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Luck, Lottery, and Equality

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Abstract

It is sometimes argued that social and natural inequalities which are both arbitrary from a moral point of view should nevertheless have a different moral status in a theory of justice: while inequalities of a social type should be rightfully neutralized, the effects of natural inequalities should be respected, because they are a component of individual identity, in a way that social inequalities are not. This paper argues against such a distinction. It first clarifies the notion of “natural lottery”; it then draws a distinction between the notion of “self-ownership” and the extensions of one’s rights over one’s body. Subsequently, it argues that the appeal to competing conceptions of “the self” is not helpful in this context, because a “thick” conception of the self is a proxy for a particular normative conception of justice, rather than a metaphysical presupposition for theories of justice. The paper concludes by suggesting an interpretation of the metaphor of a “common pool of natural abilities” that would not be intrusive so as to effectively respect the separate identity of individuals.

Keywords

Social justice, equality

Arbitrariness of Social and Natural Differences: Luck, Lottery, and Equality

Wojciech Sadurski

1. Introduction

It is commonplace, at least within the left-leaning branch of liberalism taking its cue from John Rawls's theory of justice, to argue that socially generated inequalities, i.e. those attributable to differences in wealth inheritance, family station, upbringing and various other fortuitous social circumstances, are arbitrary from a moral point of view. We cannot, morally speaking, claim any credit for benefiting from circumstances which we have not brought about, or have impacted on, be it through our conscious or our deliberate actions. That much is often accepted as a moral truth so obvious as not requiring any further defence. But then, arguably, it should be equally obvious that "natural" inequalities, that is, those attributed solely to our inborn superior natural abilities, skills and talents, are morally arbitrary, too. Their beneficial effect on our life opportunities is as "undeserved" as that of social circumstances. What implications does this analogy between social and natural inequalities bear for a theory of justice?

There are, roughly, three possible responses to the above observation. The first response is to admit the equal moral arbitrariness of natural and social inequalities, but to deny the validity of any redistributive conclusions stemming from them. This is a classical conservative position: "undeserved" deprivations are just bad luck, regardless of whether they can be attributed to social arrangements or to natural differences. It is not a proper purpose for a legal system to counter the adverse effects of luck in general. This argument, developed in an article by Richard Epstein, captures well a widespread conservative conventional wisdom: "In general the effort to use coercion to counter the adverse effects of bad luck tends only to make matters worse".¹ "Life is not fair", proclaims Milton Friedman² and a legion of free-market conservatives with him. Significantly, Friedman actually uses the analogy between natural and social inequalities in order to assert the inevitability of undeserved social inequalities, on the basis of their equal moral status with natural ones: "The inheritance of property can be interfered with more readily than the inheritance of talent. But from an ethical point of view, is there any difference between the two? Yet many people resent the inheritance of property but not the inheritance of talent".³

¹ R. A. Epstein, "Luck", *Social Philosophy & Policy* 6 (1988): 17-38 at 17.

² M. Friedman, *Free to Choose* (Harmondsworth: Penguin Books, 1980), p. 168.

³ *Id.*, p. 168

The second response is a mirror image of the first one: it also asserts the equal moral status of natural and social inequalities, but argues, on this basis, for social efforts aimed at nullifying or at least moderating the effects of both. This time, the strength of the intuition of a duty to redress *social* disadvantages is put forth in the argument about removing the differential benefits of *natural* talents and skills. This is developed in the syllogism of Herbert Spiegelberg: “(1) undeserved discriminations call for redress, (2) all inequalities of birth constitute undeserved discriminations ... (3) all inequalities of birth call for redress”.⁴ The operative is, of course, the first premise, which is considered as “self-evident”⁵ by Spiegelberg. The same result is reached in Rawls's difference principle, which he characterizes as representing “an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be”.⁶ The intuition about the equivalent arbitrariness of natural and social contingencies was articulated by Rawls explicitly: “It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society”.⁷ The equal moral arbitrariness of natural and social “lottery” provides the basis for an equally justified redistributive action, according to the egalitarian conceptions of the “common pool” of benefits, be they deriving from natural and social assets (Rawls), Dworkin's idea of the equality of resources, which is not “endowment-sensitive”⁸, Cohen's egalitarianism, built upon the precept that “no one should fare worse than others do because of bad brute luck” with the proviso that “no luck is bruter than that how one is born, raised and circumstanced”,⁹ or a host of other egalitarian theories.¹⁰

The third possible response is to *deny* the moral equivalence of natural and social differences. This view originates in an appeal for a reasonable compromise, which would capture the middle ground between the heartless conservatism of an outright rejection of any compensation for fortuitous disadvantages and (what may be viewed as) the radicalism of the egalitarian position. The third position may still admit that natural and social inequalities are similarly morally arbitrary, but it claims that there are some morally relevant differences between these two types of sources of inequalities. The upshot is that while a society has a duty to remove the benefits arising from undeserved *social* inequalities, no such duty applies to unequal (even though undeserved) *natural* talents, skills and capacities.

⁴ H. Spiegelberg, “A Defense of Human Equality”, *Philosophical Review* 53 (1944): 101-124, at 113

⁵ Or, more precisely, “at least as self-evident as any other ethical insight”, *id.* p. 114

⁶ J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972), at 101.

⁷ *Id.* at 104

⁸ R. Dworkin, “What Is Equality”, Part II, *Philosophy & Public Affairs* 10 (1981): 283-345.

⁹ G.A. Cohen, *Self-ownership, Freedom, and Equality* (Cambridge University Press: Cambridge 1995) at 229, footnote omitted.

¹⁰ See, inter alia, Ch. Ake, “Justice and Equality”, *Philosophy & Public Affairs* 5 (1975): 69-90; H. Milne, “Desert, Effort and Equality”, *Journal of Applied Philosophy* 3 (1986): 235-243; W. Sadurski, *Giving Desert Its Due* (Dordrecht: D. Reidel, 1985).

It is this third position that I propose to discuss, criticise and reject.¹¹ I will not rest my case against this third position on the simple observation that the natural and social causes of unequal benefits are so mutually entangled that it is not possible to draw the line between these two categories. To be sure, this observation bears a considerable weight. The benefits which are most likely to be challenged by the egalitarians derive from what we may generally call the productive capacities, i.e. those capacities which yield income. In a complex industrial society, incomes result from a very complex mix of the use of natural talents and of skills developed through upbringing, education and training, the latter being par excellence social. “A skill at healing, for example, is acquired through a natural aptitude for study, perseverance in school work, and an investment of hundreds of thousands of dollars worth of society's time and energy.”¹² An attempt to separate what is generated by an individual's initial genetic endowment, and what is due to social resources, access to which cannot be credited to an individual's effort, may prove hopeless. The very idea that there are some pre-social, natural abilities, which can be discerned in an individual, while all the social inputs can be screened off, sounds fanciful. But in this paper no use will be made of this observation. This is mainly because the argument about the practical amalgamation of the two categories of capacities is not sufficient to reject the aspiration for a theory of justice that would draw a distinction between the two, if there are sound moral reasons pointing to their fundamental difference. All that this observation may ultimately prove is that perfect justice is unattainable in practice; it does not undermine the moral attractiveness of the aspiration itself. Most importantly, though, the burden of the argument about how to disentangle the natural from the social factors should rely on those who base their conception on this distinction. This is *not* my position, and for the purposes of scrutinizing the natural/social distinction it is enough to presuppose, *arguendo*, that such a distinction is intelligible.

2. Lottery

Before going ahead, and reviewing the “natural/social contingency” analogy, a digression about the concept of natural (or social) “lottery” is in order. The concept of lottery is used now and then, in particular with regard to natural attributes, talents and skills, to emphasize the lack of responsibility, either in terms of praise or of blame, of a person for her own natural attributes, at least in their “raw” version, before any praise- or blame-worthy effort is added. “Birth itself, as the phrase ‘accidents of birth’ suggests, is something of a lottery” - argues Epstein, himself an opponent of a nullification of luck in natural distribution.¹³ Among the proponents of such a nullification, Rawls has been the most influential in decrying the situation in which “distributive shares are decided by the outcome of natural lottery”.¹⁴ Echoing him, Anthony Kronman asserts that: “It is unfair that people’s fate should be determined, to a considerable degree, by a

¹¹ Part of the argumentation developed here follows the reasoning that I had sketched a long time ago in the article “Natural and Social Lottery, and Concepts of the Self”, *Law and Philosophy* 9 (1990): 157-175.

¹² A. Kernohan, “Capitalism and Self-Ownership”, *Social Philosophy & Policy* 6 (1988): 6-76 at 62

¹³ Epstein, *supra* note 1 at 18.

¹⁴ Rawls, *supra* note 6 at 74.

natural lottery”.¹⁵ By extension, this concept of “lottery” is sometimes applied also to the social opportunities a person has access to without having “earned” them in any way, such as by being born into a more or less affluent family, etc.¹⁶

The notion of “lottery” as applied to these circumstances is of course nothing but a metaphor, and just like any metaphor, it illuminates some aspects and distorts others ; it has to be used with caution, and one should be aware of its limitations. In the case of the “lottery” metaphor, there are two reasons why it *inadequately* captures the point about the contingency of (and, therefore, the lack of personal responsibility for) the distribution of natural attributes and social opportunities (such as the family into which one is born). The first and most striking reason for this inadequacy is that we usually consider lottery as a matter of “option luck”, whose results are traceable to a choice (even though only a choice to take part in the lottery event)¹⁷ and therefore which should not be subject to any nullification or even modification. Indeed, if the results of a gamble were to be subject to reversal, the whole enterprise of gambling (or lottery) would be pointless.¹⁸ The fundamental *moral* point about respecting the outcomes of such ordinary lotteries is that there is a correspondence of identity between the person who “plays” the lottery and the person who is its winner or loser. But in the “natural” lottery there is no such equivalence: the “player” is impersonal: it is life itself,¹⁹ or “nature”, or God, for those who believe. For this reason, the metaphor of the “lottery” does not grasp adequately the intentions of those who use it and who wish to emphasize contingency, and therefore call for a nullification of the effects of distribution of natural attributes. The second, and minor point of difference, is that normally, the “prize” in a lottery is known and determined *ex ante*, at the point of entrance into a lottery: the stakes are well defined from the outset. (Whether it is a necessary ingredient of any properly so-called “lottery” is irrelevant here; one can probably find examples of “lotteries” with undefined stakes: for example, when the prize depends on the number of participants, which in itself is unknown at the beginning as the participation in the lottery may be wide open). In contrast, in the “natural” lottery the outcome is totally indeterminate at the point in which the “game” is “played”.

But, as with all other metaphors, one must not protest too much when depicting the inadequacy of this particular metaphor to capture the intuitions we have when reflecting on the contingent nature of the distribution of natural characteristics. In this context, a very serious challenge against the lottery metaphor was expressed by Susan Hurley, and I propose to ponder briefly this challenge, because it may be helpful to clarify the conceptual field at stake. Hurley refers to the natural-lottery concept as related to “constitutive luck”, understood as a matter of “good or bad luck in the form of morally arbitrary natural or social advantages or disadvantages: innate talents or handicaps,

¹⁵ A. T. Kronman, “Talent Pooling”, in J.R. Pennock & J.W. Chapman, eds., *Human Rights: Nomos XXIII* (New York: New York University Press, 1981): 58-79 at 76.

¹⁶ See Rawls *supra* note 6 at 75, where he says that his favoured interpretations of two principles of justice “does not weight men’s share in the benefits and burdens of social cooperation according to their social fortune or their luck in the natural lottery”.

¹⁷ For a concept of option luck, distinguished from brute luck, see Dworkin, *supra* note 8 at 293.

¹⁸ See *id.* at 293-95.

¹⁹ Dworkin talks about brute bad luck as “bad luck that flows not from a gamble deliberately taken but from life itself”, Ronald Dworkin, *Sovereign Virtue* (Harvard University Press: Cambridge Mass. 2000) at 341.

advantageous or disadvantageous family situations”.²⁰ The picture of lottery is misleading, she claims, because, usually, when talking about luck in lottery, we presuppose the continuity of identity over time, and in particular before the lottery is entered into, and at the point in which the results of the lottery are announced: “Without an identity that is constant across alternatives, we do not have a gamble or lottery but merely different possibilities - some good, some bad - in which different entities exist and different things happen”.²¹ This identity-dependence, however, is not present in the case of “constitutive luck”: “It may be good or bad luck *tout court* that this happened rather than that, but if it is not good or bad luck *for someone*, then it is not the result of a lottery or a gamble. It might be a matter of good luck that the sperm and the egg from which Mozart developed came together, rather than some others. But this does not mean Mozart might have been someone else, and that he was lucky to have been Mozart...”.²² The lottery argument, in this context, Hurley urges, should be abandoned, because the lottery metaphor encourages us to think in an incoherent way: “There can be no proto-self or possible self or bare self who might-have-existed-as-you or who-might-have-existed-as-someone-else... But the metaphor of a lottery of essential properties may encourage us to think in these incoherent terms”.²³

Is this objection capable of shattering the ideal of a lottery in the distribution of constitutive attributes? If it were, much of the moral impulse behind the lottery metaphor would have to be eroded. To be sure, we intuitively see an intelligible moral insight in saying: “X was lucky to have been born to this family, or with all her talents”, and also in contending, for instance: “Y was unlucky to have been born in a place where he could not cultivate his innate skills”. Hurley’s objection to the use of a lottery metaphor in these cases is that there was no “X” or “Y” before their birth (or their conception, if you like) in the first place: how can we thus talk of a constitutive good or bad luck in these cases? There was no pre-X who turned out lucky, and no proto-Y who turned out unlucky as a result of the operation of a natural or social lottery.

Note that the force of Hurley’s objection rests on the lack of identity of the self, prior and after the event (the event which marks the point at which an imaginary “lottery” announces its results). So to test how devastating the lack of continuity of identity is to the applicability of the lottery metaphor, consider another case of discontinuity, somewhat different from that explored by Hurley. Ponder the following sentence: “Z was very unlucky to have been on that flight as a result of the rebooking of his ticket: there was an accident, and the plane crashed to the ground killing all passengers”. The use of bad luck in this phrase does not strike us (does not strike *me*, at least) as inappropriate; nor does the analogy with lottery. And yet, there is no continuity between Z before the event and Z after the event (or, after the operation of the lottery): Z has been killed, and this event was precisely his bad luck.²⁴ There is no more post-Z than

²⁰ S.L. Hurley, *Justice, Luck, and Knowledge* (Harvard University Press: Cambridge Mass. 2003) at 117.

²¹ *Id.* at 119.

²² *Id.* at 119-20, emphasis in original.

²³ *Id.* at 121. Note that Susan Hurley has more to say against the lottery metaphor, including about the notion of “chance”, see *id.* at 123-27, but I focus here only on the argument which I find more devastating to the use of the metaphor in the present context.

²⁴ A believer in life after death would probably not need to endorse this reasoning. But then, s/he may not characterize the event as a case of “bad luck” (by considering the badness of it as having ended Z’s live) but only an event altering the mode of existence of Z.

there was pre-X or pre-Y in our earlier examples. There is a discontinuity of the personal identity in both cases: in the case of Z, the “lottery”-like event occurred at the finishing point of his life, in the case of X and Y – at the starting points of theirs. (Similarly, think of a “Russian roulette”: isn’t the whole point about this macabre enterprise that it is lottery-like, with bad luck happening to the player?) This would suggest to me that the applicability of the lottery metaphor is not necessarily identity-dependent in the way Hurley urges: to use her own example, we can indeed think of Mozart having been very lucky to be born with all his talents (to think of him as a winner in a natural lottery) even though there was no proto-Mozart, waiting to be born, awaiting the gifts that nature may, or may not, endow him with.

3. Self-Ownership and a Right over One’s Body

A good starting point for the analysis of the third position, as defined above in the Introduction, is to reflect on the nature of an individual's relationship to his or her natural capacities. A morally relevant difference between natural and social advantages lies, Alan Goldman claimed, in that the former “derive from, or rather equate with, the distinctness of physically embodied persons”²⁵, while the latter do “not affect the basic identities of persons”²⁶. To nullify naturally caused (dis)advantages therefore implies disregarding the separate identities of particular individuals.

It is necessary here to unfold the proposition according to which there is a strong link between natural attributes and individual identities. This usually comes in two versions: a “self-ownership” version and a “bodily integrity” version.

The first one proclaims a person's ownership over his or her natural capacities. This conception, described by Robert Nozick as “self-ownership”,²⁷ derives from Locke: “every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his”.²⁸ The concept of self-ownership has been given a significant prominence in recent “left-libertarian” literature in particular, and a good definition has been provided by Magnus Jedenheim-Edling: a person has effective self-ownership when she “formally owns herself” and in addition “has access to external resources so that she may exercise her self-ownership rights to a reasonable extent and the means to protect herself from marginalisation imposed by others”.²⁹ Now, the problem with the “self-ownership” concept is that it is, at best, a vague metaphor which requires further elaboration, and at worst, a distortion of the nature of a person's relationship to his or her body and natural

²⁵ A.H. Goldman, “Real People (Natural Differences and the Scope of Justice)”, *Canadian Journal of Philosophy* 17 (1987): 377-394 at 378.

²⁶ Id.

²⁷ R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 172.

²⁸ The Second Treatise of Government, ed. T.P. Peardon (Indianapolis: Bobbs-Merrill, 1952) at 17.

²⁹ M. Jedenheim-Edling, “The Compatibility of Effective Self-Ownership and Joint World Ownership”, *Journal of Political Philosophy* 13 (2005): 284-304 at 287. Similarly, Michael Otsuka defines the full right of self-ownership in the following manner: “a person’s right of self-ownership is full if and only if that person possesses, to the greatest extent and stringency compatible with the same possession by others, the ... rights ‘to decide what would become of himself and what he would do, and ... reap the benefits of what he did’”, Michael Otsuka, *Libertarianism Without Inequality* (Oxford University Press: Oxford 2003) at 13, quoting Nozick supra note 27 at 171.

capacities. Strangely, perhaps, the concept of “self-ownership” at the same time *over-* and *under-*values the nature of this relationship. It *over-*values it, because there are certain typical incidents of property rights which do not apply to one's body or natural talents: we cannot, for instance, alienate or bequeath our talents, nor have them taken in repayment of debts.³⁰ Furthermore, the metaphor of self-ownership *under-*values (according to many) what is at stake in our relationship to our bodies and talents. To suggest that we “own” something presupposes a proprietary relationship between a person and an object separate from that person, and yet many writers would argue that our relationship to our bodies is stronger: our talents and bodies are constitutive of our very identities.³¹ For my part, while I do not need to accept the equation of one's body with one's “self”, I would claim that a special protection of one's relationship to one's own body is based on the particular vulnerability of one's body to pain and discomfort. As a result, the wrong consisting in hurting the body is qualitatively different (sometimes greater, sometimes lower) than the harm done to one's property.

G.A. Cohen took issue with the point just made, i.e. that the concept of “self-ownership” is incoherent because it confusedly implies a separation between the person-owner and the self being (allegedly) owned, the point I just characterized as disclosing an under-valuation of the relationship between a person and her body, talents, etc. “Self” in the concept of “self-ownership” has “a purely reflexive significance”³² and it does not connote “the ownership of a self”.³³ Thus, according to Cohen, in order to use intelligibly the concept of self-ownership, we do not need to imagine that a person owns a separate entity (in this case, her own self), which would be indeed incoherent. But Cohen's defence of the concept is not quite convincing (even putting aside the fact that other users of the concept may indeed presuppose an ownership of the self in a stronger sense than Cohen does). Consider his defence: “[W]hat is there in the content of the concepts of ownership and personhood that might disqualify the concept of self-ownership? Persons and their powers can be controlled, among others by themselves, and there is surely always an answer to the question, with respect to anything that can be controlled, who has the right to control it? – even if that answer is: no one. The thesis of self-ownership says that the answer to all such questions about persons and their powers is: the person herself”.³⁴

But there is a difference between the notion of self-control (or control over the self) and self-ownership. In the case of control there is a fundamental ambiguity to the word, and I suppose that Cohen's analogy (between ownership and control) exploits this ambiguity. The notion of “control” may be seen as a factual, quasi-mechanical phenomenon, with the consequence that “self-control” is indeed a coherent and reflexive relationship, which does not heave our concerns about the separation of the subject and the object of control. Self-control means, for example, that I exercise a restraint over my own actions: over my body, the words I utter, etc. But “control” is also a normative phenomenon, whereby to control something is to have some authority over

³⁰ See Kernohan, *op. cit.*, pp. 63-64. To be sure, we can do these things with the products of our talents but this is a distinct relationship from the one between a person and his or her talents.

³¹ See Kernohan, *supra* note 12 at 62; Goldman, *supra* note 25 at 379.

³² Cohen, *supra* note 9 at 69, see similarly *id.* at 211.

³³ *Id.* at 211.

³⁴ *Id.* at 210, footnote omitted.

that something. This second meaning is in fact suggested by Cohen himself who refers to “a *right* to control a person or her powers”. In this second sense, the use of the notion of “self-control” would amount to a normative claim, according to which people should have an authority over their own actions. However, according to me, claiming that I have an authority over myself entails a confused use of the word (unless it is a vague metaphor), because the authority of A over B presupposes the separate existence of A and B; in fact, a much better way of making a point about “self-control” in this second, normative sense, is that the authority of *other* people (including a community as a whole) over an individual should be strictly limited, so that people should be able to decide about themselves to the highest possible degree. (The same can be said about the notion of sovereignty: to say that a person should be sovereign over herself would be a confused way of making a normative claim that sovereign authorities – whatever they are – should see the scope of their sovereignty narrowly drawn. And indeed, at certain points Cohen does use, to defend the concept of self-ownership, the analogy with sovereignty, when he argues that people can “claim sovereignty” over parts of their bodies according to the thesis of self-ownership).³⁵ Now, just as between the two notions of “control”, the concept of “ownership” is certainly more analogous to the latter, normative, notion rather than to the former, factual. And it shares the defect of that normative notion when it is combined with the reflexive “self” – of incoherently presupposing the separability of the subject and the object of control, or of ownership.

The introduction of the concept of property or ownership is therefore singularly unhelpful in this debate. Indeed, the only way we can consistently, and without doing violence to the language of “property rights”, represent the idea of self-ownership is by claiming our ownership over the *products* of our talents and work. This meaning is indicated in the second sentence in the quote from Locke cited above. But in the context of our discussion, this reveals the circularity of the “self-ownership” argument. Indeed, whether we have or not a moral right to nullify the results of one's natural talents is precisely the question at stake. The right on which the anti-redistributive argument is based, turns out, upon analysis, to be a right whose justification is at the very core of the debate.

And this is confirmed by the conclusions drawn by those very “left-libertarian” writers who cling to the concept of self-ownership and yet deny that “being rewarded in accordance with one's talents and labour” (whatever it may mean in practice) is necessary to achieve effective self-ownership. As Jedenheim-Edling points out: “[e]ffective self-ownership is not simply a matter of getting paid in proportion to one's contribution; it is also a matter of the nature, amount and quality of resources one has at its disposal”.³⁶ His example is of producers who are required to pay a certain fixed amount of money in tax: “How can this be said to affect our effective self-ownership? We may still live our lives, materially speaking, as we see fit; our autonomy is not affected”.³⁷ This seems like a good, commonsensical answer (though it is not explicitly addressed to him) to Nozick's observation that “[s]eizing the results of someone's labour is equivalent to seizing hours from him and directing him to carry on various

³⁵ Id. at 69.

³⁶ Supra note 29 at 294.

³⁷ Id. at 295.

activities”, and thus giving others part-ownership in that person.³⁸ Translating the results of labour (expressed in the currency of tax money) into someone’s hours of labour/life is a thoroughly question-begging “translation” and calls for a further argumentation. Apart from anything else, if it were true that coercive taxation (which corresponds always to someone’s pre-tax wealth, and can be “translated” into the hours of labour of the payee) were the equivalent of giving others a partial ownership in a payee (or, in an even more striking formulation of Nozick, “[t]axation of earnings from labour is on a par with forced labour”),³⁹ then it would have to apply to *any* taxation on income from labour, irrespective of its purpose: not only the taxation aimed at redistributing resources to others, but also taxation in a minimal state (endorsed by Nozick) aimed at the provision of minimal services to which a payee may not consent. As Cohen observes: “It is impossible to argue that an hour’s labour that ends up as part of somebody’s welfare payment is like slavery, while an hour’s labour that ends up as part of a policeman’s salary is not, when focus is on the condition of the putative slave himself”.⁴⁰

The second version of the argument is different. Rather than self-ownership, it stipulates as a point of departure the right of individuals to bodily integrity. This argument was coined in an article by Alan Goldman, which it is worth referring to here, so as to trace the reasoning developed in the second version of the social/natural distinction. The structure of his argument is as follows: having posited this fundamental, paradigmatic right, he further subjects it to subsequent “extensions”, which engender a prohibition over the actions that would nullify the advantages produced by natural advantages.

Before examining these “extensions”, it is important to consider the nature of this basic right of individuals over their own bodies. To play the role it is allocated in Goldman’s overall argument, this right must be shown to protect individuals against wrongs other than “pains or discomforts”.⁴¹ The right in question is not reducible to the right “not to have one’s body violated or used against one’s will”.⁴² The reason for this proviso is clear: the latter right does not lend itself to the “extensions” which lead to the anti-redistributive conclusion. Thus, a proponent of this version of the argument must show that there is more to the right to bodily integrity than the right against pains and discomforts engendered by the violation of one’s body, or by its use without consent.

This, however, I suggest, one cannot demonstrate. The problem with this claim is that it cannot be falsified, for in order to do so we would have to conceive of such violations of the right of a person over his or her body which do not entail any pain or discomfort. I cannot think of such instances; indeed, the wrongness of violations of our bodily integrity seems to lie precisely in the pain and discomfort they cause. The rights over our bodies can most conveniently be derived from the Harm to Others Principle - a principle, which does not easily lend itself to the “extensions” which lead to anti-redistributive conclusions. Indeed, the Millian Principle of Liberty is compatible with

³⁸ Nozick, *supra* note 27 at 172.

³⁹ *Id.* at 169, footnote omitted.

⁴⁰ Cohen *supra* note 9 at 235.

⁴¹ Goldman, *supra* note 29 at 379.

⁴² *Id.*, p. 380

(though does not necessarily entail) a nullification of undeserved natural advantages.⁴³ The fact that the right to bodily integrity is inseparable from the prima facie right not to be subject to pain and discomfort against our will undermines Goldman's argument at its very outset.

“Only the identification of a person with his body explains the fundamental place of rights to control what happens to it”, proclaims Goldman.⁴⁴ There is a hint of circularity about this contention, similar to the one depicted earlier with respect to “self-ownership”. Indeed, in one sense, the “identification” asserted here is either trivial or untrue. Cutting your finger against your will causes you pain and discomfort; it is wrong because it harms and hurts you. To say that the wrong of it consists in removing part of your identity sounds odd. If we have the right not to have our fingers removed against our will, it is because we value them (the fingers, that is) where they presently are; not because they are part of our separate identities. The “identity” line of argument does not add anything new to what we already know: that it is prima facie wrong to coercively interfere with our bodies. This is what the right of persons over their bodies consists in; but then the right to have our separate identity protected is merely another way of talking about our right to non-interference. So non-interference is not the conclusion deriving from a prior right over the body: they are one and the same.

Now, what is the link to be drawn between the fact that we have our capacities, skills and talents and the moral claim according to which we should keep the *products* of the use of these capacities, skills and talents? In Kronman's words, “[a]lthough a person obviously possesses his own attributes, it does not necessarily follow that he is also their owner, with the right to exploit them, within limits, for his own benefits”.⁴⁵ That is why writers such as Goldman do not use the “possession” analogy, preferring to equate an individual with his or her attributes. But, for reasons suggested above with respect to parts of one's body, this equation is suspect. It therefore has to operate through the mediation of one's achievements and products, and not directly. However, adding this extra stage to the reasoning renders the relationship between the factor in question (the products of the use of one's abilities) and the “self” even more remote than the relation between a part of the body (or the ability itself) and the self.

Through an “extension” of the basic right to one's body (as an alleged ingredient of one's self), Goldman postulates the right to “the person's products and accomplishments that further embody the self in its environment”⁴⁶. The products of one's labour, Goldman claims, just as one's “interpersonal ties”, should be viewed as “an extension of one's self”⁴⁷. Hence, “nullifying all the effects of natural differences among individuals, in the form of differential rewards or fruits of the exercise of individual capacities, is prohibited on similar grounds to those that disallow an attack on natural differences themselves”.⁴⁸

⁴³ See W. Sadurski, “Some Ruminations on the Harm Principle”, *Archiv fur Rechts- und Sozialphilosophie* 75 (1989) at 459-467.

⁴⁴ Goldman, *supra* note 29 at 379.

⁴⁵ Kronman, *supra* note 15 at 65.

⁴⁶ Goldman, *supra* note 29 at 383.

⁴⁷ *Id.*, p. 382

⁴⁸ *Id.*

It is important to note that this argument rests on two premises: (1) individual selves are constituted by, among other things, their social positions, including one's work and the products of one's labour; (2) differential financial rewards for these labours are inherent ingredients of these social positions: take them away, and the social contents of one's self will collapse. Both these premises are necessary elements in showing how an attack on differential rewards can be equated with an attack on individual selves. I will consider these two premises in turn.

4. Self: Thick and Thin

To appreciate the role the concept of “self” plays in this context, it is useful to turn to “communitarian” writers, because one of their main contributions to the current discourse on justice was to deplore (what they considered to be) under-theorized or simply erroneous conceptions of the “self” in liberal analyses. Consistently with the terminology proposed by Michael Sandel, we may talk about a “situated self”, or simply a “thick” conception of the self, where one's aims in life, social achievements and interpersonal ties are built into the very concept of self. As Sandel famously urged, we “cannot conceive our personhood without reference to our role as citizens, and as participants in a common life”.⁴⁹ In the opposition to the liberal “thin” concept of the self, defined by a common rationality and a capacity for autonomous choice, the communitarians claim that certain roles which involve us in a society are constitutive of our very identities, that “we are partly defined by the communities we inhabit”,⁵⁰ and that the idea (which they attribute to liberals) of an “unencumbered self”, existing prior to, and independent from, the competing purposes and ends in life, fails to appreciate the degree to which our identities are constituted by the communities in which we live.

Incidentally, and somewhat ironically, it should be recalled that the attack against a “thin” concept of the self was launched from the communitarian *and* libertarian standpoints alike. Common to them is the charge of incoherence. The “thinness” of the liberal conception, in its traditional Rawlsian version, is said to consist in the fact that individuals are endowed with two distinguishable moral powers: a capacity for a sense of justice and a capacity for a conception of the good.⁵¹ It is important to note the operative force of the word *capacity*. Although Rawls admits that individuals also have “at any given time a particular conception of the good that they try to achieve”,⁵² nevertheless, this “particular conception” (which, in turn, must build upon specific abilities, assets and aims of particular persons) is not necessarily constitutive of a person. The communitarian and libertarian critics point out that according to this conception, the self is (in Sandel's words) “shorn of all contingently-given attributes, ... essentially unencumbered, ... ultimately thin”.⁵³ Robert Nozick, for his part, doubts

⁴⁹ M.J. Sandel, “Introduction”, in M.J. Sandel, ed., *Liberalism and Its Critics* (Basil Blackwell: Oxford 1984) at 5.

⁵⁰ *Id.* at 6.

⁵¹ Rawls, *supra* note 6 at 561,

⁵² J. Rawls, “Justice as Fairness: Political not Metaphysical”, *Philosophy & Public Affairs* 14 (1985): 223-25 at 234.

⁵³ M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 251.

⁵³ *Id.* at 94.

whether any “coherent conception of a person” remains after real people, “thick with their particular traits” are reduced to such “purified” beings.⁵⁴

What is the specific nature of the charge of incoherence? Although Nozick does not spell it out (“Whether any coherent conception of a person remains ... is an open question”),⁵⁵ the best interpretation of this objection might probably go as follows. A person, in order to be meaningfully recognized by others as a distinct human entity, and as the same entity which is able to maintain a clear continuity in different points of time and space (as well as to recognize oneself as such), must have some features which distinguish him or her from other individuals. A being which would be merely an open repository of contingent features would lack the grounds of separateness and identity over time: such a being would be perfectly interchangeable with other beings. Neither identification by others, nor self-identification, are possible without the backing of descriptive features which can be produced on demand to distinguish the one being referred to.⁵⁶ So the alleged “incoherence” of the thin conception would lie in the fact that in order to ascribe the two fundamental moral powers (“capacities”) to a person, we need to identify this “person” as separate from others and identical in different time-stages: the separateness requirement is necessary in forming one's conception of the good, and the identity condition is presupposed by having a conception of justice which implies consistency and rationality. But we are able to identify a person as such only through some of this person's distinctive, contingent attributes.

But note that there is a *non sequitur* in the move from the conditions of identification (and re-identification) of a person to the “thickness” of the self. In order to draw the boundary line between a particular person and the rest of the human universe, all we need to know is that a person has *some* distinctive characteristics, and not necessarily *the* particular characteristics that the person happens to have. A person with a different set of abilities, talents and skills may still be the same person. The fact that all abilities and skills can be identified only as the attributes of some individuals⁵⁷, does not mean that these individuals are “constituted” by these abilities and skills. The “thin” conception of the self must therefore recognize that all abilities are always the attributes of some individuals, but it does not mean that these individuals are separate and identical over time because of these particular attributes.

Now, consider a slightly different version of the charge of incoherence. Consider a liberal and thin concept of the self that would posit a bifurcated entity: a person would, on the one hand, consist in a capacity for choice of ends in life (forming a conception of the good) and, on the other hand, in the personal attributes (such as talents, skills etc) which are viewed merely as means to the attainment of various aims that a person chooses to follow. Such a bifurcation, the argument goes, is necessary to reconcile the notion of an individual identity with the “talent pooling” generated when considering natural attributes as a matter of lottery or luck, whose effects can henceforth be neutralized by a society. But – and here comes the objection against such a conception –

⁵⁴ Nozick, *supra* note 27 at 228.

⁵⁵ *Id.*

⁵⁶ On the role of individuating attributes in the identification and re-identification of objects in general, see P.F. Strawson, *Individuals: An Essay in Descriptive Metaphysics* (Methuen: London 1959) at 15-38.

⁵⁷ See A.J. Ayer, *The Concept of a Person* (St Martin's Press, New York 1963) at 126.

this bifurcation is dubious, insofar as our choice of ends is to a large extent determined by our awareness of our own talents, skills and other natural attributes. Indeed, we do not adopt whatever aims appeal to us independently of our talents and other natural skills: we do not first decide that we wish to pursue a musical career and only then figure out whether we have musical talents or not. And, so would conclude this argument, insofar as our talents predetermine our choices, the division of a self between the ends and the means is incoherent.⁵⁸

This argument has *some* force. It cannot be seen as conclusive, though. For one thing, the choice of ends is only partly determined by the talents we have: we all know anecdotal evidence about persons displaying a clear mismatch between their ambitions and potential. Our choice of aims is largely determined, to be sure, but the determining factors only partly have to do with our inner capacities and talents. They are often based on external examples, role-models equipped with different sets of skills and talents than ours, as well as our choice to develop and cultivate talents of our own, which may happen to be at a level inadequate to match the aims we have set for ourselves. This relative independence of the aims from means thus partly supports the bifurcated conception of the self.

But the second, and perhaps more important point, is that the main purpose of the critique of a bifurcated conception is to show that by “pooling” the resources generated by special assets (the natural assets which bring about extra resources) we somehow infringe upon the individual identity. This is the context in which this debate is being conducted: the charge is that, if the bifurcation is not successful (and it *cannot* be successful, the argument goes) we cannot think of talent pooling (or the nullification of the effects of natural lottery) as innocent from the point of view of the integrity of the individual self.⁵⁹ Such an enterprise would be unobjectionable, the argument goes, if we could imagine the compensatory intervention against talent-pooling as not reaching the real self, which is the domain of the ends, i.e., if we could see the intervention within the domain of means (natural assets and their effects) as strictly separated from the domain in which the real self resides. This would hold only if the bifurcation thesis were plausible. To the extent that it is not, and insofar as the means determine the ends, bifurcation is illusory, and talent pooling-type activities inevitably corrode individual integrity - the anti-bifurcation thesis proclaims. But if *this* is the true nature of the argument, it needs to be placed safely and squarely within the context of an argument focusing explicitly on “talent pooling”, and a discussion on whether or not the nullification of effects of natural abilities can be considered as bearing a destructive effect on individual integrity. This is the point I will address later in this paper – but here the main conclusion to retain is that it really is not a debate about the conception of the individual self, but rather about the consequences of redistributive actions.

This point can be now generalized, and we may return to the “thick” concept of the self, in the context of this discussion. The question now is, what sense can be made of the “situated”, context-sensitive concept of the self? In some respects, the relationships between a social context and an individual are uncontroversial: human actions, individual desires and preferences, choices one makes and aims one pursues, are inevitably affected by the social context in a variety of ways. This is banal. In order to

⁵⁸ For a version of this argument, see Kronman supra note 15 at 71-76.

⁵⁹ See id. at 72-75.

properly understand individual actions and interpret the meaning of one's choices, we must view these actions and these choices against the background of societal arrangements, opportunities available, and dominant ideologies. But these causal relationships and epistemological postulates are irrelevant from the point of view of our present theme, for they cannot account for the prohibition of the removal of the products generated by natural assets. What is at stake for our problem in this instance is a problematic, which is neither about causality nor about the method used to study human behaviour, but rather about identity. It is, to use Sandel's terminology, a "constitutive conception".⁶⁰ It attempts to tell us something about what individuals *are*, and not merely why they act in certain ways.

It is important not to confuse this "constitutive" conception with (largely uncontroversial) claims about causality or methodology. Some communitarians can be held responsible for having contributed to this confusion, or of exploiting the force of the latter interpretations (causal or methodological) to support the former one (constitutive). Michael Walzer's argument is a case in point. In a passage where he declares his general view about the scope of individual identities, Walzer contends that:

Men and women take on concrete identities because of the way they conceive and create, and then possess and employ social goods. "The line between what is me and mine," wrote William James, "is very hard to draw." ... [P]eople already stand in a relation to a set of goods; they have a history of transactions, not only with one another but also with the moral and material world in which they live. Without such a history, which begins at birth, they wouldn't be men and women in any recognizable sense...⁶¹

This passage suggests that Walzer integrates the circumstances of an individual's possessions and transactions *within* his or her identity. Furthermore, the contention about the line between "me" and "mine" being difficult to draw seems to directly suggest that any attempt at removing (a part of) what is "mine" can be seen as an intrusion into what is "me". This is the case, however, only providing that this argument, as well as the context, point to the ontology of the self, and that they assert something about what a person actually is, namely, that what is mine is a constitutive part of me.

A brief attempt at tracing the genesis of this alleged quote from William James may be useful at this point. The maxim which he attributes to James is not exactly what James said, nor what James had in mind. The correct quote reads: "The Empirical Self of each of us is all that he is tempted to call by the name of me. But it is clear that between what a man calls me and what he simply calls mine the line is difficult to draw".⁶² James develops this claim in the context of his psycho-sociological theory of the self, in the subchapter entitled "The Empirical Self or Me". It is clear that he does not consider this statement as being about the ontology of the self, but rather about the way people tend to perceive themselves, and others, within a society. The quoted sentence is followed, a few lines further, by the following explanation:

⁶⁰ Sandel, *supra* note 53 at 150.

⁶¹ M. Walzer, *Spheres of Justice* (Basil Blackwell: Oxford 1983), p. 8, emphasis added

⁶² W. James, *The Principles of Psychology*, vol. 1 (London: Macmillan: London 1910) at 291, emphasis in original.

In its widest possible sense, however, a man's Self is the sum total of all that he CAN call his, not only his body and his psychic powers, but his clothes and his house, his wife and children, his ancestors and friends, his reputation and works, his lands and horses, and yacht and bank account.⁶³

As a description of the empirical observation showing that people do perceive themselves, and others, through the prism of their worldly possessions and personal or proprietary relations, James's statements are uncontroversial. But there is no obvious leap from this empirical observation to a metaphysical notion about what constitutes an individual identity (would it include one's "lands and horses", "yacht and bank account"?)

Significantly, Walzer quotes James not directly, but from a study by Snyder and Fromkin on the perceptions of scarcity and uniqueness in a society. They use James' observation about "me" and "mine" to support the *empirical* assertion according to which one socially acceptable way to redefine the self as different from others is through the possession of scarce commodities.⁶⁴ This observation accompanies their description of their own experiments, which show that "increased valuation accompanies the perception of scarcity".⁶⁵ This sounds eminently convincing: in order to distinguish ourselves from others, we tend to define ourselves through our scarce and valued possessions, and similarly perceive those of our fellow citizens whom we wish to endow with the attributes of uniqueness. This is *not* a proposition about the ontology of the self, but about the psychological mechanisms of the symbolic representation of the desire for uniqueness. But this is not the use that Walzer makes of the "line between what is me and what is mine" dictum: his proposition, indeed, claims to be an ontological account of the human self and its constitutive parts.

Walzer's case is instructive because it suggests that what is allegedly a metaphysical proposition (about the ontology of the self) is in fact derived from some non-metaphysical premises. It is my general argument here that the ontological status of the self in the communitarian criticisms of liberal conceptions of justice is parasitic on some other, non-metaphysical grounds. So again, what meaning could be given to the metaphysical claim, according to which the self is constituted (partly) by the community? How can we represent, meaningfully, the contrast between two opposing metaphysical concepts of individual identity: one which builds community attachments, ends and relations into the very notion of the human self, and the other which relies on the boundary between the self (understood in a "thin" way) and the social universe?

The preliminary question is, what is at stake in the choice of one or the other conception? I will argue that the choice is informed by the normative theory of justice one espouses, and does not rest on purely metaphysical grounds. To claim that I am defined by a number of my social roles (as a member of a family, of a Church, of a nation) may sound obvious, but then it is equally obvious that (at least in some circumstances) I may cease, through my conscious decision, to occupy these roles: we divorce our spouses, convert to other faiths, emigrate from our countries. My identity is at least equally defined by my current attachments as by my capacity to abandon them.

⁶³ Id., p. 291, emphases in original

⁶⁴ C.R. Snyder & H. Fromkin, *Uniqueness: The Human Pursuit of Difference* (Plenum Press, New York 1980) at 108.

⁶⁵ Id

If I do revise or abandon these commitments, has my identity *eo ipso* changed? Am I someone else, a different person, in any meaningful sense? To answer affirmatively would be merely a *façon de parler* which would not add anything new to the suggestion that I altered some of my significant relations with my social environment. To say that I am now a different person, in the sense that I am someone else, is odd and redundant in this context.⁶⁶ I am different in some respects and identical in others, but this is just another way of stating the obvious, that is, that some of my important attributes have changed. It is not as if I ceased to exist and then re-emerged as someone different. Alternatively, we may say that, as regards the “constitution” of my identity, I am now a former spouse, church-member, citizen of the country I left, and that my identity is (partly) constituted by these former attachments. But then, it is hard to determine in what sense these characteristics define my identity as opposed to merely describing my attributes, past or present. If I am “defined” by a particular social role, but at the same time I am free to modify and ultimately abandon this role, the independent weight of this role in constituting my identity seems to be nil. To represent my current and past attributes and roles as components of my identity seems to be a slightly pompous and quite unnecessary way of describing those features of my social characteristics which an observer may consider significant.

What is the function of substituting the “description of a person” with an assessment of the social components of a person's identity? Consider these arguments developed by Sandel against the “deontological ethic”, which postulates that we view ourselves as independent selves, independent in the sense that “our identity is never tied to our aims and attachments”:

[W]e cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are - as members of this family or community or nation or people, as bearers of this history, as sons and daughters of this revolution, as citizens of this republic. Allegiances such as these are more than values I happen to have or aims I 'espouse at any given time'. ... They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.⁶⁷

This quote, I believe, reveals the real grounds for Sandel's insistence on the social components of individual identity. This is an argument relying on issues of commitments, loyalties and obligations, which go beyond the ones based on typically liberal grounds, that is the ones based on fairness, reciprocity or consent. Whether one agrees with Sandel on the merits of his claim or not, the very beginning of the quote indicates that the social identity of individuals is parasitic upon the normative views about the stringency of individual commitments and loyalties to their communities. “[W]e cannot regard ourselves as independent in this way without great cost to those loyalties and convictions...” – this suggests that the moral price incurred by adopting an un-situated concept of the self is unacceptable to Sandel. The duties we owe to our

⁶⁶ For a similar critique of arguments according to which, for the purposes of a discussion on paternalism, different stages of the same self may be treated as different persons, see J. Feinberg, *The Moral Limits of the Criminal Law*, vol. 3: *Harm to Self* (Oxford University Press: New York 1986) at 81-87.

⁶⁷ Sandel, *supra* note 53 at 179.

families, communities or nations, to our history, traditions and republics, come first; the situated self is merely an expository device of conveying this message to the readers. It therefore has nothing to do with the ontology of an individual identity, but it is just another way of expressing the idea that our commitments go far beyond those made voluntarily by ourselves as free and independent agents. And, in turn, the individualistic concept of the non-situated self is instrumental to the political philosophy which celebrates the supreme value of the free choice and the relative independence of individuals from communal ties. As John Gray admitted, the liberal political philosophy must construct an individualistic conception of the person “not because of any metaphysical doctrine about personhood ... but because we need political principles that abstract from political attachments to specific moral communities”.⁶⁸ The experience of modern, pluralistic societies, displays the continuous revision of communal ties, and frequent transfers from one community to another; furthermore, we belong to a plurality of communities at the same time. As a result, “[w]e conceive the person as an un-situated or unencumbered individual, defined not by communal attachments but by autonomous choice”.⁶⁹

In reality, of course, we are *both* free agents *and* situated in our communities; we choose our attachments and they are immersed in our history and traditions; we are involved in social practices and we often challenge them - at times we even reject them entirely. The dilemma of life in modern societies is to combine commitments and their continuous alteration. Sometimes we are faced with the quandary of having to choose between the loyalty to the community and the requirements of our independent critical morality, which may lead to the questioning of the values of this community. The language of “situated selves” suggests the presumptive priority of loyalty over this questioning; the language of a free, unencumbered self emphasises the importance of independence and criticism. This is a choice between two moralities, not between two ontologies of the self. And if the notion of the “self” is but a proxy for a moral claim about the stringency of individual commitments and loyalties, it cannot lend support to these propositions.

This brings us back to our main theme: the removal of benefits generated through the exercise of natural capacities. The first premise of the argument which we proposed to explore was that individual selves are constituted by, among other things, social positions, including one's work and the products of one's labour. But we now see that the constitution of the individual self is derived from judgments about the obligation of, and towards, other individuals. The concept of the “self” is only as good as the judgment from which it is derived. It will not convince those who do not accept the underlying communitarian set of political judgments.

5. Common Pool of Abilities?

However, for the sake of the argument, let us assume that a “thick” conception of the individual self is plausible. There still remains the second premise of the argument against nullifying the differential products of natural abilities: that differential *rewards*

⁶⁸ J. Gray, “Contractarian Method, Private Property, and the Market Economy”, in J.W. Chapman & J.R. Pennock, eds, *Markets and Justice: Nomos XXXI* (New York University Press: New York 1989) at 39.

⁶⁹ Id.

belong to that sphere of individual identity which cannot be nullified without risking a violation of the human self. This is the point we mentioned when discussing the “bifurcated” conception of the self as divided into the inviolable sphere of aims and the sphere of natural assets (and rewards consequent upon these assets) which can safely be interfered with. We have observed, it may be recalled, that the objections to such an alleged “bifurcation” are in effect not about the most plausible picture of the self, but rather about whether the taxation upon the products of one’s talents and labour are an intolerable infringement of individual integrity. Even if, as Alan Goldman claims, “one’s work, the products of one’s labour [can be viewed] as an extension of one’s self”,⁷⁰ the question is what actually constitutes “the products of one’s labour” in the sense which retains a close link with one’s self, whatever way it is understood. One can immediately think of, say, paintings created by an artist, books written by a scholar, software programs developed by a computer expert or watches made by a watchmaker. These products of our labour indicate to the outside world something about us: about our skills, interests, capacities. If anything, they are part of a description (or, as some would claim, of a definition) of our selves. But to rebut the nullifying attempts made by egalitarians with respect to these differences is to attack a man of straw. It is not an inference from Rawls’s difference principle, or from similar egalitarian constructs, that we should pool these fruits of one’s labour into a bundle of communal assets.

An obvious candidate for pooling is the market return generated by various products of one’s abilities; in other words, money. This is why the egalitarians influenced by Rawls see the fiscal policies (including taxation and welfare spending) as the most adequate devices for the redistribution from the more to the less fortunate. As Kronman concludes, “what pooling requires is a system of forced transfers (a tax system) that will counterbalance the effect of the initial and arbitrary distribution of talents among individuals”.⁷¹ These “transfers” do not aim at the products of the abilities (let alone the abilities themselves).

Consider this challenge that Nozick addressed to Rawls, after having quoted the latter:

“No one deserves his greater natural capacity nor merits a more favorable starting point in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate”.⁷²

And Nozick retorts:

“And if there weren’t ‘another way to deal with them’? Would it then follow that one should eliminate these distinctions? What exactly would be contemplated in the case of natural assets? If people’s assets and talents couldn’t be harnessed to serve others, would something be done to remove these exceptional assets and talents....?”⁷³

But the response from Nozick, while admittedly rhetorically powerful, ignores the fact that it is *always* possible to think of a scheme of taxation, which would redistribute some of the gains generated by higher skills, talents, or opportunities. The scheme may be very imperfect, as we will have formidable difficulties with measuring the

⁷⁰ Goldman, *supra* note 29 at 382.

⁷¹ Kronman, *supra* note 15 at 66.

⁷² Rawls, *supra* note 6 at 102, quoted in Nozick, *supra* note 27 at 229.

⁷³ Nozick, *supra* note 27 at 229.

contributing factors of someone's income or wealth (to what extent their monetary advantages over others are due to factors which are morally arbitrary?). But this is a *different* difficulty from the one implied by Nozick about a hypothetical impossibility of "dealing with" exceptional talents and skills. So the image of a "removal" of some exceptional talents is inappropriate here. As Kronman observes: "it does not follow from the fact that we cannot redistribute talents themselves that we should not require the well endowed to share the benefit of their talent by making a compensation payment to those who have been less fortunate in the natural lottery".⁷⁴

The presumption, which we are considering now, would have, so as to play a role in the overall argument, to equate an individual's work and achievements with the dollar value he or she commands. This sounds like a wildly exaggerated claim, for at least two sets of reasons. First, in most cases (though not all), the product of one's labour (hence, the monetary value one's labour commands) is function of the combination of one's labour with worldly resources. It does not have to always occur that way: we may think of examples when someone generates income based purely on his own labour without any material resources being added to it. (Michael Otsuka gives an example of performing a song and dance for a paying audience, though even then some non-trivial material resources may be needed, such as a special dress, audio equipment etc; when pressed to give an example of a pure non-worldly-resources income-generating activity, Otsuka imagines the highly artificial example of a person whose hair can be woven into clothing).⁷⁵ But these are arguably non-typical cases: more often than not we combine our labour with things, and then the question of the rights of *others* over those "things" arises. From the perspective of "self-ownership", the argument has been made that, in order to equate one's monetary gains with one's work and achievement in the cases where worldly resources are mixed with labour, one would need to assume that "one's right of ownership over worldly resources that one uses in order to earn income is as full as one's right of ownership over oneself".⁷⁶ But, whether one uses the language of "self-ownership" or not, the presumption is hardly plausible. The thought that our ownership of external things grants us the exclusive control over these things, without any regard to how such use affects others, is just one of many possible conceptions of what a right to private ownership *should* involve, and a particularly controversial one at that. It seems intuitively persuasive that the others-regarding constraints upon the use of external resources (generated by rightful ownership) should be more extensive than the others-regarding constraints upon the use of our body.⁷⁷ At a minimum, the constraints trace the thin restriction imposed by Locke (and famously interpreted by Nozick)⁷⁸ upon the power to appropriate natural resources, that is, that enough and as good be left for others. But, the "enough and as good" proviso has lent itself to differing interpretations, and a minimalist interpretation provided by Nozick (who viewed it as based on a comparison of the appropriation-based externalities with the non-use or non-

⁷⁴ Kronman, *supra* note 15 at 66.

⁷⁵ Otsuka, *supra* note 29 at 18.

⁷⁶ *Id.* at 20, footnote omitted.

⁷⁷ "It is an intelligible presumption that I alone am entitled to decide about the use of this arm, and to benefit from its use, simply because it is my arm. ... But there is not comparable presumptive normative tie between any person and any part or portion of the external world", Cohen, *supra* note 9 at 70-71.

⁷⁸ Nozick, *supra* note 27 at 174-82.

appropriation of a given resource) has been countered by alternative interpretations.⁷⁹ The choice of a proper interpretation is a matter of competing philosophies of justice and cannot be made solely on the basis of an inquiry into the proper meaning of ownership over resources.

Secondly, and this caveat applies even to those cases where monetary gain is a result of “pure” labour, with no inclusion of material things, the monetary value of labour is shaped, among other things, by factors totally external to one's capacities and which are often unpredictable, such as the intensity and proximity of competition in a given field. To be sure, one can try to draw a link between one's praiseworthy talents and those external factors (by saying, for example, that the talent of a person consists, among other things, in properly determining which types of her efforts, under the current conjuncture of competition with others etc, will lead to the highest returns) but this would be highly convoluted and artificial. In the end, there is much that is fortuitous in the income that one's efforts and talents can command. And if this is the case, it is implausible to claim that an income generated by the products of one's abilities can be identified with these products themselves *qua* the expressions of individual selves.

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In the argument against the nullification of the rewards generated by natural abilities (as opposed to those attributable to social disadvantages) we depicted the circularity of the reasoning emerging at different stages. It now reappears at its latest stage as well, that is with regard to the relationship between social rewards and the individual self. To say that a product of one's own work is a part of the human self and that “[t]he fruits of one's own labour are rightly his own”⁸⁰, assumes what is in question - how much people should be allowed to keep of what they produce, or of the income their work generates. What is “his own” should depend on a substantive conception of distributive justice, not on a definitional fiat about what constitutes one's true identity. If the right to keep the fruits of one's labour is the only meaningful way of understanding a metaphor about what constitutes the human self, then it still awaits a substantive justification to compete with the rival principle of the duty to compensate those less fortunate for their undeserved deprivations

⁷⁹ See, e.g., Otsuka, *supra* note 29 at 22-30; Cohen, *supra* note 9 at 74-90.

⁸⁰ Goldman, *supra* note 29 at 382.