's values.

8 Cormier, "On the Permissibility of Shaping Children's Values"; and Swift, "Parents' Rights, Children's Religion."

a specific comprehensive view to be correct; there can exist considerations in favor of value shaping that, e.g., both religious and nonreligious parents could equally accept. Correspondingly, these considerations are compatible with the exclusion view. The divergence in opinion between commonsense views and exclusion views occurs less on the level of parents' permissible *actions* than on the level of admissible *motivations* and the overall *attitude* parents must cultivate towards their children.

Third, the present discussion covers only values and normative views about which there can be reasonable disagreement, such as religion or lifestyle. I sometimes also refer to these as *conceptions of the good* or *comprehensive doctrines*, following Clayton.[9] This terminology is Rawlsian in origin.[10] At other times, I speak simply of values—by which I intend a conception of the good or a comprehensive doctrine. While the categorization of certain views as "comprehensive" may not always be crystal clear, it is certainly plausible that there are core views regarding justice and morality that all children must be taught. To be sure, reasonable disagreement exists about different comprehensive doctrines or conceptions of the good or other values. With regard to the latter, the philosophical debate often focuses on religious views, notably the question of whether parents are allowed to pass these on to their children. This is understandable because religious views have often provoked societal conflict and shape people's identities. However, one needs to keep in mind that the present discussion also covers other comprehensive doctrines. For instance, Clayton cites a wide range of examples, from a view that condemns the eating of animal products to a carnist view that praises eating animals.[11] In the debate about feminism and political liberalism, feminist views that go beyond what the state could legitimately enforce are also often identified as comprehensive in nature.[12] Other examples could be a comprehensive doctrine that prizes hard work and effort versus a doctrine recommending a more hedonistic approach to life.

Finally, the term 'child' refers to every person who does not yet have the ability to make their own judgments on such matters but who will likely develop this ability over time. Without attempting to set a precise age range, one should certainly not imagine teens to fall into the category of 'children' for the purposes of this paper.

9 Clayton, *Justice and Legitimacy in Upbringing* and "Debate."

10 Rawls, *Political Liberalism*.

11 Clayton, *Justice and Legitimacy in Upbringing*, 110.

12 Abbey, "Back Toward a Comprehensive Liberalism?"; and Neufeld and Van Schoelandt, "Political Liberalism, Ethos Justice, and Gender Equality."

## 2. THE EXCLUSION VIEW

This section describes the exclusion view, along with criticism it has faced. Let me start out by explaining what the exclusion view was developed in response to—namely, the current societal commonsense view on parental value shaping, which grants parents a limited moral right to deliberately shape their children's values. According to this permissive view, parents may intentionally influence their children's conceptions of the good as long as the future autonomy of the children remains secure. This view is often based on the *achievement view* of autonomy, which holds that when a child reaches adulthood, they must possess the capacity to pursue a life of their own choosing.[13] Correspondingly, parents must not act in any way that would prevent the development of the capacity for autonomy in their children. That said, deliberately imparting one's values to one's child will not usually prevent the child from developing this capacity. Therefore, the commonsense achievement view allows parents to attempt to convince their children of their own comprehensive views.[14]

Exclusion views are highly critical of the commonsense view, based on respect for children. To a certain extent, the achievement view lets parents treat their children as extensions of themselves rather than as separate people who might form their own opinions. This seems objectionable. On Clayton's account, parents must not prejudge controversial matters for their children, who, as such, cannot yet *consent*.[15] While their children are still developing their capacities for autonomy, parents must remain neutral and refrain from imposing their own values. Otherwise, once their children grow into adults, the grown children will have reason to retrospectively contest how they were treated without their consent. Clayton criticizes the achievement view of autonomy for failing to give adequate consideration to *independence* as an important ingredient of autonomy: one's autonomy is violated when others, such as one's parents, decide what ends one should pursue, including during one's childhood.[16] Independence refers to the interpersonal aspect of autonomy.[17] In order to be independent,

13 See Clayton, "Debate," 359–60.

14 There is another aspect of future adults' autonomy that the achievement view can take into account. In addition to securing the capacity for autonomy, the achievement view may require preserving an adequate range of options for the future adult to choose from (Raz, *The Morality of Freedom*, 373–77). A very limiting manner of raising children (for example, in an isolated community) would likely violate this second condition for future adults' autonomy even if they still possessed the requisite *capacity* for autonomy.

15 Clayton, "Debate" and *Justice and Legitimacy in Upbringing*.

16 Clayton, "Debate."

17 Raz, *The Morality of Freedom*, 377.

one must not be subject to coercion or manipulation by others; so when parents impose their values on children, this violates their independence.

Importantly, it is morally relevant what *intentions* parents have when they take certain actions that may influence children's values: "Two children can have the same thing happen to them—they are fed meat, for example—but, nevertheless, the motivation of the parents can be markedly different in a way that is relevant to the children's autonomy. One parent might be motivated solely by the aim of providing a balanced diet while another might aim to create carnivores."[18] What is important for Clayton is that parents exclude the fact that they themselves endorse a certain view—in this case, carnism—as they make decisions that may influence their children's values.

Another liberal account of parental rights that supports the exclusion condition is Adam Swift's.[19] He argues that parents must not exceed their sphere of *legitimate authority* in raising their children. Since parental authority is based on the aim of securing familial relationship goods, parents must influence their children's values only to the extent that this is necessary to obtain these goods.[20] While it is admissible for parents to share their deepest convictions openly and freely in order to foster intimacy with their children, they should not transmit their own convictions simply because they hold them to be correct. Parents who do so anyway "have misunderstood their role and the moral character of the parent-child relationship."[21] A parent's ultimate aim must be not that the child adopt a particular value but only that their relationship flourish. This implies that parents must not intentionally shape their children's values in the way the commonsense view construes it. While not arguing in favor of neutrality, Swift's view shares with Clayton's the demand that parents exclude certain reasons from consideration as they make decisions that might influence their children's values. Swift's position therefore endorses the *exclusion condition*: parents must set aside what they themselves believe to be the correct values to live by in making decisions that will influence their children's values.

Although the exclusion view has faced plenty of criticism, I believe it still poses a significant challenge, which must be addressed. First, some existing responses to Clayton do not take into account that the exclusion condition is mainly about avoiding certain *motivations* rather than actions. For instance, proponents of the exclusion view may allow for children to go to church or to mosque, but not for the reason why parents usually want to take them there

18 Clayton, *Justice and Legitimacy in Upbringing*, 110.

19 Swift, "Parents' Rights, Children's Religion."

20 Swift, "Parents' Rights, Children's Religion."

21 Swift, "Parents' Rights, Children's Religion," 47.

(i.e., teaching them what they view as the true religion).[22] Hence, the conflict with the commonsense view remains. This kind of response is insufficient to defeat the exclusion view.

Second, some potential responses to the exclusion view could be successful, but they involve making some assumptions that I hope to avoid. In particular, these responses depend on theoretical commitments that proponents of the exclusion view are wont to reject. The first of these is a perfectionist response. According to Tim Fowler, parents should act to secure their children's well-being.[23] This requires parents to take action lest their children fall into empty or worthless ways of life—which may well happen in the absence of deliberate parental influence. For example, if parents do not actively influence their values, children may fall prey to the allure of consumer culture, which would be harmful to them. The idea here is that there will unavoidably be some influences on children, and so parents, who are responsible for ensuring their children's well-being, had better make sure that these influences are beneficial.[24]

To be sure, children's well-being is a very important consideration for parents, and it may well be plausible that respecting their independence cannot have absolute priority over their well-being. But this moral perfectionism relies on problematic assumptions. First of all, Fowler's view supposes that parents can confidently and reliably make judgments about the relative moral worth of different lifestyles. This is a fairly strong assumption to make. While *some* lifestyles—e.g., mindless consumerism or moral nihilism—can safely be identified as having less worth than others from a moral perspective, it remains the case that there are many matters about which there is seemingly irresolvable disagreement, such as whether a religious life is better than a secular one. Second, to the extent that it *is* clear that some lifestyles are more worthwhile than others, there need not always be a conflict between promoting children's well-being and respecting their independence. Fowler's arguments highlight situations in which there is a conflict between respecting children's independence and

22 As argued by, e.g., Giesinger, "Parental Education and Public Reason"; and Cormier, "On the Permissibility of Shaping Children's Values."

23 Fowler, *Liberalism, Childhood and Justice*, 128–30. A similar defense of perfectionist childrearing has also been put forward by Franklin-Hall, "What Parents May Teach Their Children." Since parents bear significant responsibility for the views that their children come to hold, he argues, they enjoy the privilege of guiding them towards the views they believe to be right and true.

24 A related but distinct objection involves skepticism about the very possibility of independence. If maintaining independence is a pie-in-the-sky ideal rather than a real possibility, then *other* moral considerations naturally come to the forefront. I do not further investigate this skeptical position regarding the possibility of independence since it would involve leaving the common ground I share with the proponents of the exclusion view.

securing some other important good, using cases in which respecting a child's independence will expose her to the risk of severe harm.[25] However, there are many situations in which none of the options available are harmful to children or in which it is unclear which of the available options is more harmful. For example, from a religious perspective, *not* having been introduced to religion may seem harmful, but from an atheist perspective, having been raised *with* a religious faith might seem harmful. If independence as understood by Clayton has any moral weight, it seems that parents do not have a right to privilege their own comprehensive view in such a situation, at least not based on judgments related to harm.

A second potential response to the exclusion view involves an appeal to parents' interests—specifically, parents' interest in passing on their conceptions of the good to their children.[26] The issue then becomes one of weighing parents' interests against children's autonomy interests, which could well tip the balance towards the moral permissibility of parental value shaping. Macleod argues that parents have an interest in creative self-extension, as part of what makes parenting particularly valuable to parents is the prospect of passing on one's conception of the good to one's children. In order to act permissibly, parents need to make sure that the development of their children's autonomy is not endangered by parental attempts at value shaping. On balance, Macleod maintains, parents have a right to "provisionally privilege" their own conception of the good.[27] However, they must not shield their children from other influences nor from scrutiny of the parental view.

There is a key difference between Macleod's view and mine: Macleod's view relies on the identification of "passing on one's own values" as a parental interest deserving of recognition. It is controversial whether the parental interest in creative self-extension is morally significant. Even if it is, can it so outweigh children's interests in developing their autonomy that parental value shaping becomes, on balance, morally permissible? Proponents of exclusion views are generally not open to this idea. Clayton and Swift both endorse a dual-interest view, according to which parents' interests have some weight when it comes to making decisions that affect both parents and children, but affirming a parental interest in creative self-extension in particular is a different matter, as it stands in tension with putting significant normative weight on

25 Fowler, *Liberalism, Childhood and Justice*, 128–30.

26 Macleod, "Parental Competency and the Right to Parent" and "Conceptions of Parental Autonomy."

27 Macleod, "Conceptions of Parental Autonomy," 349.

protecting independence.[28] Without taking a position on these questions, I aim to show that parental value-influencing can be morally innocent *whether or not* parents have a morally significant interest in passing on their values to their children. They are at liberty to do so as long as they respect their children's independence—which I argue is compatible with influencing one's children's values. My aim is to develop a response to Clayton and other proponents of the exclusion view in a way that shares most of the assumptions they hold but leads to a different conclusion.

In what follows, I try to show why aiming for a child's adoption of a certain value because one believes in it can indeed be morally permissible and in line with respecting the child's independence.

## 3. Does Deliberately Influencing Children's Values Always Fail to Respect Their Independence?

In this section, I argue that respect for children's independence is compatible with deliberate parental value shaping, as long as parents do not attempt to control which values their children ultimately endorse. To achieve this, certain *process conditions* (which will be examined in this section) and *background conditions* (which will be discussed in section 4) must be fulfilled. I propose that these conditions are necessary for respecting children's independence, and we should embrace them in lieu of the overly restrictive exclusion condition. I first critique Clayton's claim that respecting children's independence requires that parents abstain from trying to convince their children of the correctness of their own comprehensive views. Then, I go on to show that Swift's view is also unnecessarily restrictive.

Clayton argues that trying to persuade a child of a certain comprehensive view is impermissibly directive due to the child's lack of ability for ethical reflection.[29] It is important to emphasize that my critique of this view is not based on doubts about the importance of independence as a condition for autonomy. I believe that Clayton is quite right to be concerned about future adults' independence when it comes to the deliberate shaping of their values, and failure to do so is a weakness of the commonsense view. I also agree with Clayton that the achievement view of autonomy gives parents too much leeway by

28 Swift, while not as committed to independence as Clayton, comments with regard to creative self-extension that "there is something inappropriately self-serving about this kind of attempt to justify the claim to parent a child" ("Parents' Rights, Children's Religion," 40). The logic of his position suggests that he would also be skeptical of referring to creative self-extension as a justification for particular parental decisions.

29 Clayton, *Justice and Legitimacy in Upbringing*, "Debate," and *Independence for Children*.

neglecting future adults' independence. However, there are different possible interpretations of what respecting independence requires when it comes to children, and Clayton's is ultimately not convincing.

Independence, as already mentioned, refers to the *interpersonal* aspect of autonomy. In order for us to be autonomous, our choices must be our own, which excludes certain kinds of interference by others, namely coercion and manipulation.[30] As Clayton interprets it, protecting independence is about *non-usurpation*.[31] What does this require? It should be uncontroversial that trying to influence someone's values is *not* morally objectionable in the case of adults for whom the other two conditions for autonomy are fulfilled—i.e., they have the capacity for autonomy and an adequate range of options to choose from. It is generally morally permissible to try to persuade other adults of one's own comprehensive views, provided that no attempt at coercion or manipulation is involved.

In what follows, I analyze what meeting the requirement of "avoiding manipulation and coercion" requires of parents in the case of children, and whether it is compatible with parents' deliberately steering their children towards their comprehensive views and values. This is a challenge, as it involves thinking about the morality of engaging in debate with interlocutors who are not fully rational.[32] I will suggest that it can indeed be morally permissible to try to convince children of one's comprehensive views, and I will also propose a number of process conditions that need to be in place for this to be the case.

The case of children is clearly more complicated than that of adults. On the one hand, one could think that because children as such do not yet fulfill the capacity condition for autonomy, we simply have to manipulate and coerce them in some ways, and that this is permissible. Some forms of coercion are allowed with regard to children (e.g., preventing them from running out onto the street), and raising them might also include some instances of morally acceptable manipulation (e.g., presenting two sets of clothes to a toddler to give them an illusion of choice and thereby prevent a temper tantrum over getting dressed). So why worry about inculcating particular values in children? On the other hand, one might think that we need to be extremely cautious when influencing children's values precisely *because* they still lack the capacity for autonomy. Clayton's interpretation of what it means to respect children's

30 Raz, *The Morality of Freedom*, 377–78.

31 Clayton, *Independence for Children*, ch. 2.

32 There are few existing attempts to do this. One that I am aware of is a paper by Bou-Habib and Olsaretti ("Autonomy and Children's Well-Being") in which they argue for respecting children's autonomy *as children*, which they distinguish from respecting their independence.

independence reflects this second intuition. Since children do not yet fulfill the capacity condition for autonomy, we should not instill any view in them that is controversial and that they could later reasonably come to reject. We ought to wait until they are ready to engage with controversial views—until then, only what meets a liberal neutrality requirement may actively be taught to them.

To demonstrate the moral importance of independence, Clayton uses a number of hypothetical scenarios featuring comatose patients in order to show that we must not simply make decisions for individuals who are unable to consent rather than waiting for them to wake up and make these decisions themselves.[33] For example, we should not just give a person a nose job while they are comatose or improve their fertility without asking them first. We would presumably all agree. He then extends this reasoning to children: we must wait for them to figuratively "wake up" and make their own decisions when they reach the point at which they are cognitively capable of doing so. But there is a serious disanalogy to the comatose—namely, that children are forming their values precisely during a period in which they are not yet capable of full autonomy. Indeed, children develop their cognitive capacities *gradually*, before finally (hopefully) becoming fully autonomous, and they are necessarily already reflecting on values before reaching this point. They are not "asleep" like a comatose person but rather in a state in which their rational capacities are only partially developed yet to some extent (depending on their age) sufficient to engage in discussion with adults.

The comatose patient analogy seems phenomenologically inaccurate. Due to children's partially developed capacities for ethical reflection, when parents attempt to influence their offspring's values, there is usually an interactive quality that Clayton's analogy fails to capture. The process is not entirely one-sided, as in the case of the surgeon giving a comatose person a nose job—a child participates in their own moral development. Parents do not just decide what values their child is supposed to have and inform them of this. Much more is usually required: active participation by the child, efforts at justification by the parents, etc.

This inaccurate analogy then leads to a conflation of two things that seem different at a normative level: Clayton equates attempting to influence one's child's values with *imposing* one's values on them. To be sure, imposing one's values on another person is coercive and therefore a violation of independence. But not every instance of deliberately influencing the values that a child comes to hold is necessarily coercive or manipulative. The key moral distinction here is the difference between attempting to *influence* and attempting to *control*. An attempt to influence presents a particular option (such as a particular comprehensive

33 Clayton, "Debate," 357–59.

doctrine) as preferable to others, but it does not seek to control the outcome (i.e., whether the child actually adopts it). An attempt to influence in fact follows quite naturally from endorsing a certain conception of the good. If I endorse it myself, it is because I consider it both correct and important. The impetus to take a stand for it, particularly in a dialogue with my children whose lives I want to go as well possible, is not morally objectionable per se. But intending to and attempting to *control the outcome*—that my child ultimately indeed adopts this conception of the good as well—is indeed morally objectionable.

To illustrate, let us say that a parent deliberately tries to influence their child to subscribe to a religious worldview or to a secular comprehensive doctrine such as veganism, to which they themselves adhere. For example, the parent tells the child why they would like them to endorse this worldview, presents their own reasons for doing so, tells them relevant stories that support the parent's own view, etc. I argue that such efforts by parents are not *necessarily* coercive or manipulative, even though they certainly could be. They violate children's independence only if they aim at controlling the outcome of what values the child comes to hold.

There are a range of different factors at play that can indicate the presence or absence of a parental attempt to control the outcome. The following conditions determine whether a parent is maintaining a respectful attitude towards a child's independence. First, whether or not the parent encourages the child to ask questions and reflect on the issues discussed. Second, whether the parent is truthful in their representations of comprehensive views or whether they resort to lies. Third, the presence or absence of sanctions imposed on the child for disagreeing with the parent on their values. Fourth, whether or not the child is instructed to outwardly show allegiance to the parent's values. Fifth, whether or not the parent is respectful of values that differ from their own. I believe that these conditions are all indicative of a parent's motivations to influence rather than to control their child's beliefs; if a parent is in violation of one of these conditions, they are failing to respect their child's independence. Parents must abide by these—individually necessary—process conditions for the permissibility of deliberate parental value shaping in order to respect their children's independence.[34]

To what extent does this response address not just Clayton's argument against deliberate value shaping but also Swift's? Similarly to Clayton, Swift writes critically of parents "guiding their children toward their own religious views," which he deems illegitimate.[35] It is not clear whether "guiding" is exactly

34 The conditions are not jointly sufficient, as there are also content restrictions on what values parents may try to convince their children of, as well as background conditions, as described in section 4 below.

35 Swift, "Parents' Rights, Children's Religion," 47.

the same as "trying to convince," however. I believe that Swift is imagining a fairly hierarchical relationship between parent and child (which, of course, is often the case) whereby "attempting to convince" amounts in practice to guiding or directing. He is also worried about instrumentalization, writing that parents are not permitted to treat their children as means to pursue their own ends.[36] But this is not necessarily the case for every instance of a deliberate parental attempt at convincing their child of a certain comprehensive view. A parent might be motivated simply by the content of their own convictions rather than by a desire to express their own views *through* their children. To the extent that a more respectful approach to debating with children is possible and that instrumentalization need not occur, the reason to nonetheless resist the idea that parents may try to convince their children of their comprehensive views may simply be that the familial relationship goods approach does not provide a rationale in favor of it.[37] However, the familial relationship goods approach can allow parents to do things that are not based on their fiduciary role, as long as there are no objections to it from a moral perspective. If we do not have to worry about violating children's independence or about harming them in some way, parents may be permitted to try to convince their children of their own comprehensive views—not because this is part of the parental role but simply because they are at liberty to do so. I therefore think that Swift could accept parental value-influencing if he were to embrace my account of what it means to respect children's independence.

Will my account allow parents to teach their children about any comprehensive view they endorse? Certainly not. Views that are objectively harmful to children are not reasonable and can be excluded on those grounds. Furthermore, there are comprehensive views that can easily be taught in a respectful manner, and then there are views that must not be taught to children because they are transmitted in a way that is almost automatically disrespectful of children's independence. What I have in mind are views that order parents to teach their children in a way that violates the process conditions. Some comprehensive views contain such inbuilt authoritarianism and therefore must not be taught to children. This is not surprising: respect for children's independence is connected to a broadly liberal outlook.[38] This means, of course, that my account retains many of the restrictions on parents that Clayton and Swift also defend.

36 Swift, "Parents' Rights, Children's Religion," 47. On the instrumentalization worry, see also Clayton, "Debate," 360.

37 On the familial relationship goods account, see Brighouse and Swift, *Family Values*.

38 Of course, this is not to say that only one view will be left, nor that there remains no space for serious controversy. Clearly, there is a range of different worldviews that all share the feature of respect for children's independence. These include both religious and secular views. For example, the views motivating veganism or "carnism" could both be liberal in nature.

It is clearly more restrictive than the commonsense view. Still, I think the distinction between my account and exclusion views remains important because my account allows parents to take a stand for and try to pass on their values, in the sense of trying to convince their children of the importance of those values. It allows for something that many parents who intend to be respectful of their children would very much like to do.

I would now like to address some possible objections to the claim that deliberately influencing a child's values can ever be morally innocent. First, one could object that the picture I have painted is overly intellectualized. What happens in families is not a dialogue in the style of a philosophy seminar, with reasons being presented and debated. How would such a dialogue even be possible, especially with young children? In reality, children will learn to pray with their parents before dinner, for example, or join them regularly for church services—effectively turning them into Christians before they even know it. In other words, the process of value adoption could be quite automatic. This kind of parental conditioning is problematic, as it seems incompatible with respecting children's independence. I agree with this point, and I believe conditioning to be morally inadmissible according to the process conditions described above. The process conditions identify as morally impermissible many of the practices that the commonsense view would allow, such as religious schooling aimed at the adoption of a particular faith.[39]

Moreover, we should not underestimate the extent to which philosophical debating with children actually *does* happen. Many children start asking their parents probing questions quite early on. A toddler's "why phase" typically starts around age two to three.[40] At four to five years of age, a child could already be asking philosophical questions about the nature of God. Parents do not

39 On the other hand, this does not imply that it is impermissible for parents to, e.g., celebrate Christmas with their children or enjoy meals that are part of a particular tradition. Engaging in festivities with a religious background does not in itself imply an attempt to make children adopt religious beliefs. There is a well-known notion of being "culturally Jewish" that—while fully acknowledging the particularities of Judaism—can also be extended to other religions and worldviews to describe how people can be culturally at home in a certain religious tradition without endorsing the religious faith connected to it. I was raised "culturally Protestant," for example, but my parents deliberately refrained from inducting me and my sibling into this faith.

40 Before that age, it is rather difficult for parents to deliberately influence their children's views because the children do not yet have the ability to understand them. What is possible, of course, is formally enrolling a child in a religion, e.g., through infant baptism. I suspect that it is best to separate the analysis of symbolic actions such as baptizing a child from the question of whether parents may deliberately influence their children's values. Performing a baptism on an infant does not in and of itself influence what values the child comes to hold.

have to approach influencing their children in an overly intellectual manner in order to satisfy the criteria for morally innocent influencing that I have outlined above. Rather, what matters is that they refrain from presenting themselves as all-knowing authorities.

Secondly, one may object that the power differential in the parent-child relationship effectively makes any attempt on a parent's part to influence their child's values coercive or manipulative. Given children's dependence on their parents, do the former have a realistic opportunity *not* to endorse the latter's values? Seemingly, no matter how careful parents are with their influencing, it remains highly likely that children will ultimately adopt the values of the adults upon whom they depend most. If so, all attempts to influence would necessarily always turn into attempts to control, given the particular features of the parent-child relationship. One might resist this objection, noting that on the account I have developed, the morally relevant difference between influence and control resides in parents' *intentions* rather than in the expected effects of their actions on children. Nonetheless, I still agree that the power asymmetry between parents and children poses a serious problem. Respecting others' independence also demands that we avoid dominating them. My proposal that parents ensure the presence of other sources of influence is intended to mitigate this power differential. Some checks on parents' influence on their children must be in place. I turn to these in the next section.

## 4. INDEPENDENCE AND PARENTAL NONDOMINATION

In the previous section, I argued that parental attempts at influencing a child's values can be morally permissible. Indeed, it is not morally objectionable per se to enjoin others to adopt what one considers to be the right views, and although children are not yet fully autonomous, it is possible to engage in dialogue with children without a parent's seeking to control the outcome. Admittedly, though, the power asymmetry in the parent-child relationship makes this particularly challenging. In this section, I further argue that in order to respect children's independence, parents must also avoid being the sole or dominant influencers of their children's values. In addition to the process conditions, some *background conditions* must also be met.

Part of Clayton's motivation for developing his neutralist view is that the parent-child relationship shares important features with the relationship between a state and its citizens.[41] The parent-child relationship is coercive, nonvoluntary, and has a massive impact on children's lives. These features have led Clayton

41 Clayton, "Debate."

to defend strict moral limits on what parents may justifiably do. But these very features of the parent-child relationship might be unjustifiable. *Should* parents have that kind of power over their children in the first place? Justice considerations might call for reducing parental power in order to decrease children's vulnerability to their parents.[42] I am sympathetic to such proposals. But taking the current legal status quo regarding parental rights as a given, what must parents do in order to respect the independence of their children even while trying to influence their comprehensive views?

I have argued that there is a difference between attempting to influence and attempting to control the values of one's child, and only the former is morally permissible. However, recognizing that the power differential between parents and children makes it particularly challenging to avoid coercion or manipulation in this context, there must be a further condition in place in order to more robustly secure respect for children's independence: a parent must also avoid *dominating* their child's value development.[43] This is another facet of not attempting to control which values one's child comes to endorse.

Let me explain how the concern over parental domination regarding their children's value development can be connected to the independence condition of autonomy. The worry with regard to independence is that if parents shape their children's values, this coerces the latter into adopting specific views that they may have wanted to reject if other options had been given. One possible way to avoid this problem is for parents to abstain from value shaping altogether, waiting instead for children to develop the capacities needed to reflect on and adopt their own views—this is Clayton's approach. Another possible solution, however, is to permit several different sources of value shaping as children grow up.[44] Of course, this approach does not guarantee that the views children develop are fully their own, given that they always rely on others' input in their value formation. It does more or less guarantee, however, that they will not naively come to affirm *a specific other person's* views (in this case, their parents'). According to this interpretation of independence, the idea is not that a child should remain totally uninfluenced by others in their value development but that they should be exposed to a number of different people with significant influence.[45]

42 Gheaus, "Childrearing with Minimal Domination."

43 In using the term 'domination', I do not intend to import a full-fledged neo-republican framework into may analysis. I simply intend to respond to worries regarding monopolies of influence, which may endanger children's independence.

44 Gheaus, "Enabling Children to Learn from Religions Whilst Respecting Their Rights."

45 For an example of how this could work with regard to religion, see Gheaus, "Enabling Children to Learn from Religions Whilst Respecting Their Rights."

Tellingly, parents who want to *control* their children's value development often actively try to exclude other influences from their children's consideration, hoping thereby to prevent their children from embracing other values. But this manipulative behavior violates children's independence, as it seeks to control what values one's children will ultimately come to hold. This is true whether or not the attempt is actually successful, as it is the parents' intention to control that is morally relevant. Lest they dominate their children's value development, parents must therefore ensure access to other sources of influence that they do not control.

This general idea of securing a diversity of influences is not new, of course. For instance, we find it prominently in Joel Feinberg's influential contribution on children's right to an open future.[46] The requirement that parents must send children to public schools or at least teach their children a certain curriculum set by the state is commonly defended, even as a legitimate legal imposition by the state. However, my proposal differs from this. I am arguing in favor of parents' moral duty to expose their children from a young age to being influenced by other adults. These could be friends, godparents, neighbors, relatives, caretakers, and so on, with whom the child gets to spend a significant amount of time. In order to avoid the charge of attempting to control the outcome regarding what comprehensive view their children come to espouse, it is important that parents actually relinquish some control. (For instance, exposing their children to adults who are known to share the parents' views would not be sufficient.) Considering it is unusual for adults to feel at ease frankly sharing their values with other people's children, it will likely be necessary to explicitly give them permission and indeed to encourage them to do so.

One might worry that such conversations will expose children to harm. What if other adults teach them harmful views? Of course, if a parent finds out that harmful views are being taught to their child, they are allowed—and indeed morally required—to stop the child from interacting with the adult in question, as per their overarching duty to protect their child from harm in general. Parents must accept influence only from people whose views fall within the realm of reasonable disagreement. If, for example, an adult argues in favor of the corporal punishment of children, then it is perfectly acceptable and indeed required to shield one's child from that opinion. The more difficult question is: What if other adults are passing on views that one simply considers to be wrong? For example, must an atheist parent allow another adult to present arguments in favor of a Christian worldview to their child? I think this is indeed what follows from the requirement to refrain from controlling

46 Feinberg, "The Child's Right to an Open Future."

which values one's child ultimately adopts. And as already established, the parent is also entitled to explain why they themselves are atheist and to argue for their view as well.

A further worry might be that children will become confused by hearing different views from different adults. For example, what will a child think if they hear from their parents that God exists but are then confronted with an atheist position from another adult? On the other hand, some children already hear very different views *between parents*, and this seems entirely acceptable. There is also something positive about the confusion that results from hearing varied and possibly opposing views, namely that it requires children to engage critically with the different views, which in turn helps them to develop their own values.

If this matter is indeed all about parental intentions, one might wonder why parents must, as I have maintained, really take positive actions to avoid dominating their child's process of value formation. Could a parent not claim that all that is morally required of them is a negative duty to refrain from attempting to control the outcome of which values their child comes to endorse? If it happens anyway, they might protest, this is not their fault. I would answer that parents must take active steps to involve other adults due to the power differential involved in the parent-child relationship. As mentioned above, it may well be that the legal regulation of parenthood should be changed to address this issue. Until then, parents must take steps to mitigate the risks that come with their powerful legal and social position vis-à-vis their children. Otherwise, they knowingly subject their children to a situation in which the latter are unlikely to resist adopting their parents' values—and this would be disrespectful.

Of course, avoiding parental domination is not going to appeal to parents who want to ensure that their children come to endorse a particular worldview. I do not believe it is possible to find common ground with such parents on a liberal basis, and because of this, my view is clearly at odds with the commonsense view. Respecting children's independence simply requires accepting that their values might differ from one's own. Parents are not entitled to control which values their children come to espouse. However, there are parents who are committed to a particular worldview that they would like to take a stand for, without, however, imposing it on their children. This does not seem unreasonable, and it is compatible with liberalism, provided certain conditions are met. Some of these conditions pertain to the influencing process, while others pertain to the background of parental nondomination. Parents who fall in the camp of those who want to influence their children while also respecting their independence may very well be persuaded that they should avoid dominating their children's value development.

## 5. CONCLUSION

It was long taken for granted that parents are entitled to deliberately influence their children's values, or even simply to decide for them which values to endorse. This has rightly been questioned by philosophers in recent years: parents cannot properly respect their children while simultaneously setting their ends for them. Matthew Clayton has argued in favor of neutral childrearing, whereby respecting children's independence requires that parents refrain from imposing their conception of the good on their children. Adam Swift has recently argued that parental attempts at influencing must be motivated by a desire to create a flourishing parent-child relationship rather than by a belief in the correctness of one's view. I have put forward the claim that we should abandon this exclusion condition, and that deliberate value shaping can be morally permissible. The independence condition for autonomy is indeed important when it comes to children—ignoring it amounts to being blind to the interpersonal aspect of autonomy. However, rather than requiring neutrality from parents, in my view, the independence condition requires parents to refrain from attempting to control their children's views. This does not amount to a reconciliation with the commonsense achievement view, as it is more restrictive of parents than the latter. On the other hand, it allows parents to attempt to, for example, influence their children towards adopting a worldview that prizes individual autonomy in all spheres of life.[47]

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# NONIDEAL THEORY AS IDEOLOGY

*Jordan David Thomas Walters*

> The idea of political philosophy as reconciliation must be invoked with care. For political philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus of being ideological in Marx's sense. From time to time we must ask whether justice as fairness, or any other view, is ideological in this way; and if not, why not? Are the very basic ideas it uses ideological? How can we show they are not?
>
> —John Rawls, *Justice as Fairness*

UNTIL the recent nonideal theory turn in political philosophy, the following two propositions were relatively uncontroversial: (1) "The reason for beginning with ideal theory is that it provides … the only basis for the systematic grasp of these more pressing problems [i.e., structural domination, exploitation, coercion, and oppression]"; and (2) "[Until] the ideal is identified, at least in outline … nonideal theory lacks an objective, an aim, by reference to which its queries can be answered."[1] Yet shortly after their rapid ascent to common knowledge, these two dogmas of Rawlsian political philosophy came under fire.

Critics who reject these two dogmas often take themselves to be rejecting a particular way of *doing* political philosophy, a way that emphasizes figuring out what justice requires under conditions of full compliance, only then to consider issues of implementation in conditions of partial compliance. These critics contend that this assumption, which forms the bedrock of so-called ideal theory, veils a more pernicious political agenda, one that is antithetical to the proper goal of political philosophy as an enterprise.[2] As Charles Mills puts it,

1 The first statement is from Rawls, *A Theory of Justice*, 9; the second is from Rawls, *The Law of Peoples*, 90.

2 For a general overview of the ideal/nonideal theory debate, see Valentini, "Ideal vs. Nonideal Theory," 655–62. See also Rossi and Sleat, "Realism in Normative Political Theory." As Rossi and Sleat note, there may be significant overlap between political realism and nonideal theory, but the two concepts are nevertheless distinct. Finally, for a more recent criticism of the bright-line distinction between ideal and nonideal theory, see Levy, "There Is No Such Thing as Ideal Theory."

the problem with ideal theory is that it is the result of a "distortional complex of ideals, values, norms, and beliefs that reflects the nonrepresentative interests and experiences of a small minority of the national population—middle-to-upper-class white males—who are hugely over-represented in the professional philosophical population."[3] The safe haven for contemporary political philosophers, we are told, is in nonideal theory, for it allows us to see what ideal theory obscures: structural domination, exploitation, coercion, and oppression. But this now familiar narrative should strike us as strange, for even if we grant that ideal theory is a form of ideology, we have not yet stopped to ask ourselves: Is nonideal theory itself a form of ideology?

The goal of this paper is to examine this question. My thesis is that for all its merits, nonideal theory is neither innocent nor insulated from ideology critique.[4] More precisely, I will argue that nonideal theory is ideological in virtue of the fact that it rules out more radical utopian ways of theorizing by methodological fiat. But the goal of this paper is not to pit ideal theory against nonideal theory, for I agree that ideal theory is just as ideological as its nonideal counterpart. Instead, my goal is to argue for a deflationary resolution to the ideal/nonideal theory debate. I aim to do so by asking what it says about ourselves that we are having a debate about whether we should be ideal/nonideal theorists. I offer a pessimistic answer, which says that the debate between ideal/nonideal theory is itself a form of ideology, one that serves to reinforce the status quo by convincing political philosophers/theorists that the most pressing problems are problems about what we should think about what we are doing. But this is false. It follows that we ought to abandon the debate and address the pressing problems of political philosophy head on, in pluralist fashion, oscillating back and forth between these two modes of theorizing without a decision procedure to tell us when we should take up one perspective or the other.

## 1. PRELIMINARIES

Let us take a moment to define the terms of the debate. It is not my goal in this section to offer up a real as opposed to a nominal definition of *ideology critique*. Nor is it my goal to definitively settle the conditions that demarcate an ideal theory from a nonideal theory. This is not the place to settle these in-house disputes. What I can do, however, is prevent linguistic disputes from arising

3 Mills, "'Ideal Theory' as Ideology," 172.

4 I am not the first to raise this worry. Most recently, see, e.g., Adams, "An Ideology Critique of Nonideal Methodology." I am largely sympathetic to the overall efficacy of his critique. As such, in section 3, I aim to offer my ideology critique of nonideal theory at the level of principles, which are, I take it, still within the spirit of his critique.

by outlining precisely what I mean when I use these terms. I aim to use these terms in a general and schematic manner so that the fine-grained details can be filled in as the reader pleases.

*1.1. Ideal Theory and Nonideal Theory*

Following Laura Valentini, I say that a political philosophy/theory counts as an *ideal theory* just in case it satisfies at least one of the following three requirements.[5]

> *Full Compliance Requirement*: "(i) All relevant agents comply with the demands of justice applying to them; and (ii) natural and historical conditions are favourable—i.e., society is sufficiently economically and socially developed to realize justice."[6]
>
> *Utopian Requirement*: "Feasibility constraints play little to no role in theory construction: the point of the theory is to tell us what to think, not what to do."[7]
>
> *End-State Requirement*: Theory construction ought to aim at a "long-term goal for institutional reform."[8]

Following Valentini again, I say that a political philosophy/theory counts as *nonideal theory* just in case it satisfies at least one of the following three requirements.[9]

5 I add the qualifier "one of" to note that there are in-house disputes about which requirements are necessary conditions for making a theory an ideal theory. Cf. Rossi and Sleat, "Realism in Normative Political Theory," 690. One more qualifier: to make things streamlined, let us say that if someone endorses, say, the full compliance requirement, they cannot also endorse the partial compliance requirement on pains of practical inconsistency. I leave open the possibility that some may not prefer to box themselves in and so may prefer to mix and match principles, e.g., endorsing the full compliance requirement and the transitional requirement, but this, by my lights, does not count as ideal or nonideal theory but some hybrid variant thereof. I will defend a view broadly sympathetic to (temporal) mixing and matching in section 5.

6 Valentini, "Ideal vs. Non-ideal Theory," 655. The first is derived from Rawls, *A Theory of Justice*, 8. The second condition is derived from Rawls, *The Law of Peoples*, 4–6.

7 Valentini, "Ideal vs. Non-ideal Theory," 657. Influential representatives include but are not limited to Cohen, *Rescuing Justice from Equality*; Simmons, "Ideal and Nonideal Theory"; and Estlund, *Utopophobia*.

8 Valentini, "Ideal vs. Non-ideal Theory," 660. Valentini cites Rawls, *The Law of Peoples*; Simmons, "Ideal and Nonideal Theory"; and Gilabert, "Comparative Assessments of Justice, Political Feasibility, and Ideal Theory."

9 *Mutatis mutandis*, see note 5 above.

*Partial Compliance Requirement*: Not everyone (i) fully "complies with the demands of justice," and the (ii) "natural and historical conditions" are unfavorable.[10]

*Realistic Requirement*: Feasibility constraints play a large role in theory construction: the point of the theory is to tell us what to do, not merely what to think.[11]

*Transitional Requirement*: Theory construction ought to proceed in piecemeal fashion, identifying near-term goals that are actually achievable.[12]

### *1.2. Ideology*

Following Charles Mills, I define *ideology* as a "distortional complex of ideals, values, norms, and beliefs that reflects the nonrepresentative interests and experiences of a small minority of the national population."[13] Accordingly, to launch an *ideology critique* against some *X* is to provide both a reason to reject the truth of *X* and to provide an account of *how X* functions to reinforce relationships of domination/exploitation/coercion/oppression.[14]

Because ideology critique plays both an epistemic and an explanatory role, it ought to be distinguished from so-called debunking arguments, which play only an epistemic role.[15] In brief, debunking arguments consist of a causal premise and an epistemic premise. The causal premise identifies what causes *S* to believe *p* (e.g., underlying psychological features). The epistemic premise asserts that the causal premise is an epistemic defeater for *p*. (For example, those underlying psychological features do not appropriately track the truth.) Accordingly, the conclusion of a debunking argument is that *S*'s belief that *p* is unjustified.[16]

10 Valentini, "Ideal vs. Non-ideal Theory," 655.

11 Valentini, "Ideal vs. Non-ideal Theory," 657.

12 Valentini, "Ideal vs. Non-ideal Theory," 660. For recent discussion, see, e.g., Wiens, "Prescribing Institutions Without Ideal Theory" and "Against Ideal Guidance"; and Barrett, "Deviating from the Ideal."

13 Mills, "'Ideal Theory' as Ideology," 172.

14 Cf. Geuss, *The Idea of a Critical Theory*.

15 Unfortunately, these two types of critique are sometimes run together. See, e.g., Amia Srinivasan's criticism of Jason Stanley's definition of ideological beliefs: "Now, on Stanley's notion of ideological belief, any belief that is resistant to counter-evidence—any belief that lies near the centre of one's doxastic web—counts as ideology. But that rules in too many items of knowledge as ideology: my belief that I have hands, that 2 + 2 = 4, that my mother loves me, all count as ideology on Stanley's schema" ("Philosophy and Ideology," 374). What is therefore required, if the term "ideology" is to be extensionally adequate, is a functional counterpart to the epistemic deficiency.

16 I borrow this general structure from Kahane, "Evolutionary Debunking Arguments."

Debunking arguments are ubiquitous, for all they require is that the debunker tell a story about how *S*'s belief that *p* is improperly based. But to launch an ideology critique against some *X* (e.g., the naturalness of the male/female gender binary) is to provide both a reason to reject the truth of *X and* an account of how *X* functions so as to reinforce relationships of domination. As Tommie Shelby puts it, "A form of social consciousness is an ideology if and only if (i) its discursive content is epistemically defective, that is, distorted by illusions; (ii) through these illusions it functions to establish or reinforce social relations of oppression; and (iii) its wide acceptance can be (largely) explained by the class-structured false consciousness of most who embrace it."[17]

When we make an ideology critique against some *X* (e.g., ideal theory), what is the critique *about*? Two answers present themselves. On the cognitivist view, we might think that the target of ideology critique is the false *beliefs* of individuals, which function to reinforce/establish relationships of domination. Yet the cognitivist view seems to pass the explanatory buck, for it assumes that the skull is the holding cell for ideology. But to many philosophers, ideology seems to be just as much a matter of praxis as of belief. Indeed, as Sally Haslanger writes:

> On the cognitivist account it remains the individual's thinking or reasoning that is in error, not the very tools that our language and culture provide us in order to think. But what we absorb through socialization is not just a set of beliefs, but a language, a set of concepts, a responsiveness to particular features of things (and not others), a set of social meanings. The cognitivist emphasis on shared beliefs and patterns of reasoning is too limited to accommodate all this.[18]

Adopting Haslanger's pluralist view allows us to see ideology at work in more ordinary contexts. For instance, suppose a committee has finalized its plans to build a subway. Suppose further that none of the members of the committee have any explicitly held prejudicial beliefs against persons with mobility issues. As it turns out, the subway is widely regarded as a great success, and the committee is praised for their careful and detail-oriented planning. "But detail-oriented for whom?" we might ask, which then prompts the ideology critique. The fact that the committee failed to include an elevator in the subway plans reveals something about what they took to be the social meaning of public transportation: a means of transporting people *like them.* Thus, even though

17 Shelby, "Ideology, Racism, and Critical Social Theory," 183–84.

18 Haslanger, "Racism, Ideology, and Social Movements," 9. See also Haslanger, "Political Epistemology and Social Critique."

nobody on the committee held any explicit ableist beliefs, their actions (and omissions) played a functional role of reinforcing exclusionary ableist norms.

In what follows, I will use *ideology* and *ideology critique* in Haslanger's pluralist sense, yet I will retain the general features of Shelby's definition. One reason for doing so is that it allows us to critique not only the particular beliefs of ideal/nonideal theorists but also the functional role that the practice of theorizing in such-and-such a way plays in society.

## 2. IDEAL THEORY AS IDEOLOGY

Let us now turn to Mills's ideology critique of ideal theory. For Mills, the orthodox orientation into political theorizing begins with the assumption that we should be doing ideal theory. According to Mills, ideal theorists begin by asking the right question: "What is justice?" Where ideal theorists go wrong, Mills tells us in "'Ideal Theory' as Ideology," is that they then proceed to make a series of idealizations in order to answer that question.[19]

First, they start with an idealized social ontology—that is, the assumption that we are all, deep down, moral equals and that "structural domination, exploitation, coercion, and oppression" are deviations from this natural equality. They then build in idealized cognitive capacities. They then idealize away all oppression. Historical oppression, though it may exist in the past, is nonexistent in their thought experiments. Theorizing about reparations is not necessarily ruled out, but if anyone does discuss it, the discussion will be "vague and promissory." Next, they idealize social institutions. The family, economic structure, and legal system are assumed to operate according to yet another idealized model. This rules out patriarchal domination and oppression in the family structure, domination by the market, and discriminatory practices by judges and law enforcement officials (169). Though this may sound strange, recall that for ideal theorists, we ought to fix our ideals first before we deal with these real-world concerns, pressing as they may be. The next step for an ideal theorist is to idealize the cognitive sphere: the typical person in an ideal theorist's thought experiment faces no "cognitive obstacles" and suffers from neither akrasia nor deluded self-interest. As a last step, ideal theorists idealize compliance. That is, they assume, along with Rawls, that there is strict compliance with the principles of justice regulating a well-ordered society (169).

Having isolated the six characteristics of ideal theorizing, Mills then asks us to "perform the operation of Brechtian defamiliarization" and ask ourselves: "*How in God's name could anyone think that this is the appropriate way to do ethics?*"

19 Mills, "'Ideal Theory' as Ideology," 168 (hereafter cited parenthetically).

(169). Although mainstream political philosophers may balk when presented with this question, Mills goes on to explain why the question is intelligible and worthy of consideration. He writes:

> If we start from what is presumably the uncontroversial premise that the ultimate point of ethics is to guide our actions and make ourselves better people and the world a better place, then the framework above will not only be unhelpful, but will in certain respects be deeply antithetical to the proper goal of theoretical ethics as an enterprise. (170)

Expanding on this point, we might say that according to Mills's ideology critique, when ideal theorists endorse the full compliance requirement, this leads them to systematically ignore issues of partial compliance, for example, facts about gender and racial subordination. Herein lies the epistemic horn of the ideology critique: these issues are salient injustices; thus, a theory is epistemically deficient insofar as it fails to account for them. The functional horn of the ideology critique naturally follows: the best explanation for why ideal theorists utilize the full compliance requirement is that it allows them to endlessly defer these issues.[20] Thus, for Mills, both the principles of ideal theory and the practices of ideal theorizers function to obscure the importance of such issues (179). The proper way to highlight and theorize about such issues is to start doing nonideal theory. Put otherwise, we ought to ditch the full compliance requirement for the partial compliance requirement when theorizing about justice. This is because the partial compliance requirement avoids both the epistemic and functional horns of ideology critique. That is, it does not idealize away oppression to the benefit of non-oppressed persons; and in so doing, a nonideal theory of justice has the potential to actually illuminate—rather than obscure—these pressing matters.

Of course, some ideal theorists will claim that they do not assume the full compliance requirement. Instead, they might characterize their view, for example, as one that endorses the end-state requirement. Yet this move does not escape Mills's critique, for Mills can run a similar gambit on the end-state requirement, claiming that it too leads to epistemic distortions that function to reinforce relations of domination. Perhaps no book better exemplifies the

20 As Mills notes, not only is this issue a problem for Rawls himself, it is a problem for his followers. Mills writes: "In a 1999 five-volume collection of eighty-eight essays from three decades of writing on Rawls . . . , only one of the included essays deals with race, that being an article by the African-American philosopher Laurence Thomas. . . . What does this say about the evasions of ideal theory? Is it that the United States has long since achieved racial justice, so there is no need to theorize it?" ("'Ideal Theory' as Ideology," 179).

end-state requirement than Robert Nozick's *Anarchy, State, and Utopia*.[21] But Mills contends that the book, though almost half a century old, has failed to incite a discussion about reparations for Native Americans and Black Americans—and this is despite the fact that, for Nozick, "the principle of rectification is explicitly demarcated as one of the three basic principles of justice" (180).[22]

"Whence this silence?" Mills asks (180). An inference to the best explanation takes us to the functional horn of the ideology critique: the reason why ideal theorists utilize the end-state requirement is that it allows them to bypass theorizing about how we might think about justice in the real world, as opposed to a hypothetical world where free and equal persons engage in just original acquisitions of property. The epistemic horn of the ideology critique naturally follows. It is a truism that there are salient injustices related to unjust transfer and acquisition of property; thus, a theory is epistemically deficient insofar as it fails to account for such facts. But the end-state requirement leads us to theorize in such a way that excludes these facts, thereby making it an instance of ideology. The proper way to theorize about rectificatory justice, Mills might say, is to ditch the end-state requirement for the transitional requirement. This is because the transitional requirement evades both the epistemic and the functional horns of ideology critique; it takes the issue of how to achieve rectificatory justice head on, as opposed to marginalizing the issue to an endnote, as Nozick does (181).

Mills concludes that not only is ideal theory not useful; it is pernicious and antithetical to the proper goal of ethics—to figure out what to do, how to live, and how to be. The lesson Mills draws from his discussion of the many vices of ideal theory is that "the best way to bring about the ideal is by recognizing the

21 Nozick, *Anarchy, State, and Utopia*.

22 Indeed, one of the most prominent reviews of Nozick's book mentions neither "historical injustice" nor reparations. See Nagel, "Libertarianism Without Foundations." This is despite the fact that such a discussion would seem to, as Mills might put it, "logically follow" upon reading Nozick's book. But it is not as simple as seeing what follows from what. After all, publications citing Nozick's book that mention reparations are relatively few in the years following its publication. From 1974 to 1984, there are eighteen instances of 'reparations' within citing articles. The 1990s to the early 2000s is also quite slim: from 1984 to 1994 there are thirty-one instances; and from 1994 to 2004 there are seventy-eight. It is only following Mills's influential article "'Ideal Theory' as Ideology," published in 2005, that many readers of Nozick seem to draw the connection *en masse*: from 2004 to 2014, there are 293 instances of 'reparations' within citing articles. That said, as Katrina Forrester notes, there *was* a debate going on in the late 1960s and 1970s about reparations within political philosophy. See Forrester, *In the Shadow of Justice*, 133nn156–58. What is presumably at issue for Mills, however, is that relatively few readers of Nozick took seriously what followed from his theory. One notable exception is Bernard Williams's 1975 review in the *Times Literary Supplement*, recently reprinted as Williams, "*Anarchy, State and Utopia*, by Robert Nozick."

nonideal, and that by assuming the ideal or the near-ideal, one is only guaranteeing the perpetuation of the nonideal" (185).[23]

## 3. NONIDEAL THEORY AS IDEOLOGY

The familiar origin story of the nonideal theory turn takes the form of a two-stage redemption narrative, whereby a particular group of theorists are delivered from the distorting illusions produced by ideal theory, thereby allowing them to finally begin the hard work of theorizing about the real world, sans ideology. But the origin story is false—or at least the "sans ideology" qualifier is.

Now as I mentioned earlier, I am not the first to raise the worry that nonideal theory is subject to ideology critique. To give a recent example, Matthew Adams sums up his ideology critique of nonideal theory as follows:

> The rejection of the orthodox ideal theory paradigm can be explained by the increasing infiltration of capitalist and managerial social attitudes into academia. These social attitudes have commodified people's conception of justice and, consequently, induced suspicion of ideal theory, which is not construed as having direct practical value. Consequently, nonideal methodology performs the distorting social role of reifying and enforcing unjust features of the status quo: the hegemonies of capitalism and managerialism that induced suspicion of ideal theory.[24]

In what follows, I aim to build on Adams's ideology critique. At a macro level, both Adams and I are offering ideology critiques of nonideal methodology. At a micro level, Adams focuses on applied ethics to show how the rising interest in nonideal methodology coincides with the growing demand for "relevant" research, where relevance is construed as having a demonstrable and calculable (social) impact that can be weighed by university administrators for the long-term goal of expanding a withering undergraduate enrollment, acquiring

23 I note that there is an extensive literature devoted to rescuing ideal theory from Mills's critique. The literature exemplifies a common feature of many philosophical debates, with some holding that ideal theory can be fully vindicated, others claiming that it can only be partially vindicated, and still others finding Mills's critique particularly worrisome. But let us set these concerns aside for now. My goal in the following section is to apply a structurally similar critique to nonideal theory—one that is appropriate by Mills's own lights—in order to show that nonideal theory does not get off on the cheap. I note also that some readers may be skeptical about the very possibility of ideology critique as construed by Mills, Haslanger, Shelby, etc. See, e.g., Sankaran, "What's New in the New Ideology Critique?"

24 Adams, "An Ideology Critique of Nonideal Methodology," 676. See also Stahl, "What (If Anything) Is Ideological About Ideal Theory?" for discussion of Adams's point.

research grants, and so on. At a micro level, I am interested in our thought and talk about justice in the workplace. I will take Elizabeth Anderson's *Private Government* as a recent paradigmatic example of nonideal theorizing about justice in the workplace.[25] The main claim I will make in this section is that nonideal theory is ideological in virtue of the fact that it rules out more radical utopian ways of theorizing by methodological fiat. And both friends and foes of radical utopian political views should find this fear of utopia troublesome because a first-order view about what justice in the workplace requires should not be ruled out by one's particular second-order methodological commitments.

Following a few recent and influential nonideal theory critiques of the workplace, let us take three things for granted. First, let us take for granted that workers are *dominated*—that is, they are subject to the arbitrary and unaccountable will of their employers in the workplace.[26] Second, let us take for granted that this domination is *pervasive*—that is, it occurs both inside and outside the workplace. Domination occurs inside the workplace, for example, when workers are not permitted to take adequate bathroom breaks and are thus "forced to wear diapers" to keep up with their productivity targets.[27] Domination occurs outside the workplace, for example, when workers are "pressured by their bosses to favor some political candidate or issue, by threats of job loss, wage cuts, or plant closure."[28] Finally, let us take for granted that the *severity* of workplace domination is often positively correlated with one's social/political/economic status. For instance, Anderson notes that the abuses suffered by "hundreds of thousands" of undocumented migrant workers "include fraud, being forced to work without pay, rape and sexual harassment, beatings, torture, confinement to the workplace and to squalid housing for which extortionate rent is charged, exhausting hours, isolation, religious compulsion, and psychological manipulation and intimidation."[29]

25 Anderson, *Private Government*.

26 See, e.g., Pettit, *On the People's Terms*; and O'Shea, "Are Workers Dominated?" and "Socialist Republicanism."

27 Anderson, *Private Government*, 135. Anderson cites Oxfam America, "No Relief."

28 Anderson, *Private Government*, 135. Consider, as another example, cases of "wage slavery," whereby workers are dominated by the demands of the market. If they try and strike, there may be a reserve of unemployed workers who are ready and willing to take their places, thus rendering their resistance inefficacious. It is in this sense, then, that for Marx, all wage workers are wage slaves in the sense that they are bound to work within the wage system, i.e., the capitalist mode of production. See Marx, *Capital*. For a contemporary examination of wage slavery, see Gourevitch, "Labor Republicanism and the Transformation of Work," 595. Thanks to an anonymous referee for asking me to clarify this footnote.

29 Anderson, *Private Government*, 137.

So what is to be done? Anderson says that there are "four ways to improve the freedom and equality of workers: exit, rule of law constraints on employers, constitutional rights, and voice."[30] Note that these four ways of improving the freedom and equality of workers nicely align with the methodological commitments of nonideal theory that I outlined in section 1. Improving the exit rights of workers—either by prosecuting employers who arbitrarily interfere with employees' rights to exit or by promoting a universal basic income—can be done in a piecemeal fashion, thus satisfying the transitional requirement.[31] So too with modifying the rule-of-law constraints on employers. Whether the problem is with flawed antitrust law, inefficient market signals, outmoded foreign trade policies, rent seeking, or some combination thereof, one can simply chip away at the margins of law as it is and thereby construct the right constraints on employers.[32] In working along any of these axes, we take seriously the feasibility constraints within our liberal constitutional market society and therefore satisfy the realistic requirement. All the necessary changes being made, we can run the same gambit on the domain of constitutional rights. And finally, the recognition that workers need *voice* in the workplace assumes that not all firms comply with the demands of justice and therefore need to be held accountable to the workers who they govern.[33] Of course if things were otherwise, then perhaps workers would not need voice. But in the real world, the domination exerted by firms is persistent, pervasive, and severe, and so we should theorize with the partial compliance requirement if we want to figure out what to do in the here and now.

But are these reforms enough to bring about freedom both within and outside the workplace? Or do they preclude a more revolutionary politics? Two answers present themselves. A steadfast reformist will say that the freedom of workers will be greatly improved by instituting any one of these reforms. Of course, no steadfast reformist completely agrees with another on the details. Some believe that a universal basic income is the solution. Others say that we also need workplace democracy. And others think that we need to tinker with some combination thereof and also tackle outdated antitrust law, and so on. But all steadfast reformists agree on one thing: the solution lies somewhere

30 Anderson, *Private Government*, 133.

31 On skepticism about the sufficiency of universal basic income, see Gourevitch, "Labor Republicanism and the Transformation of Work"; and Nieswandt, "Automation, Basic Income and Merit."

32 For a recent influential criticism of the consumer welfare model of antitrust law, see Khan, "Amazon's Antitrust Paradox."

33 On workplace democracy, see, e.g., Frega et al., "Workplace Democracy"; and Landemore and Ferreras, "In Defense of Workplace Democracy."

*within* the standard liberal package, and so we should nudge ourselves towards a comprehensive rethink of liberal democracy.[34]

Radical revolutionaries think that steadfast reformists are naive and misguided. No doubt, radical revolutionaries find it hard to agree with one another on the details too. Some believe that we need to "smash capitalism" because the system is rotten and cannot be reformed, while others believe that we need to "tame capitalism" with radical anticapitalist reforms much stronger than those recommended by steadfast reformists.[35] Yet despite their disagreements, all radical revolutionaries agree on one thing: the solution lies somewhere *outside* the standard liberal package, and so we should overthrow the system and strive towards utopia.[36]

Notice that from the point of view of a radical revolutionary, the background presuppositions of nonideal theory will seem ideological in virtue of the fact that they rule out more radical utopian ways of theorizing by methodological fiat.[37] They will say that what the transitional requirement does in practice is encourage us to frame our political problems as policy problems that can be resolved through clever nudge schemes, constitutional tinkering, etc. But the radical revolutionary holds that the *cause* of our contemporary workplace ills—i.e., capitalism—is not properly addressed by focusing on piecemeal reform. Moreover, the radical revolutionary will say that in adopting the realistic requirement, we inaccurately represent certain features of our global market order as fixed, but part of the point of thinking critically about domination in the workplace is to *denaturalize* these oppressive orders.[38] And herein lies the epistemic horn of the ideology critique: these issues of workplace domination are salient injustices; thus, a theory is epistemically deficient

34 I borrow the phrase 'standard liberal package' from Patten, *Equal Recognition*. For proponents who are broadly sympathetic with the steadfast reformist position as I describe it here, see, e.g., the bibliography of Courtland, Gaus, and Schmidtz, "Liberalism."

35 I borrow these terms and general framing from Wright, *How to Be an Anticapitalist in the Twenty-First Century*, 38–42. For proponents of each, see Wright's book. There are of course more proponents to consider, and the sketch I have given here is intentionally vague on a few important details. But readers are free to fill in those details in whatever way they deem most plausible.

36 For proponents who are broadly sympathetic with the radical revolutionary position as I describe it here, see, e.g., the bibliography of Leopold, "Analytical Marxism." All the qualifiers in the previous footnote apply here too.

37 See also ideal anarchists, e.g., G. A. Cohen, Jacob T. Levy, Christopher Freiman, and Jason Brennan, as cited in Brennan and Freiman, "Why Not Anarchism?" All the necessary changes being made, one could perhaps run the same critique against nonideal theory from an ideal anarchist point of view.

38 Cf. Queloz, *The Practical Origins of Ideas*, 102.

insofar as it fails to account for the true cause of such injustices. The functional horn of the ideology critique naturally follows: the best explanation for why nonideal theorists utilize, say, the transitional requirement is that it allows them to endlessly defer these issues: rather than theorize beyond what is possible *outside* of capitalism, they encourage us to endlessly tinker *within* it. Thus, for the radical revolutionary, both the principles of nonideal theory and the practices of nonideal theorizers function to obscure the importance of such issues. The proper way to highlight such issues is to start doing ideal theory. Take up the utopian requirement, radical revolutionaries say, and ask how we would behave if we were to transcend the capitalist market order.

No doubt steadfast reformists will find the radical revolutionary ideology critique unpersuasive. They might even grant the sociological fact that the methodological commitments of nonideal theory—e.g., the transitional requirement—does function in such a way so as to eliminate a more revolutionary politics from the frame of inquiry. Yet they will contend that there is nothing wrong with this because the best we can hope for is a modest form of liberalism, warts and all. They will further point out that the radical revolutionary ideology critique holds only if we cannot imagine a fully just liberal society that functions within a global capitalist order. But they will say that we can imagine such a reasonable utopia and therefore do not need to smash capitalism.[39] Of course a radical revolutionary will regard this sort of reply as evidence that steadfast reformists are wholly caught up in their bad ideology. And the steadfast reformists will provide their arguments yet again for why their view is not ideological. Eventually, both sides will reach a point at which neither can provide the other a non-question-begging response because there is so little common ground that is agreed upon.

For the sake of argument, let us grant that steadfast reformists are right in holding that some subset of radical revolutionaries are misguided in thinking that we need to smash capitalism, and anyone who disagrees with the steadfast reformists is caught up in bad ideology. Still, it seems harder for steadfast reformists to evade the charge by a different sort of radical revolutionary who claims that we simply need to tame capitalism with radical anticapitalist reforms much stronger than the sort of reforms recommended by steadfast

39 See Wright, *How to Be an Anticapitalist in the Twenty-First Century*, 38–42. Again, unfortunately, I lack the space here to fill in the necessary details of what exactly makes one reform *R* count as an instance of taming or smashing capitalism. The details will in turn depend on how one wants to carve up the distinction between radical revolutionaries and steadfast reformists.

reformists.[40] Here there is *some* common ground. And so it seems open for this sort of radical revolutionary to ask the steadfast reformists: How sure are you that nonideal theory escapes ideology critique? Is it not possible that the framing of political problems vis-à-vis nonideal theory—that is, the eschewing of utopia in favor of realism—sometimes functions to preclude revolutionary politics? Of course, this may not always be the case. We may be able to nudge ourselves towards freedom on a wide variety of issues. But surely we cannot rely on piecemeal reform for everything.

At this point, I think epistemic humility requires that steadfast reformists concede at least *something* to the ideology critique of the radical revolutionary. They do not of course have to abandon their framework. But it does seem reasonable for them to respond not by digging their heels in. Insofar as steadfast reformists regard their radical revolutionary interlocutors as reasonable, they ought to acknowledge that they cannot rule out that they are *not* in ideology and should therefore investigate the possibility further. Indeed, this is just what Rawls—a steadfast reformist *par excellence*—prompts his readers to do in a footnote of *Justice as Fairness*:

> The idea of political philosophy as reconciliation must be invoked with care. For political philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus of being ideological in Marx's sense. From time to time we must ask whether justice as fairness, or any other view, is ideological in this way; and if not, why not? Are the very basic ideas it uses ideological? How can we show they are not?[41]

## 4. What was the point of the ideal/nonideal theory debate?

Nothing I have said here will fully resolve the debate between ideal and nonideal theorists. Like most philosophical debates, the one side will respond by

40 As an anonymous referee has pointed out, there is perhaps something strange with using the label 'radical revolutionary' to describe such a view, since, by some philosophers' lights, it is not revolutionary at all. But the labels are not too important, so feel free to swap them if you please.

41 Rawls, *Justice as Fairness*, 4n4. It is curious that nonideal theorists inspired by Rawls have not taken up this task in a detailed and thorough manner. No doubt I have provided only the contours of how these questions posed by Rawls might be answered. But I hope to have laid something of a groundwork for future inquiry. For what it is worth, I am largely sympathetic to Anderson's diagnosis of our contemporary workplace ills, and I agree with her on the solutions. Still, I think it is false to think of myself as wholly insulated from ideology critique. One of the targets of this essay is therefore, somewhat ironically, myself.

modifying their view so as to evade the objections of the other side, and the other side will in turn respond by saying that the modified view either inadequately addresses the objection, misunderstands it, or illegitimately evades the objection by means of an ad hoc patch. If that is how things proceed, then I do not purport to have provided a clean resolution to the dialectic. But perhaps we can dissolve the apparent need for a resolution by asking whether a dissolution is possible. For given the persistence of the debate, both sides may benefit from taking a step back to ask: What does it say about ourselves that we are having a debate about whether we should do political philosophy using ideal theory or nonideal theory?[42]

Here is one sort of answer we might give—let us call it the *optimist answer*. We are having the ideal/nonideal theory debate because, in part, we are trying to figure out if the Rawlsian paradigm is correct. And the Rawlsian paradigm tells us that we cannot grasp the pressing problems of political philosophy unless we can see them clearly and distinctly. Yet in order to see them clearly and distinctly, we need to figure out the correct ideal theory. Thus, we must theorize in stages: first, we get all the details of the correct ideal theory specified, and then we turn to the messy, nonideal world and apply the theory.[43]

On this telling, the ideal/nonideal theory debate is born out of disagreement with the Rawlsian paradigm. Understood as a game of choosing sides, it is now increasingly common to hear philosophers and theorists self-identify as either an "ideal theorist" or "nonideal theorist." Most parties to this debate seem to think that providing a resolute answer to the ideal/nonideal theory debate will give us some firm ground upon which we can build a systematic theory of justice. Simply put, they say that we are having the debate because we are trying to figure out what we should think about how we think about justice.

Here is another sort of answer we might give—let us call it the *pessimist answer*. Our having the ideal/nonideal theory debate is *itself* a form of ideology, one that serves to reinforce the status quo by convincing political philosophers/theorists that the most pressing problems are metaproblems, i.e., problems

42 Cf. Moyn, *The Last Utopia*, *Human Rights and the Uses of History*, and *Not Enough*. Moyn also poses a similar question regarding the rapid ascendancy of human rights discourse, thereby calling into question their neutral political status. "To know what to make of human rights," Moyn provocatively suggests, we must first "understand what they have made of us" (*Human Rights and the Uses of History*, 169). In a similar vein, we might also ask the participants to this debate, of which I am one: What is it about our particular historical moment that brought us to have *this* debate? What has the debate over ideal/nonideal theory made of us?

43 For a nice overview of this narrative of the debate, see Levy, "There Is No Such Thing as Ideal Theory." For the "stages" of theorizing in Rawls, see Rawls, *A Theory of Justice*, 9, and *The Law of Peoples*, 90.

about what we should think about what we are doing. But this framing simply moves the bump under the rug, for if Rawls's view was mistaken, then surely it is wrong to hold the neighboring view, which says that "The reason for beginning with [the debate over ideal/nonideal] theory is that it provides . . . the only basis for the systematic grasp of these more pressing problems"[44]

Here the specter of ideology critique resurfaces, for it is not clear that we *must* begin political philosophy/theory by working out all the details to methodological questions. Indeed, in emphasizing methodological questions we may displace the importance of first-order questions by endlessly deferring them.[45] And in some part, this seems to be the function of the ideal/nonideal theory debate: to convince professional philosophers that their conceptual labor is essential for figuring out what the correct methodological commitments are, which, in turn, is necessary for figuring out how to make any progress on real-world, pressing problems. This is a flattering picture of the role of philosophers in creating social change.[46] On this picture, philosophers occupy an Archimedean perspective that allows them to see beyond the muddled, situated perspectives of the dominated and the oppressed; philosophers, through their careful distinction-making, gain insight into how much we should or should not idealize when we are thinking about justice; and crucially, on this picture, philosophers' labor is not only essential but lexically prior to any social change: first comes the question of whether ideal or nonideal theory is correct, then comes the working out the details of one's first-order theorizing, then comes social change.[47] But the picture is backwards. It is often through radical political upheavals (e.g., the civil rights movement) that philosophers come to modify the details of their first-order theorizing (i.e., what fixed-points *seem*,

44 Rawls, *A Theory of Justice*, 8.

45 Cf. Moyn, *Not Enough*. Jiewuh Song reads Moyn as arguing for a "displacement thesis, on which the human rights practice has crowded out political space for more ambitious projects, with deleterious consequences" ("Human Rights and Inequality," 350). Though note that Moyn seems to have made some concessions to the "displacement thesis" in recent work, e.g., in "Sufficiency, Equality, and Human Rights."

46 Taking up a skeptical attitude towards such a picture, Amia Srinivasan writes: "I fear that the thought that what we need, politically speaking, is analytic philosophy . . . is one more legitimation myth of which we should be suspicious. After all, it would be convenient for us as professional philosophers not only if our somewhat peculiar skills turned out to be essential for the pursuit of justice but also if it turned out that the use of those skills could render political revolution, especially violent revolution, unnecessary" ("Philosophy and Ideology," 379).

47 The picture is essentially an inversion of some of the central claims of feminist standpoint epistemology. See, e.g., Hartsock, "The Feminist Standpoint"; and Collins, *Black Feminist Thought*. Both are cited in Srinivasan, "Radical Externalism," 411n27.

upon reflection, fixed), and only thereafter do they reconceptualize what they take themselves to be *doing* in theorizing about justice.

It is no surprise, then, that philosophers and theorists tell this flattering tale about themselves, for being the judge in their own case, it is only natural that they regard their skills and theorizing as lexically prior to social change. But this is nothing new. This flattering tale—about the priority of the ideal/nonideal theory debate—is simply a particular instance of a more general phenomenon that has been with us at least since Marx's critique of the ideologists—that is, artists, priests, lawyers, and so on.[48] Marx said that they were superstructural workers who mistakenly believed that their ideal products (their ideas) were the driving force of history and social change.[49] Thus, for Marx, a judge who applies the law regards their legislation as the real, active driving force of history; an artist who makes works of art regards their art as having a sort of capacity for social change; and so on. But they are all equally mistaken—at least by Marx's lights—for neither the law nor art nor any other ideal product *really* changes the world: the material forces do. Artists, lawyers, philosophers, and all the rest merely tag along for the ride, and when a given social movement takes flight they (flatteringly) attribute causal powers to their ideal products.[50] Here is precisely where the ideology critique of the ideal/nonideal theory debate rears its head: academic philosophers think that working out the right answers to methodological questions will change the world. They think that a change in people's *ideas* will enact social change. But they are fundamentally mistaken. To think as

48 Here I am heavily indebted to Mills, "'Ideology' in Marx and Engels." Cf. Roberts, "Ideology and Self-Emancipation," para. 7.

49 See Marx, *The German Ideology*. Note well that Marx's critique of ideologists is not synonymous with so-called ideology critique in the sense that I and others use the term. While the way I have opted to use 'ideology critique' in this essay may be extensionally adequate, it is perhaps a bit historically anachronistic, a manner of speaking handed down to analytic philosophers from Raymond Geuss, among others. Cf. Srinivasan, "Genealogy, Epistemology and Worldmaking," 140–47. See also Mills, "'Ideology' in Marx and Engels." Srinivasan notes that we ought to distinguish critical genealogy from ideology critique. While the latter reveals a deficient epistemic status, the former merely lays bare the *function* of our ideologies. For better or for worse, ideology critique (of the sort done by the late Mills, Shelby, Haslanger, etc.) has come to mean something different from critical genealogy, but it is important to keep in mind that I and other participants in this debate are using the term in a circumscribed *pejorative* sense, and so there is a danger of making historical connections where they are not warranted or, worse, of anachronistically interpreting, say, Marx as a proponent of "ideology critique." By my lights (and the early Mills's), Marx is *not* doing straightforward ideology critique, though misinterpreting him in such a way may have led to the development of ideology critique. *Mutatis mutandis*, cf. Bloom, *The Anxiety of Influence*.

50 See Mills, "'Ideology' in Marx and Engels," 12. Cf. Mills and Goldstick, "A New Old Meaning of 'Ideology'," 423.

they do is to suppose, with the Young Hegelians, that the driving force of history is what is inside people's heads—namely, ideas. But concepts do not change the world. People do. Of course, people operate with a given set of concepts, and it is important for them to pause and reflect on how their concepts frame their projects and guide their actions. But it is equally important to recognize that these sorts of methodological endeavors are not prior to social change. So the charge against the contemporary proponent of the ideal/nonideal theory debate is that they are caught up in bad ideology insofar as they see their product—i.e., their papers, books, talks, and so on—as being necessary for social change.[51]

## 5. A PLEA FOR PLURALISM

So if the very debate between ideal and nonideal theorists is itself a form of ideology, then what should we do? I think both parties to the debate should recognize that ideal theory and nonideal theory, understood as models for helping us grasp what justice is, are on a similar plane. And though it is difficult to occupy both perspectives at once, we can strive to oscillate between the two, without ever quite knowing whether we are occupying the right vantage point.[52] From the standpoint of the ideal theorist, it may seem like the point of a theory of justice is to tell us what to think, not what to do. The point is to get at the facts about what justice requires, come what may (à la the utopian requirement). Yet from the point of view of the nonideal theorist, the opposite seems true: the point of a theory of justice is to tell us what to do, not merely what to think (à la the realistic requirement). The point is to change the world, not to merely theorize about it. Both of these standpoints are inescapable, and they routinely conflict. Thus, upon finding ourselves caught between realism and utopia, it is only natural that we strive for a synthesis at the second-order level. Perhaps such a synthesis is forthcoming. In any case, we do not need to resolve the debate between ideal/nonideal theorists to address the pressing problems head on. We can be pluralists and oscillate back and forth between these two modes of theorizing without a decision procedure to tell us when

51 As flattering as this picture is, it is not obviously true that we need a clear picture of *how* to start theorizing about social change before we can *begin* theorizing about social change. What is more, it is not plainly true that what we need is more theory. We should be alive to the Althusserian worry that often "those who are in ideology believe themselves by definition outside ideology: one of the effects of ideology is the practical *denegation* of the ideological character of ideology by ideology: ideology never says, 'I am ideological'" (Althusser, "Ideology and Ideological State Apparatuses," 175).

52 Cf. Hall, *Cultural Studies 1983*, 84.

we should take up one perspective or the other.[53] We can look closely at the pressing problems right in front of us and ask ourselves what the point of our theorizing is in each case, and then further ask whether we should take up an ideal or nonideal theory perspective. We can do this while recognizing that in theorizing we must take up a point of view, however flawed that point of view might be.[54] Once we accept this fact—that methodology will not save us—we can finally leave the ideal/nonideal theory debate behind and thereafter begin to ask more productive and fruitful questions.

But before we start asking the more productive and fruitful questions, we should concern ourselves with one final worry—namely, that even if the pluralist position fares better than a strict form of ideal or nonideal theory, it may be, tragically, yet another instance of ideology. For surely pluralists do not occupy an Archimedean perspective that allows *them* to see beyond the problems and perils of ideal or nonideal theorists. Indeed, according to some critics, the problem with pluralists is that they still *think* with the categories of "ideal theory" and "nonideal theory." And the problem with these categories—which now occupy a reified status in contemporary political philosophy—is that they encourage us to ask political questions from a point of view that excludes from our frame of inquiry philosophers and theorists who are neither ideal nor nonideal theorists.[55]

Marx comes to mind. For Marx is not, according to many interpretations, simply trying to get at what justice requires (à la the utopian requirement).[56] That is, he is not constructing an ideal theory of a perfectly just society and thereafter critiquing existing societies for failing to meet that standard. Nor is he straightforwardly a nonideal theorist who theorizes on the terms given to us by steadfast reformists. He is a radical revolutionary of a different sort, which is why it is difficult to capture what Marx was up to using our contemporary categories of ideal/nonideal theory.[57] Marx's critique of capitalism—and indeed, of workplace domination—is rooted in a collection of comprehensive doctrines—

53 Cf. Levy, *Rationalism, Pluralism, and Freedom*, 290n7, on synthesizing impulses in political theory, especially Hegel and Taylor.

54 Cf. Walters, "The Aptness of Envy," 8n13.

55 As an anonymous referee has pointed out, theorists such as Hobbes, Kwame Nkrumah, Plato, and Lenin do not fit neatly into these categories. Cf. Du Bois, "The Propaganda of History." It is also worth asking how the ideal/nonideal theory debate fits into the wider context of political philosophy. On this, see, e.g., McKeon, "The Interpretation of Political Theory and Practice in Ancient Athens."

56 This issue is highly contentious. For an overview of the debate, see Geras, "The Controversy About Marx and Justice."

57 Perhaps this difficulty of categorization explains why the name Marx never appears in the canonical overview of the ideal/nonideal theory debate, i.e., Valentini, "Ideal vs. Non-ideal Theory."

namely, a theory of historical materialism, a theory of how capitalism functions, and perhaps even an ethical vision.[58] This all comes as a package deal for Marx. And if something of a broadly Marxist view is tenable, then it gives us a way not only to bypass the ideal/nonideal theory debate but to render it ideological.[59]

So we are faced with a choice. On the one hand, we can be pluralists and accept the categories given to us by the ideal/nonideal theory debate but reject the demand to decisively come down on one side or the other. On the other hand, we can take a cue from Marx and reject the categories of the ideal/nonideal theory debate and do political philosophy otherwise. I raise this choice not to provide a decisive answer but rather to call our attention to the striking fact that despite their many disagreements, both pluralists and Marxists offer us ways to bypass the ideal/nonideal theory debate. Pluralists extend an olive branch to ideal and nonideal theorists, exhorting both to go on theorizing with their inherited categories and distinctions, all the while recognizing the ideological risks that are bound to occur along the way. Marxists throw down their gauntlet and press all parties to the debate to acknowledge that the categories that they have inherited from the ideal/nonideal theory debate are not neutral ways of carving up political phenomena: they too have a history, and so it is well and wise to examine how they function so as to exclude certain questions, approaches, and phenomena from one's frame of inquiry.[60] The crucial lesson for our purposes here is that whatever side you find yourself on—pluralist or Marxist or some hybrid variant thereof—it follows that that the debate between ideal/nonideal theory is ideological. It also follows, somewhat ironically, that perhaps even this essay is caught up in bad ideology insofar as it is yet another contribution to the ideal/nonideal theory debate. That may be so. In any case, we ought to finally move on and address the pressing problems of political philosophy head on.[61]

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58 See, e.g., Wills, *Marx's Ethical Vision*.

59 I am indebted to an anonymous referee for asking me to clarify these points in the preceding two paragraphs and for their suggestions about how Marx might fit into this dialectic. On the role of abstraction in Marx, see, e.g., Ilyenkov, *The Dialectics of the Abstract and the Concrete in Marx's Capital.* On the material context of philosophical ideas, see Wood, *Liberty and Property*.

60 The choice that I have set up here is influenced by McClendon, "Black and White Contra Left and Right?"; Sayer, *Method in Social Science*; and Ferguson, "Contractarianism as Method." Thanks to an anonymous referee for recommending these sources.

61 I would like to thank an anonymous associate editor and two anonymous referees at *JESP* for their excellent comments on this essay. I am also grateful to Matthew Adams, Harry

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# WHAT MAKES NEPOTISM WRONG?

*Pascal L. Mowla*

WHY IS IT WRONG to distribute goods nepotistically, and is it always wrong to do so? Ordinary morality typically frowns upon nepotism, yet nepotistic activity is rarely the target of coercive policy and state intervention. Moreover, widespread disdain for nepotistic hierarchies is seldom mirrored by disapproval of special relationships or the exchange of personal favors to which we are all indebted. We dismiss those who profit from personal ties as the beneficiaries of corruption or good fortune, yet recognition of the significance of these relationships is nearly universal. In the United Kingdom, Conservative governments have faced criticism for awarding lucrative contracts to individuals and companies with links to party officials,[1] whereas public discourse online targets so-called nepo babies: the children of well-connected parents who happen to find success within the entertainment industry.[2] Indeed, it perhaps goes without saying that the prevalence of nepotism within the world we inhabit is not easily overstated. On the contrary, one's social position and network typically afford one access to various goods and competitive advantages.[3] It is thought, for instance, that roughly half of all jobs within the United States are acquired through one's social network of family, friends, and other acquaintances.[4] Despite these findings, few entertain the impermissibility of nepotism *tout court*, and many individuals appear to value opportunities for collaboration with their nearest and dearest. How then should we reconcile these conflicting intuitions?

1 Conn et al., "Chumocracy"; and Jenkins, "Of Course Michelle Mone Should Be Thrown Out of the Lords, but Others Enabled Her."

2 Gorman, "Nepo Babies"; and Jones, "How a Nepo Baby Is Born."

3 See Bourdieu, "The Forms of Capital"; Goodin, *Perpetuating Advantage*, 54–68; Lin and Dumin, "Access to Occupations Through Social Ties"; Pérez-González, "Inherited Control and Firm Performance"; Gilani, "Creating Connections."

4 See Loury, "Some Contacts Are More Equal Than Others," 299; and Corak, "Income Inequality, Equality of Opportunity, and Intergenerational Mobility," 93. See also Granovetter, "The Strength of Weak Ties" and *Getting a Job*; and Montgomery, "Social Networks and Labor-Market Outcomes."

Much of the existing literature on partiality directs its focus towards the ethical dimensions of special relationships and the duties or prerogatives they generate.[5] Less well treated, however, is the distinctly institutional phenomenon of nepotism. Despite the pervasive influence of nepotism and the challenges that such activity presents for conceptions of social or distributive justice, one may struggle to unearth a sustained normative interrogation of the concept itself.[6] While some assume that favoring friends or relatives for jobs is permissible or even obligatory within smaller businesses, others deem it objectionable to favor friends or relatives for advantageous positions even if they are suitably qualified.[7] This essay aims to quell the confusion that these vagaries produce by considering what makes nepotism wrong *when* it is wrong.

Far from identifying a distinct wrong involved in nepotism, familiar objections either are concerned with its substantive effects on some conception of distributive justice or designate nepotistic practices as ones that may constitute a kind of wrongful discrimination.[8] Though these accounts identify genuine concerns, I suggest that they fail to provide a satisfactory explanandum of what makes nepotism wrong across a diverse range of cases. As a corollary, they do not draw a plausible distinction between permissible and impermissible activity in a way that might guide institutional action. Given that many share the intuition that nepotism is at least sometimes impermissible, we might wonder how this intuition is best explained and just how far this explanation extends to proscribe nepotism as a matter of justice. In service of this end, a comprehensive account of the wrong of nepotism should (1) faithfully capture and make sense of our intuitions regarding nepotism's wrong-making features and (2)

5 See Oldenquist, "Loyalties"; Cottingham, "Ethics and Impartiality"; Baron, "Impartiality and Friendship"; Friedman, "The Practice of Partiality"; Keller, "Four Theories of Filial Duty" and *Partiality*; Feltham and Cottingham, *Partiality and Impartiality*; and Kolodny, "Which Relationships Justify Partiality?"

6 A PhilPapers search in January 2025 for 'nepotism' generated eighty-six results. Of these results, only one constituted a philosophical attempt to engage with the question that titles this essay and is discussed below. The vast majority of results discuss the practice of nepotism in relation to evolutionary biology and kinship altruism or within a historical context. Elsewhere, nepotism is frequently mentioned in passing but is rarely examined with any detail.

7 With little argumentation, Michael Walzer claims that the coercive implementation of meritocratic norms should be limited to positions of public office and that within the "petty-bourgeois economy," nepotism "appears to be morally required." See Walzer, *Spheres of Justice*, 161. Cf. T. M. Scanlon, who claims that it would be objectionable if "among many equally qualified candidates for a position, all of those who are selected are friends of people in power" (*Why Does Inequality Matter?* 50).

8 See Miller, *Institutional Corruption*, 106–15; Scanlon, *Why Does Inequality Matter?* 40–52; and Moreau, *Faces of Inequality*, 115.

give rise to a convincing distinction between permissible and impermissible nepotism. Though a satisfactory response to these questions may initially seem simple or even obvious to some, further investigation reveals the problem to be deceptively complex. As we shall see below, existing accounts of the wrong of nepotism not only fall short of the first desideratum by limiting their focus to advancing a particular conception of justice but also struggle to convincingly delineate permissible from impermissible nepotism using the standards internal to these conceptions.

This paper is structured as follows. In section 1, I offer a working definition of nepotism that is neutral with respect to its wrong-making features and congruent with ordinary use. Section 2 then outlines three accounts of the wrong of nepotism and argues that each struggles to provide a comprehensive explanandum of what makes nepotism wrong. As there are a conceivably vast number of objections to nepotism, I limit my focus here to those that provide the most coverage in terms of applying to a diverse range of cases and regularly feature in the condemnation of nepotistic activity. Contrary to received wisdom, appeals to efficiency, equal opportunity, or wrongful discrimination induce ambiguity and provide inadequate normative coverage when used to discern nepotism's permissibility. The primary takeaway from this analysis is the realization that our intuitions about nepotism's permissibility are often incongruent with existing accounts of its wrong-making features. Section 3 concludes by laying the groundwork for a more holistic account and highlights the need for an approach that balances the morally significant interests that different cases present.

## 1. A WORKING DEFINITION OF NEPOTISM

In order to orient the following discussion, it is necessary to provide a working definition of nepotism. Since allegations of nepotism typically conjure pejorative thoughts of corrupt or unethical activity, it is important that our working definition faithfully captures ordinary judgments about what nepotism consists in while remaining neutral between different explananda of its impermissibility. Given this pejorative perception, one might be puzzled by both the title of this essay and the aforementioned need for a working definition of nepotism that is neutral with respect to its wrong-making features. This confusion is likely to be a product of the thought that nepotism is wrong *by definition* and so providing an adequate definition of nepotism is analogous to explaining what makes it wrong. On this view, there is no meaningful sense in which we can delineate between impermissible and permissible nepotism, since if it were permissible, it would not be "nepotism" but something else entirely.

Though this thought might be held by some, it should be patent that endorsing it without qualification would unavoidably beg the question in favor of its impermissibility *tout court* or a particular account of its wrong-making features. In anticipation of this problem, I offer a working definition of nepotism that is neutral with regard to competing accounts of its impermissibility and leaves room for the possibility of permissible nepotistic activity. This is not to suggest, however, that the term 'nepotism' is devoid of any normative content in common parlance. Instead, it is to recognize the need for an adequate description of nepotism that suspends further evaluative considerations about its normative status within various contexts if we are to come to a considered view regarding its permissibility.[9] It is with this in mind that I provide a working definition of nepotism that successfully identifies a class of acts that captures what we typically perceive nepotism to consist in and is suitably broad so as to avoid biasing a particular account of its impermissibility.

> *Nepotism*: An agent engages in nepotistic activity whenever they utilize their influence within an institution to favor distributing goods to a member of their social network and where such membership positively influences (directly or indirectly) the decision to distribute the goods in question.

We can now posit several salient features of our working definition that establish both its neutrality and its fidelity to ordinary use.

First, the working definition identifies two dimensions that differentiate nepotism from other kinds of favoritism. The first dimension specifies the relational aspect inherent to nepotism and delimits this relational scope to members of an agent's social network. While an agent may express partiality in any number of ways (e.g., towards someone who shares their ethnicity or gender), an ordinary ascription of nepotistic activity typically refers to the practice of

9 To draw an illustrative analogy, one can provide a description of favoritism that denotes the expression of preferential treatment for a person or group at the expense of others without committing to claims about its permissibility in different scenarios. Like nepotism, favoritism may prompt pejorative thoughts of *unfair* preferential treatment, but this does not preclude us from using the term in a normatively neutral way in order to evaluate the permissibility of particular expressions of favoritism. Consider, for example, the favoritism that a mother may express towards her own children and an expression of favoritism *among* her own children. Ordinary moral judgments may deem the former act to be an instance of permissible or even obligatory partiality, while the latter is usually thought to be objectionable. See Baron, "Impartiality and Friendship," 837–38. Despite this, there is a clear and uncontroversial sense in which both acts can be described as expressions of favoritism, and this can be done without obfuscating what the term is perceived to refer to in ordinary language.

favoring one's friends and relatives for some good. In place of 'friends and relatives', I use the more inclusive term 'social network', which I believe to be congruent with the thought that nepotism can involve favoring friends as well as friends of relatives, relatives of friends, friends of colleagues, and so on.

The second dimension specifies the site or location of nepotistic activity and constrains the site of nepotism to institutions. Here, I adopt Rom Harré's definition of an institution as "an interlocking double-structure of persons-as-role-holders or office-bearers … and of social practices involving both expressive and practical aims and outcomes."[10] Construed as such, the kind of institutions under consideration admit of a wide variety, including schools, businesses, police forces, hospitals, and political institutions, as well as many others.[11] Delimiting the scope of nepotism in this respect is important because a working definition that specifies the aforementioned relational aspect without constraining the site of nepotism would be inadequately broad.[12]

The working definition does not equate nepotistic practices with acts that are inherently unfair or objectionable. Characterizing nepotism in this way avoids the preliminary concern elucidated above and also creates space for the possibility of permissible nepotistic activity.

It leaves open the possibility that nepotism can involve favoring a member of one's social network for a particular good from a position that is *internal* to the institution where the good will be realized, as well as using one's power or influence from a position that is *external* to the target institution. In either case, one utilizes one's social position and network to influence a distribution within the relational scope specified. I may, for example, have no special ties to a particular institution in which my friend hopes to work but, upon reflection, recall that a relative does and request that they do our bidding. If my membership of this extended social network then influences the decision to award

10 Harré, *Social Being*, 98. This definition is also congruent with other definitions of institutions in contemporary sociology. See Giddens, *The Constitution of Society*, 31; and Turner, *The Institutional Order*, 6.

11 One may question why the family is not listed as a relevant institution. Though the family can be understood as a kind of social institution, no one considers families to be subject to open competition for the roles within them, and they also lack the formal, interlocking double structure alluded to. Aside from the fact that it would be odd to describe gift giving within families as nepotism, it is also reductive to think of families as having particular and well-defined productive or expressive aims.

12 We may, for instance, have good reasons to scrutinize the partiality that parents express towards their own children whenever they lavish them with financial resources and exacerbate inequality as a result. But in spite of some structurally analogous features, such activity could not faithfully be described as nepotism.

my friend a high-paying job, I will have used my social network to influence decision-making in a way that constitutes nepotism.[13]

The working definition does not attempt to fix, as a constant, the set of reasons that may serve to explain why an agent favors a member of their social network for some good or why one utilizes their influence or power to obtain advantages in the ways discussed.[14] Instead, the latter clause of the working definition acknowledges that one's membership of the relevant network must positively influence the distribution of some good without attributing particular agential reasons—that is, reasons upon which agents purportedly act—as part of an explanatory narrative.[15] Membership of the relevant network must contribute (directly or indirectly) to generating a decisive reason in favor of the distribution, but the working definition is noncommittal as to *why* membership of a particular social network generates reasons for action. While it may be quite natural to think that nepotism entails agents acting upon agent-relative reasons to favor a particular person, group, or relationship, I encourage readers to set this assumption aside. For those unconvinced by this approach, contemplate the following rebuttal.

First, consider how institutions are largely defined by their *raison d'être*. This encompasses the purpose (productive or otherwise) that an institution exists to fulfill and defines an institution's role in society.[16] A particular *raison d'être* (or institutional purpose) therefore determines the particular processes or roles that are necessary to achieve the relevant ends. If an institution is to operate in a way that optimizes its pursuit of a particular end, then people with abilities, traits, or qualifications of the relevant kind are required to fulfill particular roles, and weighting of the relevant considerations is determined with reference to

13 Although the involvement of multiple agents within a social network raises questions about who is acting nepotistically or bears ultimate liability, I remain silent on questions of culpability here. In this paper, I assume that multiple agents can act nepotistically together in ways set out by the working definition even when only one individual has the authority to make a nepotistic decision.

14 It is for this reason that I refer to nepotistic activity rather than nepotistic partiality so as to leave open the possibility that nepotism may be motivated or explained by something other than a reason of partiality. For more on motivating, explanatory, and normative reasons, see Alvarez, "How Many Kinds of Reasons?"; and Hieronymi, "Reasons for Action."

15 Following Constantine Sandis, agential reasons are understood here as considerations that constitute "purported facts about the world: things *that* we believe" and may be faulty or motivated by dispositions that the agent is unaware of. See Sandis, "Verbal Reports and 'Real' Reasons," 267.

16 Or, in the words of Emanuela Ceva and Maria Paola Ferretti, "the *raison d'être* of an institution comprises the normative ideals that motivate its establishment and, consequently, its internal structure and functioning" (*Political Corruption*, 23).

the institution's purpose. In this respect, the considerations that support hiring one sous chef over another for work within a Michelin-starred kitchen are likely to differ significantly from the selective criteria deployed within an international fast-food outlet.

As we shall see, however, an institution's purpose is sometimes constituted by a productive, associative, occupational, or expressive aim that falls within the relational scope specified. In cases where an institution is created with the purpose of furthering the interests of a particular association or where the presence and visibility of a particular social network is crucial to realizing an institution's productive purpose, considerations like "*X* is a family member" might prove relevant, though defeasible, to selection. In cases of the latter kind, agent-relative reasons may or may not be present or coextensive with agent-neutral considerations of a meritocratic nature. Though this complicates things, I believe that we can reasonably regard such practices as nepotistic because these institutions, in one way or another, exemplify the practice of "keeping it in the family." In other words, they are organizations that are closely intertwined with the special relationships that populate them, with a modus operandi that excludes or disadvantages outsiders. Nepotism can therefore be "baked" into the structure of an institution such that nepotistic practices promote the institution's stated purpose and no longer appear arbitrary.[17]

Second, suppose that our working definition constrained the sphere of nepotistic activity to cases in which a distributor's agential reason for favoring a relative for some good (e.g., the decision to hire them) is an agent-relative consideration (e.g., love for a daughter) such that they distribute nepotistically whenever they act upon reasons of partiality. Though this definition captures what we might call a "classic" case, it risks excluding others that ordinary judgments would deem nepotistic due to a difference between the underlying cognitive states that explain the decision and the agent's purported reasons for action. People can be mistaken about what reasons they *actually* have to perform various actions, as is the case when an agent's love for their daughter obfuscates an impartial assessment of the daughter's ability to adequately perform a particular role. In such cases, the employer's agential reason may be the agent-neutral consideration that their daughter merits the position, but unbeknownst to the employer, their special relationship has clouded their judgment.[18] Again, I believe that we can reasonably regard such cases as examples of

17 This is not to suggest, however, that such decisions are not necessarily morally arbitrary, as we may still struggle to justify them all things considered.

18 Here, one could argue that explanatory agent-relative reasons to favor a social network member provide the relevant standard instead of agential reasons. There are, however, problems with this approach. Firstly, a definition that appeals to particular explanans

nepotism even though there seems to be an element of misfortune concerning the agent's underlying cognitive states and purported reasons for action.[19]

Where membership directly influences the decision to favor distributing some good, I refer to cases in which the decision to distribute is not mediated by a third party who may or may not possess any social ties to the agents involved. It is therefore possible for a distributor to engage in nepotistic activity even when the decision to distribute is outsourced to or mediated by a third party. This illuminates another structural feature of nepotism. A restauranteur, for example, might use their position to institute a familial ethos and market their restaurant as an authentic, family-run business. Where the realization of an institution's stated purpose hinges upon the presence or visibility of the family in question, a third-party recruiter may recommend the employment of the restauranteur's relatives. Here, membership of the relevant network indirectly influences the decision to distribute nepotistically through meritocratic criteria determined by the institution's purpose.

Within the working definition, the term 'goods' is used to refer to an expansive group of comparative advantages that include but are not limited to jobs or educational places, material or immaterial rewards and benefits, the devotion of time or effort, and awards that denote some sense of merit or achievement. For brevity, I limit my focus here to the paradigmatic practice of nepotistic hiring and selection for advantageous positions. This includes paid or unpaid employment, as well as educational places and other positions that are typically thought to be subject to open competition.[20]

Before proceeding any further, I anticipate and address some potential confusion regarding this essay's objective. By considering what makes nepotism

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must contend with the insurmountable task of capturing every possible factive explanation of why a given agent acted nepotistically. Secondly, a comprehensive explanation of an agent's reasons for a nepotistic distribution might reveal both agent-relative and agent-neutral reasons. Finally, it seems plausible to say that we have higher-order, *de dicto* agent-neutral reasons to act partially whenever this would promote whatever is impartially best. What should be clear is that encumbering our working definition with a specific explanatory narrative is liable to create more problems than it solves and risks instantiating an underinclusive definition of nepotism.

19 One might object that the working definition should instead be constrained to include all underlying mental states that motivate agent-relative reasons, irrespective of an agent's cognizance of them or the reasons they purport to act upon. Though such a definition offers a theoretical improvement on the constrained definition given above, it is still problematic in cases where agent-relative reasons may not be present or coextensive with agent-neutral considerations and is less apt for use within the real world due to the inaccessibility of mental states that play a motivational role.

20 Though I hope that some of the forthcoming discussion will also help to contribute to a better understanding of what justice might require in these other contexts as well.

wrong, I intend to draw attention to a distinction between permissible and impermissible nepotistic activity, designating the impermissible as activity that *could* be the appropriate target of coercive policies or noncoercive norms. In other words, it is a requirement of justice that we do not engage in impermissible nepotistic activity. This is not to suggest, however, that acts of permissible nepotistic activity may occur without any concern whatsoever or that they are necessarily morally admirable.[21] On the contrary, we might think that the world would be a better place if fewer people engaged in permissible nepotistic activity even if a move to proscribe such activity would struggle to find adequate justificatory support. The idea, then, is to evaluate existing objections to nepotism and consider the extent to which we should accommodate the relevant practices.

Finally, as I stated above, I shall be evaluating existing objections to nepotism that are internal to distinct conceptions of distributive or social justice, with a view to assessing the extent to which they meet the aforementioned desiderata. But as I also alluded to, nepotism is rarely subject to any thoroughgoing normative investigation, and I take this to be one reason among many for further inquiry in this area. Consequently, one might worry whether the ensuing critical analysis is liable to misconstrue the purpose of the various theories interrogated by measuring their success against external criteria that they were not developed to satisfy. In response to this worry, I want to clarify that I shall approach each of the following objections charitably, with awareness of the fact that they exist as part of distinct imperatives or conceptions of justice rather than comprehensive accounts of the wrong of nepotism. As such, it is worth prefacing the following discussion with an acknowledgement of the fact that the authors discussed here might entertain alternative ways of understanding nepotism's permissibility in an all-things-considered sense, even if their treatment of the issue is potentially misleading. That being said, the fact that so few theories exist that directly deal with the problem of nepotism in a more substantive sense should only strengthen the case for developing a distinct and more comprehensive account.

## 2. ACCOUNTS OF THE WRONG OF NEPOTISM

### *2.1. Collective Goods, Corruption, and Efficiency*

People often object that nepotism is both inefficient and corruptive of institutions. If nepotism involves favoring a member of one's social network for some

21 Nor is it to suggest that a requirement of justice necessarily entails state action, for it might be incumbent on institutions and the individuals within them to adopt just practices in cases where state intervention is undesirable or infeasible.

good within an institutional setting, then this will curtail efficiency whenever the selection of unqualified candidates undermines production of the relevant ends. There are many ways in which this concern with efficiency might be moralized through the lens of institutional corruption.[22] Seumas Miller offers one such account, which suggests that a collective moral responsibility exists to produce the goods that individuals have a right to.[23]

Miller refers to these goods as collective goods, and they are best understood as the ends that institutions directly or indirectly contribute to the provision of by means of joint activity. Miller considers these goods to be distinct insofar as they are objectively desirable, either because they contribute to the fulfillment (or means to fulfillment) of needs-based rights (e.g., a right to sustenance) or because they secure other moral rights (e.g., a right to life).[24] On this account, collective goods provide the underlying normative telos for all institutions and a universal standard against which their efficiency is assessed.[25] Institutional corruption is therefore understood as "an instance of a kind of act that has a tendency" to have the effect of undermining the provision of some collective good; and nepotism has such a tendency because it "flies in the face of principles of merit."[26] Impermissible nepotistic activity is characterized as a form of corruption that *tends* to undermine the production of goods to which individuals have a right.[27] The thought underpinning this account is that many

22 For an illuminating critical overview of competing theories, see Ceva and Ferretti, *Political Corruption*, 45–71, 82–94. I focus on Miller's account here, given his extended treatment of nepotism and the predominance of consequentialist views of corruption. Though Ceva and Ferretti's intriguing public duty–centered account of corruption provides a nuanced alternative (81–124), it applies only to public institutions and so cannot make sense of impermissible nepotism in the private sector. I also worry whether it is too formal and dialogical in its scope for it to be able to determine impermissible nepotism independently of the dialogical engagement it calls for between role-occupants.

23 Miller, *Institutional Corruption*, 23–46.

24 Miller, *Institutional Corruption*, 34–35.

25 This is coupled with a rejection of the shareholder theory of value, which equates efficiency with profit maximization. By Miller's lights, the pursuit of profit may constitute a proximate goal for an institution or sector but should ultimately be a means to the end of providing an "adequate and substantial quantum of some good." Miller, *Institutional Corruption*, 234. I share Miller's skepticism to the extent that excessive profiteering is often profoundly corruptive of the aims that we think various institutions ought to realize or be assessed by. The sale of toxic financial products leading to the 2008 global financial crash or the conduct of privately owned utility companies in the UK provides empirical support for this skepticism and casts doubt on the view that businesses operating within free markets will self-regulate in order to optimize the achievement of these aims.

26 Miller, *Institutional Corruption*, 82, 110, 112.

27 Miller, *Institutional Corruption*, 112.

institutions are involved in the renewal of goods that contribute to fulfilling various pre-institutional and institutional moral rights. Nepotism, qua corruption, is therefore objectionable whenever the inefficiencies associated with it curtail a sufficient distribution of the goods necessary to fulfill these rights.[28]

To take a straightforward but illustrative example, many converge on the thought that the state and its institutions have the fulfillment of basic needs and other moral rights as their primary purpose. A pre-institutional right to life, for example, might be thought to ground an institutional moral right to health care provision. The right to health care is instituted in various countries, and on Miller's view, this provides the relevant institutions with an institution-dependent standard of merit. If hospitals are to operate efficiently, then various roles within them must be filled by individuals with the kinds of abilities that promote the relevant ends. Frontline medical staff must have the relevant training and temperament, and contracts awarded to third parties should contribute to the sufficient provision of health care at reasonable cost to taxpayers. When government officials and internal stakeholders exploit a lack of scrutiny to award lucrative contracts to friends or relatives who are not suitably qualified, the resultant inefficiencies undermine the institution's capacity to satisfy the correlative rights. In such cases, those who occupy positions of authority subvert procedures designed to secure the relevant ends and wittingly act in ways that undermine the provision of collective goods.[29]

Whatever schedule of rights one endorses, Miller's teleological account of institutional corruption provides us with an account of the wrong of nepotism that is relatively intuitive. Where nepotistic selection involves a deviation from the relevant meritocratic considerations, institutional inefficiencies are liable to follow, and it seems prudent to condemn these inefficiencies on the grounds that they curtail the provision of goods to which individuals have a right. Given the relationship between institutions and the production of collective goods, Miller's account also provides flexibility, since one needs only to connect the insufficient fulfillment of some right with nepotistic activity in order to acknowledge the threat that it poses. Despite this, we might wonder whether it

28 It is worth noting that Miller appears to endorse a sufficientarian view of distributive justice, given his appeal to basic needs in various places. See Miller, *Institutional Corruption*, 34–36, 38, 43, 44.

29 The fact that institutional actors wittingly engage in such activity is important for Miller's characterization of corruption, and he deems such activity to impugn the moral standing of those who participate in it. For corruption to occur, it is not sufficient that some institution experiences degradation of one kind or another. Indeed, the curtailment of collective goods that is wholly the product of a lack of funding or mere incompetence is instead understood as institutional corrosion because it does not involve the corruption of persons *qua* role-occupants. See Miller, *Institutional Corruption*, 66.

risks unduly narrowing the scope of impermissible nepotistic activity. Indeed, I contend that such an account struggles to elucidate a convincing explanandum in cases where nepotism does not undermine the provision of collective goods but is nevertheless concerning. To illustrate this, consider the following case in which there are no *prima facie* rights to the ends that an institution aims to produce vis-à-vis a particular institutional role.

> *Research*: It is an open secret that a university hiring committee considers only individuals with favorable personal connections for a prestigious and privately funded research fellowship in philosophy. Successful candidates either have favorable personal relationships with committee members or are able to obtain references from academics who do. Candidates who are members of the "right" social networks and who meet the role's basic requirements are considered, whereas the applications of otherwise qualified but less well-connected candidates are overlooked. Membership of the right social network is indicative of nothing more than one's social capital and does not signify any aptitude for philosophical research. Holders of the fellowship are prohibited from teaching and instead focus their efforts on the pursuit of a research agenda.

Unless one thinks that individuals possess a right to philosophical research of a particular quality that the nepotism in Research undermines, such a case presents us with an example in which the provision of collective goods is not curtailed by nepotistic activity. As a corollary, there appears to be no corresponding obligation to select the best qualified, and the committee may enjoy a prerogative to hire nepotistically. If, like me, you suspect that the nepotism in Research is impermissible, then Miller's account fails to explain this suspicion and risks delineating the permissibility of nepotism in an unconvincing way.

This, however, may move too quickly. Recalling Miller's appeal to tendency, we might first consider whether potential instances of corruption are subject to a probabilistic assessment of their tendency to undermine the provision of collective goods. Aside from the practical difficulties of delivering assessments of this kind, this interpretation of the appeal to tendency says nothing of cases like Research where suboptimal role performance *never* directly results in the curtailment of collective goods. Instead, we might consider whether the reiteration of nepotistic practices across the university would curtail the provision of collective goods at a certain frequency. The thought here might be that Miller's appeal to tendency constitutes a kind of universalizability claim. On this interpretation, nepotism is impermissible if it would have impermissible effects when universalized as a practice within an institution. If the hiring practice in Research were institutionalized, nepotism would indeed threaten to

undermine the provision of plausible collective "academic" goods that the university makes available. Nepotistic activity that is insufficient to produce these effects is therefore impermissible, and this interpretation of Miller's appeal to tendency appears to explain why.

Though this interpretation supports the judgment that the nepotism in Research is impermissible, it lacks explanatory force because it fails to identify any wrong that does not supervene on the hypothetical consequences that would result from universalization.[30] If we think that the nepotism in Research is suspect even when considered in isolation, then we might hope for an account that not only accommodates this concern but adequately explains it. In any case, Miller's comments on the permissibility of nepotism in certain circumstances casts doubt on this interpretation of his appeal to tendency, since this leaves open the possibility that nepotism may be permissible even if it would have impermissible effects when universalized.[31] Ultimately, Miller tells us why it might be a good idea to design a regulatory framework that prohibits nepotistic practices as a rule of thumb but fails to inform us as to why a particular instance of nepotistic activity is wrong in isolation from reiterated patterns of the requisite frequency.[32] If we deem the nepotism in Research impermissible but do not want to bite Miller's bullet on tendency, then this gives us reason to reconsider the account as an explanandum of what makes nepotism wrong.

Moreover, we might think that any account that relies solely on the appeal to collective goods will either unduly limit the impermissibility of nepotism or risk positing an implausibly large schedule of rights that institutions ought to fulfill. It is reasonable to follow Miller in saying that universities have as their

30 The universalizability interpretation of the appeal to tendency also fails in cases where we think a particular instance of nepotism is permissible but would have impermissible effects when institutionalized as a practice.

31 I am unsure of what Miller means more precisely when he appeals to an act's tendency to corrupt. At one point, he states that corruptive acts are ones that "tend to undermine institutional processes, purposes, or persons … or, at least, tend to do so, if they are performed frequently, by many institutional role occupants or by those in the upper echelons of institutions" (68). Though this seems to give credence to the interpretation above, it is in tension with the view he endorses elsewhere that favoring friends or relatives for positions may be permissible in specific circumstances. See Miller, *Institutional Corruption*, 110, 112, 115.

32 Miller proceeds to state that "in some cases of independently performed corrupt actions, the action type in question might not even constitute corruption if only one person performed one token of it since in that case its institutional effect would be negligible. … An infringement of a specific law or institutional rule does not in and of itself constitute an act of institutional corruption. In order to do so, any such infringement needs to have an institutional *effect*, e.g., to defeat the institutional purpose of the rule" (*Institutional Corruption*, 69, 70).

purpose "the acquisition, transmission, and dissemination of knowledge, both for its own sake as well as for the multifarious benefits that such knowledge brings to the wider community."[33] Reasonable also is the claim that individuals have a right to some of the goods that universities make available. Less convincing, however, is the suggestion that individuals have a right to a particular quality of philosophical research, which the nepotism in Research undermines.

More generally, it can be said that accounts that appeal to some notion of efficiency struggle to provide a comprehensive explanandum for this reason. Considered in isolation, the concern with efficiency, though pertinent, overlooks other concerns of normative significance that regularly feature in our condemnation of objectionable nepotistic activity. Though inefficiency is often a by-product of nepotistic hierarchies and corruption, the practices that perpetuate them are often considered to be distinctly unfair and are sometimes thought to constitute a kind of wrongful discrimination. Miller's approach consequently struggles to delineate the permissibility of nepotism in cases where such activity has a negligible institutional effect or appears to promote an institution's productive purpose. As we shall see below, businesses operating within competitive markets sometimes posit ends within the relational scope specified by the working definition. In such cases, nepotism will help rather than hinder productivity, simply by virtue of the institutional purposes that render nepotistic considerations relevant to selection.

A satisfactory response to Research may therefore avoid any appeal to collective goods, and Miller hints at such an objection when he states that nepotism risks breaching institutional duties "as they ought to be."[34] This implies, I think, the existence of an argument for selecting the best qualified that is not wholly dependent on a moralized concern with efficiency and the renewal of collective goods. Since many institutions and occupations do not have the provision of these goods as a primary purpose and "nor should they," there may be some independent justification for selecting the best qualified that avoids the worries discussed.[35]

### *2.2. Fairness, Merit, and Equal Opportunity*

Perhaps then, a more compelling account of the wrong of nepotism appeals not to inefficiency but to unfairness. Though benefits to productivity provide a rationale to eschew efficiency-curtailing nepotism in favor of meritocratic selection, the notion that we ought to equalize opportunities for advantageous

33 Miller, *The Moral Foundations of Social Institutions*, 225.

34 Miller, *Institutional Corruption*, 112.

35 Miller, *Institutional Corruption*, 36.

social positions provides another that receives considerable support. Following Rawls, contemporary conceptions of equal opportunity are typically comprised of two guiding principles.[36] The principle of merit dictates that opportunities for positions should be subject to open competition and selective procedures designed such that they identify the best-qualified candidates, who compete under the same rules.[37] The principle of substantive opportunity requires that we "level the playing field" and aims to neutralize or mitigate the effects that one's starting place may have on one's access to advantageous positions.

One thought guiding these principles is the idea that it is unfair for some to be worse-off due to factors outside of their control.[38] Another is that an unequal distribution of positions requires special justification if it is to persist without concern. For this justification to be met, the competitive process should be procedurally fair, and everyone should have sufficiently good access to the means necessary to do well in such competitions. As T. M. Scanlon puts it, a "requirement of justifiability is not met if desirable positions in society are not 'open' to all members, regardless of the family into which they are born."[39] A justificatory rationale of this sort underwrites contemporary conceptions of equal opportunity and requires positions to be meaningfully open to all who wish to compete for them.[40] But if one is unable to access these positions because access is contingent upon membership in favorable social networks, then this distribution falls foul of the commitment to open positions that advocates of equal opportunity take so seriously. The objection to nepotism from fairness therefore captures an important but familiar concern regarding the distribution of advantageous positions.[41]

Though nepotism presents a qualitatively distinct problem to expressions of bigotry like racism or sexism, proponents of equal opportunity may view

36 Rawls, *A Theory of Justice*, secs. 11, 12, 14.

37 Mason, *Levelling the Playing Field*, 15–16; and Scanlon, *Why Does Inequality Matter?* 40–52.

38 Though the distinction between choice and circumstance is a contentious one, it appears to be a central concern on many views. See Rawls, *A Theory of Justice*, 63; Temkin, *Inequality*, 13; Scheffler, "What Is Egalitarianism?" 5; and Mason, *Levelling the Playing Field*, 89–111. It is worth noting that Rawls rejects the more thoroughgoing interpretation of this idea familiar to theories of luck egalitarianism in *A Theory of Justice*, 86–87.

39 Scanlon, *Why Does Inequality Matter?* 56.

40 For a similar iteration of this idea, see "Rules for a Fair Game" in Buchanan, *Liberty, Market and State*.

41 Advantageous positions need not be objectively desirable or attached to a relatively high level of renumeration in order for them to be advantageous on my view. Since both unemployment and underemployment exist in all societies, a position may be advantageous insofar as it grants material or immaterial rewards that are otherwise unavailable to the unemployed or those unsuccessful within the relevant competitions.

each as permitting distributive shares to be improperly influenced by "factors so arbitrary from a moral point of view."[42] Instead, an unequal distribution of positions should be justified by reasons that are relevant to the particular positions in question. Appeals to one's race, sex, or social network are considered objectionable insofar as they are irrelevant considerations that do not support the resulting distributions.[43] Scanlon offers an argument of this kind when he claims that inequality-generating institutions should select for positions "on grounds that are 'rationally related' to the justification for these positions . . . to the ways in which these positions promote the purposes of the institutions of which they are a part."[44] This requires positions to be filled in a procedurally fair manner by individuals with abilities, traits, and characteristics (hereafter qualifications) of the relevant sort and constitutes the formal requirement of the principle of merit.

We may now provide a principled objection to the nepotism in Research that better captures our intuitive unease while avoiding the issues that Miller's account presents. Contemporary accounts of equal opportunity provide compelling reasons to reject nepotistic selection practices and the hierarchies they generate on the grounds that individuals ought to have equal opportunities to compete for the goods that a different social position would afford. One may therefore object to the nepotistic hiring in Research on the grounds that such a practice violates a procedurally fair implementation of the principle of merit. When the hiring committee overlooks candidates placed in unfavorable social networks, they not only fail to operate impartially but select for reasons that are not rationally related to the justification for the position.[45] Nepotistic distributions may also violate the principle of substantive opportunity in cases where access to the qualifications necessary to attain positions is influenced by one's membership in a particular social network.[46] In this respect, nepotism

42 Rawls, *A Theory of Justice*, 63.

43 Scanlon, *Why Does Inequality Matter?* 43; and Jacobs, *Pursuing Equal Opportunities*, 10.

44 Scanlon, *Why Does Inequality Matter?* 42.

45 I use Scanlon's phrase 'justification for the position' and 'institutional or occupational purpose' interchangeably as both constrain the qualifications relevant to performing a particular role effectively. Admittedly, like Rawls, Scanlon also has in mind the array of benefits that would result from the institutionalization of meritocratic practices. Nevertheless, this suggests that every institution has some productive (or other) purpose and that this purpose should constrain the reasons that can be given in favor of a candidate's selection.

46 Substantive opportunity is understood here as having access to a "sufficiently good education for developing one's talents and sufficiently good conditions for choosing what talents to develop" (Scanlon, *Why Does Inequality Matter?* 65). On some views, this principle is interpreted as ensuring roughly equal prospects of success given similar talents and a

not only risks falling foul of the formal requirement that institutions distribute positions impartially with respect to some institution-dependent criteria but undermines the substantive requirement when the playing field is tilted towards those privileged with membership in advantageous social networks.

So far, I imagine that this account of the wrong of nepotism will strike many as relatively intuitive and perhaps even decisive. However, this approach runs into problems of its own once we begin to interrogate the concept of a qualification and its relationship to an institutional or occupational purpose. Though meritocratic conceptions of equality of opportunity need not appeal to any notion of collective goods in order to elucidate the wrong in cases like Research, they must still appeal to some institutional or occupational purpose that constrains the reasons that can be given in favor of selection. The thought here is that we ought to give weight to only those qualifications that positively contribute to some purpose, since it is only these qualifications that can justify the resulting selection when everyone has sufficient access to the means necessary to compete for the relevant positions. It is this feature of contemporary conceptions of equal opportunity that induces an obstacle to delineating the permissibility of nepotism in cases where nepotistic hiring appears to satisfy the formal requirement discussed. To illustrate this, consider the following case in which an institution's purpose appears to legitimate the selection of family members in a manner consistent with the principle of merit.

> *Café*: Maria is the owner and manager of a modest but successful café that has been within her family for three generations. The café prides itself on being a family business and has been intimately tied to its local community for a century. In an oversaturated market, the café's familial ethos provides a competitive edge as customers enjoy family recipes and react positively to family members performing various roles. Maria is nearing retirement and must choose someone to succeed her as manager. Maria selects her daughter Roberta over candidates with greater technical expertise because the café's success is predicated on its familial legacy and because she trusts Roberta as a custodian of the business.

In Café, membership of a social network positively influences the distribution of a position, and this presents theories of equality of opportunity with a

willingness to use them (Rawls, *A Theory of Justice*, 63), though many advocates of equal opportunity now propose a less demanding interpretation of this principle that seeks to mitigate rather than neutralize the effects of one's starting place. See Mason, *Levelling the Playing Field*, 134–57; and Scanlon, *Why Does Inequality Matter?* 65–67.

complex puzzle.[47] Such cases prompt us to view considerations like "being a relative" as meritocratic reasons for selection in scenarios where the presence and visibility of these special relationships "promote the purposes of the institutions of which they are a part," to return to Scanlon's phrasing.[48] Cases like Café raise the puzzle of *reaction qualifications* identified by Alan Wertheimer, whereby employer, employee, or client (hereafter recipient) reactions to personal characteristics appear to contribute to a meritocratic justification for selection.[49] Though ordinary meritocratic judgments typically appeal to what one might regard as "technical" qualifications, further examination of the attributes relevant to the distribution of positions reveals a much broader range of considerations.

Not everyone, for instance, is able to cultivate the kind of charisma that might make one a successful salesperson, and yet a recipient's reaction to this characteristic seems both permissible and appropriate. Acknowledgment of reaction qualifications is perhaps necessary, then, if we are to decide which candidate will best promote an institution's purpose. Candidates have good reaction qualifications as a result of possessing those "abilities or characteristics which contribute to job effectiveness by causing or serving as the basis of the appropriate reaction" and bad reaction qualifications whenever these traits

47 This presupposes that the relevant principles of equality of opportunity may apply to both the public and the private sectors, or at the very least, this leaves the scope of these principles open to further debate. I take it for granted here that advocates of contemporary conceptions of equal opportunity subscribe to the view that formal equality should apply in both sectors, as narrowing the scope of this requirement to the public sector will trivialize the commitment to equal opportunity and permit egregious forms of discrimination in the private sector that are typically thought to be impermissible. Moreover, if one takes the commitment to substantive opportunity seriously, then one has reason to be concerned about a society in which nepotistic hiring is prevalent, since the relevant practices effectively bar outsiders from gaining the qualifications or experience necessary to climb the socioeconomic ladder.

48 One might think that a more obvious explanation of the permissibility of nepotism here can be provided by appealing to the fact that Maria owns the business and therefore enjoys the power to transfer ownership, hire whomever she likes, and so on. I deal with a resolution of this kind to the problem of reaction qualifications towards the end of this section, but for now, it is worth noting that this merely begs the question in favor of the status quo arrangement of property rights and that an appeal to these rights is not usually considered to justify racist or sexist violations of equal opportunity in selection. It strikes me that most egalitarians would reject the view that owning a business entitles one to distribute positions in discriminatory ways, and I think that these practices are in part deemed to be objectionable because they contravene equality of opportunity. Insofar as nepotism poses a similar but qualitatively different threat from the perspective of equal opportunity, the relevant practices ought to generate concerns of a similar nature.

49 Wertheimer, "Jobs, Qualifications, and Preferences."

undermine job effectiveness.[50] Although our assessments of reaction qualifications appear benign at first, we may wonder whether it is always permissible to count nepotistic reactions as part of a meritocratic assessment given the way their appraisal risks excluding others.

Enlarging the scope of what might legitimately count as a qualification to include such considerations seems to be at odds with the commitment to open positions that contemporary conceptions of equal opportunity presuppose. From the perspective of substantive opportunity, it matters not only that individuals are able to enter a procedurally fair competition for a position but that they have access to the means "required to develop the abilities required for that career."[51] Once, however, we recognize considerations like being a relative as potentially meritorious features, then some positions will cease to be meaningfully open when there is no feasible way of equalizing access to the means necessary to acquire these traits.[52] Given that access to the relevant networks is not only arbitrary but exclusive by definition, the nepotism in Café illuminates a tension between meritocratic selection and the commitment to open positions that the spirit of equal opportunity encapsulates.

At this juncture, one might be tempted to accept nepotistic reactions that are rationally related to an institutional or occupational purpose, just as one accepts the relevant technical qualifications. One could, for instance, permit the nepotism in Café and cases like it on the grounds that we have reasons to accept the relevant inequalities whenever they are necessary to achieve productive advantages.[53] Scanlon posits a rationale of this kind when he states that a distribution of unequal positions is ultimately "justified by the beneficial consequences that will result if they are filled by individuals with certain abilities."[54] As such, equal opportunity "does not require that everyone, talented or not, should be able to attain these positions," and so rejecting the untalented, as defined by an institution's purpose, is "not unfair, or a form of discrimination."[55]

50 Wertheimer, "Jobs, Qualifications, and Preferences," 100.

51 Wertheimer, "Jobs, Qualifications, and Preferences," 65.

52 Some suggest that social capital can be redistributed in order to attend to issues concerning integration and distributive injustice. Irrespective of whether one endorses the equalization of opportunities for social capital, integrationist policies, or the redistribution of relationships themselves, these solutions strike me as unlikely to redress problematic nepotism. Even if we are able to move towards a more egalitarian distribution of social capital, this would do nothing to ameliorate nepotistic tendencies, and we will still be left with social networks that are more or less advantageous. Cf. Anderson, *The Imperative of Integration*; and Cordelli, "Justice as Fairness and Relational Resources."

53 Scanlon, *Why Does Inequality Matter?* 151.

54 Scanlon, *Why Does Inequality Matter?* 42.

55 Scanlon, *Why Does Inequality Matter?*

Perhaps, then, the acknowledgment of nepotistic reactions poses no greater worry for equality of opportunity than the kind of meritocratic discrimination that its guiding principles ordinarily presuppose, and we should hire whomever would promote an institution's purpose on the grounds of the resultant productive advantages. If rejecting the untalented is consistent with equality of opportunity, then counting nepotistic reactions as qualifications may be somewhat exclusionary but of no principled difference to selection on the basis of unearned native endowments. Just as some people will be unable to qualify for some family businesses in this way, others will be unable to acquire the technical qualifications that might make one a proficient neurosurgeon or concert pianist. On this view, there is no objection from equal opportunity to the unfortunate fact that some are born without the native endowments that might qualify them for advantageous positions, and so, similarly, there should be little discomfort regarding the acceptance of nepotistic reactions.[56]

This rebuttal fails to convince, however. Firstly, it is difficult to motivate the unconditional acceptance of *any* reaction, and an unconstrained appeal to efficiency attempts just that. Surely, sexist reactions cannot legitimately count against hiring women simply because the relevant dispositions might render sexist hiring productive. This untempered approach is equally problematic when applied to nepotism, as it would legitimate all positive reactions to members of one's social network irrespective of the context in which they arise.[57] This has led all those who have engaged with this puzzle to converge on

56 Though importantly, on Scanlon's view, "if an institution is organised in a way that requires those occupying a role to have a certain ability, but could serve its purposes just as well if it were organised in a different way … then equality requires that it makes this change, because giving preference to candidates who have this ability is unjustified" (*Why Does Inequality Matter?* 46). Here, Scanlon has in mind a job that currently requires the use of physical strength that most women lack but that could easily be completed with the use of mechanical aids. Unfortunately, Scanlon fails to elucidate his view any further, so it is unclear whether he would deem a shift from "family café" to "café" a change in purposes. I assume here that he would, as such a move would curtail the freedom of institutions to pursue particular ends of a particular quality and an agent's occupational choice. Both premier league and nonleague football teams, for example, have the purpose of playing competitive football for entertainment, but it would be odd to think that equal opportunity prohibits the former from giving preference to players who are more athletic, skilled, experienced, and so on.

57 It might be thought here that one could simply distinguish between these reactions on the grounds of offensive and inoffensive preferences. Though this goes some way towards a more viable response, it still provides no means of distinguishing the permissibility of nepotistic reactions and purposes in different contexts.

Wertheimer's view that "the correct solution is to count some, but only some reaction qualifications."[58]

Secondly, though the nepotistic hiring in Café is relatively benign and perhaps permissible, benefits to productivity may fail to fully explain why, even when they are present. To elucidate this, consider that benefits of this kind may be present in much larger economic or social institutions whenever the relevant recipients are disposed to react positively to individuals within the relational scope specified. Surely, however, there are limits to the ends that institutions can adopt that render these considerations relevant and to the reactions that might legitimate nepotistic hiring. Granting prerogatives to hire nepotistically whenever doing so offers marginal returns on productivity is liable to result in the kind of closed labor market that advocates of equal opportunity are so keen to avoid. Moreover, in some of these cases, the resultant productive advantages are merely contingent upon people adopting nepotistic preferences or ends that coincide with an unwillingness to work as efficiently with strangers. This is objectionable not only because it may culminate in fewer meaningfully open positions but also because it is partly sustained by a kind of inegalitarian ethos.[59]

More, then, needs to be said about how we might balance the freedom of institutions to count nepotistic reactions or pursue nepotistic purposes against the commitment to open positions that embodies the spirit of equal opportunity. Dismissing nepotistic reactions entirely risks instituting a less plausible interpretation of the principle of merit and seems somewhat incongruent with our acceptance of qualifications that result from native endowments. At the same time, the unconditional acceptance of efficiency-conducive nepotistic reactions risks trivializing the commitment to openness that advocates of equality of opportunity take so seriously. Pursue the former approach, and small family businesses may struggle to be commercially viable or valuable to the individuals involved. Pursue the latter approach, and one's access to social capital is likely to have an outsized influence on one's ability to attain advantageous positions. The objection to nepotism from equal opportunity is therefore too restrictive if we discount nepotistic reactions entirely, but too permissive if we accept them simpliciter.[60] What is required, then, is a principled way of

58 Wertheimer, "Jobs, Qualifications, and Preferences," 102. See the chapter "The Desert of the Best-Qualified" in Mason, *Levelling the Playing Field*; the chapter "Reaction Qualifications" in Lippert-Rasmussen, *Born Free and Equal?*; and the chapter "Appearance as a Reaction Qualification" in Mason, *What's Wrong with Lookism?*

59 G. A. Cohen formulates a well-known objection of this kind to Rawlsian incentive inequality in *Rescuing Justice and Equality*, 27–87.

60 The worry here is that accepting nepotistic reactions without constraint trivializes the commitment to equality of opportunity and renders the conception impotent. In developing

constraining the kinds of nepotistic reactions and institutional purposes that appear to render nepotistic reactions relevant to selection.

One thought here is that there might be some salient feature present in cases like Café that ought to make a normative difference in our assessment of nepotistic reactions or institutional purposes. We might, for example, differentiate between selectors who act as representatives of a larger collective, as is the case with a university, and those who act on their own behalf.[61] When selectors act on their own behalf, such as when a business owner is deciding who to employ, we might think it is permissible for them to defer to the idiosyncratic preferences of recipients when determining the best qualified, since they are free to determine the ends that the institution pursues and the best way of realizing them. By contrast, agents acting on behalf of a larger collective should disregard idiosyncratic preferences and instead base their decisions on the aims identified by the relevant body. If one has the power to act independently when selecting for positions in practice, then such a response suggests that one ought to enjoy the correlative normative authority discussed.[62] We might suppose this to be the case for the following reasons.

Firstly, when acting on behalf of a larger collective, selectors may not possess the authority to make decisions based on various stakeholders' idiosyncratic preferences, and role-based duties are often designed in ways so as to ensure impartiality and mitigate personal discretion. A university employee typically has limited influence over the overarching goals pursued by the institution as a whole and cannot substitute their own idiosyncratic preferences or aims for those that the larger collective deems to contribute to its institutional purpose. In contrast, the small business owner in Café has the authority to determine the institution's purpose and may decide how this purpose is best realized.

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theories of equality of opportunity, philosophers have sought to move away from societies that are stratified by caste, race, sex, familism, and so on. But if it turns out that selectors can satisfy the requirements of such a conception by positing institutional aims that count nepotistic reactions as qualifications, then any form of nepotism, no matter how egregious, arbitrary, or unfair, would be hypothetically consistent with the principle of merit. Allowing nepotism to operate unchecked under the guise of meritocratic norms familiar to conceptions of equality of opportunity therefore risks perpetuating the very structures that these philosophers find so concerning. Somewhat ironically then, a rationale of this kind could be used to justify nepotistic hierarchies in which social capital is the primary currency of exchange.

61 Kasper Lippert-Rasmussen tentatively suggests a distinction of this kind when discussing the permissibility of nepotistic reaction qualifications and idiosyncratic preferences in *Born Free and Equal?* 248.

62 I use the term 'power' here to refer to the legal powers one enjoys as part of a Hohfeldian framework of rights. See Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning."

We might suppose this to be the case insofar as rights of ownership grant powers to set in place an institutional purpose that legitimates nepotistic reactions. The owner is free to characterize the business as a "family café" and institute a familial ethos by employing relatives, serving authentic family recipes, and so on. Where small business owners have such authority, they also have the power to transfer ownership or reorganize institutional practices and purposes such that considerations like being a relative are no longer relevant. On such a view, then, the authority to define the ends that an institution pursues generates a prerogative to hire nepotistically whenever the idiosyncratic preferences that render nepotistic reactions relevant are rationally related to the institution's stated purpose. In such cases, a selector may therefore count the fact that a recipient has a preference for a certain candidate or their individual characteristics as a qualification.[63]

One upshot of this response to the puzzle raised by nepotistic reactions is that it seems to yield the intuitive judgment that the nepotism in Café is permissible but impermissible in Research. Another is that it *loosely* tracks a more general distinction between the public and private sector and so rightfully excludes more egregious attempts to justify nepotism in the public sector via the principle of merit.[64] In this sector, selectors are often subject to various layers of governance, and institutional purposes are defined collectively in ways that ought to align with some objective that is in the public interest. In my view, it is rightly taken for granted that selectors operating within these institutions cannot redefine their purposes ad hoc such that nepotism could be justified meritocratically. Doing so would be likely to ride roughshod over other layers of governance, role-based duties, and the institution's purpose as defined by some objective that is in the public interest.

Importantly, this response imposes constraints on institutional purposes and nepotistic reactions while providing some freedom in the definition of these purposes in order to accommodate cases like Café. It does so by grounding the normative authority to count nepotistic reactions in the power one enjoys within some organizational structure. Though granting such authority may be crucial if various businesses are to operate in ways that ensure their commercial success or realize values important to their participants, such an approach encounters the following difficulties.

63 Lippert-Rasmussen, *Born Free and Equal*, 248.

64 I consider this to be more egregious because of the significant interest that the public has in the operation of these institutions and because efficiency-curtailing nepotism in the public sector may be liable to undermine the provision of various entitlements or involve the misappropriation of public funds.

Firstly, a nontrivial commitment to open positions surely requires more than this response would realize, even if the degree of "openness" required is subject to debate. Supposing that this account loosely tracks a more general distinction between the public and private sectors, it strikes me that it would be too permissive of nepotism in the latter. Though most modern economies are mixed, many desirable positions within the private sector are distributed by selectors who act on their own behalf, and so granting the correlative normative authority discussed may result in a society dominated by nepotistic hierarchies. Even when reactions appear irrelevant in a more objective sense, agents acting on their own behalf will be able to rationalize them as relevant meritocratic considerations by positing a set of aims that count nepotistic reactions as qualifications. If the purpose of equality of opportunity is to equalize access to economic advantage and mitigate the influence that one's social network has on the relevant opportunities, then such an approach to the puzzle raised by nepotistic reactions falls worryingly short.

Secondly, a laissez-faire approach to nepotistic reactions in some businesses may also be objectionable from the perspective of efficiency. Elsewhere, Miller's comments on economic interdependence illuminate just how significant businesses operating within competitive markets are to achieving various public goods.[65] The idea here is relatively straightforward: we rely on various sectors not only to produce the goods necessary to fulfill various entitlements but to provide the means to fulfillment through paid work, taxable revenue, and economic exchange. As such, there might some expectation that these businesses not only act in ways that are congruent with a meaningful commitment to open positions but operate efficiently to ensure some contribution to the renewal of other goods.[66] If granting the aforementioned normative authority results in significant inefficiencies, then this is liable to produce negative externalities that undermine economic interdependence and the provision of entitlements.

Ultimately, though such an approach provides a proverbial step in the right direction, the conclusion that we should grant prerogatives to select

65 Miller, *Institutional Corruption*, 44.

66 This is just to say that there are moral reasons to promote efficiency within these institutions, but I stop short of adopting the stronger view that private institutions are necessarily under an obligation to do so. One might, however, consider whether markets will self-regulate in order to optimize outcomes and if businesses might avoid practicing nepotism as a consequence. I am unable to treat this issue in detail here, but I should say that I am skeptical of this idea given the prevalence of inefficiency-curtailing nepotism. For example, Francisco Pérez-González's study of three hundred chief executive officer successions found that in over a third of the cases, the incoming officer had familial ties to the person being replaced, and these successions were associated with a decline in institutional performance. See Pérez-González, "Inherited Control and Firm Performance."

nepotistically whenever some agent enjoys the authority to define what aims the institution pursues risks begging the question. Merely referring to the authority that some agents currently enjoy as a result of some combination of legal powers hardly seems to justify the institutionalization of nepotistic practices amid complaints of unfairness or inefficiency. If anything, the fact that many agents currently exercise such authority and practice nepotism with impunity only sharpens the need for a more compelling distinction in the face of potential injustice.

Here, one might be tempted to caveat this normative power with deference to the idea of fairness or collective goods, such that it is permissible to count nepotistic reactions only when they do not undermine the former or the latter. But the appeal to collective goods struggles to clearly delineate the permissibility of nepotism for reasons already discussed, and there do not appear to be any resources internal to conceptions of equal opportunity that might aid the creation of a more satisfactory distinction. Since what is up for discussion is the permissibility of nepotism and nepotistic reactions or purposes in the face of equality of opportunity, referring back to the idea of unfair advantage to constrain nepotistic reactions only raises the puzzle once more. Set the bar too high, and any prerogative to engage in nepotistic activity becomes inaccessible. Set the bar too low, and we risk trivializing our commitment to open positions. Though the objection from fairness raises an important concern that a comprehensive explanandum should acknowledge, the appeal to equality of opportunity alone offers a lot less clarity than might be expected.

### *2.3. Wrongful Discrimination and a Respect for Autonomy*

The preceding accounts of the wrong of nepotism are predicated on particular kinds of distributive complaints—namely, that nepotism is objectionable whenever it interferes with a just distribution of collective goods or opportunities for advantageous positions. Though these accounts raise genuine concerns, the preceding discussion illustrates that they struggle to draw a clear distinction between permissible and impermissible activity. The objection to nepotism from wrongful discrimination constitutes an alternative to the aforementioned distributive approaches and draws our attention to the ways in which certain decisions account for features of a person and their exercise of autonomy.

One approach of this kind, forwarded by Benjamin Eidelson, identifies a failure to treat people as individuals as an important component of wrongful discrimination.[67] Though Eidelson's account does not target nepotism specifically, it motivates an objection to nepotism whenever decision-making involves

67 Eidelson, "Treating People as Individuals."

a failure to (1) acknowledge the ways in which people have exercised agency when forming judgments about them or (2) respect an individual's capacity for agency when making predictions about their choices.[68] Given its relevance to nepotism in the distribution of positions, I focus here on 1. To contextualize this claim, recall the case of Research and consider how the decision to favor those with special ties to the committee is liable to overlook the ways in which other candidates have exercised agency to attain the relevant qualifications. As such, the committee fails to give "reasonable weight to evidence" of the ways in which these applicants have exercised agency to shape their lives even though "this evidence is reasonably available and relevant to the determination at hand."[69] As Eidelson makes clear, treating people as individuals "is not a matter of fairness" but should move us to treat each individual in a way "that befits someone with that feature—whatever it is."[70] The hiring committee therefore fails to equally acknowledge each individual's exercise of agency when forming judgments about who to hire.

Conversely, Sophia Moreau explicitly designates nepotism as a "form of discrimination" that may infringe an individual's right to deliberative freedom.[71] Moreau characterizes people who lack deliberate freedom as individuals who lack "the space to become the people whom they want to be."[72] This freedom matters in the context of selection for advantageous positions, since differential treatment in this domain is likely to generate certain opportunity costs or burdensome constraints that curtail the "opportunity to shape our lives in our own way, through our own deliberations and decisions."[73] Regarding the nepotism in Research, Moreau may argue that such practices impinge an individual's deliberative freedom whenever their social network (or lack thereof) imposes deliberative costs or constraints that meaningfully affect the "opportunity to *do* the thing that [they] may decide to do."[74]

This is not to suggest, however, that discrimination on the basis of technical qualifications presents a similar obstacle for deliberative freedom when everyone has sufficient access to the means necessary to attain them. Though decisions to attain particular qualifications impose deliberative burdens, they are "burdens that each of us can legitimately be asked to bear ourselves, since

68 Eidelson, "Treating People as Individuals," 205.

69 Eidelson, "Treating People as Individuals," 216.

70 Eidelson, "Treating People as Individuals," 209, 210. Here, Eidelson alludes to Stephen Darwall's notion of recognition respect in Darwall, "Two Kinds of Respect."

71 Moreau, *Faces of Inequality*, 115.

72 Moreau, *Faces of Inequality*, 87.

73 Moreau, *Faces of Inequality*, 87–88.

74 Moreau, *Faces of Inequality*, 88.

*everyone* must bear them."[75] Burdens imposed by nepotistic practices are therefore considered to be objectionable insofar as they are ones that encumber only individuals who lack social capital, just as racist practices burden only particular ethnic groups.[76] If it is an open secret that one is only able to attain certain positions when situated within favorable networks, then this will unequally distribute deliberative burdens in ways that align with membership of disadvantageous networks. Those who lack social capital will come to see their social networks as imposing costs or constraints that hamper their deliberative freedom and hence their agency. Use of the adage "it is not what you know, but *who* you know" to deter one's pursuit of a particular career or dampen ambition illustrates the extent to which nepotism induces deliberative burdens of the kind discussed. The more prevalent nepotistic practices are in any given society, the more one's family status and lack of social capital is put "before one's eyes" as a trait that imposes costs and deliberative burdens.[77]

Though Moreau and Eidelson's accounts are distinct in various ways, the thread central to each of them is the idea that nepotism may sometimes constitute a failure to treat others as individuals who are equally capable of autonomy.[78] When institutions distribute goods nepotistically, they risk failing to take seriously those aspects of a person that are unique to them, and insofar as these practices exist, they may be likely to curtail the freedom to pursue certain careers without having to treat one's network as a burden. Indeed, the acquisition of particular qualifications for a specific position is sometimes a lifelong endeavor, while one's occupational pursuits represent a significant domain of choice in which the ideals of autonomy and self-authorship are particularly salient. In this respect, we may interpret these accounts as giving rise to two distinct objections from wrongful discrimination that are predicated on the value of autonomy. The first prompts us to consider whether decisions to distribute certain goods nepotistically are congruent with equal respect for and recognition of individual autonomy. The second evokes consideration of the

75 Moreau, *Faces of Inequality*, 91.

76 It is perhaps worth noting here that where social segregation exists between different ethnic groups and where some of these groups are already disadvantaged in other ways, nepotism is likely to amplify intersectional disadvantages. Nepotistic practices can therefore compound various forms of disadvantage, further marginalizing those who already face other kinds of injustice. In such a world, it may therefore be the case that nepotistic practices exacerbate inequality between different ethnic groups. This is an important point, though one that merits consideration beyond what I am able to provide here.

77 Moreau, *Faces of Inequality*, 84.

78 Moreau, *Faces of Inequality*, 89–98; and Eidelson, "Treating People as Individuals," 205, 209–10.

ways in which nepotism might curtail one's deliberative freedom and the ability to shape one's life through autonomous choices.

On first look, it appears as though a wrongful discrimination account might avoid the complications raised by the preceding accounts. Unlike the appeal to collective goods, for example, nepotism on this type of account need not produce any significant institutional effects in order for it to be considered objectionable. Furthermore, such an account might raise concerns about cases that we deem to be normatively suspicious even when claims of unfairness are absent. Given the lack of any detailed discussion of nepotism by either author, I now briefly consider both objections from wrongful discrimination in more general terms and illustrate the complications they face.

In Café, it appears as though the overlooking of candidates with greater technical expertise, coupled with Maria's comparative distrust of outsiders, could render the nepotism impermissible on both views, if certain conditions are met. Firstly, the trust Maria places in her daughter as a reliable custodian may be objectionable if this judgment results from a generalized distrust of outsiders that constitutes a failure to treat people as individuals. Additionally, there may be some unease regarding the weighting of technical qualifications relative to nepotistic reactions given the way in which one usually exercises agency to acquire them. It is less clear, however, that counting nepotistic reactions is necessarily incongruent with a respect for individual autonomy. After all, the special relationships that we choose to cultivate or maintain are important parts of our identities as individuals, and reactions to these relationships certainly seem relevant to the determination at hand in Café. Here, one might question the extent to which such considerations are relevant to the distribution, but this only recapitulates the puzzle associated with the principle of merit discussed above. Another complexity this objection faces regards both inter- and intrapersonal assessments of agency: we give greater credence to our exercise of agency in certain domains, and this itself is subject to a great degree of interpersonal variation. Though a failure to treat people as individuals identifies a distinctive element of discrimination, such an account stops short of clarifying a distinction that clearly delineates nepotism's permissibility.[79]

Alternatively, we might consider whether the nepotism in Café infringes a right to deliberative freedom when those excluded come to see their social networks as constraints that hamper future deliberations. Certainly, such a complaint might not arise in a world where such cases are few and far between, but

79 On this point, Eidelson agrees, stating that his account "does not suffice to work out the concrete demands of respect for individual autonomy in particular cases, much less . . . when a given act of discrimination is or is not wrong all things considered" ("Treating People as Individuals," 227).

the veracity of this concern is strengthened in a labor market where nepotism is prevalent. Despite this, one's claim to deliberative freedom "depends both on the importance to them of this deliberative freedom; on the nature of the interference with it (that is, the fact that it stems from other people's assumptions about them); and also on the interests of the other people who are affected."[80] The strength of the objection to nepotism from deliberative freedom therefore depends upon careful consideration of the significance of the choice interfered with and the countervailing interests that might justify the infringement. This delicate balancing act is perhaps best captured by Moreau's statement that "we live our lives, not just as beings capable of autonomy, but as beings capable of autonomy *who live among other such beings*."[81]

Where the infringement on deliberative freedom is marginal, but the interests promoted by nepotistic practices are significant, there may therefore be room for nepotism even when it is motivated by objectionable assumptions about those who lack social capital. This presents us with a potentially nuanced approach but falls shy of detailing whether any interests that nepotism promotes are sufficient to defeat the interest in deliberative freedom. In cases like Research, where countervailing interests are insignificant or absent entirely, and one's lack of social capital is squarely "before one's eyes," the objection from deliberative freedom may justify proscribing the practice. Cases like Café, however, present a challenge for such an approach, and further argumentation is required to show the insignificance of deliberative freedom in this context against a credible set of interests that the practice promotes.

More generally, though these accounts identify important objections to nepotism that are grounded in a respect for autonomy, some broader problems remain for these approaches even if the preceding challenges are successfully addressed. As already suggested, one might wonder whether characterizing nepotism as a form of discrimination risks rendering the protectorate of discrimination implausibly large.[82] Indeed, it strikes me as odd to regard those overlooked in either Research or Café as victims of discrimination, irrespective of what we think about each practice's permissibility.[83] Admittedly, this may be in part due to our familiarity with antidiscrimination laws as a means to protect

80 Moreau, *Faces of Inequality*, 95.

81 Moreau, *Faces of Inequality*, 92.

82 Cécile Laborde would be sympathetic to a critique of this sort on the grounds that the protectorate of discrimination should be delimited with reference to socially salient groups who are victims of structural injustice. See Laborde, "Structural Inequality and the Protectorate of Discrimination Law."

83 Given the way both Eidelson and Moreau set out their views, I take it to be the case that failing to treat people as individuals or curtailing deliberative freedom in ways that are

victims of racism, sexism, and other forms of bigotry as a matter of primacy. That said, designating nepotism as a form of discrimination risks collapsing a meaningful distinction between the idiosyncratic preferences that often perpetuate it and more egregious expressions of prejudice.[84]

In view of this worry, Moreau stresses that she understands nepotism as a kind of discrimination "coupled with a set of other, unrelated wrongs" such as an abuse of authority or the failure to select meritocratically.[85] It is difficult, however, to see how these other wrongs might aid the delineation of a more meaningful distinction given the frequency with which they intersect with disadvantageous differential treatment stemming from either prejudice or idiosyncratic preferences. Furthermore, the appeal to both authority and merit also fails to give greater clarity to nepotism's permissibility amidst the complications discussed above. We cannot characterize a nepotistic practice as an abuse of authority until we have a clear picture of the purpose being corrupted and the powers those selecting ought to have when determining the different purposes that might render nepotism relevant to selection. Moreover, the preceding discussion illustrates that nepotism does not necessarily conflict with a plausible, reaction-inclusive interpretation of the principle of merit. Consequently, it looks like a wrongful discrimination account of nepotism falls short of providing a convincing explanandum, and it is not clear how one might overcome the challenges elucidated here. Despite this, the appeal to autonomy that grounds the objections discussed here certainly raises an important concern, which I shall reconsider in a different light below.

## 3. A WAY FORWARD?

Let us briefly take stock. Miller provides us with a plausible starting point for thinking about the impermissibility of nepotism. Justice requires the fulfillment of various rights, and institutions are crucial organizations that contribute to the fulfillment of our basic needs and protect or satisfy other rights. Given that nepotism typically involves deviating from relevant meritocratic considerations, nepotistic practices tend to curtail institutional efficiency and undermine the production of goods to which individuals have rights. This prompts the intuitive thoughts that there are moral reasons to promote institutional efficiency and that nepotism, qua corruption, is wrong whenever it directly

unequally burdensome constitutes discrimination even if it is not wrongful discrimination all things considered.

84 Elsewhere, Lippert-Rasmussen levels a similar criticism of Moreau's appeal to deliberative freedom. See Lippert-Rasmussen, *Born Free and Equal?* 189.

85 Moreau, *Faces of Inequality*, 115.

or indirectly undermines an arrangement sufficient to fulfill a particular set of moral rights. Whatever one might think of Miller's teleological account of institutions, this suggestion holds some force, and the account is malleable in its application. However, Miller's account falls short because it lacks adequate coverage and yields indeterminacy: it fails to identify any wrong in cases where the production of collective goods is not threatened and struggles to delineate the permissibility of nepotism in the cases discussed.

Advocates of equality of opportunity offer a potential solution while capturing a familiar objection to nepotism. Efficiency aside, meritocratic selection provides us with a procedurally fair way to distribute positions of advantage, provided that access to the relevant qualifications and competitions are sufficiently open. Nepotistic distributions therefore exacerbate inequality of opportunity whenever they conflict with the principle of merit or substantive opportunity. Though this provides us with an explanandum that extends beyond the moralized concern with efficiency, it falls prey to the puzzle of reaction qualifications.[86]

An attempt has been made to solve this puzzle by differentiating between selectors who act on their own behalf and those who ought to act in accordance with the ends determined by a larger collective. This, however, fails to motivate a normative distinction between these institutions that does not beg the question in favor of existing legal powers and risks trivializing the commitment to open positions. For one thing, it is unclear why being able to act on one's own behalf should entitle one to distribute goods nepotistically on the basis of idiosyncratic preferences. Many larger enterprises, for example, appear to be led by individuals who possess this authority even if they are sometimes beholden to shareholders and other layers of governance. But the mere fact that some corporate leaders are able to act independently hardly seems to justify the correlative normative authority, and this worry extends to cases involving smaller businesses. The concern here, as suggested already, is that this prerogative leaves us with a laissez-faire approach to equal opportunity and hiring practices.

In contrast to the aforementioned approaches, Eidelson and Moreau's accounts motivate an objection to nepotism from wrongful discrimination that is grounded in a respect for autonomy. Eidelson's account instructs us to give reasonable weight to evidence of the ways in which an individual has exercised their autonomy to shape their life. Nepotistic distributions that fail this condition of treating people as individuals may therefore be objectionable

86 Given Miller's appeal to meritocratic selection as a means to achieve collective ends, his account is also subject to the same worry.

and potentially impermissible. For Moreau, nepotism may infringe a right to deliberative freedom whenever someone comes to see their social network as an opportunity cost or as a meaningful constraint on future deliberations. However, whether this right is upheld and the nepotism proscribed depends upon the importance of the deliberative freedom in question and the interests of those who would be affected by proscription.

As we saw, however, both objections face a number of complexities. Indeed, it is open ended as to what, exactly, a respect for autonomy demands in the context of selection and whether any interests that nepotism promotes are sufficient to defeat a *pro tanto* right to deliberative freedom. Moreover, it is unclear if the language of discrimination is truly apt when referring to those disadvantaged by nepotism, and one might question whether Moreau's characterization renders the protectorate of discrimination implausibly large. Despite this, the appeal to autonomy underlying these accounts identifies a morally significant concern and may help orient consideration of the interests that nepotism promotes. As such, I find these approaches to provide a less compelling characterization of the wrong of nepotism even though the appeal to autonomy is worth considering further.

Notwithstanding, though each of the aforementioned accounts identifies a forceful objection to nepotism, they fail to satisfy the desiderata identified at the beginning of this paper. Taken on their own terms, each account not only fails to fully capture nepotism's wrong-making features but also falls shy of delineating a convincing distinction between permissible and impermissible activity. Consequently, we are unable to determine what makes nepotism wrong when it is wrong with any confidence, and a significant range of nepotistic activity is consigned to a normative grey area. In many ways, this result might be unsurprising, as other than Miller, none of the authors discussed here address the question that concerns this essay in any detail, and this appears to be representative of a more general failure to take nepotism seriously as a normative phenomenon. It does, however, confound a thought that many readers might have originally shared—that a convincing answer to this question is easily attainable and explained by one or more of the approaches discussed. To this extent, I hope that I have been successful in illustrating the difficulty of the task at hand as well as the internal limitations that each of the preceding accounts face.

It is worth, however, briefly considering whether a more holistic approach might succeed where other accounts have failed. So far, I have evaluated different accounts of the wrong of nepotism that intersect with particular requirements of distributive or social justice and argued that they struggle to provide a plausible explanandum of what makes nepotism wrong when it is wrong. It

is my contention that this shortcoming partly results from the fact that these approaches overlook other concerns of normative significance in lieu of articulating a particular theoretical framework. Indeed, the preceding discussion illustrates the need for an account that is able to accommodate the anatomy of objections to nepotism presented while balancing competing claims or interests relevant to the decision in question. The first challenge, then, is to consider the reasons for and against proscription in various cases. The second and more difficult challenge requires finding a principled way of balancing these competing interests if we are to come to an all-things-considered account of nepotism's permissibility. To conclude, I tentatively explore how these challenges might be addressed and lay the groundwork for an interest-balancing account that goes some way to addressing the problems identified.

Regarding the first challenge, it should be clear that we have forceful objections to nepotism whenever it interferes with an institution's ability to fulfill some basic right or undermines equality of opportunity. Though both objections fall short of painting a fuller picture of nepotism's wrong-making features, they may provide a more comprehensive explanandum when taken together. At the same time, a satisfactory explanandum must also articulate a set of constraints on the ends that institutions can legitimately promote. Moreau aside, each of the aforementioned accounts endorses an institution-dependent standard that regulates decision-making in the distribution of positions.[87] Here, the relevant grounds for selection are determined by aims internal to the institution in question, and this gives shape to a justification for the distribution that aligns with the institution's *raison d'être*. However, as the discussion of nepotistic reactions most clearly evinces, there are reasons to be wary of an account that fails to pay special attention to the ways in which a justificatory mechanism of this kind might legitimate problematic nepotism. Certainly, institutions and the agents within them must be granted a considerable degree of freedom if they are to operate efficiently or in ways that are valuable to the individuals involved, and a more productive arrangement is also in the public interest whenever everyone shares in the resultant benefits.

With this in mind, it is reasonable to suggest that there ought to be limits to the ends that institutions are able to pursue and to the potentially exclusionary reactions that legitimate selectors' decisions. Just as the institutional adoption of racist or sexist ends is not considered to legitimate prejudicial decision-making, there ought to be constraints on the kinds of ends or reactions that appear to render nepotistic considerations relevant to selection. Indeed, a nontrivial

87 Or more precisely in the case of Eidelson, a requirement to attend to the considerations that are relevant to the determination at hand.

commitment to equality of opportunity requires ensuring that positions are meaningfully open to all who wish to compete for them. Though there sometimes appears to be a meritocratic justification for nepotism given the presence of certain reactions and institutional ends, this ought to be tempered by a substantive commitment to open positions if the spirit of equal opportunity is to be acknowledged. Indeed, in a world where institutions are largely free to pursue exclusionary ends or count reactions of any kind, this commitment rings hollow. In such a world, people may still be able to apply and compete for positions through some impartial procedure, but this opportunity is rendered meaningless in scenarios where favorable social relations constitute qualifications of the relevant sort.

On the other hand, it strikes me that the absolute proscription of nepotism would be not only infeasible but objectionable for a number of reasons. In cases like Café, it seems plausible to suggest that the institution enjoys a prerogative to select nepotistically not only because this promotes the relevant ends but because proscription of the relevant practices is likely to curtail weighty interests in the freedom of association and occupational choice. These interests are perhaps best thought of as being grounded by a respect for autonomy and evoke consideration of the fact that individuals value not only opportunities for advantage in the abstract but specific opportunities to engage in certain kinds of work and within institutions that are characterized by distinct associative or occupational goals.[88] In this respect, treating people as individuals who are equally capable of autonomy requires a broader consideration of the liberty interests at stake and the ways in which our exercise of agency might intersect with the world of work. The idea familiar to liberal theory that these basic liberties sometimes take precedence reflects the intuition that some aspects of our lives are more intimately tied to our individual identities and hence to the projects, beliefs, or associations that embody the ways in which we choose to author our lives.[89]

Regulatory measures that frustrate our ability to think, associate, or express ourselves freely are thereby taken to be a greater and sometimes illegitimate constraint on the ways in which we can exercise agency, even if this exercise disrupts distributive equality. These interests in personal liberty are heightened in cases where people are working in close quarters and may be accompanied by a special interest in engaging in productive labor of a certain kind with those whom we have special relationships with. Whenever these interests are present

88 Regarding the importance of meaningful and purposeful work, Andrea Veltman and Russell Muirhead both allude to the fact that most of us spend a significant proportion of our lives working. See Veltman, *Meaningful Work*, 5; and Muirhead, *Just Work*, 1.

89 Cohen, *Rescuing Justice and Equality*, 200; and Rawls, *A Theory of Justice*, sec. 11.

and particularly significant, we feel the pull towards granting the prerogative in question even if this is at odds with the spirit of equal opportunity or an egalitarian interest in efficiency. Whenever they are weak or absent entirely, we might be skeptical of the idea that we should legitimate exclusionary ends or count nepotistic reactions, especially when doing so would curtail distributive equality.

Regarding the second challenge, I suggest that a resolution can be sought by considering how we might balance interests in equal opportunity and efficiency against the aforementioned associational and occupational interests in personal liberty. There seems, for instance, to be something reasonable about the familiar claim that nepotism may be less objectionable within the context of some small businesses and enterprises where a particular quality or form of collaboration is sought. This intuition may largely be explained by the morally significant interests that would be curtailed in the event of proscription and the lesser aggregative strain imposed by nepotism on either the distribution of opportunities or sufficient provision of goods to which we have rights.[90] To take something of a parallel, many believe that religious institutions should enjoy a partial exemption from antidiscrimination laws and liberal norms of equality.[91] In the context of selection, I contend that these exemptions are justified by a contextual balance of the morally significant interests that would be undermined when the aforementioned policies are enforced and the potential strain granting the prerogative would impose on the labor market. In cases where nepotism risks inefficiencies or bias of the kind that would directly threaten some fundamental right, such as a right to health care provision or a fair trial, the lack of any credible liberty interests and presence of weighty countervailing interests justify coercive proscription.

Returning to Café, one may wonder whether there is a similar puzzle at work when the institution is distinctively characterized as a "family café" so that being a family member is now a relevant qualification for the position. We could posit further that the café aims to realize this end by preserving its familial legacy, reproducing family recipes, and maintaining the family's longstanding association with the local community. Such a characterization renders nepotism consistent with meritocratic selection, provided that positive nepotistic reactions are sufficient to override considerations of technical expertise or experience. However, in these cases, there is a clear tension between the claim that positions should be substantively open to people, on the one hand, and the

90 I thank Stuart White for the helpful suggestion of the term 'aggregative strain'.

91 See Laborde, *Liberalism's Religion*, 197–242; Rawls, *The Basic Liberties and Their Priority*, vol. 3; Gaus, *Justificatory Liberalism*, 175; Koppelman, "A Rawlsian Defence of Special Treatment for Religion"; Patten, *Equal Recognition*, 136; and White, "Freedom of Association and the Right to Exclude."

unique aims or ends posited by an institution that effectively bar large swathes of the population from competing for a position, on the other hand. Clearly, a balance needs to be struck between keeping positions effectively open to as many candidates as possible and the freedom of institutions (and agents within them) to pursue the particular ends that constitute their *raison d'être*.

Such an approach could give rise to a convincing distinction between the permissible and impermissible without trivializing the egalitarian interest in open positions or efficiency. In cases where any negative impact on the latter commitments is marginal or proscription redundant, one may justifiably engage in nepotism, provided that the institution can be demonstrably shown to promote the aforementioned interests. This makes space for the kind of close collaboration that many might hold dear while avoiding overly burdensome constraints on the ways in which people might choose to engage in productive labor with others. An evaluation of this kind would require an objective assessment of the institution in question, and this, of course, brings forth complexities of its own. Nevertheless, it provides plausible grounds on which we might adjudicate the permissibility of nepotism given a reasonable balance of the interests at stake while maintaining a burden of proof that would illegitimate much of the nepotism that currently pervades the labor market.

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# MEANINGFUL LIVES AND MEANINGFUL FUTURES

*Michal Masny*

WHAT MORAL REASONS, if any, do we have to prevent the extinction of humanity? Various answers to this question have been proposed in the literature. For example, we may have reasons grounded in the interests of the final generation: many ways in which we could become extinct would involve intense suffering, premature death, or despair from knowing that it all ends with us.[1] Other candidate reasons relate to the significance of the past: our disappearance would bring an end to many valuable cultural artefacts that might be worth preserving for their own sake.[2] Still other considerations are rooted in what lies ahead of us: there may be trillions of happy people in the future, and our demise would prevent them from coming into existence.[3] But none of these views has universal appeal.

In his 2023 article "Unfinished Business," Jonathan Knutzen proposes another, hitherto neglected reason to care about the continuation of our tenure:

> Roughly, the idea is that certain further developments in culture would be good, and that extinction would be bad insofar as, and because, it closes off the possibility of realizing these further developments.[4]

These "developments in culture" include progress on or completion of telic collective endeavors (i.e., those endeavors that involve definable goals and collaboration between people), such as the project of science. According to Knutzen, such developments would be "good" in the sense that they would be "collectively meaningful." The key innovation here is the idea that the goodness of a state of affairs is determined not only by values such as aggregate welfare or equality but also by its collective meaningfulness—a value that is a collective analogue (and not merely the aggregate) of the meaningfulness of individual

1 See Scheffler, *Death and the Afterlife*.

2 See Frick, "On the Survival of Humanity"; and Scheffler, *Why Worry About Future Generations?*

3 See Parfit, *Reasons and Persons*; Bostrom, "Astronomical Waste"; Ord, *The Precipice*; and Greaves and MacAskill, "The Case for Strong Longtermism."

4 Knutzen, "Unfinished Business," 5 (hereafter cited parenthetically).

lives. Notably, this account is not meant to imply that our extinction would always be bad. If humanity had never engaged in the project of science or if we were to someday complete it, Knutzen suggests, these "meaning-based reasons" would not apply.

Knutzen frames his discussion as an attempt at an interpretation of a sentiment, expressed earlier by Jonathan Bennett, that it would be unfortunate if some of humanity's "important business" were left unfinished.[5] In this paper, however, I would like to set the interpretative project aside and to critically assess the idea that we have meaning-based reasons to prevent the extinction of humanity on its own merits.

Such an assessment would ideally encompass two issues. The first is whether we should recognize collective meaningfulness as a novel dimension of value, one that is analogous to individual meaningfulness. The second is what follows for matters related to extinction if we do. Here, I address the second issue. The first topic requires a longer discussion than I can afford here, and Knutzen's remarks already confer substantial plausibility on the concept of collective meaningfulness.

Perhaps the most influential account of individual meaningfulness has been articulated by Susan Wolf.[6] Wolf holds that the overall goodness of a person's life is determined not only by its welfare (that is, the subject's experiences, the satisfaction of their preferences, or the presence of various objective goods) but also by how meaningful that life is. On her view, meaning in life "consists in and arises from actively engaging in projects of worth."[7] In other terms, a person must sufficiently care about some project, that project must be objectively valuable, and one must actively engage in that project instead of just passively recognizing its value. Both welfare and meaning are genuinely reason giving: we should want welfare in our lives, and we should want meaning too. Wolf's view is also what Knutzen appears to be inspired by, as evidenced by the discussion on pages 10–12 of his article and the fact that it is the only view of meaningfulness that Knutzen explicitly mentions.

Against this background, I would like to examine what follows for matters pertaining to the prospect of extinction if collective meaningfulness is analogous to individual meaningfulness as articulated by Wolf. My contention is that the picture that emerges from these considerations is, in several important respects, different from the picture that emerges from Knutzen's discussion.

5 Bennett, "On Maximising Happiness."

6 Wolf, "Happiness and Meaning," *Meaning in Life and Why It Matters*, and "The Meanings of Lives."

7 Wolf, *Meaning in Life and Why It Matters*, 26.

In particular, our meaning-based reasons turn out to apply to a wider range of circumstances in which humanity could have found itself or may one day face than Knutzen acknowledges. And they turn out to have a similar profile to welfare-based reasons, to which Knutzen wants to offer an alternative.[8]

## 1. What are the meaning-conferring projects?

According to Wolf, meaning in life arises from actively engaging in objectively valuable projects. Her definition of projects is liberal and encompasses "not only goal-directed tasks but other sorts of ongoing activities and involvements as well."[9] Still, three kinds of endeavors are especially prominent: "creating art," "adding to our knowledge of the world," and working towards "improvement in human or animal welfare."[10] As she points out, when we look for exemplars of meaningful lives, the names that first come to mind are "Mother Teresa, or Einstein, or Cézanne."[11] Indeed, even those philosophers who reject some aspects of Wolf's view tend to share the sentiment that archetypical meaningful lives are those in some way oriented towards (as Thaddeus Metz puts it) "the good, the true, and the beautiful."[12]

If individual and collective meaningfulness are analogous, as I want to assume for the purposes of this discussion, then collective meaning arises from humanity engaging in corresponding objectively valuable *collective* projects. These projects presumably include various large-scale endeavors aimed at creating art (e.g., the construction of Sagrada Família in Barcelona, set to be completed in 2026, over one hundred and forty years after the first stone was laid); expanding knowledge (e.g., the development of the Large Hadron Collider, the world's largest and most powerful particle accelerator, which enabled the discovery of the Higgs boson); and improving human and animal welfare (e.g., the abolition of slavery and the adoption of the Universal Declaration of Human Rights).[13] A future in which people continue to engage in such projects would be collectively meaningful, and it is plausible that we have a

8 While my discussion focuses on Wolf's "hybrid" theory of individual meaningfulness, it should be straightforward to see that at least some of the same conclusions follow from a variety of objectivist and subjectivist theories as well. For an overview of the literature, see Metz, "The Meaning of Life."

9 Wolf, "The Meanings of Lives," 95.

10 Wolf, *Meaning in Life and Why It Matters*, 36–37.

11 Wolf, *Meaning in Life and Why It Matters*, 11.

12 Metz, "The Meaning of Life."

13 I think that such projects need not be universally shared to give rise to collective meaning.

reason to prevent humanity's extinction insofar as and because it would close off that possibility.

Knutzen's discussion focuses on collective projects oriented towards "the True." He argues at length that "it would be meaningful for humanity to make further progress in science" (11) and suggests that the corresponding meaning-based reasons to continue our tenure are "terminal" (13). In particular, if humanity one day completes the project of science, there will no longer be a corresponding meaning-based reason to prevent our extinction.

Some of Knutzen's remarks can give the impression that in his view, the reasons grounded in the importance of making further progress in science exhaust our meaning-based reasons to prevent the extinction of humanity. For example, he writes that "ensuring that people do not go hungry is not a reason to keep the human story going, whereas finding out whether there is intelligent life elsewhere in the universe might be such a reason" (6). But even if that is not Knutzen's considered view, it is still worth asking whether *all* meaning-based reasons to prevent the extinction of humanity are terminal.

If collective meaning arises from engaging in nontelic or moral collective projects such as creating art or ensuring that people are treated with respect and have decent lives, then not all meaning-based reasons to prevent our extinction are terminal. To be sure, particular artworks can be completed, as I hope Sagrada Família will be soon. But this magnificent structure is just a manifestation of our continued engagement with the project of artistic creation. Likewise, while slavery has been outlawed in most countries, it is still practiced more or less covertly in many parts of the world, and even just upholding current laws and norms requires sustained effort on our part. And because these projects are not terminal, neither are the meaning-based reasons to keep the human story going that they give rise to. This is the first way in which meaning-based reasons are less contingent than Knutzen's discussion makes them seem.

## 2. DOES PRIOR ENGAGEMENT MATTER?

A vital aspect of Wolf's account is that meaning in life is valuable in a genuinely reason-giving way. For example, a person who is not engaged in any valuable projects or does not sufficiently care about her projects has a reason to regret her situation.[14]

But meaning in life does not give us reasons just to hold certain attitudes. It also gives us reasons for action. According to Wolf, a person who is living a

14 Wolf, "The Meanings of Lives," 99.

meaningless life has a reason to do something about it, and we have reasons to promote meaning in the lives of others, too:

> It is part of an enlightened self-interest that one wants to secure meaning in one's life, or, at any rate, to allow and promote meaningful activity within it.[15]

> Recognizing that meaningfulness is a dimension of a good life distinct from happiness, and that meaning arises when subjective attraction meets objective attractiveness will give parents a reason to expose their children to a range of worthwhile activities and projects to which they might be "subjectively attracted" (that is, about which they might get passionate).[16]

These considerations are important for understanding the scope of meaning-based reasons to prevent extinction. To see that, suppose that humanity had never engaged in any valuable collective projects oriented towards "the True," "the Good," or "the Beautiful." In this counterfactual scenario, there are no active attempts to arrive at a systematic understanding of the universe, no ongoing artistic practices, and no efforts to make the world a better place. Instead, our species plods along in a state of "hazy passivity," a collective equivalent of the meaningless life of Wolf's "Blob."[17]

If collective meaningfulness is analogous to individual meaningfulness, then in such circumstances, humanity would have a reason to initiate meaning-conferring collective projects. In virtue of this, we could also have a reason to prevent extinction insofar as the continuation of our tenure would give us opportunities to engage in relevant endeavors and make our history more meaningful—as it plausibly would, in a wide range of cases.

Knutzen thinks about meaning-based reasons differently:

> If humanity had never taken on telic projects (e.g., by failing to embark on its civilizational adventure), or if it someday reached a stable equilibrium point at which there were no further valuable goal-directed collective tasks requiring completion, then there would be nothing valuable requiring completion and consequently no disvalue in extinction. (13)

He goes on to acknowledge that many will consider this "a very implausible result" and concedes that we might have to reach for alternative theories to explain the badness of extinction in the above cases.

15 Wolf, "Happiness and Meaning," 207.

16 Wolf, *Meaning in Life and Why It Matters*, 128–29.

17 Wolf, "The Meanings of Lives," 93.

But if the analogy between collective and individual meaningfulness holds, the implausible result is avoided. As long as we can reasonably expect to actively engage in valuable collective projects at some point, we do have a meaning-based reason to extend our tenure. A meaningful future is, after all, better than no future at all. This is the second respect in which meaning-based reasons are less contingent than Knutzen's discussion makes them seem.

## 3. IS THERE AN ASYMMETRY BETWEEN TIME AND SPACE?

To showcase the attractiveness of the view that extinction is bad because it would close off the possibility of realizing certain further developments in culture, Knutzen compares it with the welfare-based explanation mentioned in the introduction above. (He terms the former *Unfinished Business* and the latter *Opportunity Cost*.)

> One reason why Unfinished Business is interesting is that it offers an alternative to one of the dominant paradigms for explaining extinction's badness. According to this paradigm, extinction any time soon would come at a massive opportunity cost in terms of achievable welfare over the lifetime of our species or our species' descendants. (2)

One of the flaws of the welfare-based view, Knutzen thinks, is that it treats the axes of time and space as symmetrical:

> Opportunity Cost is ultimately an ahistorical explanation of extinction's badness. It is ahistorical in the sense that history only matters contingently, not in any deep way. Opportunity Cost enjoins us to prefer a universe teeming for a short while with good lives over a universe with fewer good lives spread out over longer stretches of time. Indeed, as long as the math works out right, it enjoins us to prefer a single-generation universe over a trillion-generation universe. In this way, Opportunity Cost treats axes of time and space as symmetrical. The only reason to favor the perpetuation of life over greater spans of time is that this will (contingently) be the way value is maximized.... By contrast, Unfinished Business is essentially historical. (12–13)

I believe that Knutzen's interpretation of this aspect of Unfinished Business and our meaning-based reasons to prevent the extinction of humanity more broadly rests on a misconception. To see that, suppose that in one possible future, humanity manages to complete the project of science in five decades. This is not a fluke, let us grant it, but the product of great engagement and collaboration of billions of people. In another possible future, completing the

same project takes five thousand years, and it involves equivalent engagement and collaboration of billions of people. The only difference is how many people participate in this project at any given time. Other things being equal, these two possible futures are plausibly on a par in terms of collective meaning.

Needless to say, this is a highly stylized case. In more realistic circumstances, we would presumably favor a longer future for humanity. But that is just because, contingently, a longer future would likely turn out to be more collectively meaningful. Science takes time, and we can scarcely hope to arrive at a systematic understanding of the universe through the efforts of a single generation—much like we cannot hope to populate the world with trillions of happy lives in the same timeframe. Fundamentally, however, the meaning-based view features no deep asymmetry between time and space.

To be sure, the axis of time need not be entirely devoid of significance in the context of meaningfulness. It might be that a history of humanity in which we complete the project of science in a series of small steps is more collectively meaningful than the alternative in which we accomplish as much in one giant leap. But even then, there is no deep asymmetry between time and space to reckon with—just the apparent value of evenness to build into our axiology. As long as the math works out right, to put it in Knutzen's terms, a single-generation universe could still be more collectively meaningful than a trillion-generation universe. Moreover, the very same theoretical choice is open to proponents of the welfare-based account of extinction's badness. They too could postulate that it is in one way better if a given number of happy lives is distributed over longer stretches of time and could appeal to the significance of evenness. But there is no fundamental difference in terms of how the meaning-based and the welfare-based views treat the axes of time and space.

## 4. Concluding Remarks

Knutzen has proposed that certain further developments in culture would make our history more collectively meaningful and that premature extinction would be bad because it would close off that possibility.

In this paper, I have argued that if collective meaningfulness is analogous to individual meaningfulness as articulated by Wolf, then our meaning-based reasons to extend humanity's tenure do not have a terminal point, they would apply even if humanity were not currently engaged in any valuable collective projects, and they do not imply any deep asymmetry between time and space.

If I am right about this, our meaning-based reasons turn out to have a similar profile to our welfare-based reasons. Fundamentally, both of these views are concerned with the opportunity cost of extinction. The demise of our species

would close off the possibility of a future rich in welfare, and it would close off the possibility of a future rich in collective meaning, too.[18]

Given the conditional nature of my argument, there are two lessons that we can draw from the preceding discussion. On one hand, if individual and collective meaningfulness are indeed analogous, then the reasons at issue in Unfinished Business do not exhaust our meaning-based reasons to prevent the extinction of humanity, and the character of these meaning-based reasons is quite different from what Knutzen takes it to be. On the other hand, if the reasons at issue in Unfinished Business do exhaust our meaning-based reasons to prevent the extinction of humanity, and Knutzen is right about the character of these reasons, then my discussion reveals just how different our accounts of individual and collective meaning need to be. Developing an account of the latter would not simply be a matter of "extend[ing] the concept of meaningfulness beyond individual lives … to collective human endeavors" (14), as Knutzen sees himself doing. It would require an altogether novel set of arguments, as well as a compelling explanation for the discord between individual and collective levels of meaning. But regardless of which of these lessons we choose to draw, Knutzen's interesting proposal merits further philosophical attention.[19]

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18 To be sure, our meaning-based reasons are not completely analogous to our welfare-based reasons. As Knutzen acknowledges, Wolf thinks that meaning in life is something that we should want enough of, but perhaps not something that we should try to maximize. Collective meaning might have this profile too, though it remains an open question when, if ever, our history might become meaningful enough.

19 I am grateful to two referees for their very helpful comments.

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# LEAVING PRINCIPLE CONTRACTUALISM BEHIND?

## A RESPONSE TO SALOMON

*Valentin Salein*

In an earlier volume of this journal, Aaron Salomon suggested a novel account of T. M. Scanlon's moral contractualism to circumvent an important challenge that has been raised against the original view. Traditionally, moral contractualism has been understood in terms of principle contractualism.

> *Principle Contractualism*: An action is morally required just in case any principle for the general regulation of behavior that permitted people not to perform that action is one that someone could reasonably reject.[1]

For a principle to be reasonably rejectable in this sense, it means that the personal reasons those affected by the principle's *general acceptance* have for objecting to it are stronger than the reasons speaking against any of its alternatives.[2]

While principle contractualism is widely regarded as a plausible moral theory, it faces the so-called *ideal world objection*. What this objection draws attention to is that the appeal to principles that are *generally* accepted causes the view to overlook whenever acting in the relevant way would be very bad under more realistic circumstances with lower acceptance levels.[3] Due to the implausible moral judgments that the theory can be shown to generate on account of this shortcoming, it has been argued that contractualists should shift their evaluative focal point away from principles. One way of doing this would be to adopt Hanoch Sheinman's act contractualism.

> *Act Contractualism*: An agent's action is morally required just in case someone could reasonably reject that agent's not performing that action.[4]

1 Salomon, "Maxim and Principle Contractualism," 573. He refers to Scanlon, *What We Owe to Each Other*, 4.

2 Scanlon, *What We Owe to Each Other*, 95, 202–4.

3 See, e.g., Parfit, *On What Matters*, 312–20; and Podgorski, "Wouldn't It Be Nice?"

4 Salomon, "Maxim and Principle Contractualism," 578. He refers to Sheinman, "Act and Principle Contractualism," 295. For a more recent defense of such a view, see Bourguignon,

In discussing act contractualism, Salomon expresses sympathy towards this strategy of responding to the ideal world objection. However, he also argues that adopting this view would come with serious theoretical costs because act contractualism fails to account for considerations of intuitive relevance to how we are permitted to act in certain cases. In response, Salomon therefore introduces the following alternative modification, which he takes to circumvent the ideal world objection without involving this particular shortcoming:

> *Maxim Contractualism*: An agent's action is morally required under the circumstances just in case any maxim that he might adopt that involves not performing that action under the circumstances is one that someone could reasonably reject.[5]

While I agree with Salomon that maxim contractualism offers important advantages, I believe his view cannot fully solve the problem he raises against act contractualism. More specifically, I will argue that maxim contractualism also fails to account for considerations of intuitive relevance by overlooking that, sometimes, what would be the case if an action is performed *collectively* is relevant to whether I am permitted to perform that action *individually*. By showing on these grounds that Salomon's novel suggestion still involves serious theoretical costs, my overall goal in this discussion note is to make the case that we should not be too quick in leaving principle contractualism behind.

To this aim, I will first present Salomon's case for maxim contractualism (section 1), then introduce what I take to be its central shortcoming (section 2), and finally reject a potential response (section 3).

## 1. Salomon's Case for Maxim Contractualism

In making his case for maxim contractualism, Salomon starts by arguing that act contractualism suffers from overdemandingness in a similar way as act consequentialism: due to how act contractualism can assess the reasonable rejectability of particular actions only on a piece-by-piece basis, many of our everyday activities come out as impermissible because whenever we wish to do something, there is likely someone in precarious conditions who has a stronger reason for wanting our resources to be invested for their support instead.[6]

As Salomon points out, principle contractualism seems better positioned for avoiding such overdemandingness: instead of considering only particular

"On the Possibility of Act Contractualism."

5 Salomon, "Maxim and Principle Contractualism," 572–73.

6 Salomon, "Maxim and Principle Contractualism," 581.

actions, this view reflects on which principle for the general regulation of behavior could not be reasonably rejected. From this perspective, any principle demanding us to act beneficently all the time would be met by strong reasons for objection because this demand would strip us of the kind of control over our lives necessary for making and executing plans.[7] Act contractualism, on the contrary, cannot accommodate this objection because its focus on particular actions prevents it from considering the cumulative burdens one can be subjected to as a result of performing the relevant action on more than one occasion. According to Salomon, it is due to this oversight that act contractualism fails "to account for the fact that, sometimes, what would happen if I performed an action over time is relevant to whether I am permitted to perform that action right here, right now."[8]

In response to this worry, Salomon introduces maxim contractualism as a new contender. Importantly, when Salomon talks about maxims, he pictures them as expressing a kind of personal policy—or, as he also puts it, as the "principles according to which we see *ourselves* as acting."[9] Consequentially, Salomon's novel suggestion is not forced to focus on particular acts of beneficence but can instead consider and compare what would be the case if the relevant agent adopted different maxims of beneficence and acted accordingly *over time*. From this perspective, overly demanding requirements could be rejected in the same way as in the case of principle contractualism—namely, by an appeal to the cumulative burdens the relevant agent would be subjected to due to having to act beneficently on multiple occasions. Salomon therefore concludes that maxim contractualism is the preferable view because it can avoid appealing to principles for the general regulation of behavior without failing to account for considerations of intuitive relevance in the way act contractualism does.

## 2. COLLECTIVE CONTEXTS AS A PROBLEM FOR MAXIM CONTRACTUALISM

While I agree that maxim contractualism comes with certain advantages, there still remain important considerations that the view cannot accommodate. We can see this by looking at Salomon's discussion of the moral wrong of free riding. In the case he imagines, we live in a community where it is customary not to litter. Moreover, the benefits everyone experiences because of this convention make it intuitively clear that it would be morally wrong to free ride on the collective efforts of the compliers by starting to litter. As Salomon acknowledges,

7 Kumar, "Defending the Moral Moderate," 296–303.

8 Salomon, "Maxim and Principle Contractualism," 581.

9 Salomon, "Maxim and Principle Contractualism," 572.

however, maxim contractualism struggles in generating this judgment because it cannot "capture the moral force of the 'what if everyone did that' question."[10] What Salomon means by this is that principle contractualism can consider that if *everyone* accepted a principle allowing them to litter, there would be a significant loss of cleanliness. Maxim contractualism, on the contrary, cannot appeal to that effect in explaining the moral wrongness of littering: due to its focus on maxims, the view is concerned with a scenario in which only the relevant agent would litter over time. Given the negligible impact of conducting one's own life this way, it becomes difficult to see how maxim contractualism could capture the relevant intuition on this basis.

In defense of maxim contractualism, Salomon argues that adopting maxims that allow littering would enable the relevant agent to "get all the goods without doing any of the hard work necessary to get them" and would thereby result in "treating unfairly those whose attitudes toward littering are necessary for the existence of the no-littering convention."[11] He therefore takes his view to be able to explain the reasonable rejectability of corresponding maxims on account of the fairness-based reasons of those who refrain from littering.

Importantly, though, while this suggestion seems well suited in the example Salomon discusses, it falls short in alternative cases with a slightly different structure. Notice that for the suggested fairness account to get off the ground, the agents have to receive benefits that result from the collective effort they fail to contribute to. As I will argue now, however, cases that involve agential benefits of this kind pose only a subset of the collective contexts that can be troublesome for maxim contractualism, and so the view is revealed to be affected by a more fundamental problem that Salomon's defense fails to respond to.

A good way to see this is by looking at a variant of the littering example that lacks the agential benefits Salomon appeals to. For instance, we could imagine certain fortunate neighborhoods in which any litter dropped on the streets quickly ends up in one of the adjacent, less fortunate neighborhoods—say, due to unusual air currents. Intuitively, littering as someone living in a fortunate neighborhood would still pose a moral wrong similar to the original example, even if the fortunate litterers stayed only within their own part of town. In explaining why that is, however, maxim contractualism encounters a familiar problem: structurally, the case is analogous to the original example in that the collective littering of those living in fortunate neighborhoods could significantly lower the level of cleanliness in the unfortunate ones, although each individual litterer could affect this level by only an amount too small to figure

10 Salomon, "Maxim and Principle Contractualism," 594.

11 Salomon, "Maxim and Principle Contractualism," 595.

in the reasonable rejection of corresponding maxims. Unlike in the previous variant, however, none of the fortunate litterers benefits from the no-littering convention because all litter is transported to the unfortunate neighborhoods anyway, and so Salomon is prevented from explaining the moral wrongness of their littering via the particular form of unfairness that his defense of maxim contractualism is built on.[12] As a result, it becomes unclear again how his view could capture the relevant intuition in this variant of the case.

These considerations show that maxim contractualism's failure to accommodate the "what if everyone did that" question is problematic not only in cases in which the relevant agents benefit from the collective effort they fail to contribute to. Instead, a more fundamental problem emerges once we realize that the view has the same implausible implications in a variant of the littering example that lacks agential benefits of this kind: while principle contractualism could once again explain the moral wrongness of littering by appealing to the *overall* loss of cleanliness, maxim contractualism is still prevented from this maneuver because of its evaluative focal point. What this shortcoming indicates is not only that it is problematic for a contractualist theory to fail to account for how people would be affected by the relevant action when performed on multiple occasions by the same agent *over time*. Instead, we can see in the modified littering example that by neglecting the cumulative burdens people would be subjected to as a result of the performance of the relevant action by *different* agents, maxim contractualism overlooks that, sometimes, what would be the case if an action is performed *collectively* is relevant to whether I am permitted to perform that action *individually*. As a result, maxim contractualism is revealed to still fail to account for considerations of intuitive relevance to how we are permitted to act in certain cases.

## 3. MAXIM CONTRACTUALISM AND FAIRNESS

In response, it could be insisted that Salomon's suggestion might have to be only slightly extended to avoid the problem raised in the previous section. However, while I do think that it is possible to understand fairness such that it can provide reasons for rejection without appealing to agential benefits, I am skeptical that an account of this kind can be offered on the basis of maxim contractualism. To explain this in more detail, I will first look at different ways to extend Salomon's fairness account and then argue that to serve as the basis

12 For real-world examples that could lead to similar problems, think of how consumers collectively incentivize harmful production in other parts of the world or how those above a certain age collectively contribute to the emergence of future climate harms without having to worry about being personally affected by them.

for plausible objections, they have to include a further condition that cannot be accommodated by maxim contractualism due to its evaluative focal point.

What we have seen so far is that the problem with Salomon's defense results from how his fairness notion takes agential benefits to be a necessary condition of its applicability. At first, however, it could seem easy for Salomon to extend the account in a way that avoids this shortcoming: instead of focusing on a notion of unfairness that requires being benefitted by some collective effort, one might think that it could also be unfair when one fails to take part in doing something that is beneficial only to others. However, the problem with this proposal is that refraining from some beneficial collective effort is not enough to constitute an unfairness. For instance, if some colleagues of mine were to collect money to support their friend's business, it would be absurd to claim that I am treating them unfairly by not chipping in.

Importantly, though, there may be conditions under which this could still seem to be the correct verdict. For instance, blaming me for making an unfair exemption would become much more adequate if I not only failed to join some beneficial collective effort but also cared about the resulting outcome or were morally required to care about it.[13] In the business example, we can see this by considering how not chipping in could indeed seem like an unfair treatment of my colleagues if one of these conditions were met—say, if I also happened to be friends with the beneficiary, so that I could plausibly be required to be concerned about their success.

In defending maxim contractualism, adopting such a more elaborate fairness account seems like a step in the right direction: if the fortunate litterers could be shown to either care or to be morally required to care about the level of cleanliness, following the account sketched above might allow Salomon to explain the unfairness of littering despite lacking the agential benefits his original defense relied on.[14] As closer inspection reveals, however, such an account would not suffice to serve as the basis for plausible fairness objections. We can see this by looking at a third variant of the business example: let us say it is only *my* friend who is starting a new business, and the reason my colleagues

13 For a suggestion along these lines, see Barrett and Raskoff, "Ethical Veganism and Free-Riding," 197. I thank the associate editor for bringing this account to my attention.

14 Of course, one might wonder on what grounds such an obligation to *care* about the level of cleanliness could even be established within the overall contractualist framework. However, I do not want to exclude the possibility that such obligations *could* be established (say, because being indifferent toward the relevant outcome might express an objectionable form of callousness), and so I will simply grant the success of this maneuver here and use it as a foil instead for developing the deeper problem that I take maxim contractualism to be affected by. I thank an anonymous reviewer for suggesting clarification on this point.

support him is their hope of financial gain. While it still being my friend's business allows for the same explanation of why I ought to care about its success, it would be very odd in this variant if the fact that my profit-oriented colleagues are engaged in a collective effort to bring this success about were to establish my lack of contribution as an unfairness. If anything, the fact that my friend's business already has so many investors should release me from the obligation to invest additional resources myself.

What we can see here is that for this account to serve as the basis for plausible fairness objections, a further condition is needed to distinguish between the last two variants of the business example. But what would such a condition look like? Intuitively, what makes the unfairness charge so fitting in the second variant is that this case seems to involve a disparity in what is granted to the different agents: by failing to contribute to the collective effort of supporting my friend's business, I act in a way I could not *allow* the other contributors to act, given our shared normative commitment to caring about the success of our friend's business. In the third variant, however, things are different: here, those engaged in the collective effort do so not because of any commitment of this kind but only because they hope to receive certain benefits. Given that this makes it such that I could expect my colleagues to support the business even if they were explicitly permitted to refrain from doing so, I could invite each of them to join me in my lack of contribution without undermining my friend's success as the outcome I morally ought to care about. As a result, no one can blame me for exempting myself unfairly, because all of us could be granted to refrain from supporting the business in the very same way.

What this indicates is that to constitute an unfairness, it does not suffice to fail to join a collective effort that brings about an outcome I either do or morally ought to care about. Instead, to treat others unfairly, it seems necessary that my behavior also meets the condition of being such that I could not allow those others to engage in it given what I am personally committed to. Importantly, though, while a fairness conception that includes this condition could indeed provide plausible reasons for rejection without relying on agential benefits, the problem that arises for maxim contractualism here is that it cannot accommodate corresponding objections due to its evaluative focal point: as we have seen, the difference between maxim contractualism and principle contractualism is that maxims are principles for the regulation of my own instead of general behavior. While this enables maxim contractualism to assess different ways for the relevant agent to act in while "holding fixed what everyone else *does*,"[15] the third business example shows that making an unfair exemption is not just about

15 Salomon, "Maxim and Principle Contractualism," 594–95 (emphasis added).

deviating from how others are *in fact* behaving; rather, it seems to require acting in a way one could not *allow* those others to engage in. Given this plausible claim about what constitutes unfair treatment, it becomes difficult to see how maxims could be a fitting target of fairness objections: if maxims as contractualism's evaluative focal point are supposed to merely regulate my own behavior in the way Salomon suggests, then they cannot involve any claims about what is permissible to others. Without making any such claims, however, it is not possible to object to them on the grounds of disparities in what they grant to different agents, although this would be necessary for accommodating the plausible fairness condition introduced above.[16] As a result, it becomes very difficult to see how the reasonable rejectability of maxims could be explained by the notion of fairness in the way Salomon would need for his defense to be successful.

## 4. CONCLUSION

In this discussion note, I have argued that both act contractualism and maxim contractualism fail to account for considerations of intuitive relevance to how we are permitted to act in certain cases. For contractualists, this finding gives rise to the following dilemma: while principle contractualism seems to fall prey to the ideal world objection, avoiding this problem via a shift in the view's evaluative focal point brings about serious difficulties of its own. In response to this dilemma, there are different paths forward, and it is an open question which of them is the most promising. However, especially in light of various underexplored suggestions on how contractualism could respond to the ideal world objection *without* shifting its evaluative focal point, I take the shortcomings of the existing alternatives as sufficient evidence that we should not be too quick in leaving principle contractualism behind.[17]

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16 For principle contractualism, accommodating such objections does not pose any particular difficulty. See Scanlon, *What We Owe to Each Other*, 218.

17 For suggestions along these lines, see Perl, "Solving the Ideal Worlds Problem"; Pogge, "What We Can Reasonably Reject," 132; and Suikkanen, "Contractualism and the Counter-Culture Challenge."

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